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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROBERT WILLIS)	
Employee)	OEA Matter No. 2401-0210-10R14R17
)	
v.)	Date of Issuance: March 13, 2018
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	
Mattie Johnson, Esq., Union Representative		
Carl K. Turpin, Esq., Esq., Agency Representative		

SECOND INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Robert Willis (“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 abolishing his position 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 an ET-15 Science Teacher at Ballou Senior High School (“Ballou”). I was initially assigned this matter on February 7, 2012. On February 16, 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. Both parties complied with this order and after reviewing the documents of record, the undersigned issued an Initial Decision (“ID”) in this matter on June 3, 2012, wherein I upheld DCPS’ decision to abolish Employee’s last position of record through a RIF.

Employee timely filed a Petition for Review with the Board of the OEA (“Board”). On October 29, 2013, the Board issued its Opinion and Order on Petition for Review (“O&O”) in this matter. The Board elected to remand this matter to the undersigned in order to determine

whether the Competitive Level Documentation Form (“CLDF”) used by DCPS to justify Employee’s removal was supported by substantial evidence.¹

Thereafter, the undersigned rescheduled the status conference multiple times in this matter due to various scheduling conflicts including certain dates where the District government was closed due to inclement weather. Eventually, an Evidentiary Hearing was held on December 11, 2014. On June 10, 2015, the Undersigned issued an Initial Decision on Remand (“IDR”) wherein DCPS’ abolishment of Employee’s last position of record via RIF was upheld, again. Employee filed a second Petition for Review. In response, on January 24, 2017, the Board issued an Opinion and Order on Remand (“2nd O&O”). In it, the Board remanded the matter to the Undersigned to determine if the Agency complied with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08, when conducting the RIF action. Consequently, a Status Conference was held and as part of the deliberative process, the parties opted to participate in extended Mediation/Settlement discussions. Unfortunately, their efforts to settle this matter were unsuccessful. The Undersigned provided the parties with a briefing schedule whereby they could address the concerns of the Board as noted in the 2nd O&O. The parties have submitted their respective briefs. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

ISSUE

Whether Agency complied with DPM Chapter 24, as provided in D.C. Official Code § 1-624.08, when it conducted the instant RIF action.

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.

Analysis

D.C. Official Code § 1-624.08 (“Abolishment Act”) states in pertinent part that:

¹ See O&O at 5.

(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.

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.²

Here, Ballou was identified as a competitive area and ET-15 Science Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were eleven (11) other ET-15 Science Teachers stationed at Ballou. Three of those positions did not survive the instant RIF. According to the aforementioned Retention Register, Employee was the lowest ranked ET-15 Science Teacher stationed at Ballou. Accordingly, his position was abolished as part of the instant RIF.

Employee was not the only ET-15 Science Teacher within his competitive level and area; as such he was 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%)

² District of Columbia Public Schools' Brief at 2-3 (March 7, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)³

Agency argued 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.⁴ 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.

As part of its defense of the instant RIF action, Agency noted a relatively recent development of pertinent case law issued by the District of Columbia Court of Appeals. DCPS argues that *Vilean Stevens & Ike Prophet v. District of Columbia Department of Health*⁵ clarified prior case law that had been relied upon by both the Undersigned and the OEA Board.⁶ DCPS noted that case law issued by the District of Columbia Court of Appeals is mandatory authority for the OEA and the District of Columbia Superior Court. DCPS further argues that *Stevens* holds, in part, as follows:

To put it differently, we construe the “each subsequent fiscal year” language of § 1–624.08 (a) together with the “February 1” deadline of § 1–624.08 (b) to mean that the Abolishment Act establishes a once-per-fiscal-year, time-limited opportunity for each District of Columbia agency to effect a RIF to manage its operations and workforce. This interpretation harmonizes the two RIF statutes on a basis that relies on the Abolishment Act’s plain language without rendering the general RIF statute superfluous. It means, for example, that if an agency determines after February 1 of the fiscal year that a RIF during the fiscal year is “necessary,” see D.C. Code § 1–624.03,12 it must implement the RIF, if at

³ 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).

⁴ District of Columbia Public Schools’ Brief at 5 (March 8, 2012).

⁵ 150 A. 3d 307 (December 15, 2016).

⁶ DCPS’ Position on Employee’s Appeal Based on the December 16, 2016 Court of Appeals Decision: *Vilean Stevens & Ike Prophet v. District of Columbia Department of Health* (“Position Statement”) at 1(March 30, 2017).

all, pursuant to the general RIF statute and may not do so under the Abolishment Act.⁷

DCPS contends that the Court of Appeals has harmonized the usage of the two statutes that regulate the invocation and conduct of a RIF. In a nutshell, the Court of Appeals has ended the practice of determining whether a RIF is being conducted pursuant to the Abolishment Act solely by means of an Agency's claim of budgetary distress. Rather, when in doubt as to the agency's use of the applicable RIF statute, the seminal analysis that must prevail as to which RIF statute applies to a particular matter is whether the RIF, in any given fiscal year, was implemented prior to February 1 of that fiscal year. *Stevens* also held that "the [Abolishment] Act did not require District official to have 'intended' to act under any particular statutory authority and the fact that DOH afforded appellant more process rather than the minimally required process was not a basis for denying DOH the opportunity afforded to it under the Abolishment Act."⁸

The instant RIF was implemented on November 2, 2009. The Undersigned takes judicial notice that the District of Columbia 2010 fiscal year began on October 1, 2009 and ended on September 30, 2010. Accordingly, I find that the instant RIF was implemented prior to February 1 of the fiscal year in question. Therefore, according to mandatory case law provided by the Court of Appeals in *Stevens*, I find that Employee's RIF was governed by the Abolishment Act. Given the instant facts and applicable law, I further find that the Superior Court and the OEA Board's prior mandate to cite to budgetary distress when justifying the use of an Abolishment Act RIF has been voided by the Court of Appeals in this matter.

According to the Abolishment Act, 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.

The requirements that an agency must fulfill when effectuating an Abolishment Act RIF are less stringent than what it must do in order to effectuate a General RIF. I find that the one round of lateral competition that is required under both RIF statutes are functionally similar in that one process can be utilized under either circumstance and still be fundamentally sound. In *American Federation of Government Employees, AFL-CIO v. OPM*, the Court held that OPM had "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."⁹ It has been thoroughly established that "principals have total discretion to rank their teachers"¹⁰ While it is true that there was an era where seniority was the

⁷ *Stevens* at 320 – 321.

⁸ *Id.* at 321.

⁹ 821 F.2d 761 (D.C. Cir 1987).

¹⁰ See *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774, 780-81 (D.C. Cir. 1997).

ultimate “trump” card when establishing who would be retained (or dismissed) when conducting a RIF; that era has passed. I find that the rating and ranking of Employee herein was done in a manner that is congruent with D.C. Official Code § 1-624.08. To establish a different rubric could, generally speaking, subject the youth of the District of Columbia to sub-par teacher methodologies and rigor. It would also hinder DCPS’ overall mission of providing a world-class education to its student populace.

Of note, it is not subject to genuine dispute that Employee herein was provided with thirty days written notice of the effective date of the instant RIF. As was discussed in detail in both the ID and the IDR, it is also not subject to genuine dispute that Employee was adequately provided with one round of lateral competition. The following excerpt from the IDR succinctly explains the Undersigned’s finding that Employee received legally adequate one round of lateral competition.

Despite Employee’s protestations to the contrary, there is no credible indication that any supplemental evidence would supplant the higher scores received by the remaining employees in Employee’s competitive level and area who were not separated from service.

I further note that Employee’s argument regarding the similarity of [then Ballou Principal] Branch’s responses for all of his former colleagues CLDFs as proof of the illegality of the CLDFs is unpersuasive. Branch explained that he utilized similar terminology and phrases for all of his employees so that he could fulfill the mandate of providing fair and consistent performance evaluations for all similarly situated employees. In weighing the credibility of the testimonial evidence between Branch and Employee it is clear to the undersigned that Branch used his good faith judgment when he ranked Employee against his peers as part of the instant RIF. As noted above in the summary of his testimony, Branch has presented more than sufficient evidence that Employee’s effectiveness as a Science Teacher was lacking for a number of reasons most notably, his tardiness and the lack of rigor and fidelity with respect to presenting the coursework to his students. Ultimately, this was the cause of Employee’s lackluster CLDF score. To buttress this point, Branch credibly contrasted the scores that Employee’s colleagues received and was able to explain why their CLDF scores were considerably higher than Employee’s. Moreover, in an effort to be fair with the scoring, Branch only utilized his impressions for that current school year. As has been noted previously, Principals are granted wide discretion to rate and rank employees under their supervision. Nothing in the record would lead the undersigned to believe that this RIF was conducted unfairly or with any animus towards Employee herein. Consequently, I find that Employee has failed to present credible evidence that his CLDF score was unjustified. I also find that 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.^{11 12}

I incorporate by reference my findings of fact and conclusion of law from the ID and the IDR. Employee herein was provided one round of lateral competition and was the lowest scoring incumbent within his competitive level and area. I find that Employee has not proffered any credible argument that proves that the competitive level and area in the instant matter was improperly constructed. I further find that Employee's score was accurate and his placement as the lowest ranked ET-15 Science Teacher at Ballou was the proper result.

According to *Stevens*, the fact that DCPS did not specifically state that the lateral competition was being done under the auspices of the Abolishment Act is of no moment in the instant matter.¹³ Regardless of Employee's contention to the contrary, I find that the lateral competition that was provided to Employee was done in a manner that complies with both the DCMR and the Abolishment Act.¹⁴

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. I further find that the CLDF that was used in this matter is overwhelmingly supported by substantial evidence. I further find that DCPS has met its burden of proof in this matter with respect to how it implemented and carried out the instant RIF and the resulting abolishment of Employee's last position of record. 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 should be 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:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

¹¹ 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).

¹² IDR at 12 – 13.

¹³ *Id.*

¹⁴ See ID at 11; See also IDR at 10 – 14.