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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ROBERT WEISMILLER,	)	
Employee	)	OEA Matter No. 2401-0204-10
	)	
v.	)	Date of Issuance: May 30, 2012
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
_____	)	
Robert Weismiller, Employee <i>Pro-Se</i>	)	
W. Iris Barber, Esq., Agency's Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On December 1, 2009, Robert Weismiller (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of terminating his employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time his position was abolished was ET-15 Math-Science Teacher at Transition Academy (“Transition”). Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 6, 2012. On February 9, 2012, I sent out an Order wherein I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with all applicable District laws, statues, and regulations. Due to a typographical error in said order, I issued an Amended Order on February 15, 2012, wherein the parties were given additional time in which to file their respective briefs. Agency timely complied while Employee did not submit his brief as was required by the aforementioned orders. Accordingly, on May 1, 2012, I issued an Order for Statement of Good Cause wherein Employee was required to submit a statement explaining his failure to adhere to the deadline as was previously prescribed. He was also directed to submit his legal brief. Employee’s response was

due on or before May 11, 2012. To date, the OEA has not received a response from Employee. After reviewing the documents of record, I find that there are no material issues of fact in dispute. Therefore, I further find that an evidentiary hearing is unwarranted in this matter. 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 FACTS, 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<sup>1</sup>.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02<sup>2</sup>, which

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<sup>1</sup> See *Agency's Answer*, Tab 1 (December 31, 2009).

<sup>2</sup> 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

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.

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.”<sup>3</sup> The Court also found that both

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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.

<sup>3</sup> *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.”<sup>4</sup>

However, the Court of Appeals took a different position. In *Washington Teachers’ Union*<sup>5</sup>, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”<sup>6</sup> The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act (“the Act”) instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>12</sup> Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision in order 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, I find that 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.

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<sup>4</sup> *Id.* at p. 5.

<sup>5</sup> *Washington Teachers’ Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

<sup>6</sup> *Id.* at 1132.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>11</sup> *Id.*

<sup>12</sup> *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

### ***Employee's Position***

Employee contends the following:

1. That he was not properly afforded one round of lateral competition in that Employee contends that he was not properly observed by DCPS management regarding his performance.<sup>13</sup>
2. Employee also contends that other persons in his competitive area with less tenure than himself survived the instant RIF.<sup>14</sup>
3. Employee also cited his classroom accomplishments as having a positive bearing on the outcome of this matter.<sup>15</sup>

### ***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. Employee was given thirty (30) days written notice prior to the effective date of his termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that since Employee was the lowest ranked person in his competitive level and area, he was properly terminated as a result of the one round of lateral competition.

### **Analysis**

Under Title 5 DCMR § 1501.1, the Chancellor of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based “upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office.” For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;
2. The job title for each employee; and
3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.<sup>16</sup>

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<sup>13</sup> *Employee's Petition for Appeal* (December 1, 2009).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> District of Columbia Public Schools' Brief at 2-3 (March 8, 2012). School-based personnel constituted a separate

Here, Transition was identified as a competitive area, and ET-15 Math-Science Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were four (4) ET-15 Math-Science Teachers stationed at Transition. One of those positions did not survive the instant RIF.

Employee was not the only ET-15 Math-Science Teacher within his competitive level and was, therefore, required to compete with other similarly situated employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

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 position shall be abolished:

- (a) Significant relevant contributions, accomplishments, or performance;
- (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.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

- (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)

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competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

(d) Length of service – (5%)<sup>17</sup>

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.<sup>18</sup> Agency cites *to American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given “broad authority to issue regulations governing the release of employees under a RIF...including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority.” I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

**Competitive Level Documentation Form**

Agency employs the use of a Competitive Level Documentation Form (“CLDF”) in cases where employees subject to a RIF must compete against each other in a lateral competition. In conducting the instant RIF, the Principal of Transition was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of three (3) points on his CLDF. Employee was the lowest ranked person in his competitive area and level. Employee’s CLDF stated, in pertinent part, the following:

During Mr. Weismiller’s time at [Transition], he has a disorganized classroom and he failed consistently to reinforce positive behavior. If he did reinforce positive behavior it was through the way of “free sodas and popcorn”. Mr. Weismiller was often late as he traveled daily from West Virginia where he resided. These tardy arrivals attributed to the lack of success in our students’ academic performance because administration was forced to provide substitute coverage with no available lesson plans.

**Office or school needs**

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of zero (0) points out of a possible ten (10) points in this category; a score much lower than the other employees within his competitive level. In reviewing the documents of record, Employee did not proffer any credible statutes, case law, or other regulations to refute Agency’s position regarding the principal’s authority to utilize discretion in completing an employee’s CLDF during the course

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<sup>17</sup> It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. See *White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

<sup>18</sup> Agency Brief at 5 (March 8, 2012).

of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that “school principals have total discretion to rank their teachers” and noted that performance evaluations are “subjective and individualized in nature.”<sup>19</sup>

The Principal of Transition was given the discretion to complete Employee’s CLDF. Employee has provided no credible evidence that may bolster his score in this area. Moreover, I find that the Principal at Transition had wide latitude to invoke his managerial discretion with respect to assessing the on-the-job performance and capabilities of his subordinates. With respect to Office and School needs, I find that in this matter I will not substitute my judgment for that of the Principal of Transition as it relates to the score he accorded to Employee and his colleagues in the instant matter.

**Significant relevant contributions, accomplishments, or performance**

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that the CLDF did not account for his significant contributions to the school with respect to the success of his students and his classroom management skills. Employee has provided no credible evidence that may bolster his score in this area. With respect to significant relevant contributions, accomplishments, or performance, I find that in this matter, I will not substitute my judgment for that of the Principal of Transition as it relates to the score he accorded to Employee and his colleagues in the instant matter.

**Relevant supplemental professional experiences as demonstrated on the job**

This category accounts for 10% of the CLDF. Employee used similar argument as noted in the preceding sections in order to substantiate his contention that he should have been awarded additional points on his CLDF. I find that this falls within the rubric of managerial discretion. Considering as much, I again find that Employee’s arguments to the contrary are unconvincing.

**Length of service**

According to the CLDF, Employee’s tenure with DCPS spans nine years. The length of service category was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an “outstanding” or “exceeds expectations” evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. According to the CLDF, Employee did not qualify for any of the aforementioned bonus points in this category. Employee received a total of three (3)

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<sup>19</sup>See also *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

weighted points in this category. I find that Employee has not provided any credible supporting documentary evidence to support any additional points being awarded in this category.

According to the CLDF, Employee received a total score of three (3) points after all of the factors outlined herein were tallied and scored. The lowest ranked colleague whose position survived the instant RIF received a total score of fifty seven and half (57.5). Employee has not proffered any credible evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this matter.<sup>20</sup> Further, there is no indication that any supplemental evidence would supplant the higher scores received by the remaining employees in Employee's competitive level who were not separated from service. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.<sup>21</sup> This Office will not substitute its judgment for that of an agency when determining whether a penalty imposed against an employee should be sustained. Rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."<sup>22</sup> This Office cannot substitute its judgment for that of the Principal at Transition, who was given discretion to complete Employee's CLDF and had wide latitude to invoke his managerial discretion. With respect to the aforementioned CLDF, I find that I will not substitute my judgment for that of the Principal of Transition as it relates to the scores he accorded Employee and his colleagues in the instant matter.

### **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). The RIF Notice is dated October 2, 2009. The effective date of the RIF was November 2, 2009. The RIF Notice states that Employee's position is being abolished as a result of a RIF. The RIF Notice also provides Employee with information about her appeal rights. Moreover, Employee has not submitted any credible evidence that would show that he did not receive his RIF notice on the date indicated therein. Therefore, I find that Employee was given the required thirty (30) days notice prior to the effective date of the RIF.

### **Failure to Prosecute**

Employee's failure to respond to the February 15<sup>th</sup> and May 1<sup>st</sup> Orders provides another

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<sup>20</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law).

<sup>21</sup> See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>22</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

basis to dismiss this petition. OEA Rule 621.3 grants an Administrative Judge (“AJ”) the authority to impose sanctions upon the parties as necessary to serve the ends of justice.<sup>23</sup> 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.<sup>24</sup> 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. 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.<sup>25</sup> The February 15<sup>th</sup> and May 1<sup>st</sup> 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 abolished after he properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. Therefore, I 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.

### **ORDER**

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

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
SENIOR ADMINISTRATIVE JUDGE

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<sup>23</sup> 59 DCR 2129 (March 16, 2012).

<sup>24</sup> See OEA Rule 621.2, 59 DCR 2129 (March 16, 2012).

<sup>25</sup> *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).