

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No. 2401-0253-10R13R16
BRENDAN CASSIDY,)	
Employee)	
)	Date of Issuance: May 25, 2017
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Senior Administrative Judge

Brendan Cassidy, Employee *Pro-Se*
Carl K. Turpin, Esq., Agency Representative

SECOND INITIAL DECISION ON REMAND

On December 2, 2009, Brendan Cassidy (“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 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 of the RIF was an ET-15 English Teacher at McKinley Technology High School (“McKinley”). Employee was serving in Educational Service status at the time his last position of record was abolished.

I was initially assigned this matter on February 8, 2012. On February 16, 2012, I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. The parties complied and on April 10, 2012, I issued an Initial Decision (“ID”) in this matter upholding DCPS’ decision to abolish Employee’s last position of record through a RIF.

In response to the ID, Employee timely exercised his option to file a Petition for Review with the Board of the OEA (“the Board”). On July 21, 2013, the Board issued its first Opinion and Order (“1st O&O”) in this matter. The Board elected to remand this matter back to the undersigned so that I can make a determination regarding Employee’s pre-text argument and to determine if there is substantial evidence to support the Competitive Level Documentation Form (“CLDF”) that was used by DCPS to justify the abolishment of Employee’s position at

McKinley. The Evidentiary Hearing was held over the course of three days on October 7, 2014, November 17, 2014 and January 15, 2015. On May 28, 2015, the Undersigned issued an Initial Decision on Remand (“IDR”) upholding Agency action of abolishing Employee’s last position of record.

Thereafter, Employee filed another Petition for Review. On September 13, 2016, the Board of the OEA opted to remand this matter to the Undersigned in order to determine whether DCPS complied with the District Personnel Manual (“DPM”) Chapter 24 as provided in D.C. Official Code § 1-624.08. Thereafter, the parties were present for a Status Conference. During this Status Conference, the Undersigned opted to require the parties to file written briefs in this matter. This was codified in a Post Status Conference Order that was issued on October 20, 2016. On October 24, 2016, Employee responded by filing a Motion Requesting Certification of an Interlocutory Appeal Regarding the Office’s Plan to Accept Briefs or any Further Argument on Remand. Employee argued that allowing further argument or explanation would prejudice his position in this matter. Employee’s Motion for an Interlocutory Appeal was granted. The Board of the OEA agreed with Employee and in an Opinion and Order on Motion for an Interlocutory Appeal dated January 24, 2017, held that no further briefs or arguments should be accepted into the record and that the Undersigned should base my Second Initial Decision on Remand solely on the record that has already been established. Thereafter, on March 10, 2017, DCPS filed a Notice of Supplemental Authority. Employee responded by filing a Motion to Exclude said notice on March 17, 2017. I find that I cannot rely on the arguments presented in DCPS’ Notice of Supplemental Authority. To do otherwise would run afoul of the clear instructions given to the Undersigned by the Board of the OEA in its Opinion and Order on Motion for an Interlocutory Appeal; which was to base the instant decision solely on the record that was closed with the IDR. The record is now closed.

ISSUE

Whether Agency’s action of separating Employee from service pursuant to a RIF was done in accordance with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08.

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

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's protracted appeal process with this Office.

RIF

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 The Board of the OEA wants the Undersigned to analyze the abolishment of Employee's last position of record through D.C. Official Code § 1-624.08, which states as follows:

§ 1-624.08. Abolishment of positions for fiscal year 2000 and subsequent fiscal years.

(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.

(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.

(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.

¹ See *Agency's Answer*, Tab 1 (January 7, 2010).

(f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:

(1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and

(2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

(g) An employee separated pursuant to this section shall be entitled to severance pay in accordance with subchapter XI of this chapter, except that the following shall be included in computing creditable service for severance pay for employees separated pursuant to this section:

(1) Four years for an employee who qualified for veterans preference under this chapter, and

(2) Three years for an employee who qualified for residency preference under this chapter.

(h) Separation pursuant to this section shall not affect an employee's rights under either the Agency Reemployment Priority Program or the Displaced Employee Program established pursuant to Chapter 24 of the District Personnel Manual.

(i) With respect to agencies which are not subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997, the Mayor shall submit to the Council a listing of all positions to be abolished by agency and responsibility center by March 1 of each fiscal year or upon the delivery of termination notices to individual employees.

(j) Notwithstanding the provisions of § 1-617.08 or § 1-624.02(d), the provisions of this chapter shall not be deemed negotiable.

(k) A personnel authority shall cause a 30-day termination notice to be served, no later than September 1 of each fiscal year, on any incumbent employee remaining in any position identified to be abolished pursuant to subsection (b) of this section.

(l) In the case of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997, the authority provided by this section shall be exercised to carry out the agency's management reform plan, and this section shall otherwise be implemented solely in a manner consistent with such plan.

Here, McKinley was identified as a competitive area, and ET-15 English Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were eight ET-15 English Teachers stationed at McKinley. Only seven of those positions survived the instant RIF. Employee was not the only ET-15 English Teacher within his competitive level and was, therefore, required to compete with other similarly situated employees in one round of lateral competition. In *American Federation of Government Employees, AFL-CIO v. OPM*, the Court held that OPM had "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.”² It has been thoroughly established that “principals have total discretion to rank their teachers”³ While it is true that there was an era where seniority was the ultimate “trump” card when establishing who would be retained (or dismissed) when conducting a RIF; that era has passed. I find that the rating and ranking of Employee herein was done in a manner that is congruent with D.C. Official Code § 1-624.08. To establish a different rubric could, generally speaking, subject the youth of the District of Columbia to sub-par teacher methodologies and rigor. It would also hinder DCPS’ overall mission of providing a world-class education to its student populace.

Of note, the IDR at 27 stated as follows:

During the evidentiary hearing in this matter, DCPS presented extensive testimonial evidence from Pinder and Weber. As was stated previously, Pinder noted that Employee’s approach to teaching, the effectiveness of Employee’s pedagogy in the class room; Employee’s inability to adapt to a higher standard of presenting the coursework to his students; Employee’s inability to have a positive rapport with his students; and Employee’s resistance to improving in his craft over their shared tenure at McKinley was the cause of Employee’s lackluster CLDF score. Pinder also noted that for the previous two school years, Employee had been rated as “Needs Improvement” as part of his annual performance evaluation.⁴

I incorporate by reference my findings of fact and conclusion of law from the ID and the IDR. Employee herein was provided one round of lateral competition and was the lowest scoring incumbent within his competitive level and area. I find that Employee has not proffered any credible argument that proves that the competitive level and area in the instant matter was improperly constructed. I further find that Employee’s score was accurate and his placement as the lowest ranked ET-15 English teacher at McKinley was the proper result.

Grievances

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.⁵ Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee’s numerous ancillary arguments are best characterized as grievances and outside of the OEA’s jurisdiction to adjudicate.

² 821 F.2d 761 (D.C. Cir 1987).

³ See *Washington Teachers’ Union Local No. 6, Am. Fed’n of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774, 780-81 (D.C. Cir. 1997).

⁴ Of note, at the time of the instant RIF, Needs Improvement was the lowest rank that a DCPS employee can receive as part their annual performance evaluation. Currently, a DCPS employee receiving Needs Improvement would be subject to immediate removal under its IMPACT evaluation system.

⁵ Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

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 further find that the CLDF that was used in this matter is overwhelmingly supported by substantial evidence. I further find that DCPS has met its burden of proof in this matter with respect to how it implemented and carried out the instant RIF and the resulting abolishment of Employee's last position of record. Therefore, 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 his removal should be 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:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE