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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0312-10
TYLER JACKSON,)	
Employee)	
)	Date of Issuance: April 1, 2013
v.)	
)	
DISTRICT OF COLUMBIA)	
OFFICE OF PUBLIC EDUCATION)	
FACILITIES MODERNIZATION,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Diana Bardes, Esq., Agency Representative		
Charles Brown, Jr., Esq. Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 14, 2010, Tyler Jackson (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Office of Public Education Facilities Modernization’s (“Agency” or “OPEFM”) action of terminating his employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was June 13, 2010. Employee’s position of record at the time he was terminated was a Heavy Equipment Operator. Employee was serving in Career Service status at the time he was terminated.

I was assigned this matter in July of 2012. On August 16, 2012, I held a Status Conference for the purpose of assessing the parties’ arguments. On August 28, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Both parties submitted responses to the order. 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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee believes that this Office should reverse Agency's action of terminating his employment under the RIF based on the following arguments:

1. The statements contained within Employee's 2008/2009 Performance Evaluation are unsubstantiated by fact, thus he was not given a proper round of lateral competition.
2. The scores afforded to Employee on his Performance Evaluation are not an accurate reflection of his actual work performance.
3. Agency failed to produce any documentary or testimonial support for Employee's evaluation that was "used as the basis of Mr. Jackson's termination from employment."¹
4. An evidentiary hearing should be granted for the purpose of allowing Employee to challenge the accuracy of the information contained in his Performance Evaluation.
5. Employee notes that his eighteen (18) years of service with Agency gives him seniority over other employee's within his competitive level.²

¹ Employee Brief, p. 4 (September 28, 2012).

² Petition for Appeal (May 14, 2010).

In response, Agency argues that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency further states that it provided Employee with one round of lateral competition in addition to giving him the proper written notification prior to separating him from service.

Discussion

On April 29, 2010, Agency's Executive Director issued Administrative Order No. 2010-02, which identified twenty-three (23) positions within OPEFM to be abolished under the instant RIF.³ Specifically, Agency stated that the RIF was being conducted for the purpose of eliminating excess positions as a result of the District's budgetary crisis.⁴ The authorizing Administrative Order identified one (1) Heavy Equipment Operator position to be abolished under the RIF. On May 11, 2010, Employee received notice that he was being terminated, effective Sunday, June 13, 2010.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.01 *et seq.*,⁵ for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more specific and applicable statute to govern this RIF.

Specifically, 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.

³ The instant RIF was conducted in accordance to D.C. Official Code § 1-624.01 *et seq.* and Chapter 24 of the D.C. Personnel Regulations.

⁴ Agency Answer, p. 1 (June 23, 2010).

⁵ D.C. Code § 1-624.02, which encompasses more extensive RIF procedures, states in relevant part:

(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.

(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.”⁶ 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.”⁷

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.”⁸ 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.”⁹ 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.”¹⁰

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.¹¹ 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.”¹² Further, “it is well established that the use of such a

⁶ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁷ *Id.* at p. 5.

⁸ *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1125.

¹² *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

‘notwithstanding clause’ clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other sections.”¹³

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹⁴ 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.

Lateral Competition

Chapter 24 of the D.C. Personnel Manual (“DPM”) § 2410.4, 47 D.C. Reg. 2430 (2000), defines “competitive level” as:

All positions in the competitive area...in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

Here, Maintenance was identified as the lesser competitive area in which Employee was placed.¹⁵ Heavy Equipment Operators on the RW pay plan was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were two (2) Heavy Equipment Operator positions in Employee’s competitive level. Of the two (2) positions, one (1) position was identified to be abolished under the RIF. Employee was not the only Heavy Equipment Operator within his competitive level, and was therefore required to compete with another employee in one round of lateral competition.

Section 2420.3 of the DPM provides that “competing employees shall be selected for release from a competitive level in the inverse order of retention standing, beginning with the

¹³ *Id.*

¹⁴ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

¹⁵ Section 2409.2 of the DPM provides that lesser competitive areas within an agency may be established by the personnel authority.

employee with the lowest retention standing on the retention register.”¹⁶ In this case, Employee received a “Satisfactory” performance rating on his October 1, 2008 – September 30, 2009 evaluation. However, Employee did not receive additional points for Veterans’ preference or DC residency preference.¹⁷ Employee’s RIF Service Computation Date (“SCD”) is August 10, 1992, which equates to 17.83 years of service. The other Heavy Equipment Operator in Employee’s competitive level received three (3) additional points for DC residency and has a SCD of September 12, 1974, or 35.75 years of service. Because Employee received the lowest retention standing, Agency identified his position for elimination under the RIF.

Employee argues that the statements contained within his 2008/2009 Performance Evaluation are unsubstantiated by fact, thus he was not given a proper round of lateral competition. Employee further believes that an evidentiary hearing should be held for the purpose of allowing him to challenge the accuracy of the information contained in his Performance Evaluation. According to Employee, he should have received a rating of “Role Model” on his evaluation, instead of “Satisfactory.”

OEA Rule 620, 259 DCR 2129 (March 16, 2012) gives an Administrative Judge the discretion to grant an evidentiary hearing in instances where material issues of fact exist. 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 Competitive Level Documentation Form 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.”¹⁸ Moreover, Employee does not contend that OEA has a statutory or constitutional obligation to grant him an evidentiary hearing.¹⁹ Thus, if Agency’s administrative findings are supported by substantial evidence, this tribunal must accept them even if there is substantial evidence in the record to support a contrary finding.²⁰

Employee had the lowest retention standing on Agency’s Retention Register based on his performance rating and SCD, and was therefore properly identified for separation under the RIF. Accordingly, I find that Employee was properly provided with one round of lateral competition in compliance with D.C. Official Code § 1-624.08.

¹⁶ 47 D.C. Reg. 2430 (2000).

¹⁷ Agency Retention Register, Agency Brief, Tab 5 (September 7, 2012).

¹⁸ See 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.)

¹⁹ See also *Shaibu v. D.C. Public Schools*, 2012 CA 00360 P (MPA); (holding that an evidentiary hearing was not warranted in the instance where an employee did not proffer evidence that directly contradicted any of the factual bases of his performance evaluation).

²⁰ *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 660-61 (D.C. 1994).

Notice

Under DPM Section 2422.1, a competing employee selected for release from his or her competitive level is required to receive written notice at least thirty (30) full days before the effective date of the employee's release.

Here, Employee received his RIF notice on May 11, 2010, and the RIF effective date was June 13, 2010. The notice states that Employee's position is being abolished as a result of a RIF. The notice also provides Employee with information about his appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Conclusion

Based on the foregoing, I find that Employee was properly afforded one round of lateral competition, and that a timely thirty (30) day written notification was served by Agency. I therefore 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 UPHHELD

FOR THE OFFICE:

Sommer J. Murphy, Esq.
ADMINISTRATIVE JUDGE