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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
TIMOTHY FITZGERALD,)	
Employee)	OEA Matter No.: 2401-0047-11
)	
v.)	Date of Issuance: January 23, 2013
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
_____)	
Timothy Fitzgerald, Employee <i>Pro-Se</i>		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 13, 2010, Timothy Fitzgerald (“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 his position through a Reduction-in-Force (“RIF”). Employee’s RIF notice was dated October 22, 2010, with an effective date of November 21, 2010. Employee’s position of record at the time his position was abolished was a Placement Specialist at the Office of Special Education’s Non-Public Unit (“NPU”). Employee was serving in Educational Service status at the time his position was abolished. On January 14, 2011, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on July 30, 2012. On September 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, statutes, and regulations (“September 10th Order”). Agency complied, but Employee did not respond to the September 10th Order. On November 6, 2012, I issued an Order for Statement of Good Cause (“November 6th Order”) to Employee for his failure to submit his brief by the prescribed deadline. Employee was also directed to submit his legal brief, along with his statement of good cause on or before November 16, 2012. As of the date of this decision, Employee has not responded to the aforementioned Orders. After reviewing the record,

I have determined that there are no material facts in dispute requiring further proceedings 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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

On October 8, 2010, former D.C. School Chancellor Michelle Rhee authorized a RIF pursuant to D.C. Code § 1-624.02, 5 District of Columbia Municipal Regulations (DCMR) Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was conducted to eliminate specific positions in NPU and was necessitated by budgetary reasons, curtailment of work and reorganization of functions.¹

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

¹ See Agency's Answer, RIF Authorization Notice, Tab 2 (January 14, 2011).

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:

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.”³ The Court also found that both

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- (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.

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

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*, 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 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. Under this section, an employee whose position was terminated may only contest before this Office:

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 Petition for Appeal, Employee requests that he be reinstated to his former position or a comparable position. He claims that the RIF was procedurally and substantively flawed and it was conducted in a discriminatory and arbitrary manner. Employee claims that the RIF was pre-textual, conducted for inappropriate statutory reasons, and was actually a disguised

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.*

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

¹⁰ *Id.*

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

termination. He alleges that the work in his position was still being performed by other individuals in violation of the Collective Bargaining Agreement (“CBA”). Employee also requests a displaced workers certificate guaranteeing a position with D.C. government.¹²

Agency’s Position

Agency submits that it followed RIF procedures in accordance with 5 DCMR § 1500.2,¹³ and that former Chancellor Rhee authorized the RIF to eliminate specific positions from the NPU in order to address reorganization and elimination of functions, curtailment of work, and budgetary issues. Agency also states that NPU was determined to be a competitive area and the Placement Specialist position constituted a competitive level. Agency further states that there were nine (9) other Placement Specialists whose positions were eliminated during the instant RIF.¹⁴

Entire Competitive Level Abolished

This Office has consistently held that when an employee holds the only position in his competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added), D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR § 1503.3 and 6 DCMR § 2420.3, are inapplicable.¹⁵ An agency is therefore not required to go through the rating and ranking process described in that chapter when the entire competitive level is abolished.

According to the RIF Authorization Notice, the Placement Specialist position was subject to the RIF.¹⁶ In support of its assertion that the instant RIF eliminated the entire competitive level, Agency provided an affidavit from Neela Rathinasmay, who served as the Senior Director of Administration in the Office of Special Education during the time of the instant RIF. Ms. Rathinasmay states that she was responsible for notifying employees of terminations resulting from the RIF. Ms. Rathinasmay further asserts the entire competitive level for the Placement Specialist position was eliminated and therefore, Employee was not provided with one round of lateral competition.¹⁷

Based on the documents of record, specifically the RIF Authorization eliminating specific positions at NPU and the affidavit of Ms. Rathinasmay, I find that Employee’s entire competitive level was properly abolished and Agency was not required to rank or rate Employee according to

¹² Petition for Appeal (December 13, 2010).

¹³ 5 DCMR § 1500.2 states in relevant part that a RIF is a process whereby the total number of positions is reduced for one of the following reasons:

- (a) budgetary reasons;
- (b) curtailment of work;
- (c) reorganization of functions; or
- (d) other compelling reasons.

¹⁴ Agency Brief (October 5, 2012).

¹⁵ *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

¹⁶ Agency Answer, RIF Authorization, Tab 2 (January 14, 2011).

¹⁷ Agency Brief, Tab 1, (October 5, 2012).

the rules specified in D.C. Official Code § 1-624.08(d) pertaining to multiple-person competitive levels when it implemented the instant RIF. For this reason, Agency was not required to provide Employee with one round of lateral competition.

Notice Requirements

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 “[a]n employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other necessary information regarding the employee’s status and appeal rights.” Additionally, 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, the record shows that Employee’s RIF notice was dated October 22, 2010 and the effective date for the RIF was November 21, 2010.¹⁸ The notice states that Employee’s position was eliminated as part of a RIF and also provided Employee with information about his appeal rights. Moreover, Employee acknowledged that he received his RIF notice on October 22, 2010, which equates to thirty (30) days written notice.¹⁹ Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the instant RIF.

RIF Rationale

Employee alleges that the RIF was procedurally and substantively flawed. He also alleges that the work in his former position is still being performed by other individuals in violation of the CBA. Regarding allegations that Employee’s work is still being performed, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.²⁰ Further, in *Anjuwan v. D.C. Department of Public Works*,²¹ the D.C. Court of Appeals ruled that OEA’s authority over RIF matters is narrowly prescribed. The Court ruled that OEA lacked authority to determine whether an Agency’s RIF was bona fide and explained that OEA’s authority is to determine whether the RIF complied with applicable District personnel statutes and regulations dealing with RIFs. The Court further noted that OEA does not have the “authority to second guess ... management decisions about which position should be abolished in implementing the RIF.”²² OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of whether an Agency’s RIF was bona fide, nor can OEA entertain an employees’ claim regarding how an agency chooses which position are subject to a RIF. In this case, how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge (“AJ”) has any control.²³

¹⁸ *Id.*, Tab 1.

¹⁹ Petition for Appeal, p. 9 (December 13, 2010).

²⁰ *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).

²¹ 729 A.2d 883 (December 11, 1998).

²² *Anjuwan*, 729 A.2d at 885.

²³ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

Regarding Employee's contention that Agency's RIF violated the CBA, the undersigned notes that D.C. Code §1-605.02, specifically reserves resolution of unfair labor practice allegations to the Public Employee Relations Board ("PERB"). According to the preceding statute, PERB is tasked with deciding whether unfair labor practices have been committed and with issuing appropriate remedial orders. Moreover, this Office has held that complaints relating to Employee's union activities are considered grievances and do not fall within the purview of OEA's scope of review.²⁴

Employee also asserts that this RIF action was actually a disguised termination. However, Employee has provided no credible evidence to support this contention. 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.

Discrimination Claims

Employee alleges that the instant RIF was pre-textual and conducted in a discriminatory and arbitrary manner. However, Employee has failed to submit credible evidence to corroborate this claim. Further, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.²⁵ Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan*²⁶ held that OEA's authority over RIF matters is narrowly prescribed. This Court explained that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."²⁷

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*²⁸ stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistleblowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation..."²⁹ Here, Employee's claims, as described in his submissions to this Office do not allege any whistleblowing activities as defined under the Whistleblower Protection Act. Thus, I find that Employee's claims of discrimination fall outside the scope of OEA's jurisdiction.

²⁴ See also *Anjuwan v. D.C. Department of Public Works* 729 A.2d 883 (December 11, 1998).

²⁵ D.C. Code §§ 1-2501 *et seq.*

²⁶ 729 A.2d 883 (December 11, 1998).

²⁷ See *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

²⁸ 730 A.2d 164 (May 27, 1999).

²⁹ *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

Grievances

In his Petition for Appeal, Employee requests a displaced worker's certificate. However, I find that Employee's displaced worker's certificate request is considered a grievance and does not fall within the purview of OEA's scope of review. 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 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.

Failure to Prosecute

Employee's failure to respond to the September 10th and November 6th Orders provides a basis to dismiss this petition. OEA Rule 621.3 grants an AJ the authority to impose sanctions upon the parties as necessary to serve the ends of justice.³⁰ The AJ may, in the exercise of sound discretion, dismiss the action if a party fails to take reasonable steps to prosecute or defend his appeal.³¹ Specifically, OEA Rule 621.3(b) provides that the failure to prosecute an appeal includes failing to submit required documents after being provided with a deadline for such submission.³² The September 10th and November 6th Orders advised Employee of the consequences of not responding, including sanctions resulting in the dismissal of this matter. Employee's responses to these Orders were required for a proper resolution of this matter on the merits. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office and this serves as an alternate ground for the dismissal of this matter.

CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after his entire competitive level was abolished and he was given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

³⁰ 59 DCR 2129 (March 16, 2012).

³¹ OEA Rule 621.2, 59 DCR 2129 (March 16, 2012).

³² *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

ORDER

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

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge