THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No.: 2401-0041-21
Employee	)	
v.	)	Date of Issuance: February 16, 2023
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
	)	

Ramses Davis, Employee *Pro-Se*
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

Employee worked for the District of Columbia Public Schools ("DCPS" or "Agency") as a Custodian RW-5. The Employee was assigned to Johnson Middle School ("Johnson") as a Custodian Supervisor. The Employee was responsible for the supervision of Custodian RW-3s and maintaining the cleanliness of the school building. During the 2021-2022 school year there were two Custodian RW-5's at Johnson, Employee and TM. By letter dated June 4, 2021,[1] Employee was notified that his position of record at Johnson was being abolished through a Reduction in Force ("RIF"). The effective date of the RIF was July 11, 2021.[2] It should be noted that Employee accepted an RW-3 Custodian position at Takoma Elementary school *in lieu* of being wholly separated from serving with DCPS.

On August 11, 2021, Employee filed a Petition for Appeal contesting the RIF of his former position (RW-5 Custodian). On September 28, 2021, the OEA, under the auspices of its Executive Director, sent notice to DCPS regarding Employee's appeal and required DCPS to provide an Answer by October 28, 2021. Initially, Agency did not respond. This matter was assigned to the Undersigned on November 1, 2021. Upon initial review, the Undersigned noted this error and issued an Order for Statement of Good Cause requiring Agency to explain its apparent failure to file an Answer in this matter. DCPS responded by asserting that it did not receive the notice dated September 28, 2021. This response was accepted, and the parties were convened for a

[1] Hereinafter "RIF Notice".
[2] On June 22, 2021, the effective date of Employee's RIF was changed from June 25, 2021 to July 11, 2021. This was done to ensure that Employee was provided at least 30 days written notice of the then pending RIF.

Prehearing/Status Conference to ascertain the salient issues and determine how this matter will be resolved. On March 8, 2022, the Undersigned issued a Post Prehearing/Status Conference Order which noted that this matter would be decided using written briefs. The parties have complied with this Order and have submitted their briefs. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

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 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for 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 631.2 id. States:

> For appeals filed under §604.1, 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

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, inter alia, appeals from separations pursuant to a RIF. On June 4, 2021, Employee was notified that his position was being abolished pursuant to a RIF, effective July 11, 2021. Agency asserts that it properly followed District all applicable laws, rules and regulations in conducting the instant RIF. Employee opposes that without credible reference asserting that he should have been hired elsewhere within DCPS as an RW-5 Custodian. In the current matter, Agency noted that the RIF was conducted "due to the elimination of positions that will be redundant or unnecessary following a reorganization of functions for the 2022/23 fiscal year."

One Round of Lateral Competition

This RIF was conducted pursuant to D.C. Official Code §§ 1-624.02, 1-624.03, and 5-E DCMR Chapter 15, and pursuant to the authority delegated to the Chancellor by Mayor's Order

2007-186 (Aug. 10, 2007).[3] Specifically, the RIF was done to "eliminate positions that would be redundant or unnecessary following a reorganization of functions." As such, I find that a RIF pursuant to D.C. Official Code § 1-624.02 (a) 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. D.C. Official Code § 1-624.02 (a)

Agency argued the following in support of their contention that Employee was duly provided one round of lateral competition:

> the Agency completed a reduction rubric for each employee contained within the competitive group. Each employee was assessed in four areas: (1) Relevant Significant contributions, accomplishments, or performance: as determined by their IMPACT performance/Evaluation Score; (2) Office or School Needs/Other Contributions or Experience Points. This area assesses additional contributions that the employee has made to the school; (3) Relevant supplemental professional experience as demonstrated on the job/Skills and Needs Points considers an employee's unique skills and qualifications and (4) Length of service. The Employee received an overall score of 31. Whereas T.M. received an overall score of 71. As a result of receiving the lowest score the Employee was subject to the RIF. Hence, on June 4, 2021, Employee was issued a Notice in which he was advised that his position was being eliminated as part of the RIF and that he would be separated effective June 25, 2021.[4]

After thorough review, I find that DCPS conducted the instant RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency ably explained that each school was identified as a separate competitive area, and each position title a separate competitive level. According to Agency, Employee was an RW-5 Custodian Supervisor at Johnson Middle School. Johnson was determined to be a competitive area, and Custodian RW-5 at Johnson was the competitive level. Employee's position was provided one round of lateral competition due to their being two RW-5 Custodians at Johnson. According to the retention register supplied by DCPS, Employee clearly was the lowest ranked RW-5 Custodian at Johnson and his position of record at Johnson was eliminated through the aforementioned RIF. I find that Employee failed to proffer any credible argument that proves that the competitive level and area in the instant matter was improperly constructed or scored. I further find that Employee's score was accurate and his placement as the lowest ranked RW-5 Custodian at Johnson was the proper result.

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[3] Authorization for 2021 School-Based Staff Reductions, DCPS Brief at Exhibits 2 and 3 (March 25, 2022).
[4] DCPS Brief p. 4 (March 25, 2022).

Priority Reemployment

D.C. Official Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section are to be afforded consideration for priority reemployment. As was previously noted, Employee found alternate employment within DCPS at a different school as an RW-3 Custodian. Given that his reemployment occurred as a part of his job search due to the RIF, I find that Agency more than satisfied the priority reemployment right of Employe herein.

Consideration of Job Sharing or Reduced Work Hours

According to Agency's Brief it noted that Employee's former Principal, Dwan Jordan, considered job sharing and reduced work hours as indicated in an affidavit submitted with Agency's Brief.[5] The Principal also noted that job sharing or reduced work hours would not correct the budgetary and programmatic concerns that necessitated the RIF. Accordingly, I find that job sharing or reduced hours were considered in this action. Furthermore, the D.C. Court of Appeals in *Johnson v. D.C. Dept. of Health*, 162 A.3d 808 (D.C. 2017) held that, the alternative measure of considering job sharing and reduced hours prior to imposing a RIF has "debatable merit." More specifically, the Court stated that: In concluding that budgetary and related exigencies required a RIF of all employees across the competitive area at [Employee's] level,[an agency] arguably may be assumed to have found the lesser measures such a job sharing and reduced hours inadequate to address the need; and OEA's authority to look behind that agency judgment would be open to significant question.[6] Thus, it may be assumed, based on Agency's explanation, and under the holding in *Johnson*, that the alternative of job sharing, and reduced hours would not have adequately addressed DCPS' need(s).

Notice of Employee Appeal Rights

D.C. Official Code § 1-624.02(a)(5) states that Agency must provide employees separated pursuant to a RIF their appeal rights. Each employee separated pursuant to a RIF shall be entitled to written notice at least thirty (30) days before the employee's separation from service. According to documents filed by Employee as part of his Petition for Appeal, he was given initial notice on June 4, 2021, that his last position of record was being subjected to a RIF. Initially, this first notice provided less than 30 days written notice of the then impending RIF; however, a supplemental letter was provided to Employee on June 22, 2021, that noted this harmless error and extended the time (without break) before the effective date of the RIF to July 11, 2021. Both notices informed Employee of his right to appeal to the OEA as well as the OEA's rules and appeal form. Considering the foregoing, I find that Employee was duly afforded at least 30 (thirty) days written notice prior to the effective date of the RIF as required by statue.

[5] Agency Brief at Affidavit of Dwan Jordan (March 25, 2022).
[6] *Johnson*, 162 A.3d 8080, 812-13 (D.C. 2017).

Grievances

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[7] Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. This finding particularly concerns Employee's claims regarding post-RIF activity that occurred at a different school than Johnson that he was employed with well after the RIF in question. I find that Employee's other ancillary arguments are best characterized as a grievance and outside of the OEA's jurisdiction to adjudicate.

Conclusion

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. I further find that the retention register that was used in this matter is overwhelmingly supported by substantial evidence. I further find that DCPS has met its burden of proof in this matter with respect to how it implemented and carried out the instant RIF and the resulting abolishment of Employee's last position of record. Therefore, I conclude that Agency's action of abolishing Employee's position was done in accordance with all applicable laws and regulations pertaining to RIF's and this action resulted in the abolishment of Employee's RW-5 Custodian position at Johnson should be upheld. [8]

ORDER

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

FOR THE OFFICE:

/s/ *Eric T. Robinson*
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[7] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.
[8] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").