THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WILLIAM STRICKLAND,	)	
Employee	)	OEA Matter No. 2401-0163-13
	)	
v.	)	Date of Issuance: October 8, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

William Strickland, *Employee Pro Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 13, 2013, William Strickland, ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Public Schools' ("Agency" or "DCPS") action of abolishing his position through a Reduction-in-Force ("RIF"). The effective date of the RIF was August 16, 2013. Employee was a Business Manager at Moten Elementary School ("Moten"). On October 16, 2013, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on May 14, 2014. Thereafter, on May 16, 2014, 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's brief was due on or before June 6, 2014, and Employee's brief was due on or before June 26, 2014. While Agency timely submitted its brief, Employee failed to comply with the May 16, 2014 Order. On July 2, 2014, the undersigned AJ issued an Order for Statement of Good Cause to Employee wherein, Employee was required to submit his brief, along with a statement of good cause for his failure to comply with the May 16, 2014, Order. On July 14, 2014, Employee filed a response to the Statement for Good Cause Order noting that he did not receive the May 16, 2014, Order. On July 16, 2014, the undersigned issued an Order requiring Employee to submit his brief no later than August 4, 2014. Employee has submitted his brief.

After considering the arguments herein, I have determined that an evidentiary hearing is unwarranted. 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.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On or around May of 2013, D.C. School Chancellor Kaya Henderson authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, and Title 5 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 15. Chancellor Henderson stated that the RIF was necessitated for budgetary reasons and a reorganization of functions.[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.

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).
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> (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

[1] *See Agency's Answer* (October 13, 2013); *Agency's Brief* (June 6, 2014).

[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.

> 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*, 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 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

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[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. *See also Johnson v. District of Columbia Department of Health*, 2012 CA 000278 P (MPA).

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.[12] 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 his separation from service; and/or

2. That he was not afforded one round of lateral competition within his competitive level.

Employee's Position

In his submissions to this Office, Employee argues that his position was not abolished. Employee maintains that he was separated not for lack of work, but because the Principal wanted to hire her friend from another school. Employee explains that the position was replaced with a new position – Administrative Officer, and this position performed the exact same duties that Employee performed, but at a higher salary, which is in conflict with reducing the budget. Employee maintains that it was not financially necessary for budgetary reasons, for Agency to decrease the volume of the staff at Moten and to replace his position – Business Manager, with an Administrative Officer, at a higher salary. According to Employee, the Administrative Officer position at Moten was eliminated in school year 2014-2015, and the Business Manager position restored. Employee also notes that he met the education requirements for the new position and he, and a pre-selected candidate (Principal's friend) were interviewed for the new position. Employee states that although the Principal was not part of the interview panel, the Principal selected her friend for the position. According to Employee, the Principal stated to him that "she had the final word" as to who got the position. Further, Employee notes that he notified the Principal a few months before the RIF that he was receiving weekly therapy for depression and the Principal's demeanor changed towards Employee. Employee also states that, he was given more responsibilities that were outside of his job duties and he performed them to the best of his abilities without professional feedback.

Employee acknowledges that he was the sole Business Manager at Moten and that he was in a single-person competitive level. Employee also does not argue that he did not receive thirty

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[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *See Mezile v. D.C. Department on Disability Services*, *Supra*.
[12] In *Webster Rogers v. DCPS*, No. 2012 CA006364 (D.C. Super. Ct. December 9, 2013), the D.C. Superior Court stated that D.C. Code §1-624.08 is the correct statute for RIFs conducted due to budgetary constraints and Chapter 24 of the District Personnel Manual ("DPM") is the applicable criteria to be used as opposed to Title 5 DCMR Chapter 15.

(30) days written notice prior to the effective date of the RIF. Employee also highlights that when he got his RIF Notice, he asked the Principal if she would give him a favorable recommendation and the Principal responded that "it depends on the position that I was applying for."[13]

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. Agency notes that the Chancellor of DCPS authorized the RIF, and defined the competitive areas and competitive level for the RIF. Agency explains that each school was identified as a separate competitive area, and each position title constituted a separate competitive level. Moten was determined to be a competitive area and the Business Manager position was deemed a competitive level. Agency further noted that because Employee was in a single-person competitive level - the only Business Manager in his competitive level, and the Business Manager position was chosen for elimination, one round of lateral competition is not required and DCPS is therefore not required to go through the rating and ranking process. Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date.[14]

Single Person Competitive Level

In instituting the instant RIF, Agency met the procedural requirements listed above, and Employee does not contest this. On May 13, 2013, the Chancellor of DCPS – Kaya Henderson authorized a school-based RIF for budgetary reasons, as well as the reorganization of functions. This authorization designated several competitive areas and competitive level within Agency that would be affected by the RIF. Employee's competitive area and competitive level was one of such designations. Chapter 24 of the D.C. Personnel Manual § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> All positions in the competitive area … 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.

Employee conceded that he was the only Business Manager at Moten and that he was in a single person competitive level.[15] Agency explained that Employee was not entitled to one round of lateral competition since the entire single person competitive level within the competitive area was eliminated. This Office has consistently held that, when an employee holds the only position

[13] Petition for Appeal (September 13, 2013); Employee's Brief (August 4, 2014).
[14] Agency's Answer (October 16, 2013); Agency's Brief (June 4, 2014).
[15] *See* Employee's Brief, *supra*.

in his 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.[16] 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(d) pertaining to multiple-person competitive levels when it implemented the instant RIF.

Notice Requirements

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, 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 acknowledged receipt of the RIF notice on May 24, 2013, and the RIF effective date was August 16, 2013. The notice stated 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.

Lack of Budget Crisis

Employee alleged that the Business Manager position was not abolished, but instead replaced with the Administrative Officer position. Employee explained that, since he was the only Business Manager at Moten, it was not financially necessary for budget reasons, for Agency to decrease the volume of the staff at the school and to replace his position with an Administrative Officer at a higher salary. Employee maintained that the Administrative Officer position performed the exact same duties as the Business Manager. In addition, Employee noted that the Administrative Officer position was eliminated in school year 20014-2015 and the Business Manager position restored. In *Anjuwan v. D.C. Department of Public Works,*[17] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals 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…"[18] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[19]

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[16] *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).
[17] 729 A.2d 883 (December 11, 1998).
[18] *Id*. at 885.
[19] *Id*.

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 employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[20]

Grievances

Employee also argues that DCPS hired an Administrative Officer following the RIF. Employee explained that he was qualified for, and interviewed for the position, however, the Principal decided to hire her friend from another school. He further explained that the Principal informed him that she had the final word in the hiring process. Further, Employee highlighted that upon revealing to the Principal that Employee was undergoing weekly therapy for depression, the Principal's demeanor changed towards him. Employee also relayed that after he received the RIF Notice, he asked the Principal if she would give him a favorable recommendation and the Principal responded that "it depends on the position that I was applying for." Employee stated that he was given responsibilities outside of his job duties and he performed them to the best of his abilities without professional feedback. However, Employee has not provided any credible evidence to support these contentions. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[21] Moreover, complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

ORDER

It is hereby **ORDERED** that Agency's action separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[20] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[21] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).