THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CALVIN BRAITHWAITE	)	OEA Matter No. 2401-0159-04
Employee	)	
	)	Date of Issuance: January 24, 2006
v.	)	
	)	Daryl J. Hollis, Esq.
	)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	

Calvin Braithwaite, *Pro se*
Sara Moskowitz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On July 16, 2004, Employee, a Social Studies Teacher at Hart Middle School, filed a petition for appeal from Agency's final decision separating him from Government service pursuant to a reduction-in-force (RIF).

This matter was assigned to me on March 30, 2005. I conducted a Prehearing Conference on May 24, 2005 and an evidentiary Hearing on September 15, 2005. This decision is based on the testimony elicited at the Hearing and on the documentary evidence of record. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action separating Employee from service pursuant to the RIF was in accordance with applicable law, rule and regulation.

OVERVIEW OF AGENCY'S RIF PROCESS

Section 149 of the District of Columbia Appropriations Act of 1996 (DCAA-96), Pub. L. 104-134 (April 26, 1996), 110 Stat. 1321-77, amended certain sections of the Comprehensive Merit Personnel Act (CMPA) pertaining to RIF's for the 1996 fiscal year.[1] Prior to the passage of DCAA-96, an entire agency was considered to be a "competitive area" for RIF purposes. Section 149 of DCAA-96 permitted an agency to establish, for the first time, competitive areas less than the entire agency.[2] These changes to the CMPA remained in effect for RIF's conducted during "the fiscal year ending September 30, 2000, and each subsequent fiscal year. . . ." *See* D.C. Official Code § 1-624.08 (2001). Further, consistent with the earlier modifications to the CMPA, § 1-624.08 limited an employee's appeal rights to this Office to the following areas: 1) that an agency had violated an employee's entitlement to one (1) round of "lateral competition" within his or her competitive level; and 2) that an employee had not been given thirty (30) days specific notice prior to the effective date of the RIF.

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[1] A RIF is an orderly process for the reduction of positions within an agency for, *inter alia*, budgetary reasons and major reorganizations.

[2] Section 149(a) amended § 2401 of the CMPA as follows: "A personnel authority may establish lesser competitive areas within an agency on the basis of all or a clearly identifiable segment of an agency's mission or a division or major subdivision of an agency."

Following the passage of DCAA-96, Agency published new RIF regulations.[3] By and large, these regulations remained in effect for fiscal year 2004 RIF's. Section 1501.1 of these regulations, 43 D.C. Reg. at 5265, permitted the superintendent to establish "competitive areas based upon . . . a major subdivision of the Board of Education, including discreet organizational levels such as an individual school or office." Each employee within a school or office was then assigned to a "competitive level".[4]

The following RIF regulations are also relevant to this matter:

> 1503 REDUCTION IN FORCE PROCEDURES
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> 1503.1 An employee who encumbers a position which is abolished shall be separated in accordance with this chapter notwithstanding date of hire or prior status in any other position.
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> 1503.2 *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

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[3] *See* 43 D.C. Reg. 5264 *et seq.* (1996).

[4] Section 1502.1 of the RIF regulations, 43 D.C. Reg. at 5266, defines "competitive level" as follows:

> Competitive levels are groups, within a competitive area, consisting of all positions in the same grade or occupational level that are sufficiently alike in the following characteristics that a person could be assigned to any position without changing the terms of appointment or unduly interrupting the work program:
>
> (a) Qualifications;
>
> (b) Requirements;
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> (c) Duties;
>
> (d) Responsibilities;
>
> (e) Pay schedules; and
>
> (f) Working conditions.

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, and/or areas of expertise; and

(d) Length of service.

43 D.C. Reg. at 5266. (emphasis added).

In order to assess each employee in the above areas, Agency devised a form known as the Competitive Level Documentation Form (CLDF). The CLDF was divided into four (4) categories which mirrored the categories set forth in § 1503.2, *supra*. The maximum number of points attainable in each category was twenty-five (25). Five (5) additional points could be awarded for District residency. Thus, the maximum number of points attainable was 105. Individual school principals were given broad discretion to devise methods to evaluate each employee's contributions in the first three (3) categories. "Length of Service" was based upon the following formula: One (1) to five (5) years service - 5 points; Six (6) to ten (10) years - 10 points; Eleven (11) to fifteen (15) years - 15 points; Sixteen (16) to twenty (20) years - 20 points; and twenty-one (21) or more years - 25 points.[5]

After the CLDF's were completed and tallied, each employee was ranked within his/her competitive level. Based upon each school's projected enrollment and funding for the 2004-2005 School Year,[6] positions were then eliminated, in inverse order of each employee's ranking within a competitive level. It was the principal's discretion to determine

[5] Prior military and/or other federal service was considered in arriving at each employee's length of service point total.

[6] These projections had been previously determined by Agency's central office and had been provided to each principal.

the number of positions in each competitive level that would be eliminated. Here, one position in Employee's competitive level (Social Studies Teacher), comprised of five individuals, was scheduled for elimination. Employee, who received a total of 50 points on his CLDF, was ranked fifth out of five.[7] Thus, Employee was separated from service.

SUMMARY OF TESTIMONY

1. Willie Bennett: Mr. Bennett is the Principal of Hart Middle School, and occupied that position during the 2003-2004 School Year, when the RIF in question took place. Regarding the RIF, he "facilitated the . . . process and administered the CLDF's." Tr. at 13.

In December 2003, Mr. Bennett met with the entire Hart staff and told them that, due to Agency-wide budget problems, there was a possibility that a RIF would be conducted later in the school year. He knew that Employee was at that meeting because his signature was contained on the sign-in sheet that Mr. Bennett had prepared for the meeting.

When the RIF was actually conducted in May 2004, Mr. Bennett used the same process to evaluate the teachers *vis à vis* the CLDF's. He met with each teacher individually and they completed the CLDF's together. He utilized the information that was contained in each teacher's official personnel file, as well as other documentation that each person provided. He stated that the documentation "could have been [from] a year ago, it could've been two years ago." Tr. at 38. Additionally, some teachers received credit for participating in extracurricular activities. Regarding the allocation of points, he testified:

> They were given five points per credential, information that they provided me with. One category had to do with certification. If you provided me with certification, then that was five points. If you provided me with any additional documentation like you were a certified mediator, whatever the category was, you got additional points.

Tr. at 16. Further, during the meeting with Mr. Bennett, the teachers had the opportunity to disagree with the initial calculation of points and to submit additional information afterwards.

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[7] The other members of Employee's competitive level and their CLDF scores are as follows: 1) [G.B.] – 90; 2) [C.C.] – 80; 3) [F.H.]- 80; and 4) [J.M.] – 63.

Additionally, for all teachers he used their Performance Evaluation Forms (PEP) from the 2002-2003 School Year. He did not use those from the year of the RIF (2003-2004) because those forms were not finalized until June 2004, approximately a month after the CLDF's were submitted to Agency's central office.

Employee transferred to Hart from another school prior to the 2003-2004 School Year. Thus, in processing his CLDF, Mr. Bennett used the 2002-2003 PEP that had been completed by the previous principal. On that PEP, it stated that Employee "needed improvement", and that was the basis for Mr. Bennett giving him ten points in the first CLDF category ("Relevant Significant Contributions, Accomplishments or Performance").

In the second category ("Relevant Supplemental Professional Experience as Demonstrated on the Job"), Mr. Bennett gave Employee ten points for "Classroom Management" and "Taught on university level". Responding to a question from Employee regarding this category, he testified:

> When you came in my office, I asked you if you had any information that you wanted to give me under this category. These are the two things that you provided me with. Some people came into my office and brought portfolios. Some people brought stuff with them. But then at the end of your meeting, I told you if you had anything else additional that you wanted to give me, that you could give it to me. But you never brought anything back to me at all. So I gave you an opportunity to go find whatever you had to bring it back, but you never brought anything back.

Tr. at 24.

As to the third category ("Office or School Needs"), Mr. Bennett testified as follows:

> [This] category had a lot to do with teachers actually participating in extracurricular activities, doing extra stuff outside of their jobs. You were provided the opportunity to participate in any activity in the building, but you chose not to. . . . You didn't participate so you didn't get [additional] points. Some people did, and they got points [in that] category. . . . I told the entire staff [about extracurricular activities] each time

> we had staff meetings. We also had a sign-up sheet for different areas that you wanted to participate in . . . and your name is not on any list at all. . . . [O]ur union rep, Mr. Bettor, also would stand up in most of the meetings and say that we need help in the Fundraising Committee [and] Discipline Committee, gave all teachers the opportunity to participate. You didn't participate.

Tr. at 38-40.

Additionally, at the individual CLDF meeting that Mr. Bennett had with Employee, he told him the number of people in his competitive level with whom he would be competing, and also gave him a "Frequently Asked Questions" sheet regarding the RIF process.

Employee asked Mr. Bennett if he had hired [F.H.] and [J.M.] (both members of Employee's Competitive Level) after the December meeting in which Mr. Bennett had informed the staff of the budget problems and the possibility of the RIF. Mr. Bennett replied that [F.H.] had been at Hart for 21 years and that [J.M.] was hired in either September or October of 2003.

2. Employee: He was employed at Hart Middle School only for the 2003-2004 School Year, the year that the RIF took place. Prior to coming to Hart, he had worked at the Patricia Roberts Harris School. He was present at a December 2003 meeting that Mr. Bennett had with all of the Hart staff. At the meeting, Mr. Bennett advised the staff that there was a possibility of an across-the-board "staff reduction" sometime later in the year, due to budget difficulties. Employee denied hearing the words "reduction-in-force" or "RIF".

Although Mr. Bennett discussed budgetary problems at the December 2003 meeting, he hired [J.M.] in January 2004, rather than in September or October 2003. Employee did not have any documentary evidence in support of his contention, and he testified that "I think there were other teachers [at Hart] I was trying to get a hold of who would know [about [J.M.]'s hiring]." Tr. at 46. However, Employee presented no corroborating witnesses.

Employee recalled only one individual meeting with Mr. Bennett regarding his CLDF, and that took place on May 18, 2004, the day that he and Mr. Bennett signed the form. According to Employee, at that meeting Mr. Bennett presented him with the

completed and typed CLDF (Agency Ex. 1). He denied being previously told to bring supporting documentation that would be used by Mr. Bennett to fill out the form. However, he also testified that he had told Mr. Bennett about the information that is found in the second category of his CLDF. Further, as to the information found in the third category of his CLDF, Employee testified that he was unsure if Mr. Bennett got that from Employee's personnel file, or whether he gave it to Mr. Bennett. *See* Tr. at 52. Employee also denied being given the opportunity to bring in additional documents after the meeting.

Employee Ex. 1 consists of two handwritten pages (corresponding to the CLDF categories) and a number of other documents such as "Certification of Seat Hours and Recertification" forms, transcripts from the U.S. Department of Agriculture Graduate School and Trinity College and an Official Undergraduate Academic Record from the University of the District of Columbia. According to Employee, he completed the handwritten pages the day before his Hearing. He also testified that the exhibit is the information he would have given to Mr. Bennett if he had been given the opportunity to do so.

FINDINGS OF FACT

Mr. Bennett and Employee were the only witnesses to testify at the Hearing. I listened to their testimony and had the opportunity to observe their demeanor. I found the testimony of Mr. Bennett to be significantly more credible than that of Employee. Mr. Bennett testified in an assured and straightforward manner, and there was no demonstrated motive for him to have fabricated his testimony. On the other hand, Employee's testimony was often vague, filled with a number of instances of "I don't *recall* [this or that]" and similar "waffling" language. Further, at times his testimony was contradictory. For example, he testified that he was presented with a completed CLDF at the May 18, 2004 meeting with Mr. Bennett. But he also testified that he provided Mr. Bennett with the information found in CLDF category two and may have given him the information found in category three. Additionally, he testified that he prepared the first two pages of Employee Ex. 1, *supra*, the day before the Hearing, *i.e.*, September 14, 2005. However, the language that appears in that document is almost identical to that found on his CLDF, which was completed in May 2004. Quite simply, for the most part Employee's testimony is unbelievable.

Therefore, I make the following findings of fact: In December 2003, Mr. Bennett met with the entire Hart staff and informed them that due to Agency-wide budget problems, there was a possibility that a RIF would be conducted later in the school year. When the RIF became a reality in the Spring of 2004, Mr. Bennett met with all of the

teachers individually, including Employee, to discuss the process for filling out the CLDF's. All of the teachers were given the opportunity to present supporting documentation that would be used in completing their CLDF's, and Mr. Bennett worked with each teacher in drafting their CLDF's. After the CLDF's were drafted, all of the teachers were given the opportunity to submit supplemental documentation prior to the forms being finalized. Mr. Bennett treated Employee no differently from the other staff members. Employee provided Mr. Bennett with some of the information that eventually made its way onto his CLDF. At the initial meeting, Mr. Bennett *did not* present Employee with a final CLDF to have him simply sign. That took place on May 18, 2004, sometime after the initial meeting. Further, although given the same opportunity as the other teachers, Employee did not submit supplemental documentation.

I find that Employee's CLDF was an accurate reflection of all the contributions, etc. for which he was entitled to be given credit. As to Mr. Bennett's use of the 2002-2003 PEP forms, rather than those for the RIF year, I am aware from a number of prior RIF appeals involving Agency's employees that his testimony was an accurate reflection of a system-wide usage of the previous year's evaluation forms, as it is an undisputed fact that the 2003-2004 evaluation forms were not ready prior to the Agency-imposed deadline for all principals to complete their building's CLDF's and submit them to the central office.

Finally, based on the testimony and the exhibits of record, I find that Employee was properly ranked fifth out of the five members of his competitive level.[8]

ANALYSIS AND CONCLUSIONS

Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), the agency has the burden of proof in RIF appeals such as the instant case. The agency's burden of proof is by a preponderance of the evidence, which is defined at OEA Rule 629.1, *id.*, as "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."

Here, it is Agency's burden to prove that Employee was properly afforded one round of lateral competition within his competitive level and that as a result thereof, was properly separated from service. Based on my findings of fact, I conclude that Agency has met its burden. Therefore, Agency's action must be upheld.

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[8] Although not of decisional significance, for the sake of a complete record I find that [F.M.], a member of Employee's competitive level, came to Hart in September or October of 2003.

ORDER

It is hereby ORDERED that Agency's action separating Employee from service as a result of the RIF is UPHELD.

FOR THE OFFICE:

DARYL J. HOLLIS, Esq.
Senior Administrative Judge