THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0365-10
Warren Lofton, Sr.	)	
Employee	)	
	)	Date of Issuance: December 12, 2012
v.	)	
	)	
D.C. Public Schools	)	
Agency	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge

Warren Lofton, Sr., Employee *pro se*
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

On August 17, 2010, Warren Lofton, Sr. (Employee) filed a petition for appeal with this Office from Agency's final decision terminating him due to a Reduction-in-Force (RIF). The matter was assigned to the undersigned judge on July 17, 2012. I ordered the parties to submit a legal brief by the close of business on September 24, 2012. While Agency complied, Employee failed to do so. I then sent Employee a Show Cause Order to explain his non-compliance. Again, despite prior warnings that failure to comply could result in sanctions, including dismissal; Employee failed to respond. The record is closed.

JURISDICTION

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

ISSUE

Whether this appeal should be dismissed for failure to prosecute.

FINDING OF FACTS, ANALYSIS AND CONCLUSION

According to the assertions made by the parties and the documents of record, the following is a recitation of the salient facts in this matter:

1. On July 30, 2010, the Chancellor of the District of Columbia Public Schools authorized a reduction-in-force (RIF) of certain non-instructional school-based staff due to budgetary reasons in the 2010-2011 school year. *See* July 30, 2010, Memorandum from Michelle Rhee, Chancellor, District of Columbia Public Schools (DCPS), to Kaya Henderson authorizing a

Reduction-in-Force of School-Based Staff (RIF memo) attached to the District of Columbia Public Schools' Answer to Employee's Appeal (Agency's Answer) at Tab 2.

2. The effective date of Employee's RIF was September 4, 2010. *See* Letter to Employee from Michelle Rhee, Agency Chancellor, dated July 30, 2010, attached to Agency's Answer at Tab 1.

3. For the July 30, 2010 RIF, Nalle Elementary School was a determined to be a competitive area and SW-1 Custodian Foreman constituted a competitive level.

4. Employee was a SW-1 Custodian Foreman at Nalle Elementary School (Nalle) on July 30, 2010. Employee was the sole Custodian Foreman at Nalle.

5. Because Employee was the sole occupant of his competitive level, he was not provided with one round of lateral competition and his position was RIFed.

6. Employee received specific written notice on July 30, 2010 that if he failed to secure another position at DCPS, then he would be separated from service with Agency effective September 4, 2010. *See* Tab 1.

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.

Regarding the lateral competition requirement, this Office has consistently held that, when an employee holds the only position in his competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[1]

According to the Retention Register, Employee was the sole Custodian Foreman at Nalle Elementary School. Accordingly, I conclude that Employee was properly placed into a single-

1 See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF.

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 his RIF notice on July 30, 2010, and the RIF effective date was September 4, 2010. 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 more than the required thirty (30) days written notice prior to the effective date of the RIF.

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.

In addition, in accordance with OEA Rule 621.3, 59 DCR 2129 (March 16, 2012), this Office has long maintained that a petition for appeal may be dismissed when an employee fails to prosecute the appeal. In this matter, Employee failed to respond to two Orders that I issued. Both had specific time frames and both contained warnings that failures to comply could result in penalties, including the dismissal of the petition. The Orders were sent to Employee at the address he listed as his home address in his petition and in his submissions. They are presumed to have been delivered in a timely manner. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985).

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

ORDER

It is hereby ORDERED that the petition in this matter is dismissed.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge