

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0142-10
KEITH BAILEY,)	
Employee)	
)	Date of Issuance: June 21, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Joseph E. Lim, Esq.
_____)	Senior Administrative Judge
Clarissa Thomas, Esq., Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 13, 2009, Keith Bailey (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“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 a ET-15 Counselor at Transition Academy. Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 8, 2012. On February 16, 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. Employee’s request for an extension of the deadline for submission was subsequently granted. Both parties submitted responses to the order. After reviewing the documents of record, I find that there are no material issues of fact in dispute and thus, an evidentiary hearing is unwarranted in this matter. 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 schools¹.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02², 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 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

¹ See *Agency’s Answer*, Tab 1 (December 9, 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.

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

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:

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.*

¹¹ *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/her separation from service; and/or
2. That he was not afforded one round of lateral competition within his/her competitive level.

Employee's Position¹²

Employee asserts that he is actually a Transition Coordination Specialist and not a Counselor. He submits that the school principal failed to consider all his degrees and accomplishments. According to Employee, the statements contained within his CLDF are unsubstantiated, inconsistent with his performance evaluations, and he requests an evidentiary hearing for the purpose of determining the veracity of such allegations.

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 Counselor, Employee, was terminated as a result of the round of lateral competition.

Analysis

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based “upon all or 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.¹³

¹² Employee Brief (April 18, 2012).

¹³ Agency Brief (March 8, 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.

Here, Transition Academy was identified as a competitive area, and ET-15 Counselor was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were two (2) ET-15 Counselor positions subject to the RIF. Of these positions, one (1) position was identified to be abolished.

Employee asserts that he is actually a Transition Coordination Specialist and not a Counselor. However, nothing in Employee's personnel file indicates that his position of record is anything other than that of an ET-15 Counselor. Employee has not submitted any document to prove his allegation.

The issue of what is an employee's competitive level has been raised on a number of prior occasions, and likewise resolved. Both District of Columbia and federal case law have consistently defined "competitive level" as the official position of record. In *District of Columbia v. King*, 766 A.2d 38 (D.C. 2001), the D.C. government argued, and the Court of Appeals agreed, that a District employee's competitive level must be based on his or her official position of record, and the fact that the employee may have been detailed to a different position at the time of his or her RIF does not change the fact that the establishment of the employee's competitive level is based on the official position description. Likewise, in *Estrin v. Social Security Administration*, 24 M.S.P.R. 303, 305 (1984), it was held that when an employee is detailed to or acting in a position, his competitive level is determined by his permanent position, and not the one to which he is detailed or in which he is acting. See also *Bjerke v. Department of Education*, 25 M.S.P.R. 310 (1984) and *Levitt v. District of Columbia*, 869 A.2d 364 (D.C. 2005).

Having considered this matter, both based upon the arguments posed and the documents submitted, I conclude that there is nothing in the record to indicate that Employee was serving the Agency in any capacity, other than as an ET-15 Counselor, and had been consistently serving in that position since the time he started working for the Agency.

Employee was not the only ET-15 Counselor within his competitive level and therefore, was 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
- (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%)¹⁴

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 Transition Academy 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 25.5 points on his CLDF, and therefore, was ranked the lowest in his respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Keith Bailey moderately meets the needs of the school in his counseling duties...He has not demonstrated a commitment to students and their learning...Professionally, he fulfills his professional duties and responsibilities to a minimal degree...On many levels he will do what is minimally required and only upon direction...His limited knowledge of DC STARS interferes with the effectiveness of his position...He has demonstrated minimal

¹⁴ 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).

interest in learning the basic skills necessary to perform his duties at an effective level.”¹⁵

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 three (3) points out of a possible ten (10) points in this category; a score much lower than other employee’s within his competitive level. His weighted score is twenty-two and a half (22.5) points. Employee argues that the documentary evidence does not support the score afforded to him. Employee claims that the school principal lied about him in the evaluation form.

The principal of Transition Academy was given the discretion to complete Employee’s CLDF. Although Employee provided some evidence (Master’s degree in guidance and counseling, licenses, etc.) that would bolster a score in this area, such as proof of degrees obtained pertinent to her work, licenses or other specialized education, there is no evidence to show that the principal did not take these into account. Also, the principal of Transition Academy was given the discretion to complete Employee’s CLDF and determine how many points to award based on his observation and evaluation.

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.

With respect to Office and School Needs, I find that in this matter I will not substitute my judgment for that of management, namely the principal of the school, as it relates to the score he accorded to Employee and his colleague in the instant matter. The primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not to OEA.¹⁷ Rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”¹⁸

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that his yearly performance evaluations are inconsistent with the statements contained within the CLDF. Per Title 5, DCMR §1503.2, this category requires

¹⁵ Agency Brief, Exhibit B (March 8, 2012).

¹⁶ Agency Brief at pp. 5 (March 8, 2012).

¹⁷ See *Huntley v. Metropolitan Police Dep’t*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994).

¹⁸ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

Employee's "significant relevant contributions, accomplishments, *or* performance (emphasis added). This category evaluates any clear, significant contributions made by employees, above what would normally be expected of an employee in his or her competitive level.

Employee has submitted documentary evidence regarding his education, training, and experience. However, none of these appear to above and beyond what would normally be expected of an employee in his competitive level. I incorporate by reference my reasoning from above and I find that in this matter, I will not substitute my judgment for that of the school's principal as it relates to the score the principal accorded to Employee and his colleagues in the instant matter.

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 and contends that the CLDF did not account for his significant contributions to the school. Employee disagrees with his rating but I find that this falls within the rubric of managerial discretion. Considering as much, I again find that Employee's arguments to the contrary are unconvincing.

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 a total of three (3) points in this category. An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. Employee did not receive additional points for receiving an "outstanding" performance ratings for the prior year and thus has not provided supporting documentary evidence to support any additional points being awarded in this category. Therefore, I find that Agency properly calculated this number.

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal's statements contained within his CLDF. 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."¹⁹

¹⁹See 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).

According to the CLDF, Employee received a total score of 25.5 after all of the factors outlined above were tallied and scored. The next lowest colleague who survived the instant RIF received a total score of 79.5. Despite Employee's protestations to the contrary, there is no credible indication that any supplemental evidence would supplant the higher scores received by the remaining colleagues in Employee's competitive level who were not separated from service. Employee has not proffered any credible evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this case.²⁰

Accordingly, I find that the principal of Transition Academy 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. Moreover, it appears as though Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "...interpretations of their worth against [the] principals' evaluations."²¹ While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record 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 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* 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 October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee's position is being abolished as a result of a RIF. The Notice also provides 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.

Conclusion

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. I therefore conclude that Agency's action of abolishing Employee's position

²⁰ 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.)

²¹ *Washington Teachers' Union* at 780.

was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in his removal is upheld.

ORDER

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

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge