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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | OEA Matter Nos. 2401-0073-15 |
| HAILEMICHAEL SEYOUM |) | 2401-0074-15 |
| DARYAO KHATRI |) | 2401-0084-15 |
| SHARON TERRELL, and |) | 2401-0085-15 |
| LESLIE RICHARDS, |) | |
| Employees |) | |
| |) | |
| v. |) | |
| |) | Date of Issuance: July 11, 2017 |
| UNIVERSITY OF THE |) | |
| DISTRICT OF COLUMBIA, |) | |
| Agency |) | |
| _____ |) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Hailemichael Seyoum, Daryao Khatri, Sharon Terrell, and Leslie Richards (“Employees”) worked as Professors with the University of the District of Columbia (“Agency” or “UDC”).¹ In August of 2014, Agency informed Employees that their positions would be eliminated at the end of the 2014-2015 school year as a result of a Reduction-in-Force (“RIF”). The RIF was approved by the UDC’s Board of Trustees.

¹ Hailemichael Seyoum and Daryao Khatri worked as Professors of Physics. Sharon Terrell worked as a Professor of Economics, and Leslie Richards worked as a Professor of Sociology.

Employees subsequently filed Petitions for Appeal with the Office of Employee Appeals (“OEA”). In their appeals, Employees argued that the RIF action violated several provisions of the D.C. Municipal Regulations (“DCMR”) as well as the Collective Bargaining Agreement (“CBA”) between Agency and the University of the District of Columbia Faculty Association/NEA (“Union”).²

Agency denied the allegations against it and filed a Motion to Dismiss the Petitions for Appeal for Lack of Jurisdiction. It argued that OEA lacks jurisdiction over challenges by Educational Service employees challenging RIF actions. In the alternative, it submitted that even if this Office retains jurisdiction over Employees’ appeals, OEA was prevented from second-guessing its decision to conduct the RIF. Lastly, Agency stated that Employees failed to allege an actual violation of any provisions of the Comprehensive Merit Personnel Act (“CMPA”). Therefore, it requested that the AJ dismiss Employees’ Petitions for Appeal with prejudice.³

An OEA Administrative Judge (“AJ”) was assigned to the matters in October of 2015. On November 19, 2015, the AJ held a Prehearing Conference to address the parties’ jurisdictional arguments and to determine the factual issues in dispute. After determining that an evidentiary hearing was not warranted, the AJ ordered the parties to submit additional briefs addressing whether OEA could exercise jurisdiction over Employees’ appeals.⁴

In its briefs, Agency reiterated its position that UDC Educational Service employees are statutorily exempt from challenging RIF actions pursuant to subchapter XXIV of the CMPA. According to Agency, UDC’s Board of Trustees approved a resolution, wherein a total of

² Hailemichael Seyoum and Daryao Khatri filed their Petitions for Appeal on May 18, 2015. Sharon Terrell filed her Petition for Appeal on June 6, 2015. Leslie Richards filed her Petition for Appeal on June 8, 2015.

³ *Agency’s Motion to Dismiss* (July 10, 2015).

⁴ *Post-Prehearing Conference Order* (November 19, 2015).

seventeen academic programs were eliminated because of low demand, lack of resources, lack of relevancy, and underperformance. Agency also provided that UDC had no need for continuing full-time faculty appointments in these areas and eliminated Employees' positions through a RIF as a result. Accordingly, it posited that UDC retained the sole and exclusive right to hire and assign employees; to relieve faculty members of duties due to lack of work or other legitimate reasons; and to determine the University's organizational structure. Consequently, Agency requested that the AJ grant is request to dismiss the Petitions for Appeal for lack of jurisdiction.⁵

In response, Employees contended that Agency could not "simply label [the] termination of employees as a reduction-in-force to avoid OEA's jurisdiction." Employees further stated that the RIF action was imposed as a method to avoid adverse action procedures to which they would have otherwise been entitled. With respect to Agency's post-RIF activities, Employees disputed whether the Board of Trustees' authority to eliminate programs also gave it the authority to terminate employees whose jobs continued to be performed by lower-paid, replacement employees.

While Employees did not second guess Agency's authority to conduct a RIF, they insisted that OEA was the proper forum to dispute whether the RIF was actually conducted because of a lack of work. Finally, Employees provided that they had to choose between accepting jobs as adjunct professors or being unemployed as a result of the RIF. Therefore, they believed that they effectively suffered a reduction in grade, a claim over which OEA retains

⁵ *Agency's Reply Brief in Support of its Motion to Dismiss Employees' Petitions for Appeal* (December 10, 2015).

jurisdiction. Hence, Employees reasoned that this Office was authorized to address their substantive claims.⁶

An Initial Decision was issued on November 18, 2016.⁷ The AJ first highlighted D.C. Official Code § 1-624.04, which provides that “[a]n employee who has received a specific notice that he or she has been identified for separation from his or her position through a reduction-in-force action may file an appeal with the Office of Employee Appeals if she or she believes that [the] agency has incorrectly applied the provisions of this subchapter or the rules and regulations issued pursuant to this subchapter....” However, he stated that the CMPA treats Educational Service employees of UDC differently from other District government employees. The AJ noted that the D.C. Court of Appeals in *Davis v. University of the District of Columbia*, 603 A.2d 849 (D.C. 1992), held that Educational employees of UDC are expressly excluded from appealing the loss of their position through a RIF action to OEA. Notwithstanding Employees’ arguments to the contrary, the AJ determined that Agency was duly authorized to conduct the instant RIF because of a lack of work pursuant to D.C. Official Code § 1-602.03(b).⁸ He further held that OEA lacked the jurisdictional authority to review Agency’s RIF action because Employees were

⁶ *Employees’ Sur-Reply to Agency’s Reply Brief in Support of its Motion to Dismiss Employees’ Petitions for Appeal* (December 31, 2015).

⁷ The AJ consolidated the four appeals pursuant to OEA Rule 611.2 and 611.3 in an effort to expedite the processing of the matters, as he determined that it would not adversely affect the interest of any of the parties.

⁸ §1-602.3 states the following:

(b) Educational employees of the Board of Trustees of the University of the District of Columbia shall not be governed by the provisions of § 1-609.01 relating to the development of job descriptions in consultation with the Mayor. The Board of Trustees of the University of the District of Columbia shall develop policies on classification, appointment, promotion, retention, and tenure of employees consistent with the educational missions of their respective schools and in accordance with the sound policies and practices of the American Bar Association in the case of the School of Law, and of land-grant universities that meet the standards established by the College and Universities Personnel Association in the case of the University of the District of Columbia. Additionally, educational employees shall not be covered by subchapters VIII, X, XI (except as it provides for pay setting), XIII, XIII-A, XIX, and XXIV of this chapter.

Educational Service employees of UDC at the time of their separations from service. Consequently, their Petitions for Appeal were dismissed for lack of jurisdiction.⁹

Employees disagreed with the Initial Decision and filed a Consolidated Petition for Review with OEA's Board on December 9, 2016. They argue that there has been a substantial change in law regarding an Educational Service employee's right to appeal a RIF to OEA. Employees cite to the holdings in *Board of Trustees of the University of the District of Columbia v. AFSCME District Council 20, Local 2087*, 130 A.3d 355 (D.C. 2016) and *University of the District of Columbia Faculty Association/NEA, et al., v. Board of Trustees of the University of the District of Columbia*, Case No. 2015 CA 7165 B (D.C. Super. Ct. January 12, 2016) in support of their position that OEA has jurisdiction the instant RIF. In addition, they contend that the AJ's finding that Agency's RIF action was conducted due to a lack of work is an erroneous interpretation of law. Therefore, Employees request that this Board reverse the AJ's Initial Decision.¹⁰

Agency filed its Answer to Employees' Petition for Review on January 6, 2017. It maintains that the AJ correctly determined that OEA lacks jurisdiction over appeals from Educational Service employees of UDC challenging a RIF. Agency further suggests that Employees waived their argument that there was been a change in the law which confers OEA's jurisdiction over appeals by Educational Service employees of UDC concerning RIF actions. In addition, it states that the new case law presented by Employees does not overturn the ruling in *Davis*. Moreover, it opines that the AJ's finding that the RIF action was duly conducted because

⁹ *Initial Decision* (November 18, 2016).

¹⁰ *Petition for Review* (December 9, 2016).

of a lack of work is supported by substantial evidence. Thus, Agency believes that Employees' Petition for Review should be denied.¹¹

Applicability of Board of Trustees of the University of the District of Columbia v. AFSCME

Employees first assert that the holding in *Board of Trustees of the University of the District of Columbia v. AFSCME District Council 20, Local 2087* effectively changed the law in 2016, authorizing UDC employees in Educational Service to challenge RIF actions before OEA. In *UDC v. AFSCME*, Agency conducted a RIF pursuant to D.C. Official Code § 1-624.08 (the "Abolishment Act"), which resulted in the elimination of sixty-nine faculty and staff positions due to budgetary constraints.¹² On appeal, the D.C. Court of Appeals examined whether the legislature intended to include UDC Educational Service employees within the scope of the Abolishment Act. In its analysis, the Court noted that Congress expressly intended to distinguish UDC's Educational Service employees from other employees, as evidenced by the language of D.C. Official Code § 1-601.02(a)(3). The Court further indicated that Title 2 of the CMPA specifically provides that Educational Service employees are exempt from the provisions of Title 24 of the CMPA, which governs RIF actions.

However, it stated that in 1996, Congress amended certain parts of the CMPA to "provide the District with greater flexibility to manage its workforce and control costs by giving it the authority to conduct RIFs notwithstanding any other provision of law, regulation, or collective

¹¹ *Agency Answer to Petition for Review* (January 6, 2017).

¹² D.C. Official Code § 1-624.08 was enacted to address the District's budgetary problems. It provides the following in pertinent part:

(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).

bargaining agreement....”¹³ According to the Court, “a broad ‘notwithstanding clause’ like [the one] included in Title 24 of the CMPA customarily evidences an intention of the legislature that the enactment control in spite of any earlier law to the contrary addressing the subject.” Since the Abolishment Act was promulgated after the passage of Title II of the CMPA and did not contain any exception for Educational Service employees in its language, the D.C. Court of Appeals in *UDC v. AFSCME* concluded that Congress did not specifically intend to exempt these employees from the coverage of D.C. Official Code § 1-624.08. Therefore, Educational Service employees of UDC who are separated from service pursuant to the Abolishment Act may challenge a RIF action before OEA.

Although the Court in *UDC v. AFSCME* ruled that the Abolishment Act “unambiguously vests OEA with the exclusive jurisdiction to determine whether the District government acted properly in conducting a RIF,” there is no indication that its ruling also applies to cases in which a RIF action was conducted because of non-budgetary purposes. There is no evidence in the record to support a finding that this RIF was authorized pursuant to D.C. Official Code § 1-624.08; thereby, conferring OEA with jurisdiction over Employees’ appeals.¹⁴ In the absence of such evidence, this Board finds that the holding in *Davis* remains controlling law because the instant RIF was effectuated as a result of lack of work.¹⁵ Thus, we find that the holding in *UDC v. AFSCME* is inapplicable to the facts in this case.¹⁶

¹³ The Court noted that it was undisputed that the Abolishment Act was passed to provide the District with a critical tool to address its then ongoing financial crisis and to better manage its finances in the future.

¹⁴ Moreover, in a May 22, 2014 Fiscal Impact Statement to UDC’s Office of the Chief Financial Officer to the Board of Trustees, UDC’s Office of the Chief Financial Officer clarified that the RIF would not have an immediate fiscal impact on the 2014 and 2015 fiscal budgets.

¹⁵ We are also unpersuaded by Employee’s argument that the holding in *University of the District of Columbia Faculty Association, v. Board of Trustees* reflects a change in law. On September 17, 2015, Employees in this case filed a Complaint in D.C. Superior Court alleging breach of contract and the violation of the covenant of good faith and fair dealings. As part of his Omnibus Order, the Honorable Judge Brian F. Holeman held that the proceedings

Lack of Work

Employees argue that the AJ's finding that the RIF was duly authorized due to a lack of work is an erroneous interpretation of law. On May 29, 2014, Agency's Board of Trustees adopted UDC Resolution 2014-18. Under the Resolution, "...pursuant to Article XXI- Reduction In Force of the Sixth Master Agreement Between the University of the District of Columbia and the University of the District of Columbia Faculty Association/NEA...and D.C. Official Code § 1-618.8(a), the University expressly reserves the sole right [t]o relieve employees of duties because of lack of work or other legitimate reasons...."¹⁷ The document further clarified that the instant RIF was necessary because seventeen academic programs were eliminated, as UDC no longer had a need for their continuance.

This Board finds that there is substantial evidence in the record to support a finding that the RIF was conducted because of a lack of work.¹⁸ Agency concedes that many of the programs that were targeted in the RIF are currently ongoing. However, it notes that there were 155 students majoring in the seventeen academic programs that were identified for elimination. Approximately one third of the students graduated at the end of the 2014 academic year. The remaining students are required to complete their respective programs by the spring semester of

before D.C. Superior Court must be stayed and transferred to OEA to determine, *inter alia*, whether this Office can exercise jurisdiction over Agency's RIF action. Judge Holeman did not address D.C. Official Code § 1-602.03(b), which pertains to Educational Service employees of UDC in his Order. Therefore, the ruling in *University of the District of Columbia Faculty Association, v. Board of Trustees* did not result in a substantive change in the law.

¹⁶ It should be noted that Employees' Petitions for Appeal were filed prior to the *UDC v. AFSCME* matter. As such, its holding cannot be applied retroactively.

¹⁷ *Agency's Motion to Dismiss Employee's Petition for Appeal*, Tab 4 (July 10, 2015).

¹⁸ In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), the D.C. Court of Appeals held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. See *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

2019. According to Agency, faculty was needed after the effective date of the RIF to ensure that these students could finish their academic programs. No new students are allowed to pursue a degree in the seventeen academic programs. Notwithstanding Employees' arguments to the contrary, the AJ held that Agency duly authorized the instant RIF due to a lack of work. This Board believes that the AJ's finding is supported by substantial evidence. Therefore, we will not disturb his ruling.

Conclusion

Based on the foregoing, the AJ correctly concluded that OEA lacks jurisdiction over Employees' appeals because they were Educational Service employees of UDC at the time of the RIF.¹⁹ Under D.C. Official Code § 1-602.03(b), Educational employees of UDC are expressly excluded from appealing the loss of their position through a RIF action to OEA. In addition, the holding in *UDC v. AFSCME* is not applicable to the instant RIF because it was not conducted pursuant to the Abolishment Act. UDC Resolution 2014-18 authorized UDC's Board of Trustees to conduct a RIF because of a lack of work. Thus, we conclude that the Initial Decision was based on substantial evidence. Consequently, Employees' Petition for Review must be denied.

¹⁹ See *Davis at 852*; *Cassell v. University of the District of Columbia*, OEA Matter No. 2401-0196-86 (December 30, 1988); and *Ladson v. University of the District of Columbia*, OEA Matter No. 2401-0188-86 (September 9, 1988) (dismissing each case for lack of jurisdiction in appeals filed by Educational Service employees of UDC).

ORDER

Accordingly, it is hereby ordered that Employees' Petition for Review is **DENIED**.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams.

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.