THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0137-10
REGINA SNEAD,	)	
Employee	)	
	)	Date of Issuance: June 7, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge

Regina Snead, Employee *pro se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 5, 2009, Regina Snead ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public School's ("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 Psychologist at Nalle Elementary School. Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 6, 2012. On February 8, 2012, and again 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 since she is qualified both as a school psychologist as well as a teacher, Agency should have hired her as a teacher once her position as a psychologist was abolished due to the RIF.[1] According to Employee, Agency should have included teachers in her one round of lateral competition since she was also qualified as a teacher due to her work experience and education.

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 in her position of record and thirty (30) days written notice prior to the effective date of her termination.

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[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:

> (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).

[1] Employee Brief (March 13, 2012).
[2] *See Agency's Answer*, Tab 1 (December 14, 2009).
[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.

> (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.
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> (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*, the District of Columbia Public Schools ("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]

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,

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[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.*
[9] *Id*. at 1125.

"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 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.

Regarding the lateral competition requirement, this Office has consistently held that, when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[13]

According to the Retention Register produced by Agency, Employee was the sole Psychologist at Nalle 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.

As for Employee's main argument that since she is qualified as both a psychologist and a teacher and thus should have competed with teachers in a RIF, 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

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[10] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[11] *Id.*
[12] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[13] 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).

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).

Here, it is undisputed that Employee's position of record has been that of a psychologist and not that of a teacher. Having considered this matter, both based upon the 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 a psychologist, and had been consistently serving in that position for the past eight years. Thus, there is no merit to her contention that she should be allowed to compete with teachers as well as a psychologist.

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* (emphasis added) for separation pursuant to a RIF.

Here, Employee received their 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. Here, Employee does not dispute that she was given the required thirty (30) days written notice prior to the effective date of the RIF. I therefore find that the notice requirement has been satisfied.

Lastly, Employee requests that I order Agency to provide to her her entire personnel file. On my request, Agency certified that it has mailed another copy to Employee on June 5, 2012.

CONCLUSION

Based on the foregoing, I find that Employee's position was properly abolished and that a timely thirty (30) day legal notification was properly served. I, therefore, 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:

Joseph Lim, Esq.
Senior Administrative Judge