

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0209-10
NOEL CYRUS,)	
Employee)	
)	Date of Issuance: June 8, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Joseph E. Lim, Esq.
_____)	Senior Administrative Judge
Noel Cyrus, Employee <i>pro se</i>		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Noel Cyrus (“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 his 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 his position was abolished was ET-15 Business Teacher at Ballou Senior High School. Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 8, 2012. 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 Agency complied, but Employee failed to do so. I then issued a Show Cause Order to Employee to explain her non-compliance. Again, Employee failed to respond. 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

In his petition, Employee decries the CLDF scores he received, and requests an evidentiary hearing for the purpose of determining the veracity of such allegations.

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 and thirty (30) days written notice prior to the effective date of his termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked ET-15 Business Teacher, Employee, was terminated as a result of the round of lateral competition.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. Public Schools 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 schools¹.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02², which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, 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

¹ See *Agency's Answer*, Tab 1 (December 31, 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.

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 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

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.*

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 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.

Analysis

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS 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

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.)

other specialty subjects, the subject taught by the employee.¹²

Here, Ballou Senior High School was identified as a competitive area, and ET-15 Business Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were two (2) ET-15 Business Teacher positions subject to the RIF. Of the two positions, one (1) position was identified to be abolished.

Employee was not the only ET-15 Business Teacher within his competitive level and therefore, was 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%)

¹² Agency Brief (March 8, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

(c) Relevant supplemental professional experiences as demonstrated on the job – (10%)

(d) Length of service – (5%)¹³

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 Ballou Senior High School 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”).

Employee received a total of 5 points on his CLDF, and therefore, was ranked the lowest in his respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Mr. Cyrus fails to show gains in student growth. He minimally impacts student performance and does not maintain accurate records that detail grading or grading systems...Mr. Cyrus does not tailor instruction to address the specific needs of Ballou students and does not follow the instructional model of the school...He fosters negative relationships with staff and students, which in turn creates conflict. Mr. Cyrus fails to reinforce positive behavior, engage all students in learning, check and respond to student learning, and maximize instructional time...”¹⁴

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 zero points out of a possible ten (10) points in this category; a score much lower than other employee’s within his competitive level. Employee argues that he had a total of 72 students enrolled in three classes at the time of the RIF. He does not explain the relevance of this argument to the legality of the RIF.

Although Employee provided a certificate showing that he took an entrepreneurship course and a letter showing he was admitted into a distance learning class, there is no evidence to show that the principal did not take these into account. Also, the principal of Ballou Senior

¹³ 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).

¹⁴ Agency Brief, Exhibit B (March 8, 2012).

High School was given the discretion to complete Employee's CLDF and determine how many points to award based on his observation and evaluation.

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.¹⁵ 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.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that "this hurts" as he was named Coach of the Year for Track and Field, Washington Redskins Coach of the Week, and many other honors that he receives while at Ballou that is "too many to include..."¹⁶ Per Title 5, DCMR §1503.2, this category and Employee's performance "significant relevant contributions, accomplishments, *or* performance (emphasis added). Employee did not explain the relevance of his sports accomplishments to his performance as a business teacher. Neither did he provide any documentation.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received zero (0) points in this area. Employee restates that he took an entrepreneurship course to help his students learn business. Also, the principal of Ballou Senior High School was given the discretion to complete Employee's CLDF and determine how much points to award based on his observation and evaluation. This Office will not substitute its judgment for the managerial discretion of an agency in handling its personnel matters. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.¹⁷ Rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."¹⁸

Length of service

This category 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.

¹⁵ Agency Brief (March 8, 2012).

¹⁶ Employee's petition (December 1, 2009).

¹⁷ See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994).

¹⁸ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

Employee received the maximum five (5) points allowed in this category. Therefore, I find that Agency properly calculated this number.

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal's statements contained within his CLDF.

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."¹⁹ According to the CLDF, Employee received a total score of 5 after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of 56.5. 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.²⁰

Accordingly, I find that the principal of Ballou Senior High School had discretion in completing Employee's CLDF, as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Moreover, it appears as though Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "...interpretations of their worth against [the] principals' evaluations."²¹ While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record 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.

Thirty (30) days written Notice

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)

¹⁹See 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).

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 *Washington Teachers' Union* at 780.

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 provides 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.

In addition, OEA Rule § 622.3, 46 D.C. Reg. 9313 (1999) provides as follows:

If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant." Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

The employee was warned in each order that failure to comply could result in sanctions including dismissal. The employee never complied. Employee's behavior constitutes a failure to prosecute his appeal and that is another sound cause for dismissal.

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 UPHOLD

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge