THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
OTIS J. REYNOLDS	)	**OEA Matter No. 2401-0192-04**
Employee	)	
	)	**Date of Issuance: October 5, 2005**
v.	)	
	)	**Rohulamin Quander, Esq.**
DISTRICT OF COLUMBIA	)	**Senior Administrative Judge**
PUBLIC SCHOOLS	)	
Agency	)	

Mattie P. Johnson, Esq., Employee Representative
Sara Moskowitz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On July 30, 2004, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (the "Office"), challenging the components of the reduction in force (the "RIF") that resulted in his termination as an ET 15 Teacher in the District of Columbia Public Schools (the "Agency"). Agency issued a letter of separation to Employee, dated May 27, 2004, effective June 30, 2004. Employee argued that prior to the implementation of the RIF, the Agency violated its own regulations when it failed to first place him into the proper competitive area and competitive level, and that had Agency done so, Employee, when competitively assessed with the other persons who were on the retention register, would most likely not have been RIFed.

On December 23, 2004, Agency was served a copy of the Petition for Appeal, and on January 28, 2004, filed *Agency's Response to Employee's Petition of [sic] Appeal* (the "Response"). Agency asserted that at the time that the RIF was implemented, Employee was in a single person competitive level. As such, under the governing regulations, he was not eligible to compete against any other employees at the work site. Agency asked that the Petition for Appeal be dismissed, noting that this Office has long held that where an employee is in a single person competitive level, and the entire category/position is

being abolished incidental to the RIF, there is no need for one round of lateral competition.

On March 22, 2005, Employee, through counsel, responded to Agency's Response, by underscoring that: a) According to the only Form 1s which Agency could produce, Employee was always licensed and credentialed as an English Teacher; b) Although Employee was qualified to teach reading and was assigned to teach reading, in addition to his English classes, "Reading Teacher" was never his Competitive Level or Competitive Area[1]; and c) Agency erred when it failed to place Employee on the English Teacher retention register at the time of the RIF, where he could have competed for retention with the other English teachers on staff, and had Agency done so, Employee would most likely have survived the RIF, given his length of service and other relevant evaluative factors.

The matter was assigned to this administrative Judge (the "AJ") on June 2, 2005. On that same date I issued an Order convening a Status Conference and oral argument, and convened the conference on July 13, 2005. At that time the parties presented their widely differing positions with regard to what rights, if any, the Employee had in May 2004, at the time that the RIF process was being implemented. At the request of the AJ, Agency provided Employee's expansive personnel file to the Office, to be included as a part of the record upon which this Initial Decision is based. Upon receipt of that personnel file on July 26, 2005, the record was closed.

JURISDICTION

The Office has jurisdiction over Employee's appeal pursuant to D.C. Official Code § 1-606.03(a) (2001).

ISSUE

Whether the Agency has established by a preponderance of the evidence presented that Employee was a Reading Teacher in a single person competitive level at the time that the position was abolished.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Effective July 1, 1986, Employee was temporarily hired by Agency as an English Teacher. After completion of a teaching contract, he was converted to probationary status, and later converted again to permanent status. (Employee Exhibit. #1 – initial form 1) Over the course of approximately 18 years, his personnel file contains at least 10 to 12

[1] The AJ takes administrative notice that, excluding certain exceptions which are not relevant in this matter, pursuant to D.C. Code § 1-624.08(f), the Office has no jurisdiction to entertain a Petition for Appeal challenging the establishment of a competitive area smaller than an agency. Therefore, although both Agency and Employee generously use the term "Competitive Area", as enumerated in 5 DCMR 1501 *et seq.*, in addition to the term "Competitive Level", as enumerated at 5 DCMR 1502, *et seq.*, the Office's jurisdiction in this respect is limited to addressing the issue of evaluating the correct competitive level, only.

other Form 1s, such indicating that the location of his teaching assignment had changed, reflecting that he was hired to teach English during summer school programs, or that there had been a change in his level of compensation. However, all of the Form 1s presented for this AJ's review list essentially the same job title, i.e., "Teacher English", "English Teacher", or "Teacher Summer School".

Despite Agency's apparent best efforts to locate and provide any Form 1s issued later than August 27, 1998, no Form 1s were provided for the AJ's consideration which were dated more recently than that date. The August 27, 1998, Form 1, issued to reflect a reassignment in teaching site, recites Employee's initial position as "Teacher English". During the Status Conference, Employee asserted that he had been teaching both English and Reading at Spingarn Senior High School for several years, but that he had never been provided any Form 1 which reflected that he was serving in any capacity, other than as an English Teacher, an assertion which he initially raised in his executed Petition for Appeal. The document packet Agency submitted on July 25, 2005, contains a letter to the Employee from Patricia Watkins Lattimore, Director of Human Resources, dated June 26, 2001, advising the Employee as follows:

> Due to the necessity to equalize the assignment of staff across the school district as a result of the student enrollment, you have been reassigned to Spingarn Senior High School in the position of Reading Teacher for the 2001-2002 school year. You are to report to Spingarn Senior High School on August 29, 2001.

Employee underscored that, other than this letter of reassignment whereby he was told that he would be teaching Reading for the 2001-2002 school year, there is nothing further to indicate that his official position with the Agency had been formally changed from English Teacher to Reading Teacher. He admits that in subsequent academic years, 2002-2003, and again in 2003-2004, and at the express direction of the principal, he continued to teach both English and Reading classes at Spingarn, and that he was the only person at Spingarn who was assigned to teach reading.

Acknowledging that his most recent performance evaluation referred to him as "Teacher Special Education", he demurred to that title as having any official basis in fact. He contradicted that title, by noting that in his last year before being RIFed, the true academic capacity in which he was serving, and not an incorrectly ascribed job title, should be the judge, noting that he was teaching six classes at Spingarn, four in English and two in reading. Two of the four English classes were Advanced Placement, one each in grammar and literature, offered to 11th and 12th graders. The other two English classes were offered to 9th graders. In the first semester he taught Developmental Reading I, and in the second semester he taught Developmental Reading II. Additionally, because of his experience, coupled with being the only teacher at Spingarn who was certified to teach Advanced Placement classes in English, he thought that it was "strange" that the school would elect to RIF him out, which was contrary to the critical need for someone with his credentials and recognized academic capacities.

Employee concluded with the argument that since his true job position and title was "English Teacher", Agency erred at the time that the RIF was being structured, when it denied him procedural due process rights under his collective bargaining agreement, in violation of D.C. Code § 1-624.08(d), and refused to allow him to compete with the school's four other English teachers for the three teaching positions designated for retention, pursuant to 5 DCMR § 1503.2. As such, he was denied an opportunity to receive one round of lateral competition consistent with D.C. law

The AJ notes that when a RIF is about to be implemented, the Agency completes a Competitive Level Documentation Form (the "CLDF") for each employee who might be subjected to the RIF, to assist the Agency's staff to objectively evaluate the credentials of all persons within a certain competitive level. Pursuant to 5 DCMR § 1503.2, when a decision must be made about imposing a RIF between employees in the same competitive area and competitive level, several factors must be considered in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with each employee, and shall be considered in determining which position shall be abolished. These factors include:

a) Significant relevant contributions, accomplishment, or performance;
b) Relevant supplemental professional experiences as demonstrated on the job;
c) Office or schools needs, including: curriculum specialized education, degrees, license or area of expertise; and
d) Length of service.

Conversely, Agency argues that "incumbency" is the litmus test for determining the correct job title for the Employee, and upon which the determination of whether he was in the correct position, i.e., a single member competitive level at the time of the implementation of the RIF. Citing the meaning of an "Encumbered Position", as stated at 5 DCMR § 1500.4(e), Agency notes that it is a position which is presently filled by an employee performing an assigned function. Agency concluded that, regardless of any prior position that Employee officially held during his long tenure within the Agency, at the time that the position in question was chosen for abolishment and the RIF was implemented, the Employee herein was serving as the incumbent Reading Teacher, according to Spingarn High School.

Agency also argued that, pursuant to 5 DCMR § 1501.1, employees in one competitive area shall not compete with employees in another competitive area. Therefore, Employee, who was a Reading Teacher at Spingarn, was specifically prohibited from competing with the English teachers at Spingarn, as the competitive areas were different. As well, this is the basis for why Employee was not considered for hire to fill an English teacher vacancy at Spingarn, which arose around the same time that he was RIFed.

Agency also relied upon the long standing position taken by this Office in situations where an employee is in a single person competitive level, and there is no one competing with that employee for retention at the time that the position in question is

being abolished. In those cases, the Office has ruled that, despite the statutory provision of Code § 1-624.08(e), according an employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, the Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing that employee's position. See *Lorena Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), __ D.C. Reg. __; *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003), __ D.C. Reg. __; *Deborah J. Bryant v. D.C. Department of Corrections,* OEA Matter No. 2401-0086-01 (July 14, 2003), __ D.C. Reg. __; and *R. James Fagelson v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0137-99 (December 3, 2001), __ D.C. Reg. __.

The problem with the above asserted position, however, is that Agency has not established, by a preponderance of the evidence presented, that Employee was in fact in a single person competitive level position. Accorded the opportunity to provide a Form 1 or other additional documentation reflecting personnel action formally appointing Employee to the sole Reading Teacher position, Agency never presented any currently dated documentation to buttress its initial position. In the absence of such documentation to the contrary, I find that Employee was appointed as an English Teacher on or about July 1, 1986, and that for the following 18 years, until June 30, 2004, he continued to serve in that capacity.

Further, although Employee was assigned to teach English at different schools during his career, all of the many Form 1s submitted as a part of Agency's supplemental filing of July 25, 2005, likewise reflect that Employee's job title never changed, despite his having been specifically assigned to also teach reading for academic year 2001-2002. Although there is no documentation to affirm that he was to also continue serving as a Reading Teacher at Spingarn, beyond academic year 2001-2002, he was reaffirmed by his principal or other school administrator(s) to continue teaching reading for academic years 2002-2003 and 2003-2004.

The issue of what is an employee's competitive level has been raised on a number of prior occasions, and likewise resolved. Both District of Columbia and federal case law have consistently defined "competitive level" as the official position of record. In *District of Columbia v. King,* 766 A.2d 38 (D.C. 2001), the D.C. government argued, and the Court of Appeals agreed, that a District employee's competitive level must be based on his or her official position of record, and the fact that the employee may have been detailed to a different position at the time of his or her RIF does not change the fact that the establishment of the employee's competitive level is based on the official position description. Likewise, in *Estrin v. Social Security Administration,* 24 M.S.P.R. 303, 305 (1984), it was held that when an employee is detailed to or acting in a position, his competitive level is determined by his permanent position, and not the one to which he is detailed or in which he is acting. See also *Bjerke v. Department of Education*, 25 M.S.P.R. 310 (1984) and *Levitt v. District of Columbia*, 869 A.2d 364 (D.C 2005).

Having considered this matter, both based upon the oral arguments posed and the

documents submitted, I conclude that there is nothing in the record to indicate that Employee was serving the Agency in any capacity, other than as an English Teacher, and had been consistently serving in that position since 1986. As such, Agency's assertion that he was serving as a Reading Teacher, but not buttressed by a Form 1 or other documentation to support the assertions, is totally without merit.

Being a properly credentialed English Teacher, I conclude that at the time that the RIF was implemented, on or about May 27, 2004, effective June 30, 2004, Agency universally violated the RIF regulations as enumerated in 5 DCMR § 1500, *et seq.* Employee was entitled to one round of lateral competition in his competitive area and at his competitive level, to determine if he would be retained as an English Teacher. Having been denied such, Agency erred when it RIFed the Employee, based upon an incorrect claim that he was the sole incumbent in a single person competitive area, Reading Teacher, not entitled to compete for retention against the school's teachers of English.

ORDER

The foregoing having been considered, Agency is hereby,

ORDERED, to vacate the reduction in force imposed upon the Employee, effective June 30, 2004, and to reinstate him, forthwith, to an ET 15 English Teacher position; and it is

FURTHER ORDERED that Agency restore all of Employee's ET-15 teacher benefits, including, but not limited to back pay, retirement, and all other relevant benefits, retroactive to June 30, 2004; and it is

FURTHER ORDERED that Agency file with this Office, within thirty (30) days from the date on which this decision becomes final, documents showing compliance with the terms of this Order; and it is

FURTHER ORDERED that Agency's Motion to Dismiss is DENIED.

FOR THE OFFICE:

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge