

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LOUIS C. NERO,)	
Employee)	OEA Matter No.: 2401-0223-10
)	
v.)	Date of Issuance: May 7, 2012
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
)	

Louis C. Nero, Employee *Pro-Se*
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 2, 2009, Louis C. Nero (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of abolishing his position through a Reduction-in-Force (“RIF”). Employee received his RIF notice on October 2, 2009. The effective date of the RIF was November 2, 2009. Employee’s position of record at the time his position was abolished was a Counselor at Woodson Academy (“Woodson”). Employee was serving in Educational Service status at the time his position was abolished. On January 7, 2010, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on February 8, 2012. On February 15, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations (“February 15th Order”). Agency was directed to submit its brief by February 29, 2012, which was timely received. On March 13, 2012, which was Employee’s brief due date, Employee requested an extension of time. On March 15, 2012, I issued an Order (“March 15th Order”) granting Employee’s request for additional time, directing Employee to submit his brief by March 28, 2012. Employee failed to respond to the March 15th Order. On March 30, 2012, I issued an Order for Statement of Good Cause to Employee (“March 30th Order”). Employee was ordered to submit his Statement of

Good Cause by April 10, 2012, based on his failure to provide a response to the March 15th Order. As of the date of this decision, Employee has not responded to the March 30th Order. After reviewing the record, I have determined that there are no material facts in dispute and therefore a hearing is not warranted. 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.

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 FACT, ANALYSIS, AND CONCLUSIONS OF LAW

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

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02, which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act" or "the Act") is the more applicable statute to govern this RIF.²

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

² D.C. Code § 1-624.02 states in relevant part that:

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 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

(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.

³ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

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*, 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 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 ‘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 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.

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.*

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

¹⁰ *Id.*

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

Employee's Position

Employee asserts in his Petition for Appeal that he was the only high school counselor at Woodson and his termination put the students at a disadvantage.¹² Employee contends that he never had a formal or informal observation and never received a copy of his “competitive level result.”¹³ Employee notes that there were four teachers and one counselor on the Woodson budget and four of the five were subject to the RIF. Additionally, Employee states that there was no plan by the Principal or the Board of Education to RIF him, explaining that the principal “never had the occasion to admonish [him] about work performance or reporting to work on time...”¹⁴ Employee also notes that his evaluation for the 2008-2009 school year was meet expectations, but he never received a copy.¹⁵

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.¹⁶ Agency explains that each school was identified as a separate competitive area and each position title constituted a separate competitive level. Woodson was determined to be a competitive area and the Counselor position was the competitive level.¹⁷ Agency maintains that Employee was in a single person competitive level since he was the only Counselor at Woodson.¹⁸ Agency explains that Employee was not entitled to one round of lateral competition since the entire single person competitive level within the competitive area was eliminated.¹⁹ Agency also argues that because one round of lateral competition was not warranted due to the elimination of the entire competitive area, a Competitive Level Documentation Form (“CLDF”) was not required.²⁰

Single Person Competitive Level

Regarding Employee's contention that he never had an informal or formal observation and never received a copy of his competitive level result, 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 1503.2, are both inapplicable.²¹ An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing

¹² Petition for Appeal (December 2, 2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Agency's Brief (February 29, 2012).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

Employee's position. Therefore, Agency was not required to evaluate Employee's performance or assess his prior evaluations in the instant matter.

According to the Retention Registry provided with Agency's Brief, there was one Counselor position at Woodson. Accordingly, I conclude that Employee was properly placed into a single-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. For this reason, Agency did not have to complete a CLDF to rank and rate Employee through one round of lateral competition.

Notice Requirements

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 "[a]n 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 to be taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, 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, the record shows that Employee received his RIF notice on October 2, 2009 and the effective date for the RIF was November 2, 2009.²² The RIF notice states that Employee's position was eliminated as part of a RIF. The notice also provided Employee with information about his appeal rights. Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Lack of Budget Crisis

Employee alleges that there was no plan by the principal or Board of Education to RIF him. Employee also contends that four of the five positions on the Woodson budget were RIFed. In *Anjuwan v. D.C. Department of Public Works*²³, the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF..."²⁴ The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds...[or] management decisions about which position should be abolished in implementing the RIF."²⁵

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to

²² Agency Answer, Tab 3 (December 9, 2009).

²³ 729 A.2d 883 (December 11, 1998).

²⁴ *Id.* at 885.

²⁵ *Id.*

reorganize internally was a management decision, over which neither OEA nor this Administrative Judge (“AJ”) has any control.²⁶

Failure to Prosecute

Additionally, Employee’s failure to respond to the March 15th and March 30th Orders provides a basis to dismiss this petition. OEA Rule 621.3 grants an AJ the authority to impose sanctions upon the parties as necessary to serve the ends of justice.²⁷ The AJ may, in the exercise of sound discretion, dismiss the action if a party fails to take reasonable steps to prosecute or defend his appeal.²⁸ Specifically, OEA Rule 621.3(b)-(c) provides that the failure to prosecute an appeal includes failing to submit required documents after being provided with a deadline for such submission and not informing this Office of a change of address which results in correspondence being returned. Moreover, this Office has held that failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.²⁹ Both the March 15th and March 30th Orders advised Employee of the consequences for not responding, including sanctions resulting in the dismissal of the matter. Employee’s responses to these Orders were required for a proper resolution of this matter on the merits. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office and this presents an alternate ground for dismissal of this matter.

CONCLUSION

Based on the foregoing, I find that Employee’s position was correctly abolished after he was properly placed in a single person competitive level and given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency’s action of abolishing Employee’s position was done in accordance with D.C. Official Code § 1-624.08.

ORDER

It is hereby **ORDERED** that Agency’s action of abolishing Employee’s position through a Reduction-In Force is **UPHELD**.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

²⁶ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

²⁷ 59 DCR 2129 (March 16, 2012).

²⁸ See OEA Rule 621.2, 59 DCR 2129 (March 16, 2012).

²⁹ *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).