THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Nathaniel Moone	) OEA Matter No. 2401-0054-10
Employee	)
	) Date of Conference: March 28, 2012
v.	)
	) Senior Administrative Judge
D.C. Public Schools	) Joseph E. Lim, Esq.
Agency	)
	)

Donielle Powe, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 21, 2009, Nathaniel Moone ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public School's ("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 Social Studies Teacher at Ron Brown Middle School. Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on December 5, 2011. I held a prehearing conference on December 28, 2011. 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 timely 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.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. Public Schools 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.

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

[1] *See Agency's Answer*, Tab 1 (September 10, 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;
(4) Consideration of job sharing and reduced hours; and
(5) Employee appeal rights.

> 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."[3] 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*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[5] 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."[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]

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[3] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[6] *Id.*
[7] *Id.*
[8] *Id*. at 1125.
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*

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 he/she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

2. That he/she was not afforded one round of lateral competition within their competitive level.

Employee's Position

Employee submits that Agency did not provide him a legally sufficient round of lateral competition. Specifically, Employee claims that Agency did not consider the all the statutory factors required in computing his score in the Competitive Level Documentation Form (CLDF). Instead of considering his significant relevant contributions, accomplishments, performance, relevant supplemental professional experiences as demonstrated on the job, and office or school needs.[12] According to Employee, Agency only considered his years of service and nothing else. Thus, Employee argues, he did not receive his one round of lateral competition.

Employee also asserts that he had no more than fifteen (15) days' notice of his termination. He states that he went on approved medical leave in late September 2009 and did not return to Ron Brown Middle School until mid-October 2009. He claims that it was only then that he received his RIF notice and that Agency never sent his notice to his residence beforehand.[13]

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 his termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked ET-15 Social Studies Teacher, Employee, was terminated as a result of the round of lateral competition.

Analysis

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

[11] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[12] Employee Brief at p. 5-6 (December 28, 2011).
[13] Employee Brief at p. 5 (December 28, 2011).

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.[14]

Here, Ron Brown Middle School was identified as a competitive area, and ET-15 Social Studies Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were three (3) ET-15 Social Studies Teacher subject to the RIF. Of the three positions, one (1) position was identified to be abolished.

Employee was not the only ET-15 Social Studies Teacher within his competitive level and was, therefore, 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

[14] Agency Brief at p. 3 (January 27, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

(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%)[15]

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.[16] 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 Ron Brown Middle School 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 12.5 points on his CLDF, and was, therefore, ranked the lowest in their respective competitive level. Employee's CLDF stated, in pertinent part, the following:

"Mr. Moone has failed to demonstrate his ability to effectively provide social studies instruction. He has very poor classroom

[15] 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).
[16] Agency Brief at p. 5 (January 27, 2012).

> managenement skills and his students are often disruptive and off task. Mr. Moone has difficulty with basic delivery and rarely completes a full lesson….He has failed to demonstrate that he can plan and deliver high quality lessons and often leaves the room unsupervised. On one occasion Mr. Moone walked out of his class in an angry tirade and engaged in a very belligerent disrespectful dialogue with one of the dean of students. Mr. Moone has a very poor rapport with the population of students he services and he also has difficulty working productively with his colleagues"[17]

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 seven and a half (7.5) points out of a possible ten (10) points in this category.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. Employee did not submit any documents nor does he proffer any evidence of "significant relevant contributions, accomplishments, or performance" as per Title 5, DCMR §1503.2 to show that he deserved additional points in this category.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received zero (0) points in this area. Again, Employee does not provide any documentation to supplement additional points being awarded in this area.

Length of service

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

Employee received five (5) points in this category and he does not contest this portion of his CLDF.

Employee's argument that Agency failed to consider statutory factors in determining his score on his CLDF is belied by the documents submitted. Clearly, his CLDF and those of others that Employee submitted showed that Agency did indeed consider all the statutorily mandated factors in ranking its employees.

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[17] Employee's CLDF form (September 25, 2009).

Employee's next argument is that he disagrees with Principal Darrin Slade's scoring of his CLDF and he doubts that Principal Slade actually observed him at work.

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."[18] According to the CLDF, Employee received a total score of 12.5 after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of 42.5. Employee has not proffered any evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this case.[19]

Accordingly, I find that the Principal of Ron Brown Middle School 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 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 I further find that Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Thirty (30) days written Notice

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* (emphasis added) for separation pursuant to a RIF.

Here, Employee's RIF notice was dated October 2, 2009, and the RIF effective date was November 2, 2009. Agency asserts that they sent the RIF notice to Employee on or before October 2, 2009, thereby fulfilling their requirement of a 30-day notice. However, Agency failed to submit any documentary evidence that Employee did indeed received his RIF notice at least 30 days before its effective date. Although Employee, likewise, failed to submit any evidence to show he had only 15 days notice of his RIF; the fact remains that Agency had the burden of

[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 *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.)

proving that it gave Employee the thirty (30) days written notice prior to the effective date of the RIF. I therefore find that Employee only received a 15-day notice of his RIF.

DPM 2405.6, 47 D.C. Reg. 2430 (2000) reads as follows:

> An action which was found by….the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus, calls for a do-over or reconstruction of this process as opposed to a retroactive reinstatement of Employee. A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of an employee.[20] This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level." I find that Agency's failure to provide Employee with thirty (30) days written notice prior to the RIF effective date of termination was a procedural error. Such an error will not serve to negate or overturn Employee's termination and does not constitute harmful error.

CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition but that Employee did not receive the full thirty (30) day legal notification. I therefore 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 their removal is upheld. I also conclude that Agency must pay Employee fifteen days pay and benefits.

ORDER

It is hereby ORDERED that:

1. Agency reimburse the Employee fifteen (15) days pay and benefits commensurate with his last position of record; and

2. Agency's action of abolishing Employee's position as a Social Studies Teacher through a RIF is UPHELD; and

3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

[20] DPM 2405.7, 47 D.C. Reg. 2430 (2000).

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge