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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BELINDA BRYANT,	)	
Employee	)	OEA Matter No.: 2401-0256-10
	)	
v.	)	Date of Issuance: June 13, 2012
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	STEPHANIE N. HARRIS, Esq.
Agency	)	Administrative Judge
	)	

Belinda Bryant, Employee *Pro-Se*
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 2, 2009, Belinda Bryant ("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 her position through a Reduction-in-Force ("RIF"). Employee's RIF notice was dated October 2, 2009. The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was an EG-9 Teacher at Luke C. Moore High School ("Moore"). Employee was serving in Educational Service status at the time her position was abolished. On January 7, 2010, Agency filed an Answer to Employee's appeal.

I was assigned this matter on or around February 6, 2012. On February 15, 2012, I issued an Order ("February 15th Order") directing the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. Agency's brief was timely received. On March 14, 2012, Employee submitted an unsigned emailed response to the undersigned, indicating that she did not have time to prepare her reply. However, it was unclear whether Employee intended this email submission to serve as her legal brief. On March 15, 2012, the undersigned responded to Employee's email to inform her that an unsigned document could not be accepted as part of the record. The undersigned also reminded Employee that email submissions for briefs were to be sent as a courtesy copy only and

were not a substitution for the submission procedures detailed in the February 15th Order, which included in part, mail or hand delivery of two copies of the brief to OEA, and mail or hand delivery of the brief to the opposing party. On March 15, 2012, Employee sent an email attachment with a signed response. However, Employee failed to submit this response by mail or hand delivery to OEA. Further, it was still unclear whether Employee's response would serve as her brief.

On March 20, 2012, the undersigned issued an Order for Statement of Good Cause (March 20th Order), directing Employee to address her failure to submit her brief by mail or hand delivery to OEA.[1] Additionally, because Employee stated that she did not have time to prepare her reply, the undersigned also ordered Employee to submit her legal brief, providing Employee additional time to prepare her reply brief. Employee was ordered to submit her Statement of Good Cause by March 30, 2012. As of the date of this decision, Employee has not responded to the March 20th Order.[2] Therefore, Employee's emailed submission will serve as her legal brief for this matter.

Thereafter, upon further review of the record, on May 14, 2012, the undersigned issued an Order ("May 14th Order") directing the parties to submit a written brief, along with supporting documentation addressing (1) when and in what manner Agency delivered the RIF notice to Employee; and (2) whether this delivery constituted a thirty (30) day notice for Employee. Agency timely submitted its brief, but Employee failed to submit a response on or before the prescribed deadline, June 4, 2012.[3] In light of Agency's response to the May 14th Order, the undersigned ordered Agency to submit a brief addressing whether Agency procured signed documentation from Employee acknowledging that she received her RIF notice on October 2, 2009. Agency timely submitted its brief on June 1, 2012. After reviewing the record, I have determined that there are no material facts in dispute and therefore, an evidentiary 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:

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[1] Employee's response was enclosed to Agency with this Order.
[2] *See* 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.
[3] *Id*.

> 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.[4]

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. [5]

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).

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

[5] 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.

> (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."[6] 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."[7]

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."[8] 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."[9] 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."[10]

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.[11] The Act provides that, "notwithstanding any rights or procedures established by any other provision of this subchapter,"

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[6] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[7] *Id.* at p. 5.
[8] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[9] *Id.*
[10] *Id.*
[11] *Id.*

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."[12] 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."[13]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[14] 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

In her Petition for Appeal, Employee requests an evidentiary hearing.[15] Employee asserts in her brief that Agency did not give her thirty (30) days notice of the RIF.[16] Employee also alleges that she "was informed around the 20th of October and the document was later send [sic] out post dated to October 3, 2009."[17] Additionally, Employee states that she was told "to stay at home and not come to work for the reminded [sic] of the month of October."[18]

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.[19] Agency explains that each school was identified as a separate competitive area and each position title constituted a separate competitive level. Moore was determined to be a competitive area and the EG-9 Teacher position was the competitive level.[20] Agency maintains that Employee was in a single person competitive level since she was the only EG-9 Teacher at Moore.[21] 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.[22] Agency also argues that because one round of lateral

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[12] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[13] *Id.*
[14] *See Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[15] Petition for Appeal (December 2, 2009).
[16] Employee's Brief (March 16, 2012).
[17] *Id.*
[18] *Id.*
[19] Agency's Brief (February 21, 2012).
[20] *Id.*
[21] *Id.*
[22] *Id.*

competition was not warranted due to the elimination of the entire competitive area, a Competitive Level Documentation Form ("CLDF") was not required.[23]

Single Person Competitive Level

This Office has consistently held that when an employee holds the only position in her 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.[24] An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position. Therefore, Agency was not required to evaluate Employee's performance or assess her prior evaluations in the instant matter.

According to the Retention Registry provided with Agency's Brief, there was one EG-9 Teacher position at Moore.[25] 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).

Employee alleges that she did not receive thirty (30) days notice of the instant RIF. Specifically, Employee alleges that she was informed of the RIF "around the 20th of October," which resulted in her being given eighteen (18) days notice prior to the November 2, 2009 RIF effective date.[26] Contrastly, Agency asserts that Employee was provided with written notice on October 2, 2009 that her effective date of separation was November 2, 2009.[27] Specifically, Agency submits an affidavit from Azalia Hunt-Speight, the principal of Moore at the time of the

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[23] *Id*.
[24] *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).
[25] Agency Brief, Retention Register (February 21, 2012).
[26] *See* Employee's Brief (March 16, 2012).
[27] Agency Brief, p. 5; RIF Notice, Exhibit A (February 21, 2012).

instant RIF.[28] In the affidavit, Principal Hunt-Speight states that she met with Employee at the end of the day and presented her with the RIF notice, which advised Employee that she would be separated from service effective November 2, 2009.[29] Agency also submits that a copy of the RIF notice was mailed to Employee.[30] However, Agency acknowledges that documentation of employee's signature reflecting receipt of the October 2, 2009 RIF notice cannot be located.[31] Further, Agency's submission of Employee's address from Agency's personnel system does not corroborate assertions that the RIF notice was mailed to Employee.[32] Agency maintains that despite their inability to locate documentation with Employee's signature, due in part to "the passage of time and the fact that DCPS has relocated since the October 2009 RIF," Employee was properly provided with the required thirty (30) days notice.[33]

In *Aygen v. District of Columbia Office of Employee Appeals*,[34] the D.C. Superior Court found that where an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*" (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[35] Additionally, the Court found that where an employee is not in duty status, the notice "must be sent to employee's last known address by courier, or by certified or registered mail, *return receipt requested*, before the time of the action becomes effective" (emphasis added).[36] The court further explained that "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee.[37]

While, Agency maintains that Employee was provided with the required thirty (30) days notice, they have failed to submit any documentary evidence confirming that Employee received the RIF notice on October 2, 2009, such as Employee's signature acknowledging receipt, a signed statement by a witness that Employee refused acknowledgement, or use of certified or registered mail with return receipt acknowledgment. Agency's affidavit submission by Principal Hunt-Speight is not sufficient evidence to corroborate Employee's receipt of the RIF notice on October 2, 2009. Although Employee likewise failed to submit any corroborating evidence showing that she did not receive the RIF notice on October 2, 2009, the fact remains that Agency has the burden of proving that it gave Employee thirty (30) days written notice prior to the effective date of the RIF. I therefore find that Employee only received eighteen (18) days written notice prior to the effective date of the instant RIF.

Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus calls for a reconstruction of this process as opposed to a retroactive

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[28] Agency Brief, Exhibit A (May 23, 2012).
[29] *Id*.
[30] *Id*. at p. 1.
[31] Agency Brief (June 1, 2012).
[32] Agency Brief, Exhibit B (May 23, 2012).
[33] Agency Brief (June 1, 2012).
[34] No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).
[35] *Id*.
[36] *Id*.
[37] *Id*. at pp. 10-11.

reinstatement of Employee.[38] A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of employee.[39] The DCMR defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."[40] I find that Agency's failure to provide Employee with thirty (30) days written notice prior to the RIF effective date of termination was a procedural error. Such an error will not serve to negate or overturn Employee's termination and does not constitute harmful error.

Administrative Leave

Employee also contests Agency's decision to place her on paid administrative leave until the effective date of the RIF. The RIF notice provided Employee with information about her appeal rights, as well as informing her that she would be immediately placed on administrative leave. I find that Employee was properly placed on administrative leave, pursuant to DCMR § 2422.11[41], which states in part that an employee who received written notice of release from her competitive level due to a RIF may be placed on administrative leave at the discretion of the agency head.

Evidentiary Hearing

In her Petition for Appeal, Employee requests that an evidentiary hearing be held in this matter. OEA Rule 619.2[42] states in part that an Administrative Judge can "require an evidentiary hearing, if appropriate." Additionally, OEA Rule 624.2 indicates that it is within the discretion of the administrative judge ("AJ") to either grant or deny a request for an evidentiary hearing based on whether or not the AJ believes that a hearing is necessary.[43] Further, it appears that Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "…interpretations of their worth against [the] principals' evaluations."[44] After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore, Employee's request for an evidentiary hearing is denied.

CONCLUSION

Based on the foregoing, I find that Employee's position was correctly abolished after she was properly placed in a single person competitive level. However, I find that Agency did not provide Employee with thirty (30) days written notice prior to the effective date of the instant RIF, resulting in a procedural error which can be corrected through a reconstruction of the notice

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[38] *See* District of Columbia Municipal Regulations ("DCMR") § 2405.6, 55 DCR 12899, 12902 (2008), which states in relevant part:

> An action which was found by…the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

[39] *See* DCMR § 2405.7, 55 DCR 12899, 12902 (2008).
[40] *Id*.
[41] 55 DCR 12899, 12902 (2008).
[42] 59 DCR 2129 (March 16, 2012); *See also* OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).
[43] *See Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2010).
[44] *Washington Teachers' Union* at 780.

period. Therefore, in light of the correctable procedural error, I find 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:

1. Agency reimburse Employee twelve (12) days pay and benefits commensurate with her last position of record; and
2. Agency's action of abolishing Employee's position through a Reduction-In Force is **UPHELD**; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.
Administrative Judge