THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TERRY AARON,	)	
Employee	)	OEA Matter No. 2401-0211-12
	)	
v.	)	Date of Issuance: March 10, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Terry Aaron, Employee, *Pro Se*
Carl K. Turpin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 20, 2012, Terry Aaron, ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Public Schools' ("Agency" or "DCPS") action of abolishing his position through a Reduction-in-Force ("RIF"). The effective date of the RIF was August 10, 2012. Employee was a Special Education Coordinator ("SEC") at Jefferson Academy ("Jefferson"). On September 24, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on November 22, 2013. Thereafter, on December 2, 2013, 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. Agency made several requests for an extension of time to file its brief, which were all granted. Additionally, Employee was also provided with an opportunity to submit supplemental briefs if he chose to. Both parties have submitted their briefs. After considering the arguments herein, I have determined that an evidentiary hearing is unwarranted. 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.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On or around June of 2012, D.C. School Chancellor Kaya Henderson authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, and Title 5 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 15. Chancellor Henderson stated that the RIF was necessitated for budgetary reasons and a reorganization of functions.[1]

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,[2] 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.

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

[1] *See Agency's Answer* (September 24, 2012); *Agency's Brief* (February 7, 2014).

[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.

> 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 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 ("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]

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[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. *See also Johnson v. District of Columbia Department of Health*, 2012 CA 000278 P (MPA).
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*

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.[12] Under this section, an employee whose position was terminated due to a RIF 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 argues that although he was hired as a SEC, when he was placed at Jefferson, he was not used as a SEC since the school already had a "Lead" SEC. He explained that he was instead used as a Math Resource staff/Teacher, in violation of DCPS rules, since he was not certified to teach in a classroom. Employee also contends that, his DCPS performance rating was not based on his current job description of SEC because the principal and Human Resources ("HR") changed his job description without prior notification. He maintains that he was only informed of the change after it was implemented, and he had no prior knowledge as to the criteria that would be used to evaluate him.

Additionally, Employee asserts that he is a 15 point Disabled American Veteran ("DAV"), and he was first hired by DCPS under the DAV program. He notes that DCPS has not allowed him any time to become certified for the new job criteria for SEC positions before the RIF, nor showed him any DAV preference. Employee further explains that he was informed that he did not qualify for retirement as his 9 years of military experience, and 4 years prior federal government service do not count towards his 11 years with DCPS. Furthermore, Employee states that he found out on July 9, 2012, that not all SEC were being RIF'd and that the principals were provided funds for SECs. Employee also avers that he did not receive any direction with regards to severance information, and implementation of sick and annual leave. In his brief, Employee stated that he would like to be reconsidered for an appointment with Agency, and be trained so that he can become qualified to meet the need SEC standards.[13]

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. Agency explains that each school was identified as a separate competitive area, and each position title constituted a separate

[11] *See Mezile v. D.C. Department on Disability Services*, *Supra*.
[12] In *Webster Rogers v. DCPS*, No. 2012 CA006364 (D.C. Super. Ct. December 9, 2013), the D.C. Superior Court stated that D.C. Code §1-624.08 is the correct statute for RIFs conducted due to budgetary constraints and Chapter 24 of the DPM is the applicable criteria to be used as opposed to Title 5 DCMR Chapter 15.
[13] Petition for Appeal (August 20, 2012) and Brief (January 13, 2014).

competitive level. Jefferson was determined to be a competitive area and the SEC position a competitive level. Agency further noted that because Employee was in a single level competitive area, he was not entitled to one round of lateral competition. Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date.

RIF Procedures

Chapter 24 of the DPM has been found to be the governing RIF provision pursuant to D.C. Code §1-624.08. This Office has consistently held that, when an employee holds the only position in his competitive level, D.C. Official Code § 1-624.08(e), which affords employees one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. 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.

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 usually the date on which the employee began D.C. Government service. Regarding the lateral competition requirement, the record shows that Jefferson was a competitive area, and the SEC position was the competitive level. Employee was the sole SEC at Jefferson. 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, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[14]

While Employee argues that he did not perform the functions of a SEC while at Jefferson, Employee, admitted that he was a SEC. Employee submitted his Standard Form 50 ("SF-50") which highlights that Employee was a SEC when he was RIF'd. Moreover, Employee has not submitted any credible evidence in support of his assertion that his position was changed from

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

SEC. Accordingly, I conclude that Employee was properly placed into a single-person competitive level. And for this reason, Agency did not have to complete a competitive level score card for Employee.

Notice Requirements

DPM, Chapter 24 provides the notice requirements that must be given to an employee affected by a RIF. Section 2422.1 states that "each competing employee selected for release from his or her competitive level…shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release." The specific notice shall specify the effective date of an employee's release from his or her competitive level. Additionally, D.C. Official Code § 1-624.08(e), which governs the instant RIF, 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 written RIF notice on June 18, 2012, and the RIF effective date was August 10, 2012, which is more than the required thirty (30) days. The Notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provided 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.

RIF Rationale

Employee also asserts that principals were provided funds for SECs, and that not all SECs were being RIF'd. In *Anjuwan v. D.C. Department of Public Works,*[15] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF…"[16] The Court also 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. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this AJ has any control.[18]

Grievances

Employee additionally notes that when he was placed at Jefferson, 1) he was not used as a SEC; 2) he was instead used as a Math Resource staff/Teacher, in violation of DCPS rules, since he was not certified to teach in a classroom; 3) his DCPS performance rating was not based on his current job description of SEC because the principal and HR changed his job description

[15] 729 A.2d 883 (December 11, 1998).
[16] *Id*. at 885.
[17] *Id*.
[18] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

without prior notification; 4) DCPS has not allowed him any time to become certified for the new job criteria for SEC positions before the RIF, nor showed him any DAV preference; 5) he was informed that he did not qualify for retirement; and 6) he did not receive any direction with regards to severance information, and implementation of sick and annual leave.

However, Employee has not provided any credible evidence to support these contentions. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[19] Moreover, complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. 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 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.

ORDER

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

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

[19] *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).