THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
COLLIN VAN NIEL,	)	
Employee	)	OEA Matter No. 2401-0071-11
	)	
v.	)	Date of Issuance: October 19, 2012
	)	
DEPARTMENT OF INSURANCE	)	
SECURITIES AND BANKING,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Stephen White, Employee Representative
Rhonda Blackshear, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 18, 2011, Collins Van Niel ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Department of Insurance Securities and Banking's ("Agency" or "DISB") action of abolishing his position through a Reduction-In-Force ("RIF"). The effective date of the RIF was January 21, 2011. At the time his position was abolished, Employee's official position of record was a Senior Insurance Operations Specialist. On March 25, 2011, Agency filed its Answer to Employee's Petition for Appeal.

This matter was assigned to me on July 30, 2012. Subsequently, I issued an Order wherein, I required the parties to submit briefs addressing the issue of whether the RIF was properly conducted in this matter. Agency submitted a timely brief, but Employee did not. Thereafter, on August 31, 2012, I issued an Order for Statement of Good Cause. Employee was ordered to submit a statement of good cause based on his failure to submit his brief. On September 12, 2012, Employee submitted a response to the August 31, 2012, Order, requesting additional time to submit his brief. Employee's request was granted in an email dated September 14, 2012. On September 26, 2012, Employee submitted his brief in this matter. After considering the parties' arguments as presented in their submissions to this Office, I decided that an

Evidentiary Hearing was not required. And since this matter could be decided based upon the documents of record, no proceedings were conducted. The record is now closed.

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.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. 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:

> (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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> (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.
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> (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).
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> (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.
>
> (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.

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."[1] 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."[2]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[3] 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."[4] 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."[5]

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.[6] 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."[7] Further, "it is well established that the use of such a

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[1] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[2] *Id.* at p. 5.
[3] *Id.* at 1132.
[4] *Id.*
[5] *Id.*
[6] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[7] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[8]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[9] 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 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.

Employee's Position

In his submissions to this Office, Employee submits the following:

1. He was never provided a reason why he was not retained above lower standing employees as mandated by the DC Personnel Regulations, Chapter 24, Section 2423.1[10];
2. He was not allowed to compete for employment as stipulated in Section 2410.4 of the DC Personnel Regulations;
3. He was never offered a vacant position as per Section 2405.2 of the DC Personnel Regulations;
4. Agency failed to fill vacant positions in accordance with Sections 2403.2(b) of the DC Personnel Regulations;
5. Employee's seniority was never considered because he was terminated, while two Insurance Operations Specialist with two (2) years of service were retained, and he was not allowed to compete for a grade 13 position that was available at the time of the RIF, in the Forms Analyst Division of Agency;
6. Agency filled three (3) vacant positions despite a hiring freeze effective October 1, 2010, and these positions were not offered to employees targeted by the planned RIF, although he was qualified to perform the duties of at least two (2) vacant positions;
7. He was informed in November 2010, that since his position was involved in Patient Protection and Affordable Care Act ("PPACA") his position would not be included in the instant RIF; and
8. Agency's cited reasons for the RIF (Insufficient Funds & Lack of Work) are invalid. In support of this assertion, Employee provides a detailed explanation of Agency's funding.

[8] *Id.*
[9] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[10] Employee's Brief (September 26, 2012); *See also* Petition for Appeal (February 18, 2011).

Employee further notes that Agency failed to minimize the effect of the planned RIF in violation of Section 2403.1 of the DC Personnel Regulations and the Collective Bargaining Agreement (CBA).[11]

Agency's Position

Agency submits that it conducted the RIF in accordance with the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of his separation. Agency notes that there were two (2) employees who qualified for the Retention Register at Employee's competitive level, and both employees were subject to the RIF. Agency further notes that because both positions were eliminated, the statutory provision according Employee one round of lateral competition is inapplicable. As such, Agency requests that this Office uphold the RIF in this matter and grant a summary disposition of this matter.[12]

Round of Lateral Competition

Employee asserts that his competitive level was too narrow. He also notes that Agency never gave him the opportunity to compete for employment as specified in Section 2410.4 of the DC Personnel Regulations. Chapter 24 of the D.C. Personnel Manual ("DPM") § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> All positions in the competitive area … in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

In this matter, the December 6, 2010, DISB Request for Approval of RIF which was approved December 13, 2010, listed Employee's competitive area as Agency-wide in compliance with §2409.1.[13] Pursuant to the DPM § 2410 above, Agency was authorized to establish the competitive level, based on the employee's title of record, and other relevant factors. Employee's position of record was Senior Insurance Operations Specialist. Further, according to the Retention Register, Employee's competitive level was DS-0301-13-18-N. And pursuant to the record, Employee was one (1) of two (2) employees with the same job title, grade, classification series, and sufficiently alike in qualification in this competitive area. As such, Employee was entitled to compete with the other employee within his competitive level.

Employee also contests that he was not afforded one round of lateral competition since he was not able to compete with other employees. Employee submits that he was never provided with a reason why he was not retained above lower standing employees. Employee explains that

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[11] *Id.*
[12] Agency's Brief (August 10, 2012).
[13] Agency's Answer Tab 4 (March 24, 2011).

his seniority was never considered as he was terminated while two (2) Insurance Operations Specialists with two (2) years of service were retained. Agency explains that Employee was not entitled to one round of lateral competition since the entire competitive level within the competitive area was eliminated. 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 generally the date on which the employee began D.C. Government service. Here, the two (2) Insurance Operations Specialists whom Employee alleged were retained were not within Employee's competitive level. They had a different job title than Employee. There was only one (1) other employee with the same job title as Employee and this employee was within Employee's competitive level and as such, Employee was entitled to compete with this employee in one round of lateral competition. The record shows that all positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[14]

Employee argues that he was never offered a vacant position, and that Agency failed to fill vacant positions in violation of DPM § 2403.2(b) and § 2405.2. Employee notes that Agency had vacant positions when the RIF was conducted, but did not offer these positions to employees targeted by the RIF. Pursuant to DPM § 2403.2(b), "[a]n agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency. Examples of such actions are the following: … Filling vacancies with temporary employees to perform essential work, or contracting out such work, until the reduction in force takes place…." (Emphasis added). Additionally, DPM §2405.2 provides that, "[p]ersonnel authorities and agencies *may*, in order to minimize the adverse impact of a reduction in force, offer a released employee a vacant position for which he or she qualifies." (Emphasis added). These statutes give Agency the discretion to offer employees affected by the RIF vacant positions if available. Accordingly, I find that Agency had the discretion to offer Employee and any other employees affected by the RIF vacant positions when implementing the instant RIF. Moreover, DPM §2403.1, states as follows: "[p]lanning the work program and organizing the work force to accomplish the work program within available resources *shall* be the responsibilities of the agency." While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. Therefore, I find that Agency did not abuse its discretion in not offering Employee a vacant position or filling the

[14] See *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

vacant positions available at the time of the RIF. As such, I further find that Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

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). Here, Employee received his RIF notice on December 17, 2010, and the RIF effective date was January 21, 2011. The notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provides Employee with information about his appeal rights. Moreover, Employee does not contest that he received the required thirty (30) days notice. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

RIF Rationale

Employee also contends that Agency's cited reasons for the RIF (Insufficient Funds & Lack of Work) are invalid. In support of this contention, Employee provides a detailed explanation of Agency's funding. OEA has consistently held that, how Agency elects to spend its funds on personnel services or how Agency elects to reorganize internally is a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[15] Additionally, in *Anjuwan v. D.C. Department of Public Works,*[16] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at Agency level, Agency has discretion to implement the RIF…"[17] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds… [or] management decisions about which position should be abolished in implementing the RIF."[18] OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services.

Grievances

Employee also submits that Agency violated its CBA with the Union by failing to provide a justification for the RIF as stated in the CBA. Employee also notes that Agency violated the terms of the CBA by failing to provide the Union with appropriate information to ensure that the Union can engage in impact and effects bargaining over the RIF. Employee

[15] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[16] 729 A.2d 883 (December 11, 1998).
[17] *Id*. at 885.
[18] *Id*.

further notes that Agency filled three (3) vacant positions despite of a hiring freeze effective October 1, 2010 and these positions were not offered to employees targeted by the planned RIF, although he was qualified to perform the duties of at least two (2) vacant positions. Additionally, Employee submits that he was informed in November 2010 that since his position was involved in PPACA, his position would not be included in the instant RIF. Complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[19] 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. 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 separating Employee pursuant to a RIF is UPHELD.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[19] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).