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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROBERT PARKER,)	
Employee)	OEA Matter No. 2401-0057-13
)	
v.)	Date of Issuance: May 16, 2014
)	
UNIVERSITY OF THE DISTRICT)	
OF COLUMBIA,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
_____)	
Robert Parker, Employee <i>Pro Se</i>		
Anessa Abrams, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 20, 2013, Robert Parker (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the University of the District of Columbia’s (“Agency” or “UDC”) action of abolishing his position through a Reduction-In-Force (“RIF”). The effective date of the RIF was February 28, 2013. At the time his position was abolished, Employee’s official position of record was a Boiler Plant Operator Leader. On April 10, 2013, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was assigned to me on February 24, 2014. Subsequently, I issued an Order wherein, I required the parties to submit briefs addressing the issue of whether the RIF was properly conducted in this matter. On March 13, 2014, Agency submitted a request for extension of time to file its brief. This request was granted in an Order dated March 14, 2014. This Order also extended the due date of Employee’s brief. Both parties have submitted their respective briefs. After considering the parties’ arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. And since this matter could be decided based upon the documents of record, no proceedings were conducted. The record is now closed.

JURISDICTION

The 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.

FINDING 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. I find that in a RIF, I am guided primarily by D.C. Official Code § 1-624.08, which 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.

(f) 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:

(1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and

(2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

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.”¹ 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.”²

However, the Court of Appeals took a different position. In *Washington Teachers’ Union, District of Columbia Public Schools (“DCPS”)* conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”³ 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.”⁴ 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.”⁵

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.⁶ 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.”⁷ 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.”⁸

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.⁹ 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 *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

² *Id.* at p. 5.

³ *Id.* at 1132.

⁴ *Id.*

⁵ *Id.*

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

⁷ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

⁸ *Id.*

⁹ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

1. That he did not receive written notice thirty (30) days prior to the effective date of his separation from service; and/or
2. That he was not afforded one round of lateral competition within his competitive level.

Employee's Position

In his submissions to this Office, Employee submits that the work performed by a Boiler Plant Operator is vital to Agency which is why Agency hired outside contractors to do the job. Employee notes that he should have been offered a position with the new contractors based on his skills. Employee explains that abolishing his position will negatively impact operational efficiency. Additionally, Employee contends that he was not offered one round of lateral competition within his competitive level. He explains that he was placed in a competitive level where according to District law; he could not perform the duties nor handle the responsibilities of the other two individuals in his competitive level. Employee further explains that, although he had the same job series and grade as the other individuals in his competitive level, their occupational level is different, and this is a clear violation of Chapter §§ 2410.4, 2410.5 and 2411.2 of the District Personnel Manual ("DPM").

Employee maintains that according to District laws, it is illegal for a 3rd Class Engineer like himself, to run a high pressure steam and chilled water power plant without the presence of a 1st Class Engineer like the other two individuals in his competitive level, on site at all times. In addition, Employee states that he was placed in a job description that he did not apply for, or had knowledge of, when he was rehired in 1997, following a RIF. He explained that he brought this issue to the attention of Agency's Human Resources Department ("HR") in March of 2010 and no corrective action was ever taken. Employee further explains that he was paid as a 3rd Class Engineer, performing the duties of a 1st Class Engineer.¹⁰

Agency's Position

According to Agency, the Board of Trustees approved the abolishment of positions due to budget and financial constraints on Agency. Agency highlights that the Abolishment Plan fully described how Agency selected the positions proposed for abolishment and how Agency planned to implement the abolishment action. Agency submits that it conducted the RIF in accordance with 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 separation. Agency submits that it established a lesser competitive area for each major department unit and conducted one round of lateral competition in accordance with the Abolishment Act and DPM. Agency notes that there were three (3) employees who qualified for the Retention Register at Employee's competitive level, and all three employees were subject to the RIF. Agency explains that Employee was ranked with two other individuals in his competitive level and all three positions associated with Boiler Plant were eliminated.¹¹ In addition, Agency contends that Employee's appeal is not proper before OEA based on lack of jurisdiction. Agency explains that OEA has very limited jurisdiction over Employee's appeal under the

¹⁰ Petition for Appeal (February 20, 2013); *See also* Employee's Brief (May 2, 2014).

¹¹ Agency's Answer (April 10, 2013); *See also* Agency's Brief (April 25, 2014).

Abolishment Act as Employee's appeal is clearly outside the scope of the appeal rights granted to him under the Abolishment Act.¹²

Round of Lateral Competition

Employee asserts that he did not receive one round of lateral competition as he was placed in a competitive level with Boiler Plant Operator Leader 1st Class Engineers, when his position was Boiler Plant Operator Leader 3rd Class Engineer in violation of DPM Chapter 24, §§ 2410.4, 2410.5 and 2411.2. He explained that although they had the same job series and grade, their occupational levels are different. Employee also notes that Agency never offered him a position with the newly hired contractors based on his skills. Agency on the other hand highlights that it established a lesser competitive area and complied with all the requirements of Chapter 24 of the DPM. Chapter 24 of the DPM, § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

All positions in the competitive area ... in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

In this matter, Appendix B of the UDC Resolution No. 2013-01 dated January 23, 2013 (which is equivalent to the Administrative Order) lists the various Agency divisions, departments, position number, job title, salary, service computation date of all positions that were affected by the RIF.¹³ Appendix A of this document also listed the abolishment plan, to include, but not limited to the designation of lesser competitive areas. According to the UDC Resolution No. 2013-01, three (3) Boiler Plant Operator Leader positions, along with one (1) Boiler Plant Operator 3rd Class Engineer position were listed for abolishment. Pursuant to the DPM § 2410 above, Agency was authorized to establish the competitive level, based on the employee's title of record, and other relevant factors.

In addition, pursuant to Chapter 24 of the DPM, § 2410.5, 47 D.C. Reg. 2430 (2000) "[t]he composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions, and other factors prescribed in this section and section 2411 of this chapter." Employee himself conceded that although he was paid as a 3rd Class Engineer, he performed the job of a 1st Class Engineer. Further, Chapter 24 of the DPM, § 2411.2 highlights that, "[e]mployees whose official position description have the same title, series, and grade, but who have specialties which are identified on their position descriptions by parenthetical titles in accordance with applicable classification standard, shall be assigned to separate competitive levels." This is not the case here. Employee's official position of record was Boiler Plant Operator Leader. Employee does not contend that his position of record was not Boiler Plant Operator Leader, instead, he attempts to distinguish himself from the other two (2) individuals in his competitive level by stating that he was a 3rd Class Engineer, while the other two (2) were 1st Class Engineers. According to the Retention Register, all the employees within Employee's competitive level were Boiler Plant

¹² *Id.*

¹³ Agency's Answer at Exhibit 14.

Operator Leaders, and none of the positions include parenthetical titles.¹⁴ It is also worth noting that, Employee's Notification of Personnel Action, Standard Form 50 ("SF-50") simply lists Employee's position as Boiler Plant Operator Leader without any specialty or parenthetical position description as stated in Chapter 24 of the DPM, § 2411.2. Moreover, Employee has not provided this Office with any evidence in support of his contentions.

Based on the record, Employee was one (1) of three (3) employees with the same job title, grade, classification series, and sufficiently alike in qualification in this competitive area. Consequently, I find that because Employee could successfully perform the duties of the other two (2) individuals in his competitive level, as well as the fact that the other two (2) employees had the same title, grade, and classification series, as Employee, Employee was placed within the correct competitive area. As such, Employee was entitled to compete with the other two (2) employees within his competitive level.

Section 2412 of the RIF regulations, 47 D.C. Reg. at 2431, requires an agency to establish a "Retention Register" for each competitive level, and provides that the Retention Register "shall document the final action taken, and the effective date of that action, for each employee released from his or her competitive level." Generally, employees in a competitive level who are separated as a result of a RIF are separated in inverse order of their standing on the Retention Register. An employee's standing is determined by his/her RIF service computation date (RIF-SCD), which is generally the date on which the employee began D.C. Government service. Here, Employee was entitled to compete with the other employees in one round of lateral competition. According to the Retention Register, all positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition is inapplicable because all the positions were eliminated, and thus Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.¹⁵

Employee argues that he should have been offered a position with the new contractors based on his skills. Pursuant to DPM § 2403.2(b), "[a]n agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency. Examples of such actions are the following: Filling vacancies with temporary employees to perform essential work, or contracting out such work, until the reduction in force takes place." (Emphasis added). Additionally, DPM §2405.2 provides that, "[p]ersonnel authorities and agencies *may*, in order to minimize the adverse impact of a reduction in force, offer a released employee a vacant position for which he or she qualifies." (Emphasis added). These statutes give Agency the discretion to offer employees affected by a RIF vacant positions if available. Accordingly, I find that Agency had the discretion to offer Employee and any other employees affected by the RIF vacant positions when implementing the instant RIF, *but were not required to so* (emphasis added). 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

¹⁴ Agency's Answer at Exhibit 15.

¹⁵ See *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

that the RIF was conducted unfairly. I therefore, find that Agency did not abuse its discretion in not offering Employee a position with the new contractors.

Moreover, in *Anjuwan v. D.C. Department of Public Works*,¹⁶ the D.C. Court of Appeals 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.”¹⁷ 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.

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* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added). Here, Employee received his RIF notice on January 24, 2013, and the RIF effective date was February 28, 2013. The notice stated that Employee’s position was being abolished as a result of a RIF. The Notice also provides Employee with information about his appeal rights. Moreover, Employee does not contest that he did not receive the required thirty (30) days notice. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Grievances

Employee also alleges the following: 1) the work performed by a Boiler Plant Operator is vital to Agency which is why Agency hired outside contractors to do the job; 2) he should have been offered a position with the new contractors based on his skills; 3) abolishing his position will negatively impact operational efficiency; 4) it is illegal under District laws for a 3rd Class Engineer to run a high pressure steam and chilled water power plant without the presence of a 1st Class Engineer on site at all times; 5) he was placed in a job description that he did not apply for, or had knowledge of when he was rehired in 1997, following a RIF. He explained that he brought this issue to the attention of Agency’s HR department in March of 2010 and no corrective action was ever taken; and 6) he was paid as a 3rd Class Engineer, performing the duties of a 1st Class Engineer. Generally, complaints of this nature are grievances, and do not fall within the purview of OEA’s scope of review. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.¹⁸ Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee’s other ancillary arguments are best characterized as grievances and outside of OEA’s jurisdiction to

¹⁶ 729 A.2d 883 (December 11, 1998).

¹⁷ *Id.*

¹⁸ *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).

adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that OEA is precluded from addressing any other issue(s) in this matter.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge