THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Joe Williams	)	OEA Matter No. 2401-0183-09
Employee	)	
	)	Date of Issuance: October 1, 2010
v.	)	
	)	Senior Administrative Judge
D.C. Public Schools	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Rachel Kirtner, Esq., Employee Representative
Bobbie Hoye, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On August 5, 2009, Employee, a RW-3/5 Custodian with the D.C. Public Schools (the "Agency"), filed a Petition for Appeal with the Office of Employee Appeals (OEA or the "Office"), contesting Agency's decision separating him from government service pursuant to the abolishment of his job for financial reasons (Reduction-in-Force, or "RIF"), effective August 28, 2009. This matter was assigned to me on May 5, 2010. I held a Prehearing Conference on June 2, 2010.

Since this Matter raised no factual disputes, no hearing was held. I closed the record after both parties submitted their legal briefs on the issues.

JURISDICTION

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

ISSUE

Whether Agency's action separating Employee from service as a result of the RIF was in accordance with applicable law, rule or regulation.

FINDINGS OF FACT

The following facts are not subject to genuine dispute:

1. According to Agency's personnel records, Employee was a RW-3/5 Custodian at Birney Elementary School during school year 2008-2009.

2. Agency had closed 23 schools after the 2007-2008 school year and 3 more schools after the 2008-2009 school year.

3. On June 22, 2009, School Chancellor Michelle Rhee concluded Agency needed to reorganize and eliminate additional school-based, non-instructional employees due to budgetary constraints. She made the decision for Fiscal Year 2010 to reduce staffing levels by abolishing positions throughout the school system.

4. Agency required its schools to abolish a set number of positions based on student enrollment and budgetary constraints.

5. Together with non-instructional aides, custodial staff positions to be abolished were identified on a school by school basis.

6. Birney Elementary School was initially combined with Savoy Elementary School for the 2008-2009 school year. After the Savoy building was modernized, it was decided that Birney Elementary School would be closed. Staff members were advised to apply for positions at other Agency schools. All positions at the Birney Elementary School were eliminated at the end of the 2008-2009 school year.

7. Employee's competitive area was the Birney Elementary School while his title and grade of competitive level was RW Custodian. Mr. Jefferson was the other employee at this competitive level. However, there was no round of lateral competition as all the positions at Birney Elementary were eliminated

7. Mr. Jefferson applied for, and was accepted, as a custodian at the Savoy Elementary School.

8. By the time Employee inquired about vacancies at the Savoy Elementary School, they had already hired Mr. Jefferson and had no more vacancies for a custodian.

9. On July 28, 2009, Agency issued to Employee a letter of official notice of abolishment of his position, effective August 28, 2009.

10. On August 5, 2009, Employee filed a Petition for Appeal with the Office of Employee Appeals challenging the reduction in force.

Position of the Parties

At the prehearing conference and in his submissions, Employee made several complaints: that the school's budgetary excuse for the RIF was false; that the other custodian in Birney was not

subjected to a RIF; that the Agency improperly applied the provisions of RIF regulations when it added a performance factor and military service to Length of Service; that Agency failed to give weight to Employee's seniority, and that Agency changed its former weighting of the CLDF factors.

Agency asserts that it conducted a proper RIF in accordance with all applicable D.C. statutes and regulations.

ANALYSIS, AND CONCLUSIONS

In a RIF matter, 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.

Title 5 § 1503 of DCMR governs the procedures to be followed in the implementing of RIFs for fiscal year 2000, and subsequent fiscal years, as follows:

Section 1503.1: An employee who encumbers a position which is abolished shall be separated in accordance with this chapter notwithstanding date of hire or prior status in any other position.

Section 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.

Title 5 § 1506 identified the type of notice to be given as a result of a RIF, as follows:

Section 1506.1: 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 specific 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.

Section 1506.2: An employee may also be given a written general notice prior to a separation due to a reduction-in-force but such general notice is not required. The general notice may be used when it is not yet determined what individual action, if any, will be taken.

Agency submitted a chart outlining and reflecting a school-by-school RIF in custodial staff. The competitive areas for the RIF were defined by schools where the number of positions for custodial staff or for non-instructional staff for the 2008-2009 school year exceeded the number of positions available for the 2009-2010 school year. Employee worked at Birney Elementary School, which was reflected on the chart.

I note that the parties disagree first on whether there was an actual (versus contrived) budget shortfall, such to justify the implementation of a RIF. In response to Employee's first assertion about the budget rationale, the D.C. Court of Appeals in *Anjuwan v. D.C. Department of Public Works,* 729 A.2d. 883 (12-11-98), held that 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. For several years, OEA has interpreted that ruling to include that the Office has no jurisdiction over the issue of an Agency's claim of budgetary shortfall, nor can OEA entertain an employee claim regarding how an agency elects to use its monetary resources for personnel services. How the Agency herein elected to spend its funds for personnel services, or how said Agency likewise elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.

Employee's second argument, that Mr. Jefferson, the other custodian at Birney Elementary, did not lose his job and thus, presumably was not subjected to a RIF, is belied by the facts. The entire Birney Elementary School was shut down. Thus, of necessity, *all* positions at Birney were abolished in the ensuing RIF. That Mr. Jefferson was able to apply for and secure another custodian position at Savoy Elementary School is neither illegal or improper.

Next, Employee's other challenges – the weighting of performance and military service to Length of Service; the weight given to Employee's seniority, and Agency's changing its former weighting of the CLDF factors - all relate to the lateral competition requirement.

Regarding the lateral competition requirement, the record shows that all custodian positions at Birney Elementary School, including that of Employee's, were abolished. Thus, the applicable regulation is 5 DCMR § 1503.3, which states, "When an entire competitive level within a competitive area is eliminated, these factors need not be considered in determining which positions will be abolished." Thus, Employee's complaints about the weight given to seniority in the CLDF are irrelevant.

Therefore, I conclude that the statutory provision of Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position. See *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), __ D.C. Reg. __; *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003), __ D.C. Reg. __; *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003), __ D.C. Reg. __; and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001), __ D.C. Reg. __.

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. Based on the above discussion, I find that Employee's raising the issues of budgetary shortfall, and the weight accorded an employee's length of service are grievances which are outside the jurisdiction of this Office to consider. Based on the foregoing, I find 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 any other issue(s) are outside of my authority to review in the instant matter.

Based upon the foregoing, I find that the Agency's action of abolishing Employee's position was done in accordance with the requirements of *D.C. Official Code* § 1-624.08 and the directives of Title 5 § 1506 of DCMR, and therefore must be 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:

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JOSEPH E. LIM, Esq.
Senior Administrative Judge