

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
RONALD HOLMAN,)	
Employee)	OEA Matter No. 2401-0170-09
)	
v.)	Date of Issuance: July 19, 2010
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	

Rachel A. Kirtner, Esq., Employee Representatives
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 29, 2009, Ronald Holman (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools (“DCPS” or “the Agency”) action of abolishing his position through a Reduction-In-Force (“RIF”). At the time his position was abolished, Employee’s official position of record within the Agency was a Custodian on the RW pay plan at Kramer Middle School. According to the Competitive Level Documentation Form (“CLDF”) created by the Agency in contemplation of the instant action, Employee was the second lowest rated custodian out of four. Despite this, Employee’s position was the only one abolished.

I was assigned this matter on or around March 17, 2010. Thereafter, a prehearing conference was convened in order to assess the parties’ arguments. After considering the parties’ arguments, I decided that an evidentiary hearing was not required. On April 8, 2010, I issued an Order requiring both parties to submit final written briefs in this matter. Since then, both parties have submitted their respective written briefs. 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.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

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

I find that in a RIF matter that 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 service¹; and/or
2. That he/she was not afforded one round of lateral competition within his/her competitive level.

The District of Columbia Municipal Regulations (“DCMR”) provides further guidance regarding what factors DCPS may utilize during a RIF when choosing which employees to retain within a competitive level and area. Of note, 5 DCMR 1503.2 *et al* provides in relevant part:

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.

¹ Employee did not present any credible argument on whether Agency complied with D.C. Official Code § 1-624.08 (e). Therefore, I find that Employee was afforded 30 days written notice prior to the implementation of the instant RIF.

Lateral Competition

The Agency explains that in conducting the instant RIF, it separated groups of potentially affected positions on a school-by-school basis². According to the CLDF created by the Agency in anticipation of the instant RIF, the competitive level in which Employee's position was located was Kramer Middle School and there were four Custodian positions listed on the CLDF. In exercising its discretion, the Agency decided that only three positions would survive the RIF at Kramer Middle School. Employee received the second lowest rating out of the other listed Custodian positions; however, his was the only Custodian position abolished. The person who received the lowest ranking somehow survived the instant RIF. The Agency explains its action, in pertinent part, as follows:

- d. On or before July 2, 2009, Principal Parker rated Mr. Holman and the two other custodians on the RW pay plan who were working at Kramer at that time. Principal Parker recorded the ratings on Competitive Level Documentation Forms (CLDF) and submitted those CLDFs to Peter Weber. At the same time, Principal Parker submitted a CLDF for the fourth custodian on the RW Pay Plan, but did not rate this custodian, as this custodian was not then working at Kramer Middle School...
- e. Mr. Holman was provided with one round of lateral competition and received the lowest rating out of the three custodians on the RW pay plan who were working at Kramer Middle School on and before July 2, 2009.
- f. On or around July 13, 2009, the aforementioned fourth custodian began working at Kramer Middle School. Between July 13, 2009 and July 28, 2009, Principal Parker observed the work performance of the fourth custodian.
- g. Notwithstanding the fact that Mr. Parker did not rate and complete a CLDF for the fourth custodian on or before July 2, 2009, the same result would have occurred: Mr. Holman would have received the lowest rating out of the four custodians working at Kramer Middle School on July 28, 2009, the date of the RIF...

DCPS Brief at 1 – 2.

In response, Employee counters with the following:

The CLDF for Mr. Holman's competitive level, attached to DCPS's Brief, shows that Mr. Holman did not have the lowest number of points. There was a custodian, listed in DCPS's

² See Agency's Answer to Employee's Petition for Appeal at 2.

database as working at Kramer Middle School, who received 4 points, while Mr. Holman received 32 points. Therefore, under DCPS's own rules, the fourth custodian should have been laid off, rather than Mr. Holman. Mr. Weber's Affidavit (at para. 16) states that "The employee ... with the lower or lowest point total(s) in his or her competitive level for each competitive area, was separated from service." However, that did not happen in this case.

DCPS now argues that Principal Parker *should have* or *would have* rated the fourth custodian higher than Mr. Holman. DCPS cannot change the facts months later. Principal Parker states (Affidavit, para. 8, 9) that he observed the fourth custodian's work at Kramer Middle School before the reduction-in-force, and now, months later, has filled out a new CLDF for her. Filling out a changed CLDF months after the reduction-in-force, in response to an appeal by the employee, and now claiming that Mr. Holman should have been laid off, even though he had a higher rating than the fourth custodian at the time, is a charade.

DCPS should not be allowed to rewrite CLDFs in response to employees' appeals, and use the new CLDFs as "proof" that the appealing employee should have been laid off, despite the CLDFs that were created at the time of the reduction-in-force. If DCPS is allowed to rewrite its CLDFs in response to employees' appeals, then all the protections for employees in the regulations are void, and DCPS will be given a free hand to terminate anyone for any reason and then change the facts to fit its desires *ex post facto*.

Ronald Holman's Response to DCPS's Brief at 2 – 3.

After thoughtfully considering the facts and circumstances presented by the parties, I make the following findings of fact:

1. On or around July 29, 2009, the Agency conducted a Reduction-In-Force at Kramer Middle School.
2. DCPS created the aforementioned CLDF in order to identify and categorize positions that would be affected by the instant RIF.
3. Employee's position was one of four Custodian positions listed on the contested CLDF.
4. Employee's position was the only Custodian position abolished at Kramer Middle School during the RIF.

5. According to the CLDF provided by DCPS in defense of the instant RIF - another employee who was also listed as a Custodian at Kramer Middle School had a lower rating than Employee. However, for some inexplicable reason, this employee's position survived the RIF.

My review of this matter is primarily predicated on whether DCPS properly conducted the abolishment of Employee's position in adherence to D.C. Official Code § 1-624.08 (d). It is uncontroverted that when Principal Parker began rating the four Custodian positions located at Kramer Middle School, he in his sole discretion deemed that there were only three active positions and that the fourth position was being held for another Custodian. Principal Parker, during the time he was rating these positions as part of the RIF process did not have the opportunity to rate the fourth Custodian on the CLDF.

Agency's explanation is unsatisfactory. The Agency controls all of the documentation utilized in effectuating the instant RIF. For the purpose of conducting the instant RIF, it was the Agency that grouped the four Custodians at Kramer Middle School. It was the Agency that determined that it could only afford to keep three out of four Custodians at Kramer Middle School. And, it was Principal Parker, working under the aegis of DCPS that determined that he would only rate three Custodians for the CLDF ostensibly so that he could either hire or retain the fourth Custodian mentioned herein.

OEA Rule 629.1, *id.*, places the burden of proof in RIF appeals such as the instant matter on the Agency. Further, that burden is by a preponderance of evidence standard, which is defined as "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."

It was Agency's burden to show that it conducted the instant RIF in accordance with D.C. Official Code § 1-624.08 (d) and (e). Based on the above findings of fact, I find that the Agency did not meet its burden of proof in this matter. I further find that Employee's was improperly separated due to the fact that he was not properly ranked against all employees or positions for retention. Given the instant facts, what should have happened is the fourth custodian position should have been abolished and Employee should have retained position. I further find that the Agency cannot attempt to ameliorate a RIF action after said RIF has occurred by subsequently ranking someone after a competing employee has been improperly separated. To allow such an action to occur would go against the letter and spirit of D.C. Official Code § 1-624.08 (d).

Budgetary Constraints

On another note, DCPS argued that it based the instant RIF on its good faith belief that it was facing budgetary constraints necessitating this onerous action. Employee argues that the budgetary constraints cited by the Agency are contrived and that I should reverse this action because the underlying basis for the RIF does not exist. According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), 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. 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. I find that given the instant circumstances, it is outside of my authority to decide whether there was in fact a *bona-fide* budget shortage. 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.

Conclusion

I find that Employee's position was abolished, after the Agency improperly conducted one round of lateral competition. I conclude that the Agency's action of abolishing Employee's position was not done in accordance with D.C. Official Code § 1-624.08 (d) and its action should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of abolishing Employee's position through a Reduction-In-Force is **REVERSED**; and
2. The Agency shall reinstate the Employee either to his last position of record or to a comparable position; and
3. The Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and
4. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge