THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GWENDOLYN JOHNSON,	)	
Employee	)	OEA Matter No. 2401-0027-10
	)	
v.	)	Date of Issuance: January 4, 2012
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	
	)	

Diana M. Bardes, Esq., Employee's Representative[1]
Bobbie L. Hoye, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 8, 2009, Gwendolyn Johnson ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools'("DCPS" or "Agency") action of abolishing her position as a Custodian through a Reduction-In-Force ("RIF"). Agency filed its Answer to Employee's appeal on December 16, 2009. This matter was assigned to me on or around October 21, 2011. Thereafter, I scheduled a Status Conference for November 9, 2011, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. Both parties were present at the November 9, 2011, Status Conference. Thereafter, I issued an Order directing the parties to submit a written brief regarding the RIF, which resulted in the abolishment of Employee's position. Both parties complied.[2] On November 14, 2011, after further examining the record, I issued an Order requiring Employee to address a jurisdiction issue in this matter. Employee complied. After reviewing the documents of record, I have determined that a hearing is not warranted.

JURISDICTION

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

[1] While Attorney Bardes is not listed on Employee's petition for appeal as her designated representative, Attorney Bardes, on December 14, 2011, responded to the November 9 and 14, 2011, Orders on behalf of Employee.
[2] Employee's written brief was due on December 7, 2011. However, Employee submitted her brief regarding the RIF along with her brief in support of jurisdiction on December 14, 2011. Via email, the undersigned moved Agency's due date to reply to Employee's brief from December 14, 2011, to December 21, 2011, and Agency has complied.

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 OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary and oral evidence presented by the parties during the course of Employee's appeal process with OEA. Employee argues that in conducting the RIF, Agency did not take her twenty (20) years[3] of seniority into consideration. Employee also notes that Agency is hiring new employees. Additionally, Employee denies the allegations in her Competitive Level Documentation Form ("CLDF") as being baseless. Agency contends that it followed all applicable rules and regulations with respect to the instant matter. Agency further notes that Employee's disagreement with the comments in her CLDF does not make them baseless. Also, Agency maintained that OEA has limited jurisdiction in this matter and as such, "employee is limited to challenging the RIF based on Agency's RIF regulations and on D.C. Code § 1-624.02 which sets forth reduction-in-force procedures only."[4]

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. I find that in a RIF, 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.

[3] In Employee's Reply Brief in Support of Appeal, dated December 14, 2011, Employee notes that she has been employed by Agency as a Custodian for fifteen (15) years.
[4] *See* Agency's Reply to Employee's Brief dated December 21, 2011.

> (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 service; and/or
>
> 2. That he/she was not afforded one round of lateral competition within his/her competitive level.

In instituting the instant RIF, Agency met the procedural requirements listed above. Employee received her RIF notice on October 2, 2009, and her RIF effective date was November 2, 2009. It is therefore undisputed that Employee was given the required thirty (30) days notice prior to the effective date of her RIF. Section 2412 of the RIF regulations, 47 D.C. Reg. at 2431, requires an agency to establish a "retention register" for each competitive level, and provides that the retention register "shall document the final action taken, and the effective date of that action, for each employee released from his or her competitive level." Generally, employees in a competitive level who are separated as a result of a RIF are separated in inverse order of their standing on the retention register.

Additionally, 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. 5 DCMR 1503.2 *et al* provides in relevant parts as follows:

> 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 positions shall be abolished:
>
> (a) Significant relevant contributions, accomplishments, or performances;
>
> (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.

Agency has the discretion to weigh these factors as it sees fit. According to the retention register, Employee was one of three (3) employees who occupied the Custodian position at Jefferson Middle

School. And one (1) of the three (3) positions was identified for abolishment. Employee's RIF-SCD for the purpose of the RIF was 1994. After applying the above-referenced factors to this competitive area and level, Employee had a total score of fifteen (15). She received the lowest ranking and was separated as a result. Giving the totality of the circumstance, it is therefore undisputed that Employee received her round of lateral competition within her competitive level.

According to *Anjuwan v. D.C. Department of Public Works,* 729 A.2d. 883 (December 11, 1998), OEA's authority over RIF matters is narrowly prescribed. The Court explained that 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, OEA no longer has jurisdiction over grievance appeals. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Further, Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that OEA is precluded from addressing any other issue(s) in this matter.

ORDER

It is hereby **ORDERED** that Agency's action of abolishing Employee's position as a Custodian through the RIF is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge