THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0255-10-R14
WEBSTER ROGERS,	)	
Employee	)	
	)	Date of Issuance: February 27, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Robert Porter, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2009, Webster Rogers ("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 Music Teacher at Moten Elementary School ("Moten"). Employee was in Educational Service status at the time he was terminated.

I was assigned this matter in February of 2012. On February 21, 2012, I issued an Amended Order, requiring the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations.[1] Both parties responded to the order. On June 13, 2012 I issued an Initial Decision ("ID"), finding that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and that the Reduction-in-Force, which resulted in his removal, should be upheld. Employee subsequently filed an appeal with D.C. Superior Court.

[1] The Office inadvertently sent the Order dated February 13, 2012 to Agency Representative's previous mailing address. As a result, deadlines for Employee and Agency brief submissions were modified.

On December 9, 2013, the Honorable Judge John Mott reversed and remanded the Undersigned's ID, finding that the RIF was conducted under the wrong regulation. Specifically, Judge Mott held that a mistake of law arose by applying the criteria in 5 D.C.M.R § 1500 *et seq*., instead of Chapter 24 of the D.C. Personnel Manual ("DPM"), after determining that the Abolishment Act (D.C. Code § 1-624.08) governed the RIF.[2]

On January 2, 2014, the undersigned Administrative Judge issued an order scheduling a Status Conference for the purpose of assessing the parties' arguments on the remanded Initial Decision. The conference was subsequently postponed several times because of scheduling conflicts. On April 4, 2014, an Order was issued, directing the parties to address whether Agency conducted the instant RIF in accordance with the proper criteria as outlined in D.C. Code § 1-624.08 and the Abolishment Act. Both parties submitted responses to the order.

On August 18, 2014, a telephonic Status Conference was held for the purpose of addressing Employee's request to discuss one of Agency's arguments contained within its July 31, 2014 reply brief. During the conference, counsel for Employee requested that Agency's argument be stricken from the record because it had not been raised in any prior filings. In the alternative, Employee requested that he be given an opportunity to respond in writing to Agency's argument. Agency objected to Employee's request; however, the Undersigned granted Employee's verbal request to submit a Sur-Reply Brief on or before September 5, 2014. After reviewing the document submitted, I have determined that an Evidentiary Hearing is not warranted. 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:

[2] *See* 2012 CA 006364 P(MPA) (December 9, 2013).

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 RIF pursuant to D.C. Code § 1-624.02, Title 5 of the District of Columbia Municipal Regulations ("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 schools.[3]

Although the instant RIF was authorized in part pursuant to D.C. Code § 1-624.02,[4] which 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

[3] *See* Agency's Answer, Tab 1 (December 9, 2009).

[4] 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 level;
> (3) Priority reemployment consideration for employees separated;
> (4) Consideration of job sharing and reduced hours; and
> (5) Employee appeal rights.

> 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 (emphasis added).
>
> (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."[5] The Court also found that both laws were current and that the government triggers the use of the applicable statute by using "specific language and procedures."[6]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, DCPS conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[7] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[8] 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."[9]

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.[10] 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."[11] 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."[12]

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[5] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[6] *Id.* at p. 5.
[7] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[12] *Id.*

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[13] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory provision to conduct RIFs resulting from budgetary constraints. Therefore, I am primarily guided by § 1-624.08 for RIFs. Under this section, an employee whose position was terminated may only contest before this Office:

1. That he or she did not receive written notice thirty (30) days prior to the effective date of her separation from service; and/or

2. That he or she was not afforded one round of lateral competition within her competitive level.

In his December 9, 2013 Opinion, Judge Mott agreed with the Undersigned's analysis of § 1-624.08, finding that the Abolishment Act applied to the instant RIF because "it is undisputed that the 2009 RIF in question was conducted for budgetary reasons."[14] Agency argues that this Office should completely ignore the D.C. Superior Court's finding, and perform an analysis of the RIF under § 1-624.02 and 5 DCMR § 1503. This contention is indeed repugnant to both OEA's decision, and Judge Mott's holding that § 1-624.08 (the Abolishment Act) should be the controlling statute in this case. Contrary to Agency's supposition, OEA lacks the jurisdictional authority to overturn the Superior Court's findings, as Agency's arguments regarding the applicability of the Abolishment Act to the instant RIF are outside the scope of Judge Mott's Order on remand. Accordingly, I am barred from determining that the RIF should have been analyzed under D.C. Code § 1-624.02. Thus, the sole issue to be decided on remand is whether Employee was properly RIF'ed under § 1-624.08 and Chapter 24 of the DPM.

On appeal, the D.C. Superior Court determined that a mistake of law occurred because the Undersigned failed to utilize the criteria set forth in Chapter 24 of the DPM in conjunction with the Abolishment Act. In *Washington Teacher's Union*, the D.C. Court of Appeals stated the following:

> With respect to the procedures which might require more technical knowledge, Congress provided as a point of reference Chapter 24 of the Personnel Manual, not because that chapter is generally applicable to the Educational Service (it is not), but because it not only defines 'one round of competition,' (§ 2499.1) but also explains competitive levels and how they are established (§§ 2410 and 2411), as well as provides information regarding an agency Reemployment Priority Program (§§ 2427 and 2428) and a Displaced Employee Program (§§ 2429 and 2430).[15]

Agency argues that Chapter 24 of the DPM (sections 2400 through 2499) applies to educational service employees in the Office of the State Superintendent of Education ("OSSE"),

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[13] *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[14] 2012 CA 006364 P(MPA) (December 9, 2013) at 7.
[15] *Washington Teacher's Union* at 1134.

and not educational service employees within DCPS. As such, Agency submits that it was impossible to conduct the 2009 RIF under D.C. Code § 1-624.08 and Chapter 24 of the DPM. Although there is conflicting language in the relevant case law and regulations, D.C. Code §1-624.08 is the controlling provision in this matter because of its statutory nature. As previously stated, D.C. Code § 1-624.08 requires that the RIF be analyzed under Chapter 24 of the DPM. Therefore, although Chapter 24 provides that it is only applicable to educational service employees in the Office of the State Superintendent of Education, the statutory language of D.C. Code § 1-624.08 must be followed, even where there is a discrepancy in the regulatory language. Therefore, Employee's separation from service under the RIF will be analyzed under § 1-624.08, as well as the Chapter 24 of the DPM, and where applicable 5-E DCMR, Chapter 15.

Competitive Area and Level

In order to determine if Agency conducted the instant RIF in accordance with Chapter 24 of the DPM, the Undersigned must first determine whether Employee was placed in the proper competitive area and level.

DPM § 2409.1 provides that each agency shall constitute a single competitive area. Section 2409.2 states that lesser competitive areas within an agency may be established by the personnel authority. According to DPM § 2409.4, the lesser competitive area should be no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff. DCPS, acting as its own personnel authority pursuant to 5-E DCMR § 1501.1, established competitive areas 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. Here, Agency states that the competitive area for the instant RIF was defined as Moten Elementary School, which I find is a major subdivision of DCPS and meets the requirements of DPM § 2409.

Regarding the establishment of a competitive level, DPM § 2410.1 states that each personnel authority shall determine the positions comprising the competitive levels that employees compete for retention. Additionally, DPM §§ 2410.2, 2410.3 states that assignment to a competitive level "shall be based upon the employee's position of record," which is the position that the employee receives pay. Further, DPM § 2410.4, states that a competitive level shall consist of all positions which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one position could successfully perform the duties and responsibilities of any of the other positions. Generally, an employee's position of record is reflected through the issuance of a Notification of Personnel Action Form 50 ("SF-50").[16] Employee's position of record in this case was an ET-15 Music Teacher.

Retention Standing

According to the Retention Register provided by Agency, there were three (3) Music Teacher positions at Moten, and one (1) position was identified to be abolished under the RIF.

[16] *See Armeta Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).

Because Employee was not the only Music Teacher in his competitive level, he was required to compete in a round of lateral competition. Section 2408.1 of the DPM provides that:

> The retention standing of each competing employee shall be determined on the basis of tenure of appointment, length of creditable service, veterans preference, residency preference, and relative work performance, and on the basis of other selection factors as provided in these regulations. Together these factors shall determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released.

During the 2009 RIF, Agency employed the use of a Competitive Level Documentation Form ("CLDF") in cases where employees had to compete against each other in a round of lateral competition.[17] In conducting the RIF, the principal of Moten was given discretion to assign numerical values to the following:

1. Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise. This factor was weighted at 75%.

2. Significant relevant contributions, accomplishments, or performance. This factor was weighted at 10%.

3. Relevant supplemental professional experiences as demonstrated on the job. This factor was weighted at 10%.

4. Length of service. This category was weighted at 5% and was completed by the Department of Human Resources.[18]

Employee received a total of two (2) points on his CLDF and was therefore ranked the lowest in his competitive level. Because Employee was the lowest ranked ET-15 Music Teacher in his competitive level, he was identified for separation.

Agency cites to DPM § 2414.5, which states that an employee subject to a RIF shall be denied one round of lateral competition if the employee's last performance rating was "Inadequate Performer." According to Agency, Employee, when compared to the other ET-15 Music Teachers in his competitive level, would have still been separated from service because he was an "Inadequate Performer." Agency's argument; however, fails for several reasons. In its

[17] Title 5, DCMR § 1503.2.
[18] 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).

September 8, 2014 Sur-Reply Brief, Agency admits that it lacks the authority to retroactively conduct a RIF under the Abolishment Act because it failed to take the actions necessary to allow it to proceed under the criteria enumerated in § 1-624.08 and Chapter 24 of the DPM. Agency has also failed to provide any evidence to this tribunal to prove that Employee was rated as an "Inadequate Performer" on any of his performance evaluations. Moreover, Agency's argument that Employee was an "Inadequate Performer" was not raised in any filings with OEA until *after* the matter was remanded from D.C. Superior Court. Judge Mott's order on remand requires Agency to prove, by a preponderance of the evidence, that Employee was afforded one round of lateral competition pursuant to both the Abolishment Act and Chapter 24 of the DPM. Agency has failed to produce any evidence to support a finding that it did comply with the aforementioned statutory and regulatory requirements. Based on a review of the record, and Agency's own admissions, I find that Employee was not afforded one round of lateral competition as provided for in the Abolishment Act and Chapter 24 of the DPM.

Priority Reemployment Program

D.C. Code § 1-614(h) states that:

> Separation pursuant to this section shall not affect an employee's rights under either the Agency Reemployment Priority Program or the Displaced Employee Program established pursuant to Chapter 24 of the District Personnel Manual.

Under Section 2427.1 of the DPM, Agency was required to establish and maintain a reemployment priority list for employees in affected by the RIF. Section 2427.4 provides that "a group I employee's name shall remain on the reemployment priority list for two (2) years, and a group II employee's name for one (1) year, from the date he or she was separated from his or her competitive level." In addition, all affected employees were required to be automatically entered on the priority reemployment list immediately after it was determined that the employee would be adversely affected by the RIF, and not later than issuance of the RIF notice.

In this case, the October 2, 2009 RIF notice stated that employees separated pursuant to a Reduction-in-Force received priority reemployment consideration; however, those employees were not guaranteed re-employment. Under Chapter 24 of the DPM, Employee was entitled to be added to the priority reemployment list; however, Agency has failed to produce any documentation to support a finding that he was, in fact, placed on a priority reemployment list. Accordingly, I find that Agency has failed to meet its burden of proof that it complied with Chapter 24 of the DPM regarding Employee's right to priority reemployment.

Displaced Employee Program

Section 2429.1 of the DPM required Agency to establish and maintain a displaced employee program list for priority placement referral of its displaced employees who were separated from service under the RIF. The displaced employee program is separate and distinct

from the priority reemployment program.[19] Employee's RIF notice did not refer to a displaced employee program, and Agency has not provided this tribunal with any evidence to support a finding that Employee was placed on a list for employees who were separated from service as a result of the 2009 RIF. As such, I find that Agency failed to comply with Section 2429 of the DPM.

Notice

Under both DPM § 2422, Agency is required to provide written notice to affected employees at least thirty (30) days prior to the effective date of the RIF. In this case, Employee received his RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice stated that Employee's position was being abolished as a result of a RIF. Further, Employee has not alleged that he did not receive proper notice prior to the effective date of the RIF. Accordingly, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF as required by the DPM.

CONCLUSION

This matter was remanded to the Undersigned for the purpose of determining whether Agency properly separated Employee from service pursuant to the Abolishment Act and Chapter 24 of the DPM. Notably, Agency has conceded in its May 29, 2014 brief that "The District of Columbia Public Schools did not conduct this RIF in accordance with D.C. Code §1-624.08 and Chapter 24 of the District Personnel Manual—nor was it possible."[20] Agency's assertion that this Office should overturn Judge Mott's decision and rule that it conducted the 2009 RIF under the correct criteria is a blatant disregard of the written directive from D.C. Superior Court. Agency has failed to prove that: 1) it afforded Employee one round of lateral competition under the requirements of D.C. Code § 1-624.08; 2) Employee was placed its priority reemployment list; and 3) Employee was included in the displaced employee program.

Based on the foregoing, I find that Agency has failed to prove by a preponderance of the evidence that it conducted the 2009 RIF in accordance with the procedures set forth in D.C. Code §1-624.08 and Chapter 24 of the DPM. Accordingly, Agency's action of separating Employee from service must be overturned.

[19] DPM § 2429.
[20] Agency Brief at 4. (May 28, 2014).

ORDER

It is hereby **ORDERED** that:

1. Agency's action of separating Employee via the instant RIF is **REVERSED**;

2. Agency shall reinstate Employee to the position of record that she occupied at time of the instant RIF;

3. Agency shall reimburse Employee all back-pay and benefits lost from the effective date of the separation; and

4. Agency shall file with this Office, within thirty (30) calendar days from the date on which his decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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SOMMER J MURPHY, Esq.
Administrative Judge