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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DARRECK GIBSON,)	
Employee)	OEA Matter No. 2401-0025-10
)	
v.)	Date of Issuance: December 16, 2011
)	
D.C. PUBLIC SCHOOLS,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
)	
_____)	
Mark J. Murphy, Esq., Employee’s Representative ¹)	
Bobbie L. Hoye, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 8, 2009, Darreck Gibson (“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 his 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 Prehearing 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, Prehearing Conference. Thereafter, I issued an Order directing the parties to submit a written brief regarding the RIF, which resulted in Employee’s termination. Agency complied, but Employee did not. Employee’s written brief was due on December 7, 2011. As of the date of this Initial Decision, Employee has not submitted a written brief on the issue. 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 record, I have determined that a hearing is not warranted.

¹ While Attorney Murphy is not listed on Employee’s petition for appeal as his designated representative, Attorney Murphy, on November 29, 2011, responded to the November 14, 2011, Order on behalf of Employee.

JURISDICTION

The 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 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 his thirteen and a half (13.5) years of seniority into consideration. Agency contends that it followed all applicable rules and regulations with respect to the instant matter.

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.

(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 his RIF notice on October 2, 2009, and his 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 his 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. An employee’s standing is determined by his/her RIF service computation date (RIF-SCD), which is usually the date on which the employee began D.C. Government service. According to the retention register, Employee was one of two (2) employees who occupied the Custodial Foreman² position at Cardozo Senior High School. Employee’s RIF-SCD for the purpose of the RIF was 1995³, while that of the other Custodial Foreman in his competitive level was 1987.

² During the Prehearing Conference, Employee noted that he was a Custodian and not a Custodial Foreman. However, in his petition for appeal to this Office, he listed Custodial Foreman as his position. Also, in Agency’s submissions to this Office, Agency noted that Employee was a Custodian, however, on the RIF notification letter and the retention register, Employee was classified as a Custodial Foreman.

³ The retention register, Agency’s Exhibit C, shows that’s Employee’s start date for purposes of the RIF was 1995, whereas, in Agency’s November 23, 2011, written brief to this Office, Agency noted that Employee’s start date was 1996.

Cardozo Senior High School was identified as Employee's competitive area, and Custodial Foreman as his competitive level. There were two (2) employees in this competitive level and Employee had the lowest ranking and was separated as a result of the RIF. After Agency filed its written brief with this Office on November 23, 2011, Employee was afforded a fair opportunity to address Agency's contentions in this matter but opted instead to remain silent. Giving the totality of the circumstance, it is therefore undisputed that Employee received his round of lateral competition within his 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 his 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:

MONICA DOHNJI, Esq.
Administrative Judge