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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0205-10
CALVIN ROSS,)	
Employee)	
)	Date of Issuance: April 23, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Monica Dohnji, Esq.
_____)	Administrative Judge
Calvin Ross, Employee <i>Pro Se</i>		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Calvin Ross (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of abolishing his position through a Reduction-in-Force (“RIF”). Employee received his RIF notice on October 2, 2009. The effective date of the RIF was November 2, 2009. Employee’s position of record at the time his position was abolished was a Special Education Teacher at Eastern Senior High School (“Eastern”). Employee was serving in Educational Service status at the time his position was abolished.

I was assigned this matter on February 6, 2012. On February 10, 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. Agency complied, but Employee did not. Subsequently, on March 27, 2012, I issued an Order for Statement of Good Cause to Employee. Employee was ordered to submit a statement of good cause based on his failure to provide a response to my February 10, 2012, Order. Employee had until April 10, 2012, to respond. As of the date of this decision, Employee has not responded to this Order. 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.

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.¹

In his petition for appeal, Employee submits that Agency failed to follow appropriate RIF procedures as required by D.C. Code § 1-624.08.² 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. 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:

¹ See *Agency's Answer*, Tab 1 (December 31, 2009); *Agency's Brief* (March 5, 2012).

² *Petition for Appeal* (December 1, 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;
 - (4) Consideration of job sharing and reduced hours; and
 - (5) Employee appeal rights.

(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

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.”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

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.

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

⁷ *Id.*

⁸ *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.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 due to a RIF may only contest before this Office:

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

In this matter, Employee states that he “was placed on Administrative leave...I think my being Rified was based on information from my 2008-2009 school year not 2009-2010 school year. I think my supervisor used the fact I was very active in the union (WTU) as a reason to RIF me...”¹³ Employee further contends that the RIF was illegal and the financial crisis was a pretext to terminate him.¹⁴ Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency explains that each school was identified as a separate competitive area, and each position title a separate competitive level. Eastern Senior High School was determined to be a competitive area, and the Special Education Teacher position a competitive level. Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date.

Here, Eastern was identified as a competitive area, and Special Education Teacher on the ET-15 pay plan was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were nine (9) Special Education Teachers subject to the RIF. Of the nine (9) Special Education Teacher positions, two (2) positions were identified to be abolished.

⁹ *Id.* at 1125.

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

¹¹ *Id.*

¹² *See Mezile v. D.C. Department on Disability Services, Supra.*

¹³ *Petition for appeal* at p.2 #17.

¹⁴ *Id.* at p. 3.

Employee was not the only (Special Education Teacher) within his competitive level and was, therefore, required to compete with other employees 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%)¹⁵

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 Eastern 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”).

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).

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 zero (0) points out of a possible ten (10) points in this category; a score much lower than other employees within his competitive level. Employee has failed to provide credible evidence that would bolster a score in this area, such as proof of degrees obtained pertinent to his work, licenses or other specialized education. Moreover, it is within the Principal of Eastern Senior High School's managerial expertise to assign numeric values to this factor.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. This category includes factors such as student outcomes, rating, awards, attendance etc. Employee has not provided any evidence to indicate his contribution to the student body. Moreover, the principal has discretion to award points in this area giving his independent knowledge of the employees and student body.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee did not provide any documentation to supplement additional points being awarded in this area.

Length of service

This category accounts for 5%. It 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.

Here, Employee was employed with Agency for a total of ten (10) years. He received a total of ten (10) points for years of services. He received zero (0) points for D.C. residency and Veterans preference. Because Employee did not received an ‘exceeds expectations’ for the 2008/2009 school year, he was not entitled to the extra four (4) years of service. Employee received a total weighted score of three (3) points in this category. He does not contest the calculation of the points awarded. Therefore, I find that Agency properly calculated this number.

Employee received a total of three (3) points on his CLDF, and was, therefore, ranked the lowest in his respective competitive level. 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.”¹⁶ According to the Retention Register, Employee received a total score of three (3) after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of one and a half (1.5), and also separated pursuant to the RIF. The colleague with the lowest score who was retained received a total score of twenty-seven (27) points. Employee has not proffered any evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this case.¹⁷

Accordingly, I find that the Principal of Eastern had discretion in completing Employee’s CLDF, as they were 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.

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 his 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 provided Employee with information about his 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.

Employee also argues that he was placed on administrative leave prior to the RIF effective date, and that the RIF was illegal as the financial crisis was a pretext to terminate him. In *Anjuwan v. D.C. Department of Public Works*,¹⁸ the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency’s RIF was bona fide. The Court explained 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.¹⁹ 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 claim regarding how an agency elects to use its monetary resources for personnel services. Additionally, Pursuant to District Personnel Manual (“DPM”) § 2422.11, an employee who receives written notice of release from his or her competitive level due to reduction in force may be placed on administrative

¹⁶See 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).

¹⁷ 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).

¹⁸ 729 A.2d 883 (D.C. 1998).

¹⁹ See *Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

leave at the discretion of the agency head (or his or her designee). Therefore, Agency was justified in placing Employee on Administrative prior to the effective date of the RIF.

In addition, OEA Rule 621.1 grants an AJ the authority to impose sanctions upon the parties as necessary to serve the ends of justice.²⁰ The AJ “in the exercise of sound discretion may dismiss the action or rule for the appellant” if a party fails to take reasonable steps to prosecute or defend an appeal.²¹ This Office has held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.²² Here, Employee was warned in the February 10, 2012, and March 27, 2012, Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to either Order. Both were required for a proper resolution of this matter on its merits. I conclude that, Employee’s failure to prosecute his appeal is consistent with the language of OEA Rule 621. Employee violated this rule when he did not submit a required document after receiving notice in both the February 10, 2012, and March 27, 2012, Orders. Employee was notified of the possible repercussions of failing to submit the required documents. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office, and this represents another reason why Agency’s action should be upheld.

CONCLUSION

Based on the foregoing, I find that Employee’s position was abolished after he 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 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:

MONICA DOHNJI, ESQ.
ADMINISTRATIVE JUDGE

²⁰ OEA Rule 621.1, 59 DCR 2129 (March 16, 2012).

²¹ *Id.* at 621.3.

²² *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).