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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 2401-0230-10
JOHN RICHARDSON,	)	
Employee	)	
	)	Date of Issuance: March 26, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
John Richardson, Employee, <i>Pro Se</i>		
Sara White, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On December 2, 2009, John Richardson (“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 Read 180 Lab Instructor at Stuart Hobson Middle School. Employee was in Educational Service status at the time he was terminated.

I was assigned this matter on or around January of 2012. On February 6, 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 submitted a response to the Undersigned on February 21, 2012. On March 7, 2012, I issued an Order for Statement of Good Cause to Employee because he had failed to submit a brief by the required deadline. Employee was required to submit a statement to establish good cause on or before March 16, 2012. Employee failed to submit a brief; therefore, his appeal will be decided based on the documents of record. 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<sup>1</sup>.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02<sup>2</sup>, which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

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<sup>1</sup> See *Agency's Answer*, Tab 1 (January 7, 2010).

<sup>2</sup> 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;

Official Code § 1-624.08 (“Abolishment Act or the Act”) is the more applicable statute to govern this RIF.

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*, 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.”<sup>3</sup> 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.”<sup>4</sup>

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

<sup>3</sup> *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>4</sup> *Id.* at p. 5.

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."<sup>5</sup> 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."<sup>6</sup> 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."<sup>7</sup>

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.<sup>8</sup> 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."<sup>9</sup> 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."<sup>10</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>11</sup> 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.

### ***Employee's Position***

Employee argues that he should not have been terminated under the RIF because he was placed in a position outside his area of certification. Employee further submits that Agency made an error in computing his Service Computation Date ("SCD"). Lastly, Employee believes that the competitive level process Agency utilized was "too narrow."<sup>12</sup>

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<sup>5</sup> *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1125.

<sup>9</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

<sup>12</sup> Petition for Appeal (December 2, 2009).

### ***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. Agency states that it eliminated the entire competitive level in which Employee was placed, thus he was not entitled to one round of lateral competition. Agency also contends that Employee was properly given thirty (30) days written notice prior to the effective date of his termination.

### **FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW**

This Office has consistently held that, when an employee holds the only position in their competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.<sup>13</sup>

According to the Retention Register produced by Agency, Employee was the sole ET-15 Read 180 Lab Instructor at Stuart Hobson Middle School. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF.

In addition, Employee received written notification of his termination 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 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.

With respect to the arguments raised in Employee's petition for appeal pertaining to the competitive level process being "too narrow" or that he was improperly placed in a position outside his area of certification, there is no documentary evidence in the record to support this contention. Further, Employee has not offered any proof to support his position that the SCD was incorrect on the Retention Register.

OEA Rule 621.3 provides that "if a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant." Failure of a party to prosecute an appeal includes, but is not limited to "a failure to submit required documents after being provided with a deadline for such submission."<sup>14</sup> In this case, Employee was warned that the failure to submit a brief could result

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<sup>13</sup> See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

<sup>14</sup> *Id.*

in sanctions as enumerated in Rule 621.3. Employee failed to submit a written brief in response to the Order issued on February 6, 2012, requiring him to do so. Employee also failed to provide a Statement of Good Cause on or before March 16, 2012 to explain his failure to submit a brief. I find that Employee's lack of diligence in pursuing his appeal before the OEA constitutes a failure to prosecute and serves as an alternate ground for the dismissal of this matter.

Based on the foregoing, I 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.

ORDER

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

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.  
ADMINISTRATIVE JUDGE