

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Terry Gaston)	OEA Matter No. 2401-0166-09
Employee)	
)	Date of Issuance: June 23, 2010
v.)	
)	Senior Administrative Judge
D.C. Public Schools)	Joseph E. Lim, Esq.
Agency)	
_____)	

Mark Murphy, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On July 29, 2009, Employee, an SW-3/8 Maintenance Foreman with the D.C. Public Schools (the “Agency”), filed a Petition for Appeal with the Office of Employee Appeals (OEA or the “Office”), contesting Agency’s decision separating him from government service pursuant to the abolishment of his job for financial reasons (Reduction-in-Force, or “RIF”), effective August 28, 2009. This matter was assigned to me on March 8, 2010. I held a Prehearing Conference on March 26, 2010.

Since this Matter raised no factual disputes, no hearing was held. I closed the record after both parties submitted their legal brief on the issues.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency’s action separating Employee from service as a result of the RIF was in accordance with applicable law, rule or regulation.

FINDINGS OF FACT

The following facts are not subject to genuine dispute:

1. According to Agency's personnel records, Employee was an SW-3/8 Maintenance Foreman.
2. Agency had closed 23 schools after the 2007-2008 school year and 3 more schools after the 2008-2009 school year.
3. On June 22, 2009, School Chancellor Michelle Rhee concluded Agency needed to reorganize and eliminate additional school-based, non-instructional employees due to budgetary constraints. She made the decision for Fiscal Year 2010 to reduce staffing levels by abolishing positions throughout the school system.
4. Agency required its schools to abolish a set number of positions based on student enrollment and budgetary constraints.
5. Together with non-instructional aides, custodial staff positions to be abolished were identified on a school by school basis.
6. Employee's competitive area was the Turner Elementary School while his title and grade of competitive level was SW Custodian Foreman. As there were two employees at this competitive level, Employee was provided one round of lateral competition.
7. The following weights for the competitive factors were used in the required Competitive Level Documentation Form (CDLF): relevant significant contributions, accomplishments or performance 50%; relevant supplemental professional experience as demonstrated on the job, 30%; office of school needs, 10%; length of service, 10%.
8. Employee received 58 points on his CDLF compared to the other foreman who received 100 points.
9. On July 28, 2009, Agency issued to Employee a letter of official notice of abolishment of his position, effective August 28, 2009.

Position of the Parties

At the prehearing conference and in his submissions, Employee made several complaints: that the school's budgetary excuse for the RIF was false; that the Agency improperly applied the provisions of RIF regulations when it allocated only 10% of the points in the CDLF to Length of Service; Agency further diluted the seniority factor when it added four years to an employee's seniority for a performance evaluation that was either "outstanding" or "exceeds expectations."

ANALYSIS, AND CONCLUSIONS

In a RIF matter, I am guided primarily by *D.C. Official Code* § 1-624.08, which states in

pertinent part that:

(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... 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.

(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.

According to the preceding statute, I find that a District of Columbia government employee whose position was abolished pursuant to a RIF may only contest before this Office:

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

Title 5 § 1503 of DCMR governs the procedures to be followed in the implementing of RIFs for fiscal year 2000, and subsequent fiscal years, as follows:

Section 1503.1: An employee who encumbers a position which is abolished shall be separated in accordance with this chapter notwithstanding date of hire or prior status in any other position.

Section 1503.2: 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.

Title 5 § 1506 identified the type of notice to be given as a result of a RIF, as follows:

Section 1506.1: 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 specific 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.

Section 1506.2: An employee may also be given a written general notice prior to a separation due to a reduction-in-force but such general notice is not required. The general notice may be used when it is not yet determined what individual action, if any, will be taken.

Agency submitted a chart outlining and reflecting a school-by-school RIF in custodial staff. The competitive areas for the RIF were defined by schools where the number of positions for custodial staff or for non-instructional staff for the 2008-2009 school year exceeded the number of positions available for the 2009-2010 school year. Employee worked at Turner Elementary School, which was reflected on the chart.

The competitive levels for the RIF were defined as follows:

- 1) Custodial staff on the RW pay plan;
- 2) Supervisory custodians and Custodial Foremen on the SW pay plan; and
- 3) Non-instructional staff on the DS or EG pay plan grades 4, 5, 6, and 7.

The competitive factors for the RIF, with the relative weight, were as follows:

- | | |
|---|-----|
| 1) Relevant significant contributions, accomplishments or performance | 50% |
| 2) Relevant supplemental professional experience as demonstrated on the job | 30% |
| 3) Office of School Needs | 10% |
| 4) Length of Service | 10% |

There were two (2) persons in Employee's competitive level. Agency maintained that a RIF-related evaluation was conducted, using the above-noted competitive factors, and that the lowest scoring person, the Employee herein, was laid off. Further, Agency asserted that, in addition to the implementation of the four (4) competitive factor areas of consideration, the RIF was also conducted in full compliance with Title 5 DCMR, Chapter 15, which included that the Employee received the one (1) round of lateral competition to which he was entitled, by application of the standard enumerated by the Competitive Level Documentation Form (the "CLDF"), plus the required written notice of at least thirty (30) days written notice prior to the effective date of his separation.

I note that the parties disagree first on whether there was an actual (versus contrived) budget shortfall, such to justify the implementation of a RIF. Second, Employee, through counsel, challenges the reduction of Competitive Factor #4 (Length of Service) from 25% to now only constitute 10% of the total consideration and relative weight on which staff members should be retained in their positions. Presumably Employee is arguing that, with seniority traditionally constituting 25% of the retention factors, he would have been retained when the RIF was implemented.¹

In response to Employee's first assertion about the budget rationale, the D.C. Court of Appeals in *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), held that the OEA's authority over RIF matters is narrowly prescribed. The Court explained that the OEA does not have jurisdiction to determine whether the RIF at the Agency was *bona fide* or violated any law, other than the RIF regulations themselves. For several years, OEA has interpreted that ruling to include that the Office has no jurisdiction over the issue of an Agency's claim of budgetary shortfall, nor can OEA entertain an employee claim regarding how an agency elects to use its monetary resources for personnel services. How the Agency herein elected to spend its funds for personnel services, or how said Agency likewise elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.

When two or more employees are in the same competitive area and the same competitive level, 5 DCMR § 1503.2 governs:

Section 1503.2: 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.

For this RIF, the Chancellor assigned the following weights to each factor:

- (a) 50% for significant relevant contributions, accomplishments, or performance;
- (b) 30% for relevant supplemental professional experiences as demonstrated on

¹ Interestingly, Employee admits that even in a different scenario for calculating seniority, he would still come out with less seniority than his competition, thereby rendering his argument moot.

- the job;
- (c) 10% for office or school needs, including: curriculum specialized education, degrees, licenses or areas of expertise; and
- (d) 10% for length of service.

Employee asserts that Agency violated the statute when it failed to give more weight to the seniority factor.

The provision of 5 DCMR § 1503.2(d), while providing that Length of Service is the fourth RIF-related Competitive Factor to be considered at the time that a RIF is implemented, is silent on any percentage or weight to be accorded the years of service. 5 DCMR § 1503.2 does not specify any particular number of points or relative weight that the Agency must assign to each factor. The relative weighting of the factors is deliberately left to the Agency's discretion. The language of the regulation in no way requires that each factor be given equal weight, or that the same weightings be used for all RIFs, regardless of positions affected or educational policy concerns.

Therefore, Agency has discretion to assign a value to length of service, and can likewise modify whatever number of years were previously assigned in the past. As a consequence, any reference to a 25% weight being accorded in a Length in Service component during prior years is neither controlling nor worthy of consideration. Agency, within its managerial authority and discretion, has reassessed the factors, and reduced the percentage to 10%.

By contrast, the RIF regulations are explicit and precise when specific factors must be considered in a particular way. For example, 5 DCMR § 1500.3(f) clearly prescribes how years (or points) are to be added to an employee's length of service for being a bona fide resident of the District of Columbia at the time of the RIF: "Length of service: includes service with the Board of Education, the federal government, the District of Columbia government, and the military. In addition, each employee who is a bona fide resident of the District of Columbia shall have added five (5) years to his or her creditable service for reduction-in-force purposes."

The lack of any similar instruction as to the relative weighting of the factors to be considered in comparing employees in the same competitive area and level confirms that the weighting to be assigned to each factor is within the Agency's discretion.

American Federation of Government Employees, AFL-CIO v. OPM, 821 F.2d 761 (D.C. Cir. 1987), is a case on point. In 1982, Congress gave the U.S. Office of Personnel Management "broad authority to issue regulations governing the release of employees under a RIF, requiring only that OPM give effect to four factors: (1) tenure of employment; (2) military preference...; (3) length of service; and (4) efficiency or performance ratings. 5 U.S.C. § 3502 (1982)." The court found that Congress had delegated to OPM the authority to determine the weight to be placed on each factor, stating that "[n]othing elsewhere in the statute nor in its legislative history suggests any congressional intent to cabin OPM's discretion." *Id.* The court held that "Congress gave OPM broad regulatory authority, including the authority to reconsider and alter its prior balance of factors

to diminish the relative importance of seniority” to significantly increase the importance of performance in making RIF decisions. *Id.* (Emphasis added.) This case confirms the Agency’s interpretation of its RIF regulations.

Agency acted consistently with the text of its RIF regulations, which do not prescribe any mandatory or minimum weight that must be given to each of the competitive factors. Agency’s actions here were consistent with the plain language of the governing regulations. Educational priorities and policies change over time, and how the Agency exercised its discretion in 2004, for instance, does not limit how the Agency should exercise its discretion in 2009. Furthermore, how the factors are weighted in a RIF of non-instructional personnel may be very different from how they are weighted in a RIF of teachers. Employee would have this Office read into DCPS’s RIF regulations language that is not there – language mandating that each of the four factors be given equal weight.

Calculation of Length-of-Service

Employee asserts the Agency failed to consider seniority. Such is not the case here. First, as demonstrated above, a length-of-service or “seniority” calculation was performed for each employee who had to compete for his or her position. The length-of-service calculation, along with point totals for the remaining factors, were weighted and added together in order to properly rank each competing employee. Therefore, the Agency did, in fact, incorporate the length-of-service factor into determining which employees would be subject to the RIF.

Next, Employee alleges that the Agency gave so little weight to Seniority as to essentially make it “void.” Employee asserts that the Agency violated the DCMR when it added a performance factor and military service into the Employee’s length of service. Length-of-service is defined in the District of Columbia Municipal Regulations at 5 DCMR § 1500.4(f):

Length of service: includes service with the Board of Education, the federal government, the District of Columbia government, and the military. In addition, each employee who is a bona fide resident of the District of Columbia shall have added five (5) years to his or her creditable service for reduction-in-force purposes.

Length-of-service, 5 DCMR § 1503.2(d), was calculated by adding together the totals of the following factors:

- 1) Years experience (this number was calculated by adding together the number of years employee worked for DCPS, the District government and the federal government, then subtracting that total from the date of the RIF);
- 2) Military bonus (four extra years for employees with a veteran’s preference);
- 3) DC residency points (five additional years for employees residing in the District of Columbia); and,

4) Rating add (four extra years of service for employees with an evaluation within the past year of “outstanding” or “exceeds expectations”).

The Agency cannot simply ignore the laws of the District of Columbia regarding prescribed reduction-in-force procedures for educational service employees. See D.C. Code § 1-624.02. Specifically, the Agency followed the law of the District of Columbia and incorporated its requirements into its own regulations by awarding four extra years of service for employees with an evaluation of “outstanding” or “exceeds expectations” within the past year and four extra years for employees with a veteran’s preference.

D.C. Code § 1-624.02(b)(3) specifically states that “[p]erformance ratings documented and approved which recognize outstanding performance *shall* serve to increase the employee’s service for reduction-in-force purposes by 4 years during the period the outstanding rating is in effect. Performance ratings may not be changed subsequent to the establishment of retention registers and issuance of reduction-in-force notices.” (Emphasis added.)

D.C. Code § 1-624.02(a)(1) specifically states that “[r]eduction-in-force procedures *shall* apply to the...Educational Services...and *shall* include a prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residence, veterans preference, and relative work performance.” (Emphasis added.)

Employee also asserts that the Agency “actually counted military service twice for employees,” since “length of service includes ‘service with...the military’” while also awarding extra years for veteran’s preference. Again, the Agency followed the laws of the District of Columbia. As it is clearly stated in §§ 1-624.02(b)(1) and (b)(2) of the D. C. Code, years added for veterans preference is separate and in addition to credit for military service years. Without the veteran’s preference, military service would count for no more than civilian government service, and that is clearly not what the statute requires. Thus, I conclude that the Agency neither violated the laws of the District of Columbia nor its own regulations in calculating length-of-service for the reduction-in-force at issue in this matter.

Again, nothing in the applicable regulation requires that any of the listed factors be accorded a specific minimum weight. Not surprisingly, Employee does not suggest what minimum weighting for seniority would be acceptable; doing so would be an exercise in fabrication with no basis in the language of the regulation. I conclude that the Agency’s interpretation was reasonable and wholly consistent with the RIF regulations.

As stated above, Turner Elementary School was identified as a competitive area and the RW pay plan custodians as a competitive level. There were two employees in the RW pay plan custodian position at Turner Elementary School, so, therefore, Employee received one round of lateral competition. Because one RW pay plan custodian was subject to the RIF and since Employee

received the lowest ranking of the two employees, Employee was separated from service.

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, the OEA no longer has jurisdiction over grievance appeals. Based on the above discussion, I find that Employee's raising the issues of budgetary shortfall and length of service are outside of the jurisdiction of this Office to consider. Further, from the perspective of this Office's limited jurisdiction, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. At best, Employee's ancillary arguments are characterized as potential grievances and outside of the OEA's jurisdiction to adjudicate. That is not say that Employee may not press his claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims. Based on the foregoing, I find that the Agency's action of abolishing Employee's position was done in accordance with *D.C. Official Code* § 1-624.08 (d) and (e) and that any other issue(s) are outside of my authority to review in the instant matter.

Based upon the foregoing, I find that the Agency's action of abolishing Employee's position was done in accordance with the requirements of *D.C. Official Code* § 1-624.08 (d) and (e) and the directives of Title 5 § 1503 of DCMR, and therefore must 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:

JOSEPH E. LIM, Esq.
Senior Administrative Judge