

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of: )	
JOYCE COVINGTON, )	OEA Matter No.: 2401-0139-10
Employee )	
v. )	Date of Issuance: May 30, 2012
DISTRICT OF COLUMBIA )	
PUBLIC SCHOOLS, )	
Agency )	Joseph E. Lim, Esq.
_____ )	Senior Administrative Judge
Kristin Dobbs, Employee Representative	
Sara White, Esq., Agency Representative	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On November 5, 2009, Joyce Covington (“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 her 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 her position was abolished was a Social Worker at Cardozo Senior High School.

I was assigned this matter on February 8, 2012. On February 16, 2012, 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. Both parties submitted timely responses to the order. 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.

***Employee’s Position***

Employee submits that Agency failed to provide her one round of lateral competition when it failed to consider her two masters degrees, her multiple licenses and expertise in her job, her contributions to the school in the form of the reading program, bullying program, talent show, and other events.<sup>1</sup> According to Employee, the statements contained within her CLDF are unsubstantiated by any documentary evidence.

### ***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 by affording Employee one round of lateral competition and 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 the lowest ranked Social Worker, Employee, was terminated as a result of one round of lateral competition.

### **FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW**

On September 10, 2009, former D.C. Public Schools 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.<sup>2</sup>

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02<sup>3</sup>, which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, 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*

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<sup>1</sup> Employee Brief at p. 5 (March 29, 2012).

<sup>2</sup> See *Agency's Answer*, Tab 1 (December 14, 2009).

<sup>3</sup> 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.

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.”<sup>4</sup> 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.”<sup>5</sup>

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.”<sup>6</sup> 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.”<sup>7</sup> 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.”<sup>8</sup>

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<sup>4</sup> *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>5</sup> *Id.* at p. 5.

<sup>6</sup> *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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.<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>12</sup> 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 she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or
2. That she was not afforded one round of lateral competition within their competitive level.

Under Title 5 DCMR § 1501.1, the Superintendent 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.

Here, Cardozo Senior High School was identified as a competitive area, and Social Workers on the ET pay plan was determined to be the competitive level in which Employee

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<sup>9</sup> *Id.* at 1125.

<sup>10</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>11</sup> *Id.*

<sup>12</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

competed. According to the Retention Register provided by Agency, there were two (2) Social Worker positions subject to the RIF. Of the two positions, one (1) position was identified to be abolished.

Employee was not the only Social Worker within her competitive level and was, therefore, required to compete with another 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%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)<sup>13</sup>

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<sup>13</sup> 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.<sup>14</sup> 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 Cardozo Senior High School 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 11.5 points on her CLDF, and was, therefore, ranked the lowest in their respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Ms. Covington has not used her expertise and training as a social worker to support the vision and mission of the school. She has not functioned in a proactive manner to assist students with social and emotional concerns. She has not contributed to student learning, has not offered services or training to the staff or community and has not contributed to a collegial work environment. Ms. Covington must be sought out to address student concerns...She does not coordinate programs and services with administrators and teachers in the building and has not narrowly defined the scope of her work...Ms. Covington has not participated in after school programs, and has not implemented any programs to assist the staff, student body and community to deal with the many economic and social problems that exist at Cardozo.”<sup>15</sup>

### ***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 one (1) point out of a possible ten (10) points in this category; a score much lower than other employees within her competitive level. Employee argues that the documentary evidence does not support the

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<sup>14</sup> Agency Brief at pp. 4-5 (March 8, 2012).

<sup>15</sup> Agency Brief, Exhibit B (March 8, 2012).

score afforded to her. The principal of Cardozo Senior High School was given the discretion to complete Employee's CLDF. Although Employee provided some evidence that would bolster a score in this area, such as proof of degrees obtained pertinent to her work, licenses or other specialized education, there is no evidence to show that the principal did not take these into account. Also, the principal of Cardozo Senior High School was given the discretion to complete Employee's CLDF and determine how much points to award based on her observation and evaluation.

***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 her contributions are inconsistent with the statements contained within the CLDF. Per Title 5, DCMR §1503.2, this category and Employee's performance "significant relevant contributions, accomplishments, or performance (emphasis added).

Again, the principal of Cardozo Senior High School was given the discretion to complete this area. The principal is in the best position to determine Employee's contributions, accomplishments and performance. This Office will not substitute its judgment for that of management in rating an employee's performance.

***Relevant supplemental professional experiences as demonstrated on the job***

This category accounts for 10% of the CLDF. Employee received zero (0) points in this area and has not provided any documentation to supplement additional points being awarded in this area.

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

Employee received eight (8) points in the length of service category. She does not contest the points awarded and therefore, I find that Agency properly calculated this number.

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 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.”<sup>16</sup> According to the CLDF, Employee received a total score of 11.5 after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of 60. Employee has not proffered any evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.<sup>17</sup>

Accordingly, I find that the principal of Cardozo Senior High School had discretion in completing Employee’s CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. I therefore find that Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

### **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. (Emphasis added)

Here, Employee received her RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee’s position is being abolished as a result of a RIF. The Notice also provides Employee with information about her appeal rights. Employee does not dispute that she got the required thirty (30) days written notice prior to the effective date of the RIF. I therefore find that she received proper notice.

Lastly, Employee complains that she did not receive priority consideration for re-employment after her RIF. This complaint is a grievance over which this Office does not have jurisdiction.

This Office has consistently held that OEA lacks jurisdiction to consider those matters.<sup>18</sup> OEA’s authority was established by D.C. Official Code §1-606.03(a). It provides that:

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<sup>16</sup>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).

<sup>17</sup> 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.)

<sup>18</sup> *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03, Opinion and Order on Petition for Review (January 25, 2006), \_\_\_ D.C. Reg. \_\_\_; *Lillian Randolph v. District of Columbia. Water and Sewer Authority*, OEA Matter No. 2401-0085-02, Opinion and Order on Petition for Review (July 16, 2006), \_\_\_ D.C. Reg. \_\_\_; and *Mark James v. Office of the Chief Technology Officer*, OEA Matter No. J-0003-08, Opinion and Order on Petition for Review (November 23, 2009), \_\_\_ D.C. Reg. \_\_\_\_.

“[a]n employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.”

Therefore, OEA can only consider adverse actions that result in removal, reductions-in- grade, suspensions of 10 days or more, or reductions-in-force.

Moreover, District Personnel Regulations and OEA Rules sections 604.1 and 604.3 provide the following regarding OEA’s jurisdiction:

**604.1**

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-601.1 et seq. or Rule 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more; or
- (c) A reduction-in-force.

**604.3**

The Office shall exercise jurisdiction over appeals filed with the Office before October 21, 1998 by an employee appealing a final agency decision that:

- (a) Denies his or her appeal of a performance evaluation;
- (b) Effects an adverse action against him or her;
- (c) Releases him or her through reduction-in-force procedures;
- (d) Resolves a grievance;
- (e) Refuses to grant a waiver of the District's claim for an erroneous overpayment to an employee;
- (f) Denies his or her appeal regarding records management and privacy of records; or
- (g) Denies his or her classification appeal.

OEA's jurisdiction changed on October 21, 1998. According to OEA Rule 604.3, the agency only had jurisdiction over grievances if the appeal was filed with the Office *before* October 21, 1998. Employee's Petition for Appeal was filed in June of 2009, nearly 11 years after the deadline. Employee improperly asserts that the CMPA of 1978 provided that OEA has jurisdiction over grievance matters. As a result of the above-mentioned rules and regulations, Employee's argument must fail.

Employee's grievance clearly falls outside the scope of this Office's jurisdiction. Because this Office does not have jurisdiction over the Employee's grievance, we cannot consider the merits of this claim.

## **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. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in her removal is upheld.

## **ORDER**

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

FOR THE OFFICE:

Joseph E. Lim, Esq.  
Senior Administrative Judge