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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0170-10
BENJAMIN SCOTT,)	
Employee)	
)	Date of Issuance: May 9, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Benjamin Scott, Employee, <i>Pro Se</i>		
W. Iris Barber, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 25, 2009, Benjamin Scott (“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 Counselor at Kramer Elementary School (“Kramer”). Employee was in Educational Service status at the time he was terminated.

I was assigned this matter in January of 2012. On February 17, 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 Agency submitted a response to the Undersigned on March 12, 2012. On April 23, 2012, I issued an Order for Statement of Good Cause to Employee because he had failed to submit a brief by the required deadline. Employee did not submit a response to the Order as of the date of this decision. Employee’s appeal will therefore be decided based on the documents of record. The record is now closed.

¹ The Office inadvertently sent the Order dated February 6, 2012 to Agency Representative’s previous mailing address. As a result, deadlines for Employee and Agency brief submissions were modified.

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 schools².

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02³, which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

² See *Agency's Answer*, Tab 1 (December 29, 2009).

³ 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;

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.”⁴ 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.”⁵

(4) Consideration of job sharing and reduced hours; and
(5) Employee appeal rights.

⁴ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁵ *Id.* at p. 5.

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, 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 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, 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 their separation from service; and/or
2. That he or she was not afforded one round of lateral competition within their competitive level.

In his petition for appeal, Employee argues that his seniority was not considered when Agency implemented the RIF. In addition, Employee believes that the RIF process was unfair and that his success as a Counselor at Kramer should serve as grounds for the reversal of his termination.

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency states that it provided Employee with one round of lateral competition, which resulted in him being ranked the lower of two

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

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1125.

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

¹¹ *Id.*

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

Counselors within his competitive area and level. Agency also contends that Employee was properly given thirty (30) days written notice prior to the effective date of his termination.

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS Schools 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.¹³

Here, Kramer Elementary School was identified as a competitive area, and ET-15 Counselor was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were two (2) Counselor positions subject to the RIF, and one (1) position was identified to be abolished. Because Employee was not the only Counselor within his competitive level, he was required to compete in a round of lateral competition.

According to Title 5, DCMR § 1503.2 *et al.*:

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;

¹³ Agency Brief at pg. 3 (March 12, 2012).

- (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%)¹⁴

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. 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.” 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 lateral competition. In conducting the instant RIF, the principal of Kramer 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”).

¹⁴ 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).

Employee received a total of eleven and a half (11.5) points on his CLDF and was therefore ranked the lowest in his competitive level. Employee's CLDF stated in pertinent part:

“Mr. Scott has not demonstrated the ability to perform his duties and responsibilities. I assigned him to specifically work with the sixth graders and two seventh grade sections and to date, there has been little if any collaboration given to these teachers from a counseling perspective and he has not established individual or group counseling sessions. His contributions are extremely limited and offer no value to our school.”¹⁵

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. Employee has failed to provide any credible evidence that would bolster a score in this area. In addition, it was within the principal's discretion to assign a numerical value in this category.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF and includes factors such as student outcomes, ratings, awards, and attendance. Employee received zero (0) points in this area, and has failed to provide any documentation to indicate his relevant contributions to the student body at Kramer.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received a total of zero (0) points. He has not provided any documentation to supplement additional points being awarded.

Length of service

This category accounts for 5% of the CLDF and was calculated by the Department of Human Resources 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.

Here, Employee had a Service Computation Date (“SCD”) of 2000, which equated to nine (9) years of experience on his CLDF. Employee received six (6) points for D.C. Residency, but did not receive points for Veterans Preference, or the ratings add for an “Exceeds

¹⁵ Agency Brief, Exhibit B (March 12 2012).

Expectation” evaluation during the prior school year. Employee has not contested the calculation of his length of service score.

In reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency’s position regarding the 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.”¹⁶ According to the CLDF, Employee received a total score of eleven and a half (11.5) after all of the factors outlined above were tallied and scored. The other employee subject to termination under the RIF received a total of sixty eight (68) points on their CLDF, a score much higher than Employee’s. Employee has not proffered any evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome.¹⁷

Accordingly, I find that the Principal of Kramer had discretion in completing Employee’s CLDF, as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record would lead the Undersigned to believe that the RIF was conducted unfairly. I therefore find that Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

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* (emphasis added) give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Here, Employee received his RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee’s position was being abolished as a result of a RIF. The Notice also provided Employee with information regarding his right to appeal the adverse action. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

In addition, OEA Rule 621.3 provides that “if a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may

¹⁶See 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.)

¹⁷ 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.)

dismiss the action or rule for the appellant.”¹⁸ Failure of a party to prosecute an appeal includes, but is not limited to “a failure to submit required documents after being provided with a deadline for such submission.”¹⁹

In this case, Employee was warned that the failure to submit a brief could result in sanctions as enumerated in Rule 621.3.²⁰ Employee failed to submit a written brief in response to the Order issued on February 17, 2012. Employee also failed to provide a Statement of Good Cause on or before April 30, 2012, to explain his failure to submit a brief. I find that Employee’s lack of diligence in pursuing an appeal before the OEA constitutes a failure to prosecute and serves alternate grounds for the dismissal of this matter.

Based on the foregoing, I conclude that Agency’s action of abolishing Employee’s position was done so 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:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

¹⁸ 59 DCR 2129 (March 16, 2012).

¹⁹ *Id.*

²⁰ 59 DCR 2129 (March 16, 2012).