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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
ERNEST HUNTER,	)	
Employee	)	OEA Matter No. 2401-0321-10
	)	
v.	)	Date of Issuance: October 12, 2012
	)	
D.C. CHILD AND FAMILY	)	
SERVICES AGENCY,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Ernest Hunter, Employee *Pro Se*  
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 10, 2010, Ernest Hunter (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Child and Family Services Agency’s (“Agency” or “DC CFSA”) action of abolishing his position through a Reduction-In-Force (“RIF”). The effective date of the RIF was June 11, 2010. At the time his position was abolished, Employee’s official position of record was a Contract Compliance Officer with Agency. On July 14, 2010, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was assigned to me on or around July 10, 2012. Subsequently, on July 12, 2012, 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. Both parties submitted timely briefs. On August 14, 2012, upon further review of the file, the undersigned issued an Order requiring Agency to submit the signed Administrative Order approving the RIF. On August 22, 2012, Agency submitted its brief, along with a request for additional time to locate the requested documents.<sup>1</sup> On September 7, 2012, Agency submitted its Supplemental Submission of Documents. 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

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<sup>1</sup> See Agency’s submission of Documents (August 22, 2012).

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).*

(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.

(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.”<sup>2</sup> 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.”<sup>3</sup>

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.”<sup>4</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>5</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>6</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>7</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>8</sup> Further, “it is well established that the use of such a

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

<sup>3</sup> *Id.* at p. 5.

<sup>4</sup> *Id.* at 1132.

<sup>5</sup> *Id.*

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

<sup>7</sup> *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

<sup>8</sup> *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.”<sup>9</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>10</sup> 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 Petition for Appeal, Employee submits that he was wrongfully RIFed 1) in retaliation for his complaints of and participation in the investigation of wrongful discrimination; 2) in retaliation for his complaint and participation in the investigation of mismanagement, cronyism, and abuse of authority in contract management by the Contracts and Procurement Division of DC CFSA; and 3) in violation of applicable Personnel Regulations.<sup>11</sup>

Additionally, in his brief, Employee provides a detailed account of the various issues in support of his retaliation claim. Specifically, Employee highlights the following:

- 1) At a meeting held on April 28, 2010, he made additional disclosures to the former Director of Agency Dr. Roque Gerald (“Director”), his General Counsel Jim Toscono and his Chief of Staff Loren Ganoë with regards to an ongoing audit;
- 2) The RIF is in violation of D.C. Whistleblower and Human Rights statute because it occurred after Employee reported a fraudulent activity to the Office of Inspector General in July 2008 and made several complaints to District officials with regards to discrimination. Employee explains that, if the RIF was approved by the Director as a result of the April 28, 2010, meeting, then the Director violated the Whistleblower statute, and as such, the RIF was not consistent with D.C. Code § 1-624.08;
- 3) Employee also states that, the RIF is in violation of D.C. Code § 1-624.08 and the Collective Bargaining Agreement between Agency and the Union because Agency failed to identify any position for abolishment prior to February of that fiscal year (“FY”) and the Union should have been engaged in the process as required;<sup>12</sup>

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

<sup>10</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

<sup>11</sup> Petition for Appeal (June 10, 2010).

<sup>12</sup> Employee highlights that the Union has filed an unfair labor practice complaint with the Public Employee Relations Board (“PERB”).

- 4) Employee also notes that his request for the Administrative Order<sup>13</sup> (“AO”) approving the RIF that abolished his position has been futile;
- 5) Employee argues that he was not afforded one round of lateral competition as prescribed by D.C. Code § 1-624.08 or § 1-624.02. Employee contends that the competitive area/level used in the instant RIF is too narrow. He maintains that every position within the competitive level that is equal in grade and series regardless of title should have been subject to competition;
- 6) Employee further alleges that his position number (position # 00001731) was never abolished and is still vacant, although the title has changed;
- 7) Employee asserts that the RIF listed his position as being under the Contracts and Procurement Administrative Office of the Chief of Staff competitive area, and under a DS-13-14-N competitive level. However, his Personnel Action Form (“SF-50”) lists his position under the Office of the Deputy Director of Administration, DS-0301-13;
- 8) Employee also argues that the realignment package submitted by Agency lacks pertinent signatures/dates, including the City Administrator’s signature. He notes that Agency did not attach an AO and there is no evidence that a City Administrator or designee approved or even saw the package that was allegedly sent to Brenda Gregory on April 29, 2010, the day after he last met with the Director, and forwarded to the City Administrator’s office for its concurrence on May 5, 2010, the day before he was issued the RIF notice dated May 6, 2010; and
- 9) Employee states that, his Director resented him doing his job, including reporting to the Office of the Inspector General the fraudulent activities, which is why he was RIFed.<sup>14</sup>

### ***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 Employee was the only employee in his competitive area and level. Agency explains that it created a separate Retention Register for each competitive level. Agency also states that, on April 29, 2010, it submitted a request containing all positions to be abolished to the City Administrator for approval to conduct a RIF; however, it has been unable to locate the signed approval from the City Administrator or its designated representative approving the RIF.<sup>15</sup> Agency further notes that, the April 29, 2010, document requesting the RIF approval was signed by the Director, who had authority to approve RIFs pursuant to a Consent Order (“CO”).<sup>16</sup>

### ***RIF Authorization***

Chapter 24 of the D.C. Personnel Manual (“DPM”) § 2406, 47 D.C. Reg. 2430 (2000) provides the following: “If a determination is made that a reduction in personnel is to be

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<sup>13</sup> Administrative Order No CFSA-2010-01 (April 29, 2010).

<sup>14</sup> Employee’s Brief (August 7, 2012).

<sup>15</sup> Agency’s Submission Documents, Exhibit 1 (August, 22, 2012).

<sup>16</sup> See Agency’s Supplemental Submission of Documents (September 7, 2012), Exhibit 1 - Consent Order issued in *Lashawn A. et al. v. Anthony Williams, et al.*, C.A. No. 89-175 (October 23, 2000).

conducted pursuant to the provisions of ... this chapter, the agency shall submit a request to the appropriate personnel authority to conduct a reduction in force (RIF). Upon approval of the request as provided in subsection 2406.1 of this section, the agency conducting the reduction in force shall prepare a RIF Administrative Order, or an equivalent document, identifying the competitive area of the RIF; the positions to be abolished, by position number, title, series, grade, and organizational location; and stating the reason for the RIF.”

Employee contends that Agency has failed to produce the AO authorizing the RIF. Employee notes that, all his attempts to obtain the AO from Agency have been futile. Agency on the other hand notes that, it has been unable to locate the AO authorizing the RIF. According to § 2406 of the DPM referenced above, upon approval of a request to conduct a RIF, Agency has to submit an AO or an equivalent document, identifying the competitive area of the RIF; the positions to be abolished, by position number, title, series, grade, and organizational location; and stating the reason for the RIF. Agency’s request for RIF approval to the City Administrator dated April 29, 2010, had attached to it, AO No. CFSA 2010-01, which lists the reason for the RIF, the competitive and/or lesser area of the RIF, the position number, position title, series, grade and organizational location, in compliance with § 2406 of the DPM.

Employee further asserts that, the April 29, 2010 letter from Agency to the City Administrator requesting approval of the RIF and/or the realignment package dated May 5, 2012, lacked pertinent dates and signatures. Employee notes that it is not signed and dated by the City Administrator and/or its designated representative. Agency, however, explains that the April 29, 2010, request for RIF approval is signed by Agency’s Director, whom, pursuant to a CO, has authority to approve RIFs. Also, the CO notes states that, “CSFA, shall be established as a cabinet-level agency with independent personnel authority, including full authority to hire, retain and terminate personnel consistent with District law...”<sup>17</sup> Section 2406 of the DPM goes on to note that, “the approval by the appropriate personnel authority of the RIF Administrative Order ... shall constitute the authority for the agency to conduct a reduction in force.” Here, the CO gives the Agency’s Director the authority to approve RIFs. The April 29, 2010 AO though not dated, was signed by Agency’s Director Roque Gerald. Therefore, I find that, Agency had authority to conduct the instant RIF.

Additionally, Employee asserts that, the RIF is in violation of D.C. Code § 1-624.08 because Agency failed to identify any position for abolishment prior to February of FY 2010. D.C. Code § 1-624.08 (b), provides that, prior to February 1st of each fiscal year, each personnel authority... shall make a final determination that a position within the personnel authority is to be abolished. However, this section is silent as to whether or not the agency is required to document or disclose this information to anyone. In addition, this section does not highlight what steps the agency should take once it makes a determination that a position within the personnel authority is to be abolished (such as documenting and/or submitting the identified positions for approval). As such, the undersigned will revert back to Chapter 24 of the DPM, which as stated above, only requires that the agency upon making a determination that a RIF is needed, submit a RIF request for approval, which Agency in this case complied with. Moreover, Employee has not provided any credible evidence to show that Agency had not identified the position for abolishment prior to February 1, of 2010.

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<sup>17</sup> CO at pg. 2.

### ***Round of Lateral Competition***

Employee notes that his SF-50 highlights that his position was within the Office of Deputy Director of Administration. Chapter 24 of the DPM § 2409, 47 D.C. Reg. 2430 (2000) authorizes agency personnel to establish lesser competitive areas when conducting RIFs. Here, the April 29, 2010, RIF authorization letter approved the Office of the Chief of Staff Contracts and Procurement Administration as a lesser competitive area for purposes of the instant RIF. Also, Agency's Attachment 4, dated March 16, 2010, lists Employee's position as being under the Office of the Chief of Staff, Contracts and Procurement Administration.<sup>18</sup> Consequently, I find that Employee was properly placed in the Office of the Chief of Staff Contracts and Procurement Administration competitive area, and was therefore subject to the instant RIF.

Furthermore, D.C. Code § 1-624.08 (f), *supra* highlights, with a few exceptions not relevant to this case, that neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished...shall be subject to review.

Employee also argues that he was not the only employee with the same grade, series, and similar duties and therefore, he was able to compete with other employees. Employee asserts that every position within a competitive level that is equal in grade and series, regardless of title, should have been subject to competition. Chapter 24 of the DPM § 2410, 47 D.C. Reg. 2430 (2000), states in pertinent parts as follows:

Each personnel authority shall determine the positions which comprise the competitive level in which employees shall compete with each other for retention. Assignment to a competitive level shall be based upon the employee's position of record.

A competitive level shall consist of 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.

The composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions, and other factors prescribed in this section and section 2411 of this chapter.

In this matter, 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

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<sup>18</sup> See Agency's Brief, Attachment 4 (July 26, 2012).

position of record was Contracts Compliance Officer. And according to the record, Employee was the only Contracts Compliance Officer in his competitive area.

Employee also contests that he was not afforded one round of lateral competition since he was not able to compete with other employees. 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.

Employee was the only Contracts Compliance Officer in his competitive area and was in a single person competitive level. Agency explains that Employee was not entitled to one round of lateral competition since the entire single person competitive level within the competitive area was eliminated. This Office has consistently held that, when an employee holds the only position in his competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee’s position.<sup>19</sup> According to the Retention Register produced by Agency, Employee was the sole Contract Compliance Officer at D.C. CFSA Contracts and Procurement Administration.<sup>20</sup> Accordingly, I conclude that Employee was properly placed into a single person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(e) pertaining to multiple-person competitive levels when it implemented the instant RIF.

### ***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 May 6, 2010, and the RIF effective date was June 11, 2010. 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

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<sup>19</sup> See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

<sup>20</sup> See Agency’s Post Status Conference brief, *supra*, at Tab 4.



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.

### ***Discrimination***

Employee contends that the RIF was based on discrimination, and that it was retaliatory in nature. Employee further notes that the RIF was in violation of the Whistleblower and Human Rights Statute because it was approved after he reported fraudulent activities to the Office of Inspector General in July of 2008, and made several complaints to District Officials with regards to discrimination. Employee also states that, “if” the RIF was approved by the Director as a result of the April 28, 2010 meeting he had with the Director, then the Director violated the Whistleblower statute.<sup>21</sup> 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.<sup>22</sup> Additionally, District Personnel Manual (“DPM”) § 1631.1(q) reserves allegations of unlawful discrimination to OHR. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883 (December 11, 1998) held that OEA’s authority over RIF matters is narrowly prescribed. 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.”<sup>23</sup>

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*<sup>24</sup> 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...”<sup>25</sup> In the instant case, Employee notes that the RIF was discriminatory, retaliatory in nature, and possibly a violation of the Whistleblowers statute, stemming from a 2008, incident. Employee explains that his Director resented him for doing his job, including reporting fraudulent activities to the Office of the Inspector General in 2008. However, Employee has failed to provide any substantive evidence to substantiate his assertions or establish that the RIF was specifically created to target him in retaliation or that it was conducted in a discriminatory manner. Moreover, I find that, when the alleged incident occurred and when the RIF was conducted is too far apart in time to support a whistleblower or retaliation claim. Additionally, since Employee was not the only employee affected by the RIF, it can be reasonably assumed that Agency had identified the positions to be RIFed prior to the April 28, 2010, incident

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<sup>21</sup> Employee’s brief at p. 2 (August 7, 2012).

<sup>22</sup> D.C. Code §§ 1-2501 *et seq.*

<sup>23</sup> *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

<sup>24</sup> 730 A.2d 164 (May 27, 1999).

<sup>25</sup> *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

Employee referenced. Consequently, I find that Employee's claims are unsubstantiated and as such, fall outside the scope of OEA's jurisdiction.

### *Grievances*

Employee contends that his position was never abolished, and is still vacant, although the title has changed. Employee also maintains that his Director resented him for doing his job. Employee further asserts that the RIF was in violation of the CBA between Agency and the Union because the Union should have been engaged in the RIF process as required. Employee stated in his submissions to this Office that the Union has filed an unfair labor practice complaint with PERB with regards to the breach in contract relative to the RIF. I find that complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. 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 are outside of OEA's jurisdiction. 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:

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MONICA DOHNJI, Esq.  
Administrative Judge