

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
ALICE DIGGS,)	OEA Matter No.: 2401-0240-10
Employee)	
v.)	Date of Issuance: June 18, 2012
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Joseph E. Lim, Esq.
_____)	Senior Administrative Judge
Alice Diggs, Employee <i>pro se</i>	
Sara White, Esq., Agency Representative	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2009, Alice Diggs (“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 her 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 her position was abolished was an ET-15 Elementary Teacher at Patterson Elementary School (“Patterson”). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 7, 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. Both parties submitted timely responses to the order. After reviewing the documents of record, I find that there are no material issues of fact in dispute. Therefore, I further find that an evidentiary hearing is unwarranted in this matter. 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.

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.

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 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

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

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.

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

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

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.

⁹ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

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

Employee’s Position

Employee submits that Agency eliminated her position due solely to her age and disability. She did not specify her age or her disability.¹² Employee also grieved that her attempts to contact then Chancellor Rhee were never reciprocated.

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 her termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked ET-15 Elementary Teacher, Employee, was terminated as a result of the round of lateral competition.

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;

¹⁰ *Id.*

¹¹ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

¹² Employee Brief (March 29, 2012).

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 other specialty subjects, the subject taught by the employee.¹³

Here, Patterson was identified as a competitive area, and ET-15 Elementary Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were twenty (20) ET-15 Elementary Teacher positions subject to the RIF. Of these positions, six (6) positions were identified to be abolished.

Employee was not the only ET-15 Elementary Teacher within her 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%)

¹³ Agency Brief at pp. 2-3 (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.

- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)¹⁴

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 Patterson 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 her CLDF, and therefore, was ranked the lowest in her respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Ms. Diggs has failed to contribute to the needs of the school...Consistently, administrative observations revealed Ms. Diggs’ failure to engage actively with students and assume the role and responsibility of a teacher...Ms. Diggs failed miserably to provide effective instruction and management of the classroom milieu. Students were observed fighting, off-task, loud, and unengaged...”¹⁵

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 (0) points out of a possible ten (10) points in this category; a score much lower than other employee’s within her competitive level. Employee does not dispute her score and has failed to provide credible evidence that would bolster a score in this area, such as proof of degrees obtained pertinent to her work, licenses or other specialized education.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area. Per Title 5, DCMR §1503.2, this category evaluates any clear, significant

¹⁴ 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).

¹⁵ Agency Brief, Exhibit B (March 8, 2012).

contributions made by employees, above what would normally be expected of an employee in his or her competitive level.

Employee does not dispute her score and has failed to provide credible evidence that would bolster a score in this area.

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 and has not provided any documentation to supplement additional points being awarded in this area.

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.

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

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.¹⁶ 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.

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.”¹⁷ 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 who survived the instant RIF

¹⁶ Agency Brief at pp. 4-5 (March 8, 2012).

¹⁷See 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).

received a total score of 58. Employee has not proffered any credible evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this case.¹⁸

Accordingly, I find that the principal of Patterson 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. 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).

Here, Employee received her 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 her 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.

Discrimination

Employee's main argument against her RIF rests in her allegation that she was a victim of age and disability discrimination. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.¹⁹ Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works* held that OEA's authority over RIF matters is narrowly prescribed.²⁰ This Court explained that, OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." This court further explained that

¹⁸ 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.)

¹⁹ D.C. Code §§ 1-2501 *et seq.*

²⁰ 729 A.2d 883 (December 11, 1998).

OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs." Citing *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997). However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*²¹ stated that, OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation..."²² Here, Employee's claims as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature. I find that Employee's claims fall outside the scope of OEA's jurisdiction.

Grievance

I find that Employee's complaints regarding the unresponsiveness of the chancellor are best characterized as grievances and are outside of the OEA's jurisdiction to adjudicate. As set forth above, an employee whose position was abolished as a result of a RIF may only contest the following before this Office: 1) that he was not afforded one round of lateral competition within his competitive level; and/or 2) that he was not given 30-days notice prior to the effective date of his separation. Employee's arguments do not fall within either of these areas. In essence, Employee's complaints are grievances. As of October 21, 1998, this Office no longer has jurisdiction over grievance appeals.²³ Because this Office does not have jurisdiction over the Employee's grievances, I cannot consider the merits of his claims. That is not to say the Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

Conclusion

Based on the foregoing, I find that Employee's position was abolished after she 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 her removal is upheld.

ORDER

²¹ 730 A.2d 164 (May 27, 1999).

²² *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

²³ Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, restricted the Office's jurisdiction to the following: 1) a performance rating which results in removal of the employee; 2) an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or 3) a RIF. Further, since the passage of OPRAA, this Office has consistently held that grievances are not within our jurisdiction. See, e.g., *Scott v. D.C. Public Schools*, OEA Matter No. J-0005-02 (July 17, 2002); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999); *Phillips-Gilbert v. Department of Human Services*, OEA Matter No. J-0074-99 (May 24, 1999); *Brown et al. v. Metropolitan Police Department*, OEA Matter Nos. J-0030-99 *et seq.* (February 12, 1999. See also OEA Rules sections 604.1 and 604.3 regarding jurisdiction.

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