THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DONEY G. OLIVIERI	)	**OEA Matter No. J-0137-03**
Employee	)	**OEA Matter No. 2401-0196-04**
	)	
	)	**Date of Issuance: October 3, 2005**
v.	)	
	)	**Rohulamin Quander, Esq.**
	)	**Senior Administrative Judge**
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS	)	
Agency	)	
	)	

Omar Vincent Melehy, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 20, 2003, Employee, through counsel, filed with the D.C. Office of Employee Appeals (the "Office") a Petition for Appeal, challenging his termination as an ET-7, World Language Content Specialist ("Content Specialist"), teaching Spanish in the District of Columbia Public Schools (the "Agency") at Anacostia Senior High School. Upon notification, Agency responded to the Petition on January 26, 2004, and moved to dismiss the Petition on the basis that: a) despite the notice of termination letter of June 13, 2003, effective immediately, Employee was paid on a 12 month basis, through August 2003, and was subsequently hired as an ET-15 Spanish Teacher with Agency, effective August 28, 2003, sustaining neither a loss of pay[1] nor any of his employment-

[1] Although Agency recited that there was no loss in pay, this Administrative Judge takes note that Employee's then level of compensation as an ET-7 Content Specialist paid about $4,000.00 more per annum, than the ET-15 teacher.

related benefits; and b) In accordance with the terms of the Collective Bargaining Agreement (the "Agreement") between the Washington Teachers Union (the "WTU") and the Agency, employees in the bargaining unit are required to use the grievance procedure stated in the Agreement to address their grievances, not the facilities of the Office.

At the request of this Administrative Judge (the "AJ"), the Agency submitted a memorandum in support of its position, which memorandum added two additional elements, i.e., a) that at the time that the Content Specialist positions were abolished, June 13, 2003, the Employee was probationary in that position, and as such, he was not entitled to receive a 30-day notice, and likewise could be terminated, effectively immediately; and b) being probationary, he was not entitled to the benefit of the retreat rights of 5 DCMR § 1307.7, which provides that if an employee has permanent status in any position in the Educational Service, the employee shall be entitled to return to a suitable available position equivalent to his or her prior position.

While the above-noted matter was pending before the Office, Agency found it necessary to implement another reduction in force ("RIF"), due to continuing fiscal problems and educational programmatic realignments. On May 27, 2004, Employee was served a 30-day notice, advising him that, effective June 30, 2004, he would be separated from the Agency, due to a RIF. Because he was the only teacher in the Spanish language department at Francis Junior High School, there was no Competitive Level Documentation Form (the "CLDF") prepared, pursuant to the provisions of 5 DCMR § 1503.3, which provides that where an entire competitive level within a competitive area is eliminated, the rating factors to decide which employee(s) is to be retained are not applicable.

On July 30, 2004, Employee filed a second Petition for Appeal, OEA Matter No. 2401-0196-04, challenging his termination from the Agency for the second time in two years. Employee neither asserted that he was not given a prior 30-day notice, nor challenged Agency's decision to abolish the entire department. Rather, Employee's sole assertion in the second Petition is that the RIF was effectuated in violation of D.C. Official Code § 1-624.08(b) (2001), which requires that final RIF decisions must be made by February 1st of each fiscal year, but that Agency did not make the RIF decision until well after that date, the effect of which voided the entire RIF. Since both matters were assigned to me, I consolidated them for consideration and disposition.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

The issues to be decided are:

1. Does the record in OEA Matter No. J-0137-03 establish that Employee was no longer a probationary employee?
2. If Employee was no longer in a probationary status, was the termination letter issued to him on June 13, 2003, effective immediately, sufficient notification under the D.C. Personnel Regulations?
3. Does the record establish that although Employee was initially hired as a Content Specialist on December 12, 2000, a temporary position, with notation, "Not to Exceed ("NTE") June 30, 2001", Agency continued to employ him, presumably pursuant to additional one year contracts, as a Content Specialist for academic years 2001-2002, and 2002-2003?
4. Does the Office have jurisdiction to hear and decide complaints which raise the issue of whether a decision to impose a RIF is invalid if not made until after February 1st of that fiscal year, because it is violates the provisions of D.C. Official Code § 1-624.08(b) (2001)?

FINDINGS OF FACT ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states, "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." According to OEA Rule 629.1, *id.*, a party's burden of proof is by a "preponderance of the evidence", which is defined as "[t]hat 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." In the above-noted issues, the burden of proof rests solely with the Employee.

Employee was hired by Agency on or about November 20, 1989, and pursuant to the requirements of 5 DCMR § 1307.3, he served a two year probationary term, which was completed on or about November 20, 1991. At that date he acquired permanent status as a teacher in the Educational Service of the Agency, although the relevant paperwork to reflect his status was not completed until on or about June 18, 1992.

On December 18, 2000, Employee was selected to serve as an ET-7 World Languages Content Specialist ("Content Specialist"). According to the Request for Employment Action Form (the "REA Form"), dated December 18, 2000, this appointment was temporary, and was not to exceed June 30, 2001. At his then level of compensation he was paid approximately $4,000.00 per annum more than a regular ET-15 teaching position. He completed the remainder of the academic year through June 30, 2001. It is unclear from the record whether REA Forms or additional Content Specialist contracts were prepared for the succeeding academic years 2001-2002, and 2002-2003.

However, the record does contain a Recent Job History Corrections printout issued by the Agency, dated September 10, 2003, which indicates that Employee was continuing to serve as an ET-7, Step 5 on August 25, 2002, and was subsequently appointed/reinstated as an ET-15, Step 13 on August 28, 2003.

Pursuant to 5 DCMR § 1304.2(a), a temporary assignment appointment cannot extend beyond June 30th of the school year in which the appointment is made. Further, pursuant to 5 DCMR § 1304.4, a temporary appointment position may be terminated at any time. However, the termination of the temporary appointment position with the Agency does not likewise automatically operate as a termination of the teacher/employee from the Agency.

On June 13, 2003, Agency served written notice to Employee that, effective immediately, his educational services as a *probationary* (emphasis added) Content Specialist were no longer needed. Despite the reference in the letter to his being a "probationary employee", the credible documentation presented to this AJ for consideration indicates that Employee's appointment to the Content Specialist position was, from the outset, *temporary,* not *probationary.*

If it was ever intended that the Content Specialist position would eventually become a permanent employment position within the Agency, which would potentially justify the reference to Employee as being in a probationary status on December 12, 2000, at the outset of his serving in that capacity, on the two year anniversary of that date, December 12, 2002, Employee would have successfully completed his then probationary status, and accrued a permanent status. Having completed at least two years as a Content Specialist, pursuant to 5 DCMR §§ 1307.5 and 1307.6, Employee attained an enhanced status as a tenured employee in his position and salary class. He would have retained both, had the position of Content Specialist not been abolished Agency wide.

Employee having earned permanent status as an ET-15 in 1991, Agency erred when it issued a notice, dated June 13, 2003, effective immediately, advising him that he was being terminated from both the Agency and the *probationary* (emphasis added) position as a Content Specialist. While he could be terminated from the program, due to its abolishment, under the governing regulations he could not be summarily separated from the Agency due to retreat rights.

At 5 DCMR § 1307.7, it is provided that if an employee in the Educational Service has permanent status in any prior position, said employee shall be entitled to return to a suitable and available position equivalent to his or her prior position. Pursuant to that provision, and after the Content Specialist position had been abolished, on or about August 28, 2003, Employee was hired by the Agency as an ET-15 Spanish Teacher, and directed to teach at Francis Junior High School. It is disputed between Agency and Employee whether Employee was reinstated, as Agency asserts, or located the position and pursued the appointment on his own, as Employee asserts.

When Agency elected to impose another RIF at the end of the 2003-2004 academic year, Employee was then RIFed from this position, pursuant to a 30-day notice, effective June 30, 2004.

Employee received a proper 30 day notice regarding the termination of his employment. At the time that Employee's second position as a Spanish teacher for the Agency was abolished, he was the sole Spanish teacher at that competitive level in the Spanish language department at Francis Junior High School. Consistent with the governing regulations, no CLDF was required or prepared at that time.

Employee is a member of WTU, and was an included employee under the negotiated Agreement between WTU and the Agency, which covered the period of October 1, 2001, through September 30, 2004. Pursuant to Article VI, § C(9), covered employees in the bargaining unit and the union are mandated to follow the grievance procedures set forth in this article with respect to any grievances that they might have, and a failure to do so will result in a forfeiture of the employee's right to rely upon the benefits of the provision.

Although the Agency has not specifically withdrawn its assertion that the Office lacks jurisdiction in OEA Matter No. J-0137-03, because Employee's alleged sole route for seeking relief was purportedly limited to the grievance provisions of the Agreement with the WTU, the AJ takes administrative notice that the Agency has withdrawn this same assertion in other RIF cases presented before the Office. Likewise, Agency has previously conceded that, provided the Office determines that it does have jurisdiction to decide a matter pending before it, the grievance procedures referenced in the Agreement do not apply to D.C. government mandated RIFs, which are to be handled and decided by this Office. As such, RIFS are not grievances which are to be addressed pursuant to the Agreement.

D.C. Official Code § 1-624.08(b) specially provides that, "Prior to February 1 of each year, each personnel authority . . . shall make a final determination that a position within the personnel authority is to be abolished". At § 1-624.08(d), it states that, "An employee affected by the abolishment of a position pursuant to this section . . . shall be entitled to one round of lateral competition pursuant to Chapter 24 of the D.C. Personnel Manual . . ." Further, at 1-624.08(e), it states that, "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."

Guided by the limiting provisions of 1-624.08(f)(2),[2] this Office has long held that an employee may file with the Office an appeal contesting that the separation procedures of subsections (d) and (e), above, were not properly applied, and that our jurisdiction is generally limited to matters which revolve around those issues only. I find, therefore, that the jurisdiction of this Office to decide RIF cases is limited, and would not include broad enough jurisdiction and authority to invalidate a RIF which was imposed after February 1 of the fiscal year in question. The authority lies elsewhere for the Employee to challenge the validity of the RIF, if any, on the basis that the decision date on

[2] This section of the Code provides, "Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that: ... (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsection (d) and (e) were not properly applied."

which the RIF was formally adopted was after February 1 of the fiscal year in question. As such, it cannot be raised in this forum.

Having taken the record as a whole into consideration, I conclude that in OEA Matter No. J-0137-03, Employee has established, by a preponderance of the evidence, that he did not become a probationary employee when, effective December 12, 2000, he was shifted over from the ET-15 Spanish Teacher position to an ET-7 Content Specialist. Rather, he was a permanent employee in full Career Status, who had been given three successive temporary assignments, pursuant to contract. As such, Agency erred when it served written notice of termination from the Agency, effective immediately, on June 13, 2003, without according Employee a proper 30-day notice. Since the position was abolished system-wide, there was no need for lateral competition or the preparation of a CLDF.

I further conclude that this Office has no jurisdiction to invalidate Employee's RIF in OEA Matter No. 0196-04, and that the requested relief far exceeds the limited jurisdiction and authority of this Office. When the Council of the District of Columbia (the "Council") conferred jurisdiction upon the Office, pursuant to D.C. Official Code § 1-624.08(d) and (e), respectively, said Council specifically limited the jurisdiction to, first, a determination of whether the affected employee received one round of lateral competition in the employee's competitive area, and second, that said employee also received at least a 30-day notice prior to the effective date of the RIF.

ORDER

The foregoing having been considered, it is hereby,

ORDERED, that Agency's action in OEA Matter No. J-0137-03 of removing Employee by notification of termination, dated June 13, 2003, and effectively immediately, is REVERSED. Employee was no longer probationary and had the right to receive a proper 30-day notice prior to being laid off; and it is

FURTHER ORDERED, that since Employee was able to locate suitable employment as an ET-15, effective August 28, 2003, Agency must take relevant steps to: a) assure that Employee sustained no loss in pay or benefits between the dates of June 13, 2003, and August 28, 2003; b) if there was a loss in pay for that short period, Agency must correct the error and compensate Employee for all lost wages, earned at the Content Specialist's rate of pay for the 30-day notice period; c) restore all lost benefits, and to cancel any potential break in service, if any such occurred. Because Agency abolished all of the Content Specialist positions, which reduced Employee's annual compensation rate by about $4,000.00 per annum, this Order does not consider the pay differential between the two positions as a loss in pay incidental to the failure to give a proper 30-day notice; and it is

FURTHER ORDERED, that Agency's RIF action in OEA Matter No. 0196-04, is UPHELD,

as implemented consistent with the RIF requirements, and that Employee's request that the RIF be invalidated for alleged non compliance with the February 1st of each fiscal year deadline, is rejected, as being beyond the limited jurisdiction of this Office to hear and decide; and, it is

FURTHER ORDERED, that Agency's Motion to Dismiss OEA Matter No. J-0137-03, is DENIED, but Agency's Motion to Dismiss OEA Matter No. 2401-0196-04, is UPHELD.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge