THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ANTHONY LEE,	)	
Employee	)	OEA Matter No. 2401-0251-12
	)	
v.	)	Date of Issuance: March 21, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Diana Bardes, Esq., Employee Representative
Carl K. Turpin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 10, 2012, Anthony Lee, ("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 an Attendance Counselor at Roosevelt High School ("Roosevelt"). On October 12, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on December 9, 2013. Thereafter, on December 18, 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. On January 9, 2014, Agency filed a Motion to Extend Briefing Schedule. This Motion was granted in an Order dated January 14, 2014. 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* (October 12, 2012); *Agency's Brief* (January 24, 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 he was unjustly terminated by the instant RIF. He explains that based on his eleven (11) years of seniority with Agency, he should be reinstated and made whole for lost wages and benefits. Employee also states that, other DCPS employees with less seniority are not receiving RIF notifications. Additionally, Employee notes that Agency is hiring other employees. [13]

In addition, relying on the rulings in *Levitt v. OEA*,[14] and *Sligh v. DCPS*,[15] Employee requests that an Evidentiary Hearing be held to challenge Agency's motivation for abolishing his position. Furthermore, Employee avers that a hearing is necessary to adduce testimony to support the motivation behind Agency's decision to terminate all of the Attendance Counselors at Roosevelt. Employee maintains that it is unusual for an Agency to abolish all positions in a competitive level. Employee further notes that, "[c]ommon sense dictates that another employee at Roosevelt would have to take on the responsibilities of the attendance counselors after the position was abolished or DCPS hired new attendance counselors following the RIF."[16] Additionally, Employee notes that, should an Evidentiary Hearing be granted in this matter, Agency should provide Employee with a copy of his personnel file from Agency.

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 competitive level. Roosevelt was determined to be a competitive area and the Attendance

[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 District Personnel Manual ("DPM") is the applicable criteria to be used as opposed to Title 5 DCMR Chapter 15.
[13] Petition for Appeal (September 10, 2012).
[14] 869 A.2d 364 (D.C. 2005).
[15] 2012 CA 0697 P (MPA) (Mar. 14, 2013).
[16] Reply Brief of Employee in Support of Appeal (February 12, 2014).

Counselor position was deemed a competitive level. Agency further noted that because the entire competitive area and competitive level was eliminated, one round of lateral competition is not required and DCPS is therefore not required to go through the rating and ranking process. Agency further maintains that, no Retention Register was created since the RIF eliminated all employees in the named position. Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date.[17]

RIF Procedures

While Employee does not dispute that the entire competitive level was abolished, Employee contends that his eleven (11) years of seniority was not taken into consideration when the instant RIF was conducted. Employee explains that employees with less seniority did not receive RIF notifications. Chapter 24 of the DPM has been found to be the governing RIF provision pursuant to D.C. Code §1-624.08. 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, Employee makes a blanket assertion that employees with less seniority did not receive RIF notifications. However, Employee did not provide any evidence to show that these employees were in the same competitive area/level as Employee. The record shows that Roosevelt was a competitive area, and the Attendance Counselor position was the competitive level. All positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(d), 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.[18]

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[17] Agency's Answer (October 12, 2012); Agency's Brief (January 24, 2014). Agency's Brief included an affidavit from Sara Goldband (Director of Staffing, DCPS Office of Human Capital), however, I did not rely on this affidavit in my decision because the affidavit was not notarized and the signature of the affiant could not be authenticated.

[18] 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.*

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.

Evidentiary Hearing

Relying on *Levitt* and *Sligh*, Employee requests that an Evidentiary Hearing be held to challenge Agency's motivation for abolishing his position, and to adduce testimony to support the motivation behind Agency's decision to terminate all of the Attendance Counselors at Roosevelt. Employee maintains that the facts in his case are similar to those in *Levitt*. Employee explains that it is unusual for an Agency to abolish all positions in a competitive level, noting that, this "is precisely the "cavalier discharge…under the guise of a reduction-in-force" that Levitt made clear was impermissible."

The employee in *Levitt* appealed his termination to the OEA pursuant to a RIF. He requested that discovery be undertaken and a hearing held, alleging that he was given an assignment which came to an end less than one month after it was created. Levitt was first transferred after a number of years in a career service position to the excepted service, and, then, transferred out of the excepted service and back to a newly-created career service supervisory position with no one to supervise; and, then, a few weeks later, the agency abolished the very position it had specifically created for him. Levitt explained that, this was extremely unusual because, it is rare for a Grade 15 position not to have supervisory responsibilities and never before had a non-supervisory Grade 15 Labor Relations Officer position existed in the history of that office. He also alleged that by placing him in this particular job/grade/non-supervisory classification, Agency effectively put him in a one-of-a-kind competitive level, noting that, he was given an assignment which came to an end less than one month after it was created. The Administrative Judge ("AJ") assigned to Levitt's case declined to hold a hearing. The Court in *Levitt* concluded that, under the particular facts and circumstances of the case, OEA's decision to

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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).

dismiss Levitt's Petition for Appeal on its face and deny discovery and a hearing upon Levitt's detailed allegations of improper employment actions is not supported by substantial evidence.[19]

The facts in this case are distinguishable from those in *Levitt*. Unlike in *Levitt*, here, Employee has not provided this Office with any detailed allegations of improper employment action. Employee is simply challenging the RIF on the grounds that the abolishment of all of the Attendance Counselor position is unusual because "common sense dictates that another employee at Roosevelt would have to take the responsibility of the attendance counselor after the position is abolished or DCPS hired new Attendance Counselors following the RIF." Furthermore, unlike the employee in *Levitt*, Employee was not transferred from one position to the next, just months before his position was abolished. Instead, Employee was an Attendance Counselor for eleven (11) years, prior to his position being abolished by the instant RIF. Moreover, in *Anjuwan v. D.C. Department of Public Works,*[20] the D.C. Court of Appeals 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*."[21] (Emphasis added). 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. This Court additionally noted that, an employee challenging the abolition of the position he occupied needs to demonstrate that his contention was "non-frivolous" in order to be entitled to a hearing. Here, apart from relying on what common sense dictates, Employee has not offered any detailed and/or credible evidence in support of his assertions. Additionally, OEA has decided many cases where entire competitive levels have been abolished.[22] Accordingly, I find that Employee's contentions do not meet the threshold established in *Anjuwan*. Therefore, I further find that Employee is not entitled to an Evidentiary Hearing in this matter. Additionally, an AJ has the discretion to decide a matter on the record or conduct an evidentiary hearing.[23]

Grievances

Employee also argues that DCPS hired new Attendance Counselors following the RIF. However, Employee has not provided any credible evidence to support this contention. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[24] 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

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[19] *Levitt, supra.*
[20] 729 A.2d 883 (December 11, 1998).
[21] *Id.*
[22] *Perkins v. District Department of* Transportation, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of* Health, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment* Services, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).
[23] OEA rule §624.2.
[24] *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).

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