THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0219-10
CHARLES ALEXANDER,	)	
Employee	)	
	)	Date of Issuance: June 18, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Daniel Katz, Esq., Employee Representative
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2009, Charles Alexander ("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 his 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 his position was abolished was an ET-15 Social Studies teacher at Woodson Senior High School ("Woodson"). Employee was in Educational Service status at the time he was terminated.

I was assigned this matter in February of 2012. On February 21, 2012, I issued an Amended Order requiring the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations.[1] Agency submitted a response to the Undersigned on March 13, 2012. On March 30, 2012, Employee requested an extension of time in which to file his brief. The motion was granted and Employee submitted a brief on April 20, 2012. The record is now closed.

[1] The Office inadvertently sent the Order dated February 13, 2012 to Agency Representative's previous mailing address. As a result, deadlines for Employee and Agency brief submissions were modified.

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 § 1-624.02,[3] which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

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[2] *See Agency's Answer*, Tab 1 (January 7, 2010).

[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;

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."[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]

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(4) Consideration of job sharing and reduced hours; and
(5) Employee appeal rights.

[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.

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[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 to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

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

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

Employee challenges his termination under the RIF bases on the following arguments:

> a. The principal of Woodson used illegal factors to assure that certain individuals were exempt from the RIF, which was a violation of D.C. Municipal Regulations, Chapter 15. Employee believes that the principal was "protecting certain agency employees based upon impermissible factors…." Employee also contends that the principal instructed him to

[6] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[7] *Id.*
[8] *Id.*
[9] *Id*. at 1125.
[10] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[11] *Id.*
[12] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

"come up with a list of 15 employees to be RIF'd, and that none of them could be teachers who were hired just before the 2009-2010 school year."

b. Agency failed to provide evidence to support how the principal of Woodson scored the other Social Studies teachers within Employee's competitive level. Employee contends that the affidavit provided by Peter Weber, Chief Advisor to the Chancellor, is inadequate evidence upon which this Office may rely in deciding this matter.

c. Employee should be allowed to challenge the statements contained within the CLDFs through discovery because they contain factual errors and lack the inclusion of certain material facts.[13]

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency states that it provided Employee with one round of lateral competition, which resulted in him being ranked the lowest of four (4) Social Studies teachers within his competitive area and level. Agency also contends that Employee was properly given thirty (30) days written notice prior to the effective date of his termination.

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS Schools 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.[14]

Here, Woodson Senior High School was identified as a competitive area and ET-15 Social Studies teacher was determined to be the competitive level in which Employee competed.

[13] Employee Brief (April 20, 2012).
[14] *Agency Brief*, p. 3 (March 13, 2012).

According to the Retention Register provided by Agency, there were four (4) Social Studies teacher positions subject to the RIF, and one (1) position was identified to be abolished. Because Employee was not the only Social Studies teacher within his competitive level, he was required to compete in a round of lateral competition.

According to Title 5, DCMR § 1503.2 *et al.*:

> If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:
>
> (a) Significant relevant contributions, accomplishments, or performance;
>
> (b) Relevant supplemental professional experiences as demonstrated on the job;
>
> (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
>
> (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

> (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
>
> (b) Significant relevant contributions, accomplishments, or performance – (10%)
>
> (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
>
> (d) Length of service – (5%)[15]

[15] 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).

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. 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 Woodson 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 sixteen and a half (16.5) points on his CLDF and was therefore ranked the lowest in his competitive level. Employee's CLDF stated in pertinent part:

> "Mr. Alexander is still on a 90 [d]ay probationary plan from last year. Mr. Alexander was disorganized and failed to follow a logical, linear lesson plan. His room was disorganized and the studies were noisy. He set low expectations for his students and does not plan strong lesson or unit plans. One student sat at his computer and told the principal she was making up a crossword puzzle for the next day's class. When Mr. Alexander began to teach, he was yelling instead of speaking in a clear and concise voice. His yelling has been mentioned to him in the past in that it stirs students up while he tried to talk above them. He has not formed a strong bond with his students or his fellow teachers."[16]

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of two (2) points out of a possible ten (10) points in this category and argues that his CLDF contains factual errors upon which the principal relied in completing the form.

In reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize

[16] *Agency Brief*, Exhibit B (March 13, 2012).

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."[17]

Employee argues that he has a statutory and regulatory due process right to discovery and an evidentiary hearing on the merits of this case. Employee's desire for an evidentiary hearing; however, is simply a request to examine the principal's subjective motivations for justifying the points that he received on his CLDF. In essence, Employee seeks to dispute the principal's assessment of his work performance, but there has been no proffer of evidence to suggest that holding an evidentiary hearing would require that his CLDF be altered, or that a hearing would necessitate a different outcome in this case. It was within the principal's discretion to assign a numerical value in this category and I find no reason to substitute my judgment for that of the principal at Woodson.[18]

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF and includes factors such as student outcomes, ratings, awards, and attendance. Employee received zero (0) points in this area and has failed to provided any credible evidence to indicate that his contributions to the student body at Woodson were significant and relevant, thereby justifying an increase in his score. I find no credible reason to substitute my judgment for that of the principal in this category.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received a total of zero (0) points here and has not provided any documentation to supplement additional points being awarded. I find that this score falls within the rubric of managerial discretion. Considering as much, I again find that Employee's arguments to the contrary are unpersuasive.

Length of service

This category accounts for 5% of the CLDF and was calculated by the Department of Human Resources 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

[17] *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.)

[18] *See Washington Teachers' Union, et al. v. Clarence Labor, Jr., et al*, D.C. Court of Appeal's Order No. 11-OA-36 (D.C. 2012) (unpublished), in which the Court denied the movant's petition for writ of mandamus as being moot on March 29, 2012. The Court further stated that "Petitioners' administrative appeals are now being processed by the Office of Employee Appeals.

calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Employee had a Service Computation Date ("SCD") of 2005, which equates to four (4) years of experience on his CLDF. Employee did not receive additional points for D.C. residency, Veterans Preference, or the ratings add for an "Exceeds Expectation" evaluation during the prior academic school year. Employee therefore received a score for Years of Service of three (3) points, which results in a weighted score of one and a half (1.5) points in this category. Employee has not contested the calculation of his length of service, and I therefore find that Agency properly afforded him the correct amount of points in this category.

On his CLDF, Employee received a total score of sixteen and a half (16.5) points after all of the factors outlined above were tallied and scored. The other employees in his competitive level who were not identified for termination received scores of sixty-eight (68) and seventy-two (72) points respectively on their CLDFs, scores much higher than Employee's.[19] Again, Employee has not proffered any evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome.[20]

Accordingly, I find that the Principal of Woodson had discretion in completing Employee's CLDF, as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra,* when implementing the instant RIF. Employee argues that this Office may not rely on the affidavit of Peter Weber, Chief Advisor to the Chancellor, in deciding the instant appeal. I disagree. The federal rules of evidence are general guides in administrative hearings; however, this Office is not bound by them. All evidence which is relevant and reliable may be considered in the disposition of an administrative hearing. I therefore find that Peter Weber's affidavit, which explains the procedures utilized in the instant RIF, is relevant and may be considered as admissible evidence in this appeal.

In addition, Employee asserts that Woodson's principal was "protecting certain agency employees based upon impermissible factors" when identifying persons to be terminated under the RIF. I also find that there is insufficient evidence in the record to support these allegations. D.C. Code 1-624.08(c) gives this Office limited jurisdiction over Career Service employees in RIF cases, regardless of their date of hire. Although there may have been employees serving in probationary status who were not identified for separation during the instant RIF, based on the aforementioned section, probationary employees were nonetheless subject to the RIF procedures found in D.C. Code § 1-624.08, which includes receiving one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF.

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[19] *See* Agency Retention Register, *Agency Brief*, Exhibit B (March 13, 2012). It should be noted that one ET-15 Social Studies teacher received a "N/A" in the "total score" section of his or her CLDF. This employee was awarded a total of sixty (60) points for factors 1-3, and received six (6) additional points for D.C. residency in the Length of Service category. While it is unclear as to why this employee did not receive a numerical score in the "Total Score" section on Agency's retention register, based on the information provided, this employee would have nonetheless received a higher total CLDF score than Employee's.

[20] *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.)

While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record would lead the Undersigned to believe that the RIF was conducted unfairly. I find that Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

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* (emphasis added) 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 RIF notice on October 2, 2009 and the RIF effective date was November 2, 2009. The notice states that Employee's position was being abolished as a result of a RIF. The Notice also provided Employee with information regarding his right to appeal the adverse action. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

OEA Rule 617.6, 59 DCR 2129 (March 16, 2012), states that "[d]iscovery may be commenced after the Office notifies the agency that the employee has filed the petition. Unless the Administrative Judge directs otherwise, discovery shall be completed by the date of the pre-hearing conference."[21] Therefore, parties may commence discovery beginning from the date on which Agency is notified of an employee's appeal.

OEA Rule §617.4 further provides that the Administrative Judge may limit the frequency or use of discovery if:

a. The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
b. The party seeking discovery has had ample opportunity by discovery in the appeal to obtain the information sought; or
c. The discovery is unduly burdensome or expensive, in light of the nature of the case, the relief sought, the limitations on the parties' resources, and the importance of the issues involved in the case.

The certificate of service reflects that a copy of the Notice of Appeal was mailed by this Office to Employee's address on December 8, 2009.[22] Accordingly, the period for discovery commenced in December of 2009. On March 30, 2012, Employee requested, and was granted, an extension of time in which to file a brief because he had recently obtained legal counsel.

[21] At the time Employee filed her petition for appeal, rules pertaining to OEA's discovery process were formerly cited as OEA Rule 618.6 (1999).
[22] *See* Notice of Appeal letter (December 8, 2009).

A review of the record reflects that no motions to compel discovery were filed on Employee's behalf since his petition for appeal was filed in 2009. A copy of Employee's personnel file was available to be retrieved from the Department of Human Resources as well. I therefore find that Employee was given the opportunity to submit discovery requests to Agency prior to filing his April 20, 2012 brief, and all relevant information pertinent to the disposition of this case was submitted to the record.

Lastly, in his petition for appeal Employee alleges possible violations of the Whistleblower Protection Act as well as Agency's alleged use of age discrimination. Employee has failed to expound upon his allegations in subsequent filings with this Office, thus I am unable to address the merits, if any, if his arguments.

Based on the foregoing, 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 his 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:

_____
SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE