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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0174-10
MARLA ZONGKER,)	
Employee)	
)	Date of Issuance: May 25, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Kristin Dobbs, Esq., Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 28, 2009, Marla Zongker (“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 an ET-15 Elementary Teacher at Lafayette Elementary School (“Lafayette”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter in February of 2012. On February 6, 2012, I issued an Order requiring the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. Both parties submitted 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.

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

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.

¹ See *Agency's Answer*, Tab 1 (December 30, 2009).

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.

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 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*, 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, which was conducted for budgetary reasons, triggered the Abolishment

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).

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

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. Under this section, an employee whose position was terminated may only contest before this Office:

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

Employee asserts the following as grounds for reversing her termination:

- a. Agency failed to follow the proper RIF procedures because Employee was not properly afforded one round of lateral competition.
- b. Agency failed to consider Employee’s advanced degrees, continuing graduate-level courses, as well as the implementation of literacy programs and other contributions to the student body at Lafayette.
- c. Agency failed to properly consider Employee for priority reemployment after she was terminated under the RIF.¹²

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.)

¹² *Employee Brief* (March 20, 2012).

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency contends that it provided Employee with one round of lateral competition, which resulted in her being the lowest rated employee in her competitive level. Agency further contends that it properly afforded Employee thirty (30) days written notice prior to the effective date of her termination.

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS Schools 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.¹³

Here, Lafayette Elementary School was identified as a competitive area and ET-15 Elementary Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were twenty-four (24) Elementary Teacher positions at Lafayette and one (1) position was identified to be abolished under the RIF. Because Employee was not the only person within her competitive level, she was required to compete in a 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;

¹³ *Agency Brief* (March 13, 2012).

- (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%)¹⁴

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. 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 Lafayette was given discretion to assign numerical values to the first three factors listed in Title 5, DCMR § 1503.2, *supra*, as they deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

¹⁴ 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).

Employee received a total of two and a half (2.5) points on her CLDF and was therefore ranked the lowest in her competitive level. Employee's CLDF stated in pertinent part the following:

“Ms. Zongker demonstrates almost no ability to implement a standards based reading program. She was assigned to assess first grade students reading levels this fall and violated the testing protocol by sharing the testing lists with parents. She has been unable to learn how to assess students using a computer-assisted program even after several training sessions with other reading specialists. She shares testing information with parents in an inappropriate manner referring by to grade levels...[she] has not demonstrated any interest in planning with grade level teams. She is absent or very late to meetings, often needing reminders to get to them. She often walks into classrooms, interrupting instruction asking for particular children to come to her. She developed a reading schedule that does not take into account other instructional areas so that students who follow the schedule may miss math instruction. She has not used the school master schedule in any capacity in developing the schedule she wants to follow. Ms. Zongker's entire reading program seems to be based on her personal pet projects....She has produced a year-long plan that lists projects that do not align with first grade work. She does not seem to have a reading program that involves any scope or sequence. Ms. Zongker is also inappropriate in her behavior with students. She growls at the students, often scaring them. Her explanation is that she is just acting like a mother bear and that is how a mother bear responds to cubs. She makes racially and culturally insensitive comments often referring to ‘those’ students as being difficult to teach.”¹⁵

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 and contends that her CLDF did not account for her Masters degree in Elementary Education as well as other graduate-level courses she has taken in literacy. However, Employee has not provided any *credible* evidence that provides a basis for bolstering her score in this area. It was within the principal's discretion to assign a numerical value in this category and I find no reason to substitute my judgment for that of the principal.

¹⁵ *Agency Brief*, Exhibit B (February 28, 2012).

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF and includes factors such as student outcomes, ratings, awards, and attendance. Employee received zero (0) points in this area. In her brief, Employee highlights her various literacy initiatives during her tenure with Agency, but has failed to expound upon how such activities have been significant, therefore indicating that additional points should be awarded in this category.¹⁶ Moreover, Employee's literacy program was acknowledged in her CLDF, but it was noted as lacking "scope and sequence" and did not "align with first grade work."¹⁷ In this instance, I will not substitute my judgment for that of the principal of Lafayette, as he or she was in the best position to observe and evaluate both Employee and her colleagues.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received a total of zero (0) points and has not provided any *credible* documentation to supplement additional points being awarded here.

Length of service

This category accounts for 5% of the CLDF and was calculated by the Department of Human Resources 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 has a Service Computation Date ("SCD") of 2001, which equates to eight (8) years of experience on her CLDF, and a weighted score of two and a half (2.5) points. She did not receive points for D.C. residency, Veterans preference, or the ratings add for an "Exceeds Expectations" evaluation during the prior school year. Employee has not disputed Agency's calculation of this category.

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

¹⁶ *Employee Brief* at 7 (March 20, 2012).

¹⁷ *See Agency Brief*, Exhibit B (February 28, 2012).

nature.”¹⁸ According to the CLDF, Employee received a total score of two and a half (2.5) points after all of the factors outlined above were tallied and scored.¹⁹ The next lowest ranked Elementary Teacher in Employee’s competitive level received a total of sixty (60) points on their CLDF, a score much higher than Employee’s. Again, Employee has not proffered any evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome.²⁰

Accordingly, I find that the Principal of Lafayette had discretion in completing Employee’s CLDF, as he or 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 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* (emphasis added) give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Employee received her RIF notice on October 2, 2009 and the RIF effective date was November 2, 2009. The notice stated that Employee’s position was being abolished as a result of a RIF. The notice further provided Employee with information regarding her right to appeal the termination. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Regarding Employee’s argument that she was not properly granted priority reemployment rights, the Undersigned finds that D.C. Official Code § 1-624.08, and not § 1-624.02,²¹ is the more applicable statute to govern the instant RIF, as discussed *infra*. D.C. Code § 1-624.08 limits my review of this appeal to determining the following issues: 1) whether Employee was afforded one round of lateral competition within her competitive level; and 2) whether Employee received written notice thirty (30) days prior to the effective date of the RIF. It should be noted that Agency’s authorization of the instant RIF pursuant to D.C. Official Code § 1-624.02 includes affording priority reemployment rights to employees affected under the RIF. Assuming *arguendo* that § 1-624.02 was the applicable statute in this case; there is no evidence

¹⁸See 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.)

¹⁹ The Undersigned AJ has re-calculated Employee’s CLDF to account for additional points being awarded for the “Years of Service” category.

²⁰ 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.)

²¹ D.C. Official Code § 1-624.02 (2001) requires that reduction-in-force procedures include priority reemployment consideration for employees identified to be separated.

in the record to suggest that Employee was not given priority reemployment consideration if and when she applied for new positions with Agency.²²

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.

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

²² Employee argues that she applied for jobs with Agency, but was not hired subsequent to the RIF.