THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0132-10
CRYSTAL PROCTOR,	)	
Employee	)	
	)	Date of Issuance: June 11, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Agency	)	Monica Dohnji, Esq.
	)	Administrative Judge

Horace L. Bradshaw, Esq., Employee's Representative
Sara White, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 4, 2009, Crystal Proctor ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of abolishing her position through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was an ET-15 Social Studies Teacher at Jefferson Middle School ("Jefferson"). Employee was serving in Education Service status when her position was abolished.

I was assigned this matter on February 6, 2012. On February 10, 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. Agency's brief was timely received. On March 26, 2012, Employee requested an Extension of Time to File Brief. This Motion was granted in an Order dated March 27, 2007. According to this Order, Employee had until April 25, 2012, to submit her brief. Employee has complied. After reviewing the record, I have determined that there are no material facts in dispute and therefore, an evidentiary hearing is not warranted. 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 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 schools.[1]

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02[2], which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

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[1] *See* Agency's Answer, Tab 1 (December 9, 2009).

[2] 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;

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.
>
> (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*,[3] 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." 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."[4]

However, the Court of Appeals took a different position. In *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, [5] DCPS conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005." The Court of Appeals

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

[3] No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] 960 A.2d 1123, 1125 (D.C. 2008).

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."[6] 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."[7]

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.[8] 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."[9] 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."[10]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[11] 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 she did not receive written notice thirty (30) days prior to the effective date of her separation from service; and/or

2. That she was not afforded one round of lateral competition within her competitive level.

Employee's Position

In her petition for appeal, Employee submits that Agency failed to follow appropriate procedures as required by D.C. Code § 1-624.08. She also alleges that, "the RIF was illegal…the Chancellor created the budget crisis to RIF teachers."[12] And as such, she "wants OEA to reverse the illegal RIF."[13] In her brief, Employee also submits that, Agency has failed to 1) demonstrate "by competent evidence that an "actual RIF occurred in for [sic] the 2010 fiscal year" permitting Employee's termination without just cause; 2) demonstrate that Employee's "low ranking in the alleged competition was legitimate and not pretextual" and; 3) point to a "single document which

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[12] Petition for Appeal (November 4, 2009).
[13] *Id.*

supports the allegations contained within the sole unsworn document relied upon as cause for Proctor's termination."[14] Employee further notes the following:

1. That there was a discrepancy with her performance evaluation for the 2008-2009, school year, and as such, it was declared invalid by the Instructional Superintendent.[15]

2. That her Competitive Level Documentation Form ("CLDF") did not contain any information from her September 2009 observation report.[16]

3. That she was not given credit for being a D.C. resident. Her teaching position was not terminated as a result of the RIF. Noting that, another teacher simply took over her teaching position, while Agency "continued to hire people before, during and after the RIF."[17]

4. That the actual existence of a RIF is a factual issue, and thus, her appeal is not frivolous. Explaining that since Agency has failed to comply with D.C. RIF statutes and regulations, this Office should reinstate her.[18]

5. That the other competing employee received a high score although she did not have a Masters degree.

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her separation. Agency asserts that there were two (2) ET-15 Social Studies teacher positions at Jefferson, and one (1) position was identified as the position that would be subject to the RIF. Agency maintains that it utilized the proper competitive factors in implementing the RIF and that Employee was the lowest ranked ET-15 Social Studies teacher, and was terminated as a result of the round of lateral competition.[19]

Analysis

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS 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,

[14] Employee Crystal Proctor's Brief at p. 10 (April 25, 2012).
[15] *Id.* at Exhibits F and G.
[16] *Id.* at Exhibit J.
[17] *Id.* at pp. 10-12.
[18] *Citing Levitt v. District of Columbia Office of Employee Appeals*, 869 A.2d, 366 N.4 (D.C. 2005).
[19] Agency's Brief (March 5, 2012).

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.[20]

Here, Jefferson was identified as a competitive area, and ET-15 Social Studies teacher was determined to be the competitive level in which Employee competed. Employee has not provided any credible evidence that she was placed in the wrong competitive level. According to the Retention Register provided by Agency, there were two (2) ET-15 Social Studies Teachers subject to the RIF. Of the two (2) positions, one (1) was identified to be abolished. Because Employee was not the only ET-15 Social Studies Teacher within her competitive level, she was required to compete with other employees in one 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;
>
> (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
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> (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

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[20] *Id.* at pp 2-3. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

(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%).[21]

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.[22] 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 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 Jefferson 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").

Employee received a total of forty and a half (40.5) points on her CLDF and was therefore ranked the lowest in her competitive level. Employee's CLDF stated, in pertinent part, the following:

> "Crystal has improved this year in following the instructional model at Jefferson. Crystal still has trouble grasping the concepts of Strategic Design and the teaching and learning framework. Student achievement rates low [sic] in informational text, which is the focus of support for

[21] 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).
[22] Agency Brief at pp. 4-5 (March 5, 2012).

> history with English DC CAS testing area. Crystal at times is not punctual to meetings. She coaches volleyball."[23]

Office or school needs

This category is weighted at 75% on the CLDF and accounts for any factors that may have an impact on the success of the school or achievement of the students at the school such as; curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of five (5) points out of a possible ten (10) points in this category, resulting in a weighted score of thirty-seven and a half (37.5); a score much lower than the other employee within her competitive level. In her petition for appeal, Employee asserts that the ratings she received were too low, and Agency did not submit any documentation in support of its allegations in the CLDF. She also submits that the CLDF did not highlight the information contained in her September 2009 observation report. She further notes that her bachelors and masters degrees were not taken into consideration by the principal.[24] However, Employee has failed to provide any evidence to highlight how her degrees translate into her classroom expertise. Moreover, because Employee received a total of five (5) points in this category, it can be reasonably assumed that her degrees were taken into consideration in the calculation of the awarded points. Also, there is no indication that any supplemental evidence would supplant the higher score received by the other employee in her competitive level who was not separated from service pursuant to the RIF. Additionally, it is within the principal of Jefferson's managerial expertise to assign numeric values to this factor. As such, this Office cannot substitute its judgment for that of the principal at Jefferson.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. This category includes factors such as student outcomes, rating, awards, attendance etc. Employee did not provide any documentation to supplement additional points being awarded in this area. Moreover, it is within the principal's managerial discretion to award points in this area given her independent knowledge of the employees and student body.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee did not provide any documentation to supplement additional points being awarded in this area. Moreover, it is within the principal of Jefferson's managerial expertise to assign numeric values to this factor.

Length of service

This category accounts for 5%. It was completed by DHR and was calculated 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

[23] *Id.* at Exhibit B.
[24] Employee's Brief, *supra*.

other factors, were weighted and added together, resulting in a ranking for each competing employee.

Here, Employee's Service Computation Date ("SCD") is listed as 1999. She was employed with Agency for ten (10) years. She received ten (10) points for Years of Experience. Employee did not receive any points for Veterans preference or for D.C. residency. She did not receive an "outstanding" or "exceeds expectations" performance rating for the prior year, and therefore, did not receive the additional four years. Employee argues that she was a D.C. resident when the RIF was conducted. However, the address on Employee's RIF Notice is a Maryland address and not a D.C. address. Employee has not provided any credible evidence to dispute this fact. Employee also disputes her 2008/2009 school year performance rating. However, since Employee's performance evaluation for that school year was considered "null and void" by the Instructional Superintendent, there is no evidence in the record to provide any guideline to the undersigned in determining what rating Employee is entitled to.[25] Assuming *arguendo* that Employee is given points for D.C. residency and for an "outstanding" rating for the 2008/2009 school year, the maximum weighted points Employee can receive in this section is five (5) points. Employee currently has three (3) points in this category. There is no evidence in the record to show that an additional two (2) points will supplant the higher total score received by the other employee who was retained in service.

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."[26] Employee has a total score of forty and a half (40.5) points after all of the factors outlined above were tallied and scored. As discussed above, if an additional two (2) points are added to the Length of Service category, Employee will have a total score of forty-two and a half (42.5) points. The only employee who was retained received a total score of seventy-six and a half (76.5) points. Employee has not proffered any other evidence to suggest that a further re-evaluation of her CLDF scores would result in a different outcome in this case.[27]

Accordingly, I find that the principal of Jefferson had discretion in completing Employee's CLDF as she 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 that would lead the Undersigned to believe that the RIF was conducted unfairly. I therefore find that Agency did not abuse its discretion in completing the CLDF, and Employee

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[25] It should however be noted that, the record contains performance evaluations from previous years, and Employee received a "meets expectations" in a majority of them.

[26] *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).

[27] *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).

was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Thirty (30) Days Notice Requirement

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* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added). Here, Employee received her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provided Employee with information about her appeal rights. Employee has not alleged that she did not receive a written thirty (30) days notice prior to the effective date of the RIF. Thus, it is undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

RIF Rationale

Employee also asserts that the RIF was illegal and there were no budget issues. Employee maintains that the RIF was a pretext and did not exist. However, she notes that this is not an attempt to get OEA to second-guess the mayor's decision about shortage of funds, but rather, she wants OEA to determine whether Agency complied with the applicable RIF statutes and regulations. As discussed above, I find that Agency complied with the applicable D.C. statutes, laws and regulations governing RIFs in the instant case. Moreover, Employee has not provided any credible evidence to support her assertion that the RIF was a pretext and did not exist.

Employee also submits that her teaching position was not terminated as a result of the RIF. She notes that another teacher simply took over. She further submits that Agency continued to hire new teachers before and after the RIF. In *Anjuwan v. D.C. Department of Public Works,*[28] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF…"[29] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[30]

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. Here,

[28] 729 A.2d 883 (December 11, 1998).
[29] *Id*. at 885.
[30] *Id*.

how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[31] In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[32] This does not mean that Employee's objections regarding Agency's post-RIF activity cannot be entertained elsewhere.

CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after she properly received one round of lateral competition and a timely thirty (30) days legal notification was properly served. 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 her removal is upheld.

ORDER

It is hereby **ORDERED** that Agency's action separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

[31] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[32] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).