THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GWENDOLYN SCOTT-GILCHRIST	)	
Employee	)	OEA Matter No. 2401-0177-09
	)	
v.	)	Date of Issuance: May 28, 2010
	)	
D.C. DEPARTMENT OF,	)	ROHULAMIN QUANDER, Esq.
HUMAN SERVICES	)	
Agency	)	Senior Administrative Judge
	)	

Greg Sharma-Holt, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 3, 2009, Gwendolyn Scott-Gilchrist ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Department of Human Services ("DHS" or "the Agency") action of abolishing her position of IT Specialist (Data Management), DS-2210-13-08-N, through a Reduction-In-Force ("RIF"). Agency entered an arrangement with the Office of the Chief Technology Officer ("OCTO"), which then subsumed all of the duties of Employee's position of record. Further, I note Agency justified implementation of the RIF in significant measure due to Agency's claim of curtailment of work and budgetary reasons. In all, 19 employees of the above-noted office were terminated as a result of the RIF.

This matter was assigned to me on April 1, 2010. Thereafter, I convened a Prehearing conference on May 13, 2010, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. After considering the parties' arguments, I decided that an evidentiary hearing was not required.

Since this case could be decided based upon the documents of record, and the recited positions of the respective parties, no additional proceedings were conducted. The

record is 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.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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:
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> > 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of the Employee's appeal process with this Office, as well as oral argument received during the Prehearing Conference.

Employee challenged the necessity of the RIF, raising several issues which Employee wished to be addressed. Among the items raised were:

1) That the RIF exceeded the authority of Administrative Order 2009-01, issued by the Agency on May 29, 2009, which provided for the implementation of a RIF, in that the recited alleged basis for the RIF, i.e., "budgetary reasons," was not the case, as neither savings nor budget cutting occurred as a result of the RIF;[1]
2) Employee's position was federally funded, and not affected by the D.C.

[1] See Agency Tab #7.

Government's (Agency's) current fiscal crisis, so any claim that the termination of her position was a savings to the D.C. Government is falsely based;

3) The claimed abolishment of Employee's position, as well as the position of the other IT Specialist, did not meet or address any designated Agency need, as the need was clearly there and continued to exist, as demonstrated by Agency's immediate contract with the Officer of Chief Technology Officer ("OCTO"), which immediately replaced Employee, both as to staff and duties;[2]
4) At a certain point, not too long before the RIF was implemented, Employee's job title was changed, which narrowed the area of consideration when the RIF was eventually implemented, whereas she just as easily could have been regrouped with the Informational Programmers and retained in job series CS 2210, none of whom were affected by the RIF;[3] and
5) That the RIF was a pretext to fire Employee in retaliation for her prior union shop steward activities which were in contravention to her supervisor's efforts in a non-related sexual harassment complaint, brought by another employee.[4]

Agency responded and challenged each of Employee's assertions. First and foremost, and without conceding to the merits of any of Employee's claims, Agency underscored that in weighing the provisions of the RIF law and subsequent regulations, as enumerated in both the *D.C. Official Code*, § 1-624.08, all of Employee's above-noted assertions are completely outside of the jurisdiction of the Office, and cannot be entertained or considered in this forum, even if there was merit to any of Employee's claims.

Although the RIF statute has been amended a number of times, the controlling language addressing the abolishment of positions for fiscal year 2000 and subsequent years has not changed, and the above-noted provisions have remained intact since FY 98. The Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA") amendments clearly provided that RIFed employees are entitled to one round of lateral competition within his/her competitive level and 30 days' advance written notice of the effective day of the RIF. Therefore, an employee's appeal rights to this Office are limited to allegations that s/he was not afforded the mandated one round of competitive-level lateral competition and/or that s/he was not given the required 30-day written notice. Of specific relevance to this case are D.C. Official Code § 1-624.02, which tracks OPRAA § 101(x). This section reads in pertinent part as follows:

§ 1-624.02. Procedures.

(a) Reduction-in-force procedures shall apply to the

[2] See Agency Tab #8.
[3] Based upon the documents Employee submitted, it is unclear whether the positions that she refers to as "Programmers" are the same as those identified as either "IT Specialist (Network/Customer Support") or "IT Specialist (Applications Software"). Agency responded to Employee's claim, by pointing out that the job descriptions of those positions require different qualifications, duties, and responsibilities, and were not the same as those required by Employee's former position at the time that the decision was made to institute the RIF.
[4] See undated Declaration of Carol Thompkins, Paragraph #18.

> Career . . . [Service] and shall include:
> . . . .
>
> (2) One round of lateral competition limited to positions within the employee's competitive level.
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> . . . .
>
> (5) Employee appeal rights.
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> . . . .
>
> (d) A reduction-in-force action may not be taken until the employee has been afforded at least 30 days advance notice of such an action.[5] The notification required by this subsection must be in writing and must include information pertaining to the employee's retention standing and appeal rights.

Employee has not alleged that Agency violated her right to a single round of lateral competition within her respective competitive levels,[6] or that she were denied at least 30 days advance written notice prior to the effective date of the RIF. The allegations which she does make are all pre-RIF or collateral issues, and outside of the scope of my jurisdiction over RIF appeals, pursuant to § 144(b) of District of Columbia Appropriations Act of 1999 (the DCAA-99), which is codified at D.C. Official Code § 1-624.08 (2001).[7] Therefore, I find that Employees have made no claim for relief

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[5] The only substantive change that occurred in this area was taken in the 1999 OPRAA amendments, which increased the RIF notice period from 15 days to 30 days, to universally align notification time conflicts within D.C. personnel regulation notice provisions of various RIF-related amendments.

[6] Employee's claim that she should have been regrouped with the Informational Programmers, none of whom was RIFed, is a potential job misclassification grievance issue, which cannot be considered by OEA.

[7] *D.C. Official Code* § 1-624.08, which states in pertinent part that:

> (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... 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:
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> (1) An employee may file a complaint contesting a determination or a

cognizable before this Office.

The issue of whether pre-RIF conditions at an employee's former agency can be addressed by this Office has been raised previously, and likewise long ago decided. In *In the Matter of Teteja*, 2405-0013-91, (7-2-92), 39 D.C.Reg. 7213, a seminal case in the subject area, the Temporary Appeals Panel (the "TAP") determined that the TAP does not have jurisdiction to hear a claim of a prior job misclassification in the process of adjudicating an employee's RIF appeal, and that permitting job classifications to be challenged under the guise of a RIF appeal, would be incompatible with the limited scope of review of RIF determinations. Further, TAP emphasized that its role is limited to reviewing the validity of matters covered by the RIF regulations. See also *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), which held that this Office's authority is narrowly prescribed, and did not have jurisdiction to determine whether the RIF at the agency was *bona fide* or violated any law, other than the RIF regulations themselves.

In *David A. Gilmore v. University of the District of Columbia,* 695 A.2d 1164, (D.C.1997), the court held that Gilmore could not use the RIF process to belatedly contest the process utilized in his job being reclassified, which position was subsequently abolished during a RIF. The court further noted that Gilmore could have filed a timely grievance with his employer, challenging what he believed was a misclassification of his position. Had he done so, the grievance would have afforded his employer the opportunity to redefine the duties the position entailed, so as to remove uncertainty about its classification and the grounds for any future legal disputes that might arise. Depending upon the outcome of the grievance process, a timely grievance would have enabled Gilmore to decide whether to accept the "good" with the "bad", i.e., the increased vulnerability of his new job reclassification and the promotion that came with it, rather than accepting the benefits when given, and challenging his status only later when the burdens of the higher position, including the ultimate RIF, materialized. *Id* at 1168.

In maintaining this position, OEA is adhering to determinations previously made by the federal courts. In *Menoken v. Department of Health and Human Services,* 784 F.2d 365, 368-369 (Fed.Cir.1986), the court held that:

> In determining the retention rights of the former employees of the Community Services Administration, the [Merit Systems Protection] Board necessarily had to look at the situation as it actually existed in that agency when the reduction in force took place on September 30, 1981, and not to the situation that might or should have existed on that date. It would be almost impossible to determine the retention rights of employees

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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.

> affected by a reduction in force or transfer of function if the correctness of the classification of the positions the employees held had to be reexamined. Reductions in force deal with actual and not theoretical or possible situations.

See also *Biddle v. United States*, 195 U.S.App.D.C. 263, 602 F.2d 441 (1979), holding that complaints of pre-RIF treatment are not a proper issue of RIF appeal subject to review of the Federal Employee Appeals Authority. Instead, those issues had to be raised within the agency's own grievance procedures. For further discussion of this same issue, see *Wharton v. District of Columbia Public Schools*, OEA Matter J-0111-02 (Mar. 3, 2003), __ D.C. Reg. __ ( ); *Levitt v. District of Columbia Office of Personnel*, OEA Matter No. 2401-0001-00, *Opinion and Order on Petition for Review* (Nov. 21, 2002), __ D.C. Reg. __ ( ); *Powell v. Office of Property Management*, OEA Matter No. 2401-0127-00 (Feb. 3, 2003), __ D.C. Reg. __ ( ); *Booker v. Department of Human Services*, OEA Matter No. 2401-0190-97 (Oct. 11, 2000), __ D.C. Reg. __ ( ).

Therefore, I find that an Employee raising collateral issues when challenging a RIF does not confer additional authority upon the Office to enforce all laws and regulations, as such would clearly exceed both the limited statutory authority and jurisdiction of this Office. Having reviewed the current status of the RIF law and governing regulations, I conclude that the jurisdiction of this Office in conducting RIF appeals is limited to the authority granted by the plain language of the statute, particularly the provisions of *D.C. Official Code* § 1-624.08 (d) (one round of lateral competition which shall be limited to positions in his/her competitive level), and (e) (at least 30 days written notice before the effective date of his/her separation). Anything else is beyond this Office's authority to address.

Further, this Office has consistently held that when a separated employee is the only member of his/her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added by this AJ), "the statutory provision affording [him/her] one round of lateral competition was inapplicable." *See, e.g., Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), __ D.C. Reg. __ ( ); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005), __ D.C. Reg. __ ( ); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003), __ D.C. Reg. __ ( ). *See also Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), __ D.C. Reg. ( ).

I note that the parties disagree first, on whether there was an actual (versus contrived) budget shortfall, and second, and in more broadly considered terms, whether there was a curtailment of work that would ostensibly justify the implementation of the instant RIF. I find that given the instant circumstances, it is outside of my authority to decide whether there was in fact a *bona fide* budget shortage or curtailment of work. I further find that the entire unit in which Employee's position was located – IT Specialist – Data Management, consisting of two positions, was abolished, along with 17 other positions, after a RIF had been properly structured and authorized and a timely 30-day

legal notification was properly served. According to *Anjuwan v. D.C. Department of Public Works,* 729 A.2d. 883 (12-11-98), the OEA's authority over RIF matters is narrowly prescribed. The Court explained that the OEA does not have jurisdiction to determine whether the RIF at the Agency was *bona fide* or violated any law, other than the RIF regulations themselves.

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, the OEA no longer has jurisdiction over grievance appeals. 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 say that Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims. Based on the foregoing, I find that the 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 any other issue(s) are outside of my authority to review in the instant matter.

ORDER

It is hereby

ORDERED that Agency's Motion to Dismiss Employee's Petition for Appeal is GRANTED; and it is,

FURTHER ORDERED, that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

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ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge