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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
SARA LAIL, ¹)	
Employee)	OEA Matter No. 2401-0196-10
)	
v.)	Date of Issuance: June 8, 2012
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Senior Administrative Judge
_____)	
Sara Lail, Employee <i>Pro-Se</i>)	
W. Iris Barber, Esq., Agency's Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Sara Lail (“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 ET-15 Social Studies Teacher at Sousa Middle School (“Sousa”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 6, 2012. On February 9, 2012, I sent out an Order wherein I ordered the parties to submit written briefs on the issue of whether the OEA may exercise jurisdiction over the instant matter. Due to a typographical error in said order, I issued an Amended Order on February 15, 2012. This provided the parties with additional time in which to file their briefs. Agency timely submitted their response to this order. Employee failed to submit a response. Accordingly, I issued an Order for Statement of Good Cause wherein I

¹ When Employee herein originally filed her petition for appeal, her surname was Adongo. However, according to a letter authored by Employee dated, May 9, 2012, she has since changed her surname back to her maiden name of Lail.

ordered Employee to explain her failure to submit her brief in this matter. This order also required Employee to submit her overdue brief pursuant to my February 15, 2012. On May 9, 2012, Employee submitted a succinct response wherein she requested additional time in which to find counsel and to file her brief. After careful consideration of Employee's response, on May 22, 2012, I issued another order wherein Employee's request for an extension of time in which to file a brief was granted. Employee's brief was due on or before June 1, 2012. To date, the OEA has not received a response from Employee. In the February 9, February 15, & May 1 orders, Employee was duly warned of the potential consequences of not submitting her response in the time and manner as described therein. After reviewing the documents of record, I find that there are no material issues of fact subject to a genuine dispute. Therefore, I further find that 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.

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 schools.²

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02³, 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 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.

² See *Agency's Answer*, Tab 1 (December 31, 2009).

³ 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.

(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.”⁴ 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.”⁵

However, the Court of Appeals took a different position. In *Washington Teachers’ Union*⁶, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”⁷ 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.”⁸ 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.”⁹

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.¹⁰ 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.”¹¹ 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.”¹²

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹³ Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision in order 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, I find that an employee whose position was terminated may only contest before this Office:

⁴ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁵ *Id.* at p. 5.

⁶ *Washington Teachers’ Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁷ *Id.* at 1132.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹² *Id.*

¹³ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

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

Employee's Position

In her petition for appeal, Employee contends the following:

1. That she was improperly placed at Sousa due to an “unjust excessing (*sic*) from the previous school year.”¹⁴
2. Employee also generally contends that “DCPS failed to follow appropriate procedures for Riffing.”¹⁵
3. Employee alleges that she was a tenured teacher who had received meets expectations as part of her prior performance evaluations.¹⁶
4. Employee requests an evidentiary hearing in this matter.¹⁷

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. Employee was given thirty (30) days written notice prior to the effective date of her termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that since Employee was the lowest ranked person in her competitive level and area, she was properly terminated as a result of the one round of lateral competition.

Analysis

Under Title 5 DCMR § 1501.1, the Chancellor 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:

¹⁴ *Petition for appeal at 3 (December 1, 2009).*

¹⁵ *Id.* at 5

¹⁶ *Id.*

¹⁷ *Id.*

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.¹⁸

Here, Sousa was identified as a competitive area, and ET-15 Social Studies Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by the Agency, there were two other ET-15 Social Studies Teachers stationed at Sousa. Only one of those positions survived the instant RIF.

Employee was not the only ET-15 Social Studies Teacher within her competitive level and was, therefore, required to compete with other similarly situated 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:

¹⁸ District of Columbia Public Schools' Brief at 2-3 (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.

- (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%)¹⁹

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.²⁰ 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.

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 a lateral competition. In conducting the instant RIF, the Principal of Sousa 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 nineteen and a half (19.5) points on her CLDF. Employee was the second lowest ranked person in her competitive area and level. Employee’s CLDF stated, in pertinent part, the following:

Ms. Lail-Adongo does not have patience. As a teacher, Ms. Lail-Adongo neglects students because of their bad behavior or poor academic performance. We have urged Ms. Lail-Adongo to use performance-based assessments, and doing practical work in order to bring interest to the subject onto the students’ mind...

¹⁹ 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).

²⁰ Agency Brief at 5 (March 7, 2012).

Unfortunately, the teacher struggles to build meaningful relationships. Ms. Lail-Adongo has sent several students out of class within the first few weeks of school. In each of these cases, while the student may have posted a modest disruption, a more attentive teacher would have been able to solve the problem in the classroom.

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 rating score of one (2) points out of a possible ten (10) points in this category. This resulted in a weighted score of fifteen (15) points in this category. Employee's score was much lower than the other employee within her competitive level who was retained in service. In reviewing the documents of record, Employee did not proffer any credible 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."²¹

Employee also claims that she was not evaluated and did not receive any observation reports. She also claims that she was improperly observed in previous years at other schools beside Sousa in which she was previously stationed. The undersigned notes that the criteria Agency instructed principals to use in ranking employees did not require a formal observation of employees.²² Specifically, in the Office or School Needs category, principals were instructed to assign scores "reflect[ing] [the] best judgment of the extent to which the person meets the particular needs of [the] school."²³ I also note that Employee's ranking at Sousa is the only one which is of concern in the instant matter. Employee's treatment prior to the instant RIF, at other schools, or her placement at Sousa as a result of an excess action is of no moment in this matter.

I find that Employee has provided no credible evidence that may bolster her score in this category. Moreover, I find that the Principal at Sousa had wide latitude to invoke his managerial discretion with respect to assessing the on-the-job performance and capabilities of his subordinates. Regardless of Employee's protestations to the contrary, there is no indication that any supplemental evidence would supplant the higher scores received by the remaining employee in Employee's competitive level who was not separated from service. With respect to Office and School needs, I find that in this matter I will not substitute my judgment for that of the Principal of Sousa as it relates to the score he accorded to Employee and her colleagues in the instant matter.

²¹See 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).

²² Agency Answer, Tab 2, Attachment B (January 7, 2010).

²³ *Id.*

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received one (1) point in this area. 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 not provided any credible supplemental evidence suggesting that she should have earned a higher score in this category. With respect to significant relevant contributions, accomplishments, or performance, I find that in this matter, I will not substitute my judgment for that of the Principal of Sousa as it relates to the score he 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 category. Employee proffered no coherent argument that would ostensibly buttress an award of additional points in this category. 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

According to the CLDF, Employee's tenure with DCPS spans twenty nine (29) years. The length of service 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 alleges that she was a tenured teacher who had received meets expectations as part of her prior performance evaluations. The undersigned assumes that she is contesting her point total with respect to length of service and the additional point award that may be had if an employee was rated as "exceed expectations" in their previous performance evaluation. However, Employee admits that she only received "meets expectations" which did not, as part of the CLDF, warrant an award of additional points.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. According to the CLDF, Employee did not qualify for any of the aforementioned bonus points except for D.C. residency. I find that Employee has not provided any credible supporting documentary evidence to support any additional points being awarded in this category.

According to the CLDF, Employee received a total weighted score of nineteen and a half (19.5) points after all of the factors outlined herein were tallied and scored. The lowest ranked colleague whose position survived the instant RIF received a total weighted score of eighty four and a half (84.5). Employee has not proffered any credible evidence to suggest that a re-

evaluation of her CLDF scores would result in a different outcome in this matter.²⁴ Employee has only proffered unsubstantiated allegations and mere conjecture to support her contention that her position should have survived the instant RIF. There is no indication that any supplemental evidence would supplant the higher scores received by the remaining employee in Employee's competitive level who was not separated from service. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.²⁵ This Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."²⁶ This Office cannot substitute its judgment for that of the Principal at Sousa, who was given discretion to complete Employee's CLDF and had wide latitude to invoke his managerial discretion. With respect to the aforementioned CLDF, I find that I will not substitute my judgment for that of the Principal of Sousa as it relates to the scores he accorded Employee and his colleagues in the instant matter.

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). The RIF Notice is dated October 2, 2009. The effective date of the RIF was November 2, 2009. The RIF Notice states that Employee's position is being abolished as a result of a RIF. The RIF Notice also provides Employee with information about her appeal rights. Moreover, Employee has not submitted any credible evidence that would show that she did not receive her RIF notice on the date indicated therein. Therefore, I find that Employee was given the required thirty (30) days notice prior to the effective date of the RIF.

Evidentiary Hearing

According to Employee, an evidentiary hearing was requested in order to examine the appropriateness of the RIF action that led to her removal. OEA Rule 619.2²⁷ states in part that an Administrative Judge ("AJ") can "require an evidentiary hearing, if appropriate." Additionally, OEA Rule 625.2 indicates that it is within the discretion of the AJ to either grant or deny a request for an evidentiary based on whether or not the AJ believes that a hearing is necessary.²⁸

²⁴ 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).

²⁵ See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

²⁶ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

²⁷ 59 DCR 2129 (March 16, 2012); See also OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).

²⁸ See *Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2010).

After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore Employee's request for an evidentiary hearing is denied.

Further, it appears that 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."²⁹ While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record to corroborate that the RIF was conducted unfairly.

Grievances

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.³⁰ Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. With respect to the exercise of OEA's jurisdiction, Employee's has proffered other ancillary arguments, including but not limited to: that she was improperly placed at Sousa due to an "unjust excessing (*sic*) from the previous school year."³¹ I find that the preceding argument is best characterized as a grievance and is outside of the OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

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) day legal notification was properly served. Therefore, 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:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

²⁹ *Washington Teachers' Union* at 780.

³⁰ Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

³¹ *Petition for appeal at 3 (December 1, 2009)*.