THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0061-10
APRIL BATTLE,	)	
Employee	)	
	)	Date of Issuance: April 9, 2013
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge

H. David Kelly, Jr., Esq., Employee's Representative
Sara White, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 22, 2009, Dr. April Battle ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Public Schools' ("DCPS" or the "Agency") action of abolishing her last position of record through a Reduction-In-Force ("RIF"). During the instant RIF, Employee's last position of record and competitive level was Counselor and her competitive area was Beers Elementary School ("Beers"). Employee was informed that her last position of record was slated to be abolished via the instant RIF by letter dated October 2, 2009, from then Chancellor Michelle Rhee ("RIF Letter"). According to the RIF Letter, the effective date of the RIF was November 2, 2009.

I was assigned this matter on or about December 19, 2011. As this matter has been litigated before the undersigned, the parties have participated in a prehearing conference, various status conferences and extended discovery. This matter has experienced a multitude of delays due the pressing needs of the parties for personal matters. These unavoidable delays resulted in the parties failing to meet previously established filing deadlines. However, given time, the parties eventually submitted all of their required documents and briefs. After thoroughly examining the documents of record, I determined that an evidentiary hearing in this matter was unwarranted. 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. Public 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.

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[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;

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.
>
> (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

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(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.

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

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,*[5] the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[6] 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."[7] 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."[8]

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.[9] 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."[10] 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."[11]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[12] 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:

1. That he/she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

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

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[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.* at 1132.
[7] *Id.*
[8] *Id.*
[9] *Id*.
[10] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[11] *Id.*
[12] *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

Employee's Position

Employee asserts that her placement at Beers was a sham and that DCPS never intended to provide her with a fair opportunity to compete for a position that would survive the instant RIF. Prior to her stint with Beers, Employee was an Assistant Principal stationed at Winston Education Center for school year 2008 – 2009. At the end of that school year, Employee was informed by DCPS that she was not going to be reappointed as an Assistant Principal at Winston Education Center and that she should wait for further correspondence as to where she would report for duty for the next school year. During the spring and summer prior to school year 2009 – 2010, Employee alleged a harrowing ordeal in an attempt to get placed at Winston Education Center or any other DCPS facility with multiple allegations of being offered positions as an Assistant Principal to then having those offers rescinded only weeks later. Ultimately, just prior to the start of the start of school year 2009 – 2010, Employee was informed by DCPS that she was to report to Beers and that she would be working as a Counselor. At the time, Employee held proper certification to perform the duties of a counselor. Employee argues that DCPS knew that it would institute the RIF prior to placing her at Beers and that her placement was done so that it could more easily effectuate her removal under the guise of a RIF.

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. DCPS denies Employee's allegation that her placement at Beers was sham so that she could be easily removed via RIF. Agency also notes that 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:

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.[13]

Here, Beers was identified as a competitive area, and Counselor was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there was one other Counselor stationed at Beers. Employee's position did not survive the instant RIF.

Employee was not the only Counselor within her competitive level and was, therefore, required to compete with another similarly situated employee 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%)

[13] District of Columbia Public Schools' Brief at 2-3 (April 2, 2012). School-based personnel constituted a separate competitive area from non-school-based personnel and are precluded from competing with school-based personnel for retention purposes.

(c) Relevant supplemental professional experiences as demonstrated on the job – (10%)

(d) Length of service – (5%)[14]

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.[15] 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 lateral competition. In conducting the instant RIF, the principal of Beers 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 27.5 points on her CLDF. The other Counselor with whom Employee competed against as part of the CLDF process received a score of 89. Employee was the lowest ranked person out of two in her level.

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 three (3) points out of a possible ten (10) points in this category; a score much lower than the other employee within her competitive level. The Principal of Beers was given the discretion to complete Employee's CLDF. Employee has provided little credible evidence that may bolster her score in this area. Moreover, I find that the Principal at Beers had wide latitude to invoke her managerial discretion with respect to assessing the on-the-job performance and capabilities of her subordinates. 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 Beers as it relates to the score she accorded to Employee and her colleague in the instant matter.

[14] 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).

[15] District of Columbia Public Schools' Brief at 5 (April 2, 2012).

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that the RIF was a sham and that she was not able to be properly evaluated by the Principal of Beers for the purpose of this evaluation. Assuming arguendo Employee was accorded the full amount of points under this category her score would still be inferior to the Counselor who survived the instant RIF. Consequently, 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 Beers as it relates to the score she accorded to Employee and her colleague in the instant matter.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF and is weighted at 10%. Employee received zero (0) points in this area. Employee did not readily contest that she was generally due additional points in this category except for her general contention that the score she was accorded was based on a sham RIF process. Regardless of Employee's argument to the contrary, 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

This 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) performance ratings 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.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. I find that Employee has not provided any credible supporting documentary evidence to support any additional points being awarded in this category. Employee received a weighted score of five (5) points in this category.

In reviewing the documents of record, Employee does 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."[16] According to the CLDF, Employee received a total score of five (5) after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score

[16]*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).

of sixty nine (69). 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.[17]

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[18]. 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 contested 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

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 whether the implementation of the instant RIF was a sham. Employee characterizes the circumstances under which she was separated as unusual because she was assigned to Beers as a counselor approximately one and a half months prior to being terminated under the RIF.[19] Employee further speculates that Agency placed her at Beers at a non-existent Counselor position so that she could be removed via RIF shortly after the beginning of the 2009 – 2010 school year.[20] 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 "improper employment actions."[21] 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. 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.

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[17] 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).
[18] Emphasis Added.
[19] *See* Employee's Brief at 6 (March 15, 2013).
[20] 869 A.2d at 365-66.
[21] *Id*.

Here, Employee was placed at Beers approximately a month and a half prior to receiving notice that her position was subject to the RIF. Moreover, Employee was able to use her retreat right from a management position (Assistant Principal) to one in the education service (Counselor) after her services as an Assistant Principal were no longer required. It stands to reason that if the Agency wanted to remove Employee it would have done so while Employee was serving in management whereby she would have had less opportunity (than she does now) to contest her removal. Moreover, I find that the record is abundantly clear that at the start of school year 2009 – 2010, Beers had been allotted two Counselor positions; however, due to budgetary constraints out of the control of DCPS, one of those positions was not allowed to survive the instant RIF.[22] Lastly, DCPS was required to provide extensive discovery in this matter including providing a copy of Employee's entire personnel file. I find that nothing within the discovery propounded and argued before the undersigned nor the arguments of Employee provide proper credence to Employee's allegation of a sham RIF. I further find that the mere assertion that being terminated as a result of Agency's budgetary constraints shortly after being placed in a vacant counselor position does not rise to the level of "unusual" or "cavalier" under the holding in *Levitt*. Based on the foregoing, I find that an evidentiary hearing is unwarranted in this matter.

Grievances

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[23] Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as grievances and 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 so in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in her removal is upheld.

[22] *See* DCPS Brief at Exhibit A (April 2, 2012).
[23] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE