THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0166-10
COURTNEY BROWN,	)	
Employee	)	
	)	Date of Issuance: May 21, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Agency	)	Monica Dohnji, Esq.
	)	Administrative Judge

Kristin Dobbs, Esq., Employee's Representative
Sara White, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 24, 2009, Courtney Brown ("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 her position 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 ET-15 Special Education Teacher at Cardozo Senior High School ("Cardozo"). Employee was serving in Education Service status when her position was abolished. Employee submitted a change of address to this Office on March 21, 2012.

I was assigned this matter on February 7, 2012. On February 17, 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. Both parties submitted timely responses to the Order. 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:
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> > 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 schools.[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") 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)

[1] *See* Agency's Answer, Tab 1 (December 30, 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.

> 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.

The Abolishment Act ("the Act") applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). Further, the legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.[3] 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."[4] 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."[5] Furthermore, 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."[6] In *Hoey v. Office of Employee Appeals*, the D.C. Court of Appeals, in examining the statutory meaning of 'notwithstanding,' noted that the use of such clause "clearly signals the drafter's intention that the provision of the 'notwithstanding' section override conflicting provisions of any other section.[7]

It should be noted that 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."[8] 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."[9] I find that DCPS triggered the use of § 1-624.08 by noting that the RIF was necessitated for budgetary reasons. While *Mezile* notes that the government's use of the procedures prescribed by § 1-624.02 can show intent, several of the provisions § 1-624.02, including priority reemployment, job sharing, length of service, and relative work performance are found in 5 DCMR Chapter 15, which was also used to conduct the instant RIF.[10] Additionally, the provisions of § 1-624.08

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[3] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[4] *Id.* at 1132.
[5] *Id.*
[6] *Id.*
[7] 30 A.3d 789 (D.C. Nov. 3, 2011) (*citing* Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993).
[8] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[9] *Id.* at p. 5.
[10] *See* DPM §§ 1500, 1503, 1505, 1506, 1507.

including a notice period and one round of competition, are encompassed in § 1-624.02. Thus, the Agency's use of procedures in similar statutory regulations does not trigger the applicable statute governing the instant RIF. I find that the intent is set forth in the reason that necessitated the RIF, which in this case was due to budgetary reasons, rather than the procedures used in the implementation of the RIF. Although DCPS enacted the RIF, in part, pursuant to § 1-624.02, based on the holdings of *Mezile, Washington Teachers Union*, and *Hoey*, this Office finds that § 1-624.08 is the more applicable statute to govern the instant RIF.[11]

Moreover, the Act provides that, "[N]otwithstanding 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."[12] 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."[13] The Abolishment Act was enacted after § 1-624.02, and thus is a more streamlined statute for use during times of fiscal emergency.[14] 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 she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

2. That she was not afforded one round of lateral competition within their competitive level.

Employee's Position

In her petition for appeal, Employee states the following:

> "I was unfairly let go. CLDF contained fraudulent information. I was not given credit for completion of a master's degree. Document stated that I was doing a poor job. However all evaluations stated that I either met or exceeded expectations.…I was also unable to get credit for my involvement in school activities even though I started an extra-curricular program this year with another teacher."[15]

Employee further submits that Agency failed to follow the proper procedure for conducting a RIF as it did not give Employee a round of lateral competition.[16] Specifically, Employee maintains that, Agency failed to properly complete a competitive level ranking score card. Employee explains that she

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[11] While § 1-624.02 provides a broader basis for appeal, there is no substantial evidence to show that Agency did not comply with the statutory provision provided.
[12] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[13] *Id.*
[14] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[15] Petition for Appeal, pp. 3, 5 (November 24, 2009).
[16] Employee Courtney Brown's response to District of Columbia Public School's Brief, p.4 (April 2, 2012).

"received a zero for specialized degree in her field – Master's degree in Special Education."[17] Employee also states that she 'received zero credit for her contributions to the school – such as the girls' intervention program she instituted…as her involvement in Cardozo school community events such as Homecoming and International Day."[18] Employee also notes that "the comments made in the score card for Ms. Brown are not accurate and contradict themselves."[19] Additionally, Employee maintains that Agency did not follow proper RIF procedures because it did not consider her for priority re-employment.[20]

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 her separation. Agency asserts that, there were fifteen (15) ET-15 Special Education Teacher positions at Cardozo, and five (5) positions were identified as positions that would be subject to the RIF. Agency maintains that it utilized the proper competitive factors in implementing the RIF and that Employee was ranked the third lowest ranked ET-15 Special Education Teacher, and was terminated as a result of the round of lateral competition.[21]

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.[22]

Here, Cardozo was identified as a competitive area, and ET-15 Special Education Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency,[23] there were fifteen (15) ET-15 Special Education Teachers subject to the RIF. Of the fifteen (5) positions, five (5) were identified to be abolished.

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[17] *Id.* at p. 5.
[18] *Id.*
[19] *Id.*
[20] *Id.* at p. 6.
[21] Agency's Brief (March 12, 2012).
[22] *Id.* at pp 2-3. School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.
[23] *Id.* at Exhibit A.

Employee was not the only ET-15 Special Education Teacher within her competitive level and was, therefore, 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%).[24]

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.[25] 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.

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[24] 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).

[25] Agency Brief at pp. 4-5 (March 12, 2012).

Competitive Level Documentation Form

Agency employs the use of a 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 Cardozo 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 seventeen and a half (17.5) points on her CLDF and was therefore ranked the third lowest in her competitive level. Employee's CLDF stated, in pertinent part, the following:

> "Ms. Brown has not demonstrated the ability to use Bloom's Taxonomy effectively. Her presence in the classroom is weak, she does not avail herself to plan lessons with her co-teacher, and she has not implemented engaging lessons. Administrators have often not been able to complete an observation on Ms. Brown as she could not be located in the appropriate class during the appropriate time.
>
> She is non-responsive to constructive criticism …. She is not reliable and often reports to classes late. *She does work well with her colleagues or administrators and is not viewed as a team player*." [26]

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 two (2) points out of a possible ten (10) points in this category; a score much lower than other employees within her competitive level. Employee argues that her Master degree in her field was not considered in her competitive level ranking score card. However, it can be reasonably assumed that her Master degree was taken into consideration in the calculation of the awarded points. And there is no indication that this would supplant the higher score received by the other employees in the Competitive Level who were not separated from service pursuant to the RIF. Moreover, it is within the principal of Cardozo's managerial expertise to assign numeric values to this factor.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. This category includes factors such as student outcomes, rating, awards, attendance etc. Employee contends that she did not receive any credit for involvement in Cardozo school community events such as planning homecoming and International day; and starting a 'girl's intervention group'. While these all seem to be worthwhile contributions to the school, it is within the principal's managerial discretion to award points in this area given her independent knowledge of the employees and student body. Considering as much, this Office cannot substitute its judgment for that of the principal at Cardozo.

[26] *Id.* at Exhibit B. (Emphasis added – Employee in her brief submits that Agency contradicted itself in making this statement. However, it can be reasonably assumed from the context of this document that in typing out this statement, the principal inadvertently omitted the word 'not' in this sentence. As such, I find that this is a typological error and will not be addressed further).

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee did not provide any documentation to supplement additional points being awarded in this area. Moreover, it is within the principal of Cardozo's managerial expertise to assign numeric values to this factor.

Length of service

This category accounts for 5%. It 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.

Here, Employee's Service Computation Date ("SCD") is 2007. She was employed with Agency for a total of two (2) years. She received a total of two (2) points for years of experience, and a score of five (5) for years of service. She also received a score of six (6) for D.C. residency. However, she did not receive any points for Veterans preference or rating. An outstanding performance rating in the previous year will get an employee an extra four (4) years of service. Employee received a total weighted score of two and a half (2.5) points in this category. She does not contest the calculation of the points awarded. Therefore, I find that Agency properly calculated this number.

Priority Re-employment

Employee also argues that she did not receive a proper round of lateral competition because she was not considered for priority re-employment in violation of § 1-624.02. As discussed above, § 1-624.08 and not § 1-624.02 applies to the instant RIF. Section 1-624.08 does not require Agency to engage in priority re-employment procedures. However, in conducting the instant RIF, Agency maintains that it complied with 5 DCMR Chapter 15 which addresses the issue of priority re-employment.[27] Furthermore, the RIF Notice from Agency specifically informed Employee that she could apply for any job vacancies with Agency or the District government, and she would be considered for priority re-employment. However, it further explained that, this did not guarantee re-employment. Also, Employee has not provided any credible evidence to show that she applied to any available positions and was not considered for priority re-employment. Considering as much, I conclude that Employee's argument regarding priority re-employment is wholly unsubstantiated.

Employee argues that she was unfairly let go and that the CLDF contained fraudulent information. However, 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."[28] Moreover, according to the CLDF, Employee received a total score of seventeen and a half (17.5) points after all of the factors

[27] Agency's Brief at p.8 (March 5, 2012).
[28] *See 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).

outlined above were tallied and scored. The next lowest colleagues who were retained received a total score of fifty (50) points. Employee has not proffered any evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.[29]

Accordingly, I find that the principal of Cardozo had discretion in completing Employee's CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. 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 or fraudulently. 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 Notice Requirement

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 her RIF notice 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.

CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after she properly received one round of lateral competition and a timely thirty (30) days legal notification was properly served. I therefore 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 separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

[29] *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).