THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JUDY COFIELD,	)	OEA Matter No. 2401-0134-09-R-14
SARINITA BEALE,	)	OEA Matter No. 2401-0136-09-R-14
Employees	)	
	)	
v.	)	Date of Issuance: July 8, 2016
	)	
OFFICE OF CONTRACTING & PROCUREMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Stephen Leckar, Esq., Employee Representative
David Wachtel, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 19, 2009, Judy Cofield ("Employee" or "Cofield") and Sarinita Beale, ("Employee" or "Beale") filed separate petitions for appeal with the Office of Employee Appeals contesting the Office of Contracting and Procurement ("OCP" or "the Agency") action of abolishing their last positions of record through a Reduction-In-Force ("RIF"). Cofield's last position of record was Staff Assistant in the competitive area of OCP - Office of the Assistant Director for Procurement. Beale's last position of record was Program Analyst in the competitive area of OCP – Office of Procurement Support. For both matters, the effective date of the RIF was May 22, 2009. Both of the Employees herein were the only person in their respective competitive level and area when the instant RIF was effectuated. On or about November 30, 2009, both matters were initially assigned to Administrative Judge Sheryl Sears. On or around April 2010, due to Administrative Judge Sears' retirement, both of these matters were then reassigned to Senior Administrative Judge Rohulamin Quander. On or around June 2011, due to Senior Administrative Judge Quander's retirement, these matters were then reassigned to Senior Administrative Judge Joseph Lim. On or around October 2011, these matters were then reassigned to the undersigned Senior Administrative Judge for adjudication.

Thereafter, the parties were present for multiple status conferences. Beale and Cofield originally alleged that the Agency did not adhere to all of the requirements of D.C. Official Code § 1-624.02. Moreover, they contended that their positions were eliminated so that other persons could illegally take their former positions of record. OCP disagreed with the Employees' position and contended that the RIF of their respective positions were done in accordance with applicable law, rule and regulation. Taking into account the strikingly similar issues that was brought to bear in prosecution of both Cofield's and Beale's appeal, I found that these matters should be joined for adjudication.[1]

An evidentiary hearing was held in these matters on May 7, 8, 9, and 31, 2012. Afterwards, the parties were required to submit written closing arguments in support of their positions. After granting extensions of time in which to file their closing arguments, both parties complied with this order by submitting their closing arguments in or around September 2012. Thereafter, I issued an Initial Decision ("ID") in this matter on February 8, 2013. In the ID, I found in favor of the Agency and upheld its RIF action against both Employees. Employees appealed the ID to the District of Columbia Superior Court. The Superior Court of the District of Columbia issued its first Opinion in these matters on August 26, 2014. This Opinion was the original Opinion that brought this matter back under the Undersigned's purview. Subsequently, the Court issued an Amended Opinion which superseded the Court's August 26, 2014, Order. On January 12, 2016, the Honorable John M. Mott issued the Amended Opinion on these matters on appeal wherein he held the following:

> The court affirms OEA's determination that § 1-624.08 applied to the RIF because the conclusion is supported by substantial evidence in the record. The court likewise affirms OEA's determination that it lacked jurisdiction to consider petitioners' reemployment rights. The court finds that OEA's conclusion that the RIF was executed in accordance with the relevant laws and regulations is not supported by substantial evidence and remands this case to OEA for further proceedings.[2]

The Amended Opinion granted District of Columbia's motion for reconsideration (before the Superior Court). The issues that were remanded to the undersigned were lessened pursuant to the Amended Opinion. When this matter was initially remanded to the Undersigned, the parties were under a dual track of presenting competing briefs that addressed the issues that the Honorable John M. Mott presented as part of the original remand. The parties also attempted to mediate their differences under the auspice of the OEA's Mediation Department. Regrettably, the parties protracted attempts to settle these matters failed. After considering the breadth of the parties' submissions, the undersigned has determined that no further proceedings are warranted. The record is now closed.

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[1] *See* OEA Rule 611, 59 DCR 2129 (March 16, 2012).
[2] Sarinita Beale *et al* Civil Case No. 2012 CA 003434 B at 2 (January 12, 2016).

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 Employees herein 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

As the Court noted in its Amended Opinion and as was stated previously in the ID, Employees herein are only able to contest whether they "receive[d] written notice thirty (30) days prior to the effective date of their separation from service; and/or [whether they were] 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 Employees Beale and Cofield were properly placed in a single person competitive level or if the entire competitive level was abolished."[3] However, the Court noted the following:

> Here, the court is unable to determine from the record if petitioners were properly separated from their respective position of record, as both were reassigned in the months preceding the RIF. Beale was reassigned to a Program Analyst position on February 1, 2009, whereas Cofield was assigned to the "Goods Unit" in January 2009, before being shifted back

[3] *See* ID at 17.

> to her original position on March 15, 2009. Beale's "Form 50" identifies her February 2009 reassignment to OCP as a whole, without identifying any particular subdivision. However, the justification documents used by DCHR in creating the lesser competitive area identified Beale's position as being located in the "Procurement Support" subdivision of OCP. Similarly, Beale's RIF notice identifies "Procurement Support" as her position's competitive area. (internal citations omitted).[4]

Agency's Position[5]

Agency contends that the removal of Employees herein via RIF was lawful. In support of this contention, and in response to the Courts remand of this matter, Agency buttresses this argument by noting that both Employees Beale and Cofield were receiving pay for the positions noted in their RIF Notices. In further support, Agency submitted copies of both Employees pay stubs for the months preceding their separation from service. According to those pay stubs Employee Cofield's job title was Staff Assistant[6] and Employee Beale's job title was Program Analyst.[7] In doing so, Agency notes that [a]n employee's position of record is defined in the District of Columbia Regulations (DCMR) Title 6B § 2410.3 as "the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary or term basis."[8] In reliance on same, OCP further contends that these documents are sufficient justification of Employees position of record at the time of the RIF.

The Agency distinguishes these matters from *Armeta Ross v. Office of Contracting and Procurement.*[9][10] Agency argues that *Ross* is distinguishable from the instant matters in that *Ross* dealt with whether a memorandum was sufficient for effecting a reassignment (for the purposes of conducting a RIF) whereas in the instant matters the Undersigned must grapple with official position of record of Employees herein at the moment of the RIF in adherence with DCMR 6B § 2410.3. Agency further contends that this matter is more in line with *Leon Graves v. Department of Youth Rehabilitation Services*[11] wherein the AJ held that DPM § 2410.3 provides that the position for which the employee receives pay is that employee's position of record with respect to determining whether an employee occupies a position that is being

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[4] Sarinita Beale *et al* Civil Case No. 2012 CA 003434 B at 10 (January 12, 2016).
[5] OCP also made other arguments in support of its post RIF actions with respect to Priority Reemployment for Employees herein. However, this issue was addressed in the ID and affirmed by the Court in its Amended Opinion. Accordingly, this issue will not be readdressed in this Initial Decision on Remand.
[6] *See* Agency's Response to Order at attachment 10 (April 24, 2015).
[7] *Id*. at attachment 6.
[8] *See* Agency's Response to Order at 3 (April 24, 2015).
[9] OEA Matter No.: 2401-0133-09R11 (April 8, 2013).
[10] In *Ross*, OCP's RIF separation of an employee was reversed because the agency was unable to demonstrate that the employee had been properly separated from her position of record. In that matter, OCP was unable to produce a form 50 that accurately reflected Ross' reassignment to a new position of record that was later slated for abolishment via RIF. In support of its RIF action, the agency in *Ross* submitted a memorandum that purported to effectuate her reassignment. The Administrative Judge found that this memorandum, without other supporting documentation (e.g. form 50), was insufficient for the purpose of sustaining Ross' removal via RIF.
[11] OEA Matter No. 2401-0018-14 (March 25, 2015).

abolished via RIF. [12] Agency strongly contends that the facts in these matters are similar and that this provides proper justification for the instant RIF actions against Employees herein.

Employees Position[13]

Employees do not deny that the pay stubs cited in footnotes 6 and 7 are accurate. Employees strenuously assert that they were not separated from service from their official positions of record. To substantiate this assertion, they contend that the Form SF-50's that are a part of the record are not authentic (they lack signatures). Employees further contend the Form SF-50 is generally understood to be an official classification of an employee's position that requires a degree of formality to create. Moreover, this is the reason why this document has been overwhelmingly used to verify positions of record in matters such as this. Employees allege that they should prevail since this document does not accurately reflect Employees positions of record. Employees also contend that their inclusion in lesser competitive areas was essentially a ruse in order to effectuate their respective removals more efficiently. Employees cite the *Ross* matter as persuasive authority buttressing their contentions.[14] Employee also cites the matter of *Carolyn Williams v. District of Columbia Public Schools*, [15] where Employee matter was reversed due to the Agency improperly removing Employee from service via RIF. Like the matters at hand, the agency in *Williams* did not have a Form SF-50 that properly denoted her position of record for the RIF. However, in that matter, the evidence provided by agency to buttress its failing argument was *Williams'* performance evaluations. In *Williams*, the Board noted that performance evaluations are not "official personnel documents"[16].

Analysis

Employees are correct in noting that historically, the OEA has relied almost exclusively on Form SF-50 in helping to making an accurate determination of an employee's last position of record. Typically, this document, when it has been properly generated and executed, is a reliable record, kept in the ordinary course of business, reflecting changes in an employee's employment classification. The changes could be as mundane as a change of address for an employee or as important as an employee's change in job title, pay, grade, step, etc. However, OCP has credibly countered that assertion with excerpts from the District Municipal Regulations ("DCMR") which plainly note the following:

[12] *Id*. at 8.
[13] Employees also made other arguments in prosecution of Agency's post RIF actions with respect to Priority Reemployment for Employees herein. However, this issue was addressed in the ID and affirmed by the Court in its Amended Opinion. Accordingly, this issue will not be readdressed in this Initial Decision on Remand.

[14] *See* footnote 8.
[15] Opinion and Order on Petition for Review, OEA Matter No. 2401-0124-10-R13 (February 16, 2016).

[16] *Id*. at 6.

2410 COMPETITIVE LEVELS

2410.1 Each personnel authority shall determine the positions which comprise the competitive level in which employees shall compete with each other for retention.

2410.2 Assignment to a competitive level shall be based upon the employee's position of record.

2410.3 An employee's position of record is the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary or term basis.

I also note that given the current circumstances, I am required to follow the course of review prescribed by the Court. The undersigned was tasked by the Court to determine whether "petitioners were properly separated from their respective position of record"[17] via the instant RIF. In remanding this matter, the Court affirmed the ID's determination that D.C. Code § 1-624.08[18] was the relevant RIF provision. Employees contend that they should not have been in included in the lesser competitive areas. They further allege that doing so allowed OCP to improperly remove Employees without having to undergo lateral competition for positions that survived the instant RIF. With respect to Employee Beale, the executed Administrative Order ("AO") dated March 23, 2009[19] lists her position as "Program Analyst" and her position number as 00026621. Her unexecuted Form SF-50 has the same position title and number noting her

[17] *See* footnote 4.

[18] (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.

[19] See Agency's Response to Order at Attachment 2 (April 24, 2015).

removal. Similarly, with respect to Employee Cofield the executed AO lists her last position of record as "Staff Assistant" and her position number as 00010757. Her unexecuted Form SF-50 has the same position title and number noting her removal.

Usually, the Undersigned would rely on the Form SF-50 to make a reliable determination as to the last position of record for employees. However, since both documents for Employees herein are unexecuted, I must take into account that Employees do not dispute the veracity of the aforementioned pay stubs[20] nor do they provide any mandatory law, rule or regulations that would contradict (or give context) to DCMR 2410.3. The positions listed in the pays stubs for both Employees are identical to the positions authorized for abolishment through the AO. I also note that Employees did not dispute their position title (or pay) prior to their removal. In making this determination, I opt to follow the holding in *Graves* where another OEA Administrative Judge relied on this same section of the DPM in order to make a credible determination of an employee's last position of record when the record lacked a credible Form SF-50. I further find that *Williams* is inapplicable to this matter due to the fact that in *Williams*, the documentation provided by the agency was performance evaluations (not official pay stubs that clearly denoted the positions listed in the AO). And, the Board in *Williams* did not discuss the applicability of DCMR 2410.3. Left with this, I find that OCP has met its burden with respect to establishing that Employees positions of record at the moment of the RIF were Program Analyst (Beale) and Staff Assistant (Cofield). I further find that Employees Beale and Cofield occupied the positions identified in the AO that were slated for abolishment via RIF.

In an appeal before this Office, I cannot consider the one round of lateral competition issue if I determine that Beale and Cofield were properly placed in a single person competitive level or if the entire competitive level was abolished. In the matters at hand, I further find that the entire units in which Beale and Cofield respective positions were located were abolished after a RIF had been properly implemented. I find that the Employees herein were properly placed in their respective competitive levels when the instant RIF occurred; therefore "the statutory provision affording them one round of lateral competition is inapplicable.

Conclusion

I find that Employees herein have failed to proffer any credible argument(s) or evidence that would indicate that the RIF was improperly conducted and implemented. [21] I further find that the Agency's action of abolishing Employees Beale and Cofield positions were done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in their removal is upheld.[22]

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[20] *See* footnotes 6 and 7.
[21] The parties agree that Employees Beale and Cofield received their RIF notice at least 30 days from their removal.
[22] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of abolishing Employees Beale and Cofield positions through a Reduction-In-Force pursuant to D.C. Official Code § 1-624.08 is UPHELD.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE