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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0041-10
ANITA NAVES,)	
Employee)	
)	Date of Issuance: May 9, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Diana Bardes, Esq., Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 16, 2009, Anita Naves (“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 her 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 her position was abolished was an EG-9 Attendance Counselor at Anacostia Senior High School (“Anacostia”).

I was assigned this matter in November of 2011. On January 12, 2012, I held a Status Conference (“SC”) for the purpose of assessing the parties’ arguments with respect to the instant appeal. I subsequently issued an Order requiring the parties to submit written briefs on the issue of whether Agency conducted the RIF in accordance with applicable District laws, statues, and regulations. Both parties submitted responses to the Order. After reviewing the record, I determined that an evidentiary hearing was not required. 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 FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School 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 or the Act") is the more applicable statute to govern this RIF.

¹ See *Agency's Answer*, Tab 1 (December 17, 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.

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 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

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).

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:

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

Employee argues that she should not have been placed in a single-person competitive level when Agency implemented the RIF because she was the sole Attendance Counselor at Anacostia and submits that the school “must have continued to track student attendance and have other employee’s fulfill [her] former responsibilities.”¹² Employee further argues that the circumstances surrounding her termination under the RIF constituted an ‘unusual personnel action’ because she was terminated only a month and a half after being hired by Agency. In addition, Employee’s contention is that an evidentiary hearing is needed to examine Agency’s motivation[s] for abolishing Employee’s position.¹³

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency states that it eliminated the entire

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.)

¹² Employee Brief at p. 4 (February 24, 2012).

¹³ *Id.*

competitive level in which Employee was placed, thus she was not entitled to one round of lateral competition. Agency also contends that Employee was properly given thirty (30) days written notice prior to the effective date of her termination.

This Office has consistently held that, when an employee holds the only position in their competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.¹⁴

According to the Retention Register produced by Agency, Employee was the sole Attendance Counselor at Anacostia.¹⁵ Agency eliminated the entire competitive level in which Employee was placed. Employee does not dispute that her position was that of an Attendance Counselor, or that there were other employees that should have competed within her competitive level. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels.

Employee received written notification of her termination on October 2, 2009, and the RIF effective date was November 2, 2009. The notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provided Employee with information about her 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.

Employee cites to the holding *Levitt v. D.C. Office of Employee Appeals*, 869 A.2d 364 (D.C. 2005), in support of her position that she should be afforded an evidentiary hearing to examine Agency's "motivations for abolishing her position."¹⁶ Employee characterizes the circumstances under which she was separated as unusual because she was hired only a month and a half prior to being terminated under the RIF.¹⁷ Employee further speculates that Agency delegated her duties to a different employee after she was RIF'ed, thus creating a "cavalier discharge" similar to the employee in *Levitt*.¹⁸ The facts in *Levitt*; however, are not squarely on point with those in the instant appeal.

In *Levitt*, the D.C. Court of Appeals held that OEA erroneously dismissed the employee's petition for appeal by not affording him an opportunity for discovery and remanded the case so that the Administrative Judge could conduct a hearing regarding the employee's allegations of

¹⁴ See *Lyles v. D.C. Dept 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).

¹⁵ For the purposes of the instant RIF, Anacostia Senior High School was identified as a competitive area and the position of Attendance Counselor constituted a competitive level.

¹⁶ Employee Brief at pp. 4-6 (February 24, 2012).

¹⁷ *Id.*

¹⁸ 869 A.2d at 365-66.

“improper employment actions.”¹⁹ The employee in *Levitt* was transferred after several years in a Career Service position, to a position in the Excepted Service. The agency subsequently transferred the employee back to a *newly-created* supervisory position in Career Service, yet he had no employees to supervise (emphasis added). Several weeks later, the employee in *Levitt* was terminated, via a RIF, from the same position the agency had recently and specifically created for him.²⁰

Here, Employee was hired approximately a month and a half prior to receiving notice that her position was subject to the RIF. Employee was not shuffled around to different positions prior to being terminated like the employee in *Levitt*. Although the circumstances surrounding Employee’s termination in this case were unfortunate, the mere assertion that being terminated as a result of Agency’s budgetary constraints shortly after being hired does not rise to the level of an “unusual” or “cavalier” circumstance under the holding in *Levitt*.

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 and the Reduction-in-Force which resulted in her 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:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

¹⁹ *Id.*

²⁰ *Id.*