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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0215-12
ENNICE DAVIS,)	
Employee)	
)	Date of Issuance: April 29, 2014
v.)	
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Brenda Zwack, Esq., Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 21, 2012, Ennice Davis (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“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”). Employee’s position of record at the time she was terminated was an Administrative Aide at Marshall Elementary School. The effective date of Employee’s termination was August 10, 2012.

I was assigned this matter in November of 2013. On November 25, 2013, I issued an Order scheduling a Prehearing/Status Conference for the purpose of assessing the parties’ arguments. During the conference, it was determined that there were no material issues of fact that would warrant an evidentiary hearing. I subsequently ordered the parties to submit written briefs addressing whether the RIF should be upheld. Both parties submitted responses 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.

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.

Employee's Position

Employee argues the following as grounds for reversing her termination under the RIF:

1. Agency failed to produce evidence to support a finding that a RIF actually occurred at Marshall Elementary school.
2. Agency did not resolve its alleged budgetary deficit because Employee's position was fully funded by the budget, and another employee assumed the same position after Employee was RIF'd.
3. Agency's legal brief was filed in an untimely manner, and Employee was not properly served.¹

Agency's Position

Agency argues that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency states that because Employee was in a single-person competitive level, she was not entitled to one round of lateral competition. Agency also contends that Employee received thirty (30) days written notice prior to the effective date of her termination.

¹ Agency's brief was filed three (3) days after the January 23, 2014, due date. While the Undersigned takes note of Agency's late filing, I find this error to be harmless, and a Cause Order was not issued.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On March 26, 2012, DCPS Chancellor, Kaya Henderson authorized a Reduction-in-Force (“RIF”) pursuant to D.C. Code § 1-624.02, 5-E DCMR Chapter 15, and Mayor’s Order 2007-186 (August 10, 2007). Chancellor Henderson stated that the RIF was necessary for budgetary reasons, explaining that the 2013 DCPS fiscal year budget was not sufficient to support the current number of school-based positions.²

Because this issue has arisen in other related matters with respect to the applicable RIF procedures that can be found within multiple sections of the D.C. Official Code, the Undersigned will address why D.C. Official Code § 1-624.02, which encompasses more extensive RIF procedures, is inapplicable to the instant matter. Moreover, 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 the following:

(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

² See *Agency’s Answer*, Tab 1 (September 28, 2012). The RIF authorization was subsequently amended on June 14, 2012.

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*, the District of Columbia Public Schools (“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 further 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

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

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.

⁹ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹⁰ *Id.*

¹¹ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

guided by § 1-624.08 for RIFs authorized due to budgetary restrictions.¹² Under this section, an employee whose position was terminated may only contest before this Office:

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

Lateral Competition

Chapter 24 of the D.C. Personnel Manual (“DPM”) contains the regulations that govern RIFs.¹³ Section 2409.1 provides that each agency shall constitute a single competitive area; however, § 2409.2 allows agencies to establish lesser competitive areas within an agency for the purpose of conducting a RIF. Section 2410.4 of the DPM further provides the following:

A competitive level shall consist of all positions in the competitive area identified pursuant to section 2409 of this chapter 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. (Emphasis added).

Moreover, Section 2412.1 of the DPM requires that Agency create a Retention Register whenever a competing employee is to be released from his or her competitive level. A separate Retention Register is required to be prepared for each competitive level in the competitive area. Contrary to Employee’s contention that a RIF did not actually occur, Mayor’s Order 2007-186 *supra* authorized a RIF to be conducted at Marshall Elementary School.¹⁴

In this case, the competitive area in which Employee competed was Marshall Elementary School, and the competitive level in which Employee competed was the position of Administrative Aide. Regarding the lateral competition requirement, this Office has consistently held that when an employee holds the only position in his or her competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, is inapplicable.

¹² See *Gill v. Office of Employee Appeals*, No. 2012 CA 5844 (D.C. Super. Ct. October 23, 2013) (affirming OEA’s finding that the record contained substantial evidence that § 1-624.08, and not § 1-624.02, was the applicable statute governing the RIF); See also *Johnson v. District of Columbia Department of Health*, No. 2012 CA 0278 (D.C. Super. Ct. June 24, 2013).

¹³ D.C. Reg. 2430 (2000). See also *Rogers v. District of Columbia Public Schools*, No. 2012 CA 6364 (D.C. Super. Court December 9, 2013), stating that “since the court has determined, just as it was determined by the Court of Appeals and OEA before it, that the Abolishment Act applies to this RIF since it was conducted for budgetary reasons, the grading criteria of [DPM] Chapter 24 should have been applied in this case.”

¹⁴ The RIF identified each school as a separate competitive level.

An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.¹⁵

According to Agency, Employee was the sole Administrative Aide at Marshall Elementary School. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and 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

D.C. Official Code § 1-624.08(e) states that "each employee selected for separation...shall be given written notice of at least 30 days before the effective date of his or her separation. Here, Employee received her RIF notice on June 18, 2012, and the effective date of that RIF August 10, 2012. The notice stated that Employee's position was being abolished as a result of a RIF. The notice further provided Employee with information regarding the right to appeal her termination. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Budgetary Crisis

In *Anjuwan v. D.C. Department of Public Works*,¹⁶ the D.C. Court of Appeals held that OEA lacked the authority to determine whether an agency's RIF was bona fide. The Court stated that, as long as a RIF is justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF.¹⁷ The Court in *Anjuwan* also noted that OEA does not have the "authority to second-guess the mayor's decision about the shortage of funds...about which positions should be abolished in implementing the RIF."

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee's claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds for personnel services. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.¹⁸

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 her removal, is upheld.

¹⁵ See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness 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).

¹⁶ 729 A.2d 883 (D.C. 1998).

¹⁷ See *Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

¹⁸ *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

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