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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
CARLENE THOMPSON,)	
Employee)	OEA Matter No. 2401-0122-14
)	
v.)	Date of Issuance: January 20, 2015
)	
D.C. PUBLIC SCHOOLS,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
_____)	
Stephen White, Employee Representative)	
Carl Turpin, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 5, 2014, Carlene Thompson, (“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 her position through a Reduction-in-Force (“RIF”). The effective date of the RIF was August 8, 2014. Employee was an Administrative Aide at Fillmore Arts Center (“Fillmore”). On October 8, 2014, Agency submitted its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on October 10, 2014. Thereafter, the parties were ordered to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Both parties have submitted their respective briefs as requested. 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 April 4, 2014, 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.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* at Tab 1, (October 8, 2014); See also *Agency's Brief* at Tab 2, (November 17, 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

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

Employee’s Position

In her submissions to this Office, Employee notes that she has been employed with the District of Columbia Government for over thirty (30) years. She explains that no explanation was given in her initial letter from DCPS as to the reason why she was subject to the instant RIF. Employee also notes that she was replaced with a ‘WAE’ employee who was previously a Music Teacher at Fillmore. Employee explains that the ‘WAE’ employee who replaced her started working in the office with Employee several months before Employee was RIF’d and she started assuming some of Employee’s duties.

Additionally, Employee notes that pursuant to DCMR 1503.2, she should not have been RIF’d from her position. She explains that she more than fulfilled all of the required factors that should have been used to determine who should have been let go. Employee further contends that her IMPACT Rating Conference Supervisor told her she would be replaced with three (3) individuals. Employee states that the Supervisor noted that she was aware that Agency had to accommodate Employee’s disability. Employee states that she was not allowed to put her resume on file.¹³

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 notes that the Chancellor of DCPS authorized the RIF, and defined the competitive areas and competitive level for the RIF. Agency explains that each school was identified as a separate competitive area, and each position title constituted a separate competitive level. Fillmore was determined to be a competitive area and the Administrative Aide position was deemed a competitive level. Agency further noted that because Employee was in a single-person competitive level - the only Administrative Aide in her competitive level, and the Administrative Aide position was chosen for elimination, one round of

¹¹See *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 5, 2014); Employee’s Brief (December 19, 2014).

lateral competition is not required. Agency further explains that because the entire competitive level was eliminated, DCPS was therefore not required to go through the rating and ranking process. Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date. It explains that Employee received specific notice of the RIF on May 16, 2014. Employee was notified that she would be separated from service effective August 8, 2014.¹⁴

Single Person Competitive Level

In instituting the instant RIF, Agency met the procedural requirements listed above, and Employee does not contest this. On April 4, 2014, the Chancellor of DCPS – Kaya Henderson authorized a school-based RIF for budgetary reasons. This authorization designated several competitive areas and competitive level within Agency that would be affected by the RIF. Employee's competitive area and competitive level was one of such designations. Chapter 24 of the D.C. Personnel Manual § 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.

Employee argues that based on 5E DCMR 1503.2¹⁵, she should not have been RIF'd from her position because she more than fulfilled all of the required factors that should have been used to determine removal. However, Employee has not provided any evidence in support of this argument. Additionally, Agency explained that Employee was not entitled to one round of lateral competition since she was in a single person competitive level, and the entire single person competitive level within the competitive area was eliminated. Employee does not dispute Agency's assertion that she was the only Administrative Aide at Fillmore. This Office has consistently held that, when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5E DCMR 1503.2, are both inapplicable. Moreover, 5E DCMR

¹⁴ Agency's Answer (October 8, 2014); Agency's Brief (November 17, 2014).

¹⁵ 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 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.

1503.3 highlights that, when an entire competitive level within a competitive area is eliminated, [the factors listed in 5E DCMR 1503.2] need not be considered in determining which positions will be abolished. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.¹⁶ Accordingly, I conclude that Employee was properly placed into a single-person competitive level and since the entire competitive level was eliminated, Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF.

Notice Requirements

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, D.C. Official Code § 1-624.08(e), which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF. (Emphasis added).

Here, while Employee does not dispute the fact that she received the required RIF notice thirty (30) days prior to the effective date of the RIF, Employee however, notes that no explanation was given in her initial letter from DCPS as to the reason for her removal. I disagree with this assertion. A review of the RIF notice dated May 16, 2014 noted in pertinent parts that "...your 12-month position with the District of Columbia Public Schools (DCPS) *is being eliminated as part of a reduction-in-force*, effective August 8, 2014." (Emphasis added). Consequently, I conclude that the notice clearly stated that Employee's position is being abolished as a result of a RIF. Employee received the RIF notice on May 16, 2014, and the RIF was effective on August 8, 2014. The Notice also provided Employee with information about her 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.

Grievances

Employee also argues that DCPS replaced her with a "WAE" employee who was previously a Music Teacher at Fillmore. Employee explains that "WAE" Music Teacher had recently started working in the office with Employee several months before the instant RIF, and had started to assume some of Employee's duties. However, Employee has not provided any credible evidence to support this argument. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.¹⁷

¹⁶ See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. 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).

¹⁷ *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).

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 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 her 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:

MONICA DOHNJI, Esq.
Administrative Judge