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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JAMES MELBOURNE,)	
Employee)	OEA Matter No. 2401-0182-10
)	
v.)	Date of Issuance: June 5, 2012
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Senior Administrative Judge
_____)	
James Melbourne, Employee <i>Pro-Se</i>)	
Sara White, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 30, 2009, James Melbourne (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of terminating his employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time his position was abolished was an ET-15 Special Education Teacher at Ballou Senior High School (“Ballou”). Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 7, 2012. On February 16, 2012, I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Agency timely complied with this order while Employee did not. Of note, Employee’s copy of the aforesaid order was returned to the OEA by the U.S. Postal Service with the notation “Returned to Sender, Unclaimed, Unable to Forward.” On May 1, 2012, I sent out an Order for Statement of Good Cause to Employee. Pursuant to this order, Employee was required to submit a statement of good cause explaining his failure to comply with the previous order and he was required to submit his brief as was initially required by the February 16th order. Employee’s response was due on or before May 11, 2012. To date, this letter was not returned to sender; moreover,

Employee has not submitted a response. After reviewing the documents of record, I have decided that an evidentiary hearing is unwarranted in this matter. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools¹.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02², which

¹ See *Agency's Answer*, Tab 1 (December 31, 2009).

² D.C. Code § 1-624.02 states in relevant part that:

(a) Reduction-in-force procedures shall apply to the Career and Educational Services... and shall include:

(1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;

(2) One round of lateral competition limited to positions within the employee's competitive

encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 (“Abolishment Act or the Act”) is the more applicable statute to govern this RIF.

Section § 1-624.08 states in pertinent part that:

(a) ***Notwithstanding*** any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) ***Notwithstanding*** any rights or procedures established by any other provision of this subchapter, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).

(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.

(e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that “the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency.”³ The Court also found that both laws were current and that the government triggers the use of the applicable statute by using

level;

(3) Priority reemployment consideration for employees separated;

(4) Consideration of job sharing and reduced hours; and

(5) Employee appeal rights.

³ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

“specific language and procedures.”⁴

However, the Court of Appeals took a different position. In *Washington Teachers' Union*⁵, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”⁶ The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act (“the Act”) instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”⁷ The Court stated that the “ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF.”⁸

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.⁹ The Act provides that, “notwithstanding any rights or procedures established by any other provision of this subchapter,” which indicates that it supersedes any other RIF regulations. The use of the term ‘notwithstanding’ carries special significance in statutes and is used to “override conflicting provisions of any other section.”¹⁰ Further, “it is well established that the use of such a ‘notwithstanding clause’ clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other sections.”¹¹

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹² Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision in order to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, I find that an employee whose position was terminated may only contest before this Office:

1. That he did not receive written notice thirty (30) days prior to the effective date of his separation from service; and/or
2. That he was not afforded one round of lateral competition within his competitive level.

Employee’s Position

Employee contends that DCPS was wrong in removing him from service via RIF.

⁴ *Id.* at p. 5.

⁵ *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁶ *Id.* at 1132.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹¹ *Id.*

¹² *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

Employee submits that the RIF action was based on his age and salary rather than his performance.¹³

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Employee was given thirty (30) days written notice prior to the effective date of his termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that since Employee was one of the lowest ranked persons in his competitive level and area, he was properly terminated as a result of the one round of lateral competition. Agency requested an evidentiary hearing in this matter.¹⁴

Analysis

Under Title 5 DCMR § 1501.1, the Chancellor of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based “upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office.” For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;
2. The job title for each employee; and
3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.¹⁵

Here, Ballou was identified as a competitive area, and ET-15 Special Education Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were twenty-two (22) ET-15 Special Education Teachers stationed at Ballou. Five of those positions did not survive the instant RIF.

Employee was not the only ET-15 Special Education Teacher within his competitive level and was, therefore, required to compete with other similarly situated employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

¹³ See Employee's Petition for Appeal (November 30, 2009).

¹⁴ See Agency's Answer at p. 4 (December 31, 2009).

¹⁵ District of Columbia Public Schools' Brief at 2-3 (March 8, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:

- (a) Significant relevant contributions, accomplishments, or performance;
- (b) Relevant supplemental professional experiences as demonstrated on the job;
- (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
- (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

- (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)¹⁶

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.¹⁷ Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given “broad authority to issue regulations governing the release of employees under a RIF...including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority.”

¹⁶ It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. See *White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

¹⁷ Agency Brief at 5 (March 8, 2012).

I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

Competitive Level Documentation Form

Agency employs the use of a Competitive Level Documentation Form (“CLDF”) in cases where employees subject to a RIF must compete against each other in a lateral competition. In conducting the instant RIF, the Principal of Ballou was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of twelve and half (12.5) points on his CLDF. Employee was one of the five lowest ranked persons in his competitive area and level. Employee’s CLDF stated, in pertinent part, the following:

Mr. Melbourne has consistently failed to demonstrate high quality instruction. In spite of numerous conferences with coordinators and administrator (*sic*), he fails to produce rigorous standards based lessons. It appears that Mr. Melbourne is more concerned with befriending students, as evidenced by frequently allowing students to hang out in his classroom during instructional time and by purchasing food for them from the local carry out.

I find that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.¹⁸ This Office will not substitute its judgment for that of an agency when determining whether a penalty imposed against an employee should be sustained. Rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”¹⁹ This Office cannot substitute its judgment for that of the Principal at Ballou, who was given discretion to complete Employee’s CLDF and had wide latitude to invoke his managerial discretion. With respect to the aforementioned CLDF, I find that I will not substitute my judgment for that of the Principal of Ballou as it relates to the scores he accorded Employee and his colleagues in the instant matter.

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of one (1) point out of a possible ten (10) points in this category; a score much lower than the other employees within his competitive level. Employee argues that the documentary evidence does not support the score afforded to him. In reviewing the documents of record, Employee did not proffer any credible statutes, case law, or other regulations to refute Agency’s position regarding the

¹⁸ See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

¹⁹ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to rank their teachers" and noted that performance evaluations are "subjective and individualized in nature."²⁰ The Principal of Ballou was given the discretion to complete Employee's CLDF. Employee has provided no credible evidence that may bolster his score in this area. Moreover, I find that the Principal at Ballou had wide latitude to invoke his managerial discretion with respect to assessing the on-the-job performance and capabilities of his subordinates. With respect to Office and School needs, I find that in this matter I will not substitute my judgment for that of the Principal of Ballou as it relates to the score he accorded to Employee and his colleagues in the instant matter.

Significant relevant contributions, accomplishments, or performance & Relevant supplemental professional experiences as demonstrated on the job

Both of these categories are weighted at 10% a piece on the CLDF. Employee received zero (0) points in both areas. Employee has provided no credible evidence that may bolster his score in either area. With respect to both of these categories, I find that I will not substitute my judgment for that of the Principal of Ballou as it relates to the score he accorded to Employee and his colleagues in the instant matter.

Length of service

This category was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an "outstanding" or "exceeds expectations" evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. According to his CLDF, Employee's tenure with DCPS spans twenty eight (28) years. Employee received a total of five (5) weighted points in this category. Employee did not dispute his length of service computation. I find that there is no credible reason to support awarding Employee any additional points in this category.

According to the CLDF, Employee received a total score of twelve and half (12.5) points after all of the factors outlined herein were tallied and scored. The lowest colleague whose position survived the instant RIF received a total score of forty five and half (45.5). Employee has not proffered any credible evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this matter.²¹ Further, there is no indication that any supplemental

²⁰See also *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

²¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law).

evidence would supplant the higher scores received by the remaining employees in Employee's competitive level who were not separated from service.

Thirty (30) Days Written Notice

Title 5, §1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF. (Emphasis added). The RIF Notice is dated October 2, 2009. The effective date of the RIF was November 2, 2009. The RIF Notice states that Employee's position is being abolished as a result of a RIF. The RIF Notice also provides Employee with information about his appeal rights. Moreover, Employee has not submitted any credible evidence that would show that he did not receive his RIF notice on the date indicated therein. Therefore, I find that Employee was given the required thirty (30) days notice prior to the effective date of the RIF.

Discrimination Claims

Employee ostensibly alleges that he was the target of discrimination as part of the instant RIF due to his age. However, Employee has provided no evidence or documentation to corroborate this claim, which renders it a generalized unsubstantiated allegation. Further, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.²² Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works*²³ held that OEA's authority over RIF matters is narrowly prescribed. This Court explained that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."²⁴

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*²⁵ stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistleblowing activities outside the

²² D.C. Code §§ 1-2501 *et seq.*

²³ 729 A.2d 883 (December 11, 1998).

²⁴ See *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

²⁵ 730 A.2d 164 (May 27, 1999).

scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation...”²⁶ Here, Employee’s claims as described in his submissions to this Office do not allege any whistleblowing activities as defined under the Whistleblower Protection Act. Thus, I find that Employee’s claims of discrimination fall outside the scope of OEA’s jurisdiction.

Failure to Prosecute

Employee’s failure to respond to the February 16th and May 1st Orders provides another basis to dismiss this petition. OEA Rule 621.3 grants an Administrative Judge (“AJ”) the authority to impose sanctions upon the parties as necessary to serve the ends of justice.²⁷ The AJ may, in the exercise of sound discretion, dismiss the action if a party fails to take reasonable steps to prosecute or defend his appeal.²⁸ Specifically, OEA Rule 621.3(b)-(c) provides that the failure to prosecute an appeal includes failing to submit required documents after being provided with a deadline for such submission. Moreover, this Office has held that failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.²⁹ The parties are also required to keep the OEA apprised of any change of address while a matter is pending before the OEA. The February 16th and May 1st Orders advised Employee of the consequences for not responding, including sanctions resulting in the dismissal of the matter. Employee’s responses to these Orders were required for a proper resolution of this matter on the merits. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office and this presents an alternate ground for dismissing of this matter.

Evidentiary Hearing

According to the Agency, an evidentiary hearing is needed in this matter. OEA Rule 619.2³⁰ states in part that an AJ can “require an evidentiary hearing, if appropriate.” Additionally, OEA Rule 625.2 indicates that it is within the discretion of the AJ to either grant or deny a request for an evidentiary based on whether or not the AJ believes that a hearing is necessary.³¹ After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore Agency’s request for an evidentiary hearing is denied.

Grievances

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.³² Based on the above discussion, Employee has failed to

²⁶ *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

²⁷ 59 DCR 2129 (March 16, 2012).

²⁸ See OEA Rule 621.2, 59 DCR 2129 (March 16, 2012).

²⁹ *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

³⁰ 59 DCR 2129 (March 16, 2012); See also OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).

³¹ See *Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2010).

³² Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments, as alleged herein, are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

Conclusion

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. Therefore, I conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in his removal is upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHeld.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE