THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DALE JACKSON,	)	
Employee	)	OEA Matter No. 2401-0089-11
	)	
v.	)	Date of Issuance: February 21, 2013
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

Alan Lescht, Esq., Employee Representative
Andrea Comentale, Esq., Assistant Attorney General

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 14, 2010, Dale Jackson ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Department of Health's ("DOH" or the "Agency") action of abolishing his last position of record through a Reduction-In-Force ("RIF").[1] Employee's last position of record with DOH was Motor Vehicle Operator. According to the Retention Register created as part of the RIF, Employee's competitive area was DOH Health Emergency Preparedness and Response

[1] According to a letter dated March 23, 2011, from Employee's representative, Alan Lescht, Esq., Employee filed his petition for appeal on the date described herein via facsimile. As proof of submission, Employee submitted a sent journal from Alan Lescht's facsimile machine which indicates that a facsimile transmission was attempted to the OEA on October 14, 2010, on at least five instances. Three instances went through as OK, one resulted in send error and another resulted in stop pressed. Given the initial date the petition for appeal was received by the OEA, Agency motioned for a dismissal on jurisdictional grounds because Employee's full petition for appeal was not found or date stamped by the OEA until March 23, 2011, which is well outside the 30 day timeframe for filing a petition for appeal before the OEA. Employee, through counsel, contends that he submitted his petition for appeal on October 14, 2010, within the filing deadline established under OEA rules and precedent. I note that it is generally preferred that matters before the OEA be decided on their merits. Considering as much as well as the facts and circumstances as set forth by the parties herein, I find that Employee timely filed his petition for appeal with the OEA. Accordingly, I must also deny Agency's motion to dismiss.

Administration ("HEPRA") – Public Health Laboratory and his competitive level was WS-5703-06-02-N. Of note, according to the Retention Register, Employee was the only person in his competitive level and area when the RIF occurred. According to the RIF Notice dated August 20, 2010, addressed to Employee and signed by Dr. Pierre N.D. Vigilance ("Vigilance"), Agency Director, the effective date of the instant RIF was September 24, 2010.

The undersigned was assigned this matter on or about July 30, 2012. Thereafter, pursuant to an Order dated September 7, 2012, I required the parties to address, in writing whether the instant RIF was properly conducted by affording Employee herein one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF. The parties have since complied with the aforementioned Order. After considering the parties arguments along with the documents of record I have determined that no further proceedings are warranted. 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

Employee's Position

Employee, through counsel, argues that another employee with less tenure should have

been included within the RIF and through the competitive nature of the RIF process, Employee herein would have prevailed and would not have been RIFFED. The basis for this argument comes via deposition testimony of Dr. Maurice E. Knuckles ("Knuckles") who stated, in a separate matter before the United States District Court for the District of Columbia, that both employees performed similar duties for the DOH.[2] Knuckles went on to explain that Employee's salary was paid through local funds whereas the other employee's salary was paid through federal funds. Knuckles then admitted that the other employee was situated within the HIV and AIDS group and that he was not the direct supervisor of the other employee.[3] Employee also contends that he was targeted for the RIF due to a past EEOC complaint lodged against the Agency.

Agency's Position

Agency argues that it conducted the instant RIF in accordance with all applicable laws, rules and regulations. Moreover, DOH contends that since Employee's entire lesser competitive level was abolished, therefore, Employee was not entitled to one round of lateral competition.

Analysis

Because this issue has arisen in other related matters with respect to the applicable RIF procedures that can be found within multiple sections of the D.C. Official Code, the undersigned will address why D.C. Official Code § 1-624.02,[4] which encompasses more extensive RIF procedures, is inapplicable to the instant matter. Moreover, 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

[2] *See* May 3, 2012, deposition of Dr. Maurice E Knuckles at 7 - 16.
[3] *Id*.
[4] 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 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.

> 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."[5] 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."[6]

However, the Court of Appeals took a different position. In *Washington Teachers' Union,*[7] the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[8] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[9] 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."[10]

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent*

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[5] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[6] *Id.* at p. 5.
[7] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[8] *Id.* at 1132.
[9] *Id.*
[10] *Id.*

fiscal years (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.[11] 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."[12] 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."[13]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[14] 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/she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

2. That he/she was not afforded one round of lateral competition within their competitive level.

In an appeal before this Office, I cannot consider the one round of lateral competition issue if I determine that Employee was properly placed in a single person competitive level or if the entire competitive level was abolished. It is evident from the record that Employee's entire lesser competitive level was abolished via the instant RIF. Despite Employee's arguments to the contrary, there is nothing in the record to indicate that Employee's placement in the aforementioned competitive level and area was anything but proper. I find that the Employee herein was properly placed in his lesser competitive level and area when the instant RIF occurred; therefore "the statutory provision affording [him] one round of lateral competition [is] inapplicable. *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), ___ D.C. Reg. ___ ( ). In the matter at hand, I find that the entire unit in which Employee's positions was located was abolished after a RIF had been properly implemented.

Budgetary Concerns

In *Anjuwan v. D.C. Department of Public Works*,[15] the D.C. Court of Appeals noted that the OEA does not have the "authority to second-guess the mayor's decision about the shortage of

[11] *Id.*
[12] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[13] *Id.*
[14] *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[15] 729 A.2d 883 (D.C. 1998).

funds…about which positions should be abolished in implementing the RIF." Moreover, the Court of Appeals observed that "as long as the RIF is justified by a shortage of funds at the agency level, the agency has the discretion to implement the RIF and may release employees whose positions are adequately funded."[16] As in *Anjuwan* , the RIF in the instant matter was conducted, *inter alia*, because of a shortage of funds. Once a shortage of funds is established, *Anjuwan* allows an agency to use discretion in implementing the RIF. Here, DOH's decision, to use lesser competitive areas to conduct the RIF, as carried out by the Mayor and his designee Vigilance, was totally within its discretion. Moreover, given the instant circumstances, the "OEA has [no] authority to second-guess the [DOH]'s management decision about which position[s] should be abolished in implementing the RIF." *Anjuwan* at 885. Accordingly, I find that Employee has failed to prove that the RIF was improper.

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 employee's claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds for personnel services. Likewise, I find that how Agency elected to reorganize internally, was a management decision, over which neither the OEA nor this AJ have any control.[17]

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 15, 2010. The effective date of the RIF was November 19, 2010. 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 his appeal rights. Moreover, Employee has not submitted any credible evidence or argument 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.

Discrimination

In his petition for appeal, Employee stated the following: "I also believe that the District included me in the RIF because I made a EEOC complaint against the agency on April 7, 2010." This is the sum total of Employee's "discrimination" claim. Although Employee was provided with an opportunity to put forth any credible evidence or argument regarding this or any other contention relevant to this matter, he has offered no other evidence or argument to support this

[16] *Anjuwan* at 885.
[17] *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

claim. Further, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[18] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works* held that OEA's authority over RIF matters is narrowly prescribed.[19] This Court explained that, OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied…the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs." *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997). However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[20] stated that, OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[21] Here, Employee's claims as described in his submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature. Therefore, I find that Employee's EEOC RIF retaliation claim falls outside the scope of OEA's jurisdiction.

Grievances

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[22] Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

Conclusion

Employee has failed to proffer any credible argument or evidence that would indicate that the RIF was improperly conducted and implemented. I further find that the 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.

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[18] D.C. Code §§ 1-2501 *et seq.*
[19] 729 A.2d 883 (December 11, 1998).
[20] 730 A.2d 164 (May 27, 1999).
[21] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).
[22] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

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