

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
TROY LEMIEUX,	)	
Employee	)	OEA Matter No. 2401-0173-09
	)	
v.	)	Date of Issuance: June 15, 2010
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
_____	)	

Rachel A. Kirtner, Esq., Employee Representatives  
Bobbie L. Hoye, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On July 31, 2009, Troy Lemieux (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools (“DCPS” or “the Agency”) action of abolishing his position through a Reduction-In-Force (“RIF”). At the time his position was abolished, Employee’s official position of record within the Agency was a Custodian on the RW pay plan at Dunbar Senior High School. According to the CLDF form created by the Agency in contemplation of the instant action, Employee was the second lowest rated custodian out of seven and his position was one of two that was abolished. I was assigned this matter on or around March 26, 2010. Thereafter, a prehearing conference was convened in order to assess the parties’ arguments. After considering the parties’ arguments, I decided that an evidentiary hearing was not required. On May 7, 2010, I issued an Order requiring both parties to submit final written briefs in this matter. Since then, both parties have submitted their respective written briefs. The record is now closed.

**JURISDICTION**

The 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 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

### FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of the Employee's appeal process with this Office.

I find that in a RIF matter that I am guided primarily by D.C. Official Code § 1-624.08, which states in pertinent part that:

(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... 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.

(f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:

(1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-

1403.03; and

(2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

According to the preceding statute, I find that a District of Columbia government employee whose position was abolished pursuant to a RIF may only contest before this Office:

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

The District of Columbia Municipal Regulations (“DCMR”) provides further guidance regarding what factors DCPS may utilize during a RIF when choosing which employees to retain within a competitive level and area. Of note, 5 DCMR 1503.2 *et al* provides in relevant part:

1503.2 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.

The Agency, when it instituted the instant RIF, did not accord equal weight to the four factors outlined within 5 DCMR 1503.2. The Agency weighed the factors as follows:

- (a) Significant relevant contributions, accomplishments, or performance - 50%.

- (b) Relevant supplemental professional experiences as demonstrated on the job – 30%
- (c) Office or school needs, including: curriculum specialized education, degrees, licenses or areas of expertise – 10%
- (d) Length of Service – 10%

Agency argues that nothing within the DCMR, applicable case law or D.C. Official Code prevents it from exercising its discretion to weigh the factors as it sees fit to do so. Employee does not offer a credible rebuttal to Agency's assertion on this point. Agency correctly notes that there is no language contained within any applicable regulation, statute or case law that mandates that the factors outlined in 5 DCMR 1503.2 be given equal weight. Practically speaking, weighing the factors on an uneven basis allowed DCPS to retain (in its own determination) competent personnel who but for their length of service would have lost their positions to underperforming colleagues who could only retain their position based on their seniority. I find that given the instant circumstances, Agency was within its discretion, to weigh the aforementioned factors, in a consistent manner throughout the instant RIF, as it deemed necessary.

Agency argued that it based the instant RIF on its good faith belief that it was facing budgetary constraints necessitating this onerous action. Employee argues that the budgetary constraints cited by the Agency are contrived and that I should reverse this action because the underlying basis for the RIF does not exist. According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), the OEA's authority over RIF matters is narrowly prescribed. The Court explained that the OEA does not have jurisdiction to determine whether the RIF at the Agency was *bona-fide* or violated any law, other than the RIF regulations themselves. Further, it is an established matter of public law, that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, the OEA no longer has jurisdiction over grievance appeals. I find that given the instant circumstances, it is outside of my authority to decide whether there was in fact a *bona-fide* budget shortage. Further, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. And, Employee's other ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not say that Employee may not press his claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I find that Employee's position was abolished, after Employee properly received one round of lateral competition and a timely 30-day legal notification was properly served. I conclude that the Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that the OEA is precluded from addressing any other issue(s) in this matter.

ORDER

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

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
ADMINISTRATIVE JUDGE