THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
IKE PROPHET,	)	OEA Matter No. 2401-0090-09-R-12
VILEAN STEVENS,	)	OEA Matter No. 2401-0089-09-R-12
Employees	)	
	)	
v.	)	Date of Issuance: January 31, 2013
	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
	)	

David A. Branch, Esq., Employees Representative
Andrea G. Comentale, Esq., Agency Representative

ADDENDUM DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 27, 2009, Vilean Stevens ("Stevens") 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 position through a Reduction-In-Force ("RIF"). On March 3, 2009, Ike Prophet ("Prophet") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Agency's action of abolishing his position through a Reduction-In-Force ("RIF"). Both Stevens and Prophet's last position of record was Supply Technician, Grade 6, Step 6.

These matters were assigned separately to the undersigned on or around October 2009. Thereafter, I conducted preliminary conferences in both matters in order to ascertain the relevant issues and to decide the next steps. Accordingly, for both matters, I determined that an evidentiary hearing was unnecessary and ordered both parties to submit legal briefs regarding whether Agency conducted the instant RIFs in accordance with all applicable District laws, statues, and regulations. After reviewing the documents of record, I decided that there are no material issues of fact subject to a genuine dispute. In separate Initial Decisions, I upheld the

Agency's action of removing both Prophet and Stevens from service.[1] Thereafter, Stevens and Prophet appealed their Initial Decision to the District of Columbia Superior Court whereupon the matters were consolidated for disposition. The Honorable Joan Zeldon upheld the Initial Decisions in part and remanded them in part. In an Order dated June 14, 2012, the Superior Court wanted further explanation only on whether D.C. Official Code § 1-624.08 should apply and whether Employees sham RIF arguments are frivolous or non-frivolous. Thereafter, this matter was remanded to the undersigned. Accordingly, a status conference was held on August 9, 2012. After considering the parties position, I ordered the parties to submit legal briefs regarding the issues noted in Judge Zeldon's Order. The parties eventually submitted their respective briefs. 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 D.C. Official Code § 1-624.08 is the proper statute in order to effectuate the abolishment of Employees' last position of record through a Reduction-In-Force ("RIF").

Whether Employees sham RIF arguments are frivolous or non-frivolous.

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.

[1] *See Vilean Stevens v. Department of Health*, OEA Matter No. 2401-0089-09 (April 1, 2010); *Ike Prophet v. Department of Health,* OEA Matter No. 2401-0090-09 (April 1, 2010).

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Employee's Position

Prophet and Stevens provided numerous arguments in support of their position. These arguments are described in pertinent part as follows:

- The instant RIF that resulted in their removal was carried out pursuant to D.C. Official Code § 1-624.02.

- Agency's failed to adhere to D.C. Official Code § 1-624.02 by not considering job sharing and reduced work hours and agency reemployment (6 DCMR2403.2 and 2401.1); by not providing justification for a lesser competitive area than the Agency (6 DCMR 2409.3); by not providing a broader competitive level (6 DCMR 2410.4); and, by not providing a Retention Register after approval for the RIF (6 DCMR 2412). According to Prophet and Stevens, Agency's aforementioned failures resulted in an arbitrary and capricious RIF action.

- "RIFing nine locally funded positions and changing a locally-funded position to accomplish the necessary $541,529 budget cut and RIFing an additional six federally-funded positions to pay for such outsourcing with federal funds. Instead of disclosing this motivation and making its decision making process transparent, the District of Columbia falsely stated that the reason for the RIF was a "Lack of Funds." The lack of funds refers to the $541,529 budget cut. It does not refer to the RIF for purposes of outsourcing for which there were ample federal funds."[2]

Agency's Position

DOH contends that according to the FY 2009 Local Budget Reduction dated October 7, 2008, the Community Health Administration said "the City Administrator has directed the [DOH] to reduce the FY 2009 Local Baseline Budget by $2.919 million." Therefore, the Agency argues that it was the budgetary restrictions of DOH that made the instant RIFs necessary. Because of same, DOH further argues that the instant RIF was enacted pursuant to D.C. Official Code § 1-624.08.

DOH also contends that Prophet and Stevens sham RIF arguments are frivolous and must fail. In Agency's Brief on Remand, the following argument is relevant to this matter:

[2] Employee's Brief at 11 (September 10, 2012). Internal citations omitted.

> Employees argue that the purpose of the RIF was contrived because, *inter alia*, there was not a lack of funds. However, Employees acknowledged that "CHA uses federal and local funds to operate the CFSP. Employees further acknowledge that CHA's budget for the CSFP program was reduced by $541,529 in local funds. The loss of $541,529 in local funds equates to a 32.9077% shortage of funds based on a total CFSP funding of $1,645,600.73 for FY 2009 or a 36.1019% shortage of funds based on $1,500,000 in costs for FY 2009 needed to operate the CFSP using government employees.
>
> Additionally, local funds were required to operate the CSFP using government employees. Employees acknowledge that the Mayor, the City Administrator, the Director of the Department of Human Resources, and the Director of the Department of Health found that "The USDA grant, however, has never fully covered operations and administrative costs, including personnel, IT support, rental of warehouse space, and vehicle maintenance."[3]

The Agency goes on to argue as follows:

> Facing the lack of funds, numerous officials in the Executive Branch of the District government formulated a plan to continue the services afforded by the CSFP while reducing costs. The solution that materialized was a RIF of CSFP employees and issuing a grant to an outside organization to provide CSFP services. By doing so, the level of service for eligible District residents remained the same.
>
> Basically, Employees' argument is that the Department of Health should have terminated the employment of only those CSFP employees who were paid with local funds and should have continued the employment of those CSFP employees who were paid with federal funds. Accepting Employees' argument would have meant a substantial reduction in the workforce for the CSFP. Corresponding to this workforce reduction would have been a reduction in services to some of the District's most vulnerable residents who depend on the food products distributed by the CSFP to live. Rather than protect some of the District's most vulnerable resident[s], Employees would have the District protect their employment. The lack of funds situation continued for DOH throughout the [remainder] of Fiscal Year 2009 when other employment of other DOH employees was terminated through other RIFs. Some of these additional employees have filed appeals to the Office of Employee Appeals. The lack of funds issue continues today for DOH as the District's revenues continue to decrease.[4]

[3] Agency's Brief on Remand at 7 (October 26, 2012) (internal citations omitted).
[4] *Id*. at 8.

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,[5] 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 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

[5] 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.

> 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."[6] 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."[7]

However, the Court of Appeals took a different position. In *Washington Teachers' Union,*[8] the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[9] 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."[10] 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."[11]

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.[12] 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."[13] 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."[14]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[15] 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

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

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 Employees Prophet and Stevens were properly placed in a single person competitive level or if the entire competitive level was abolished. It is evident from the record that Employees Prophet and Stevens entire competitive level was abolished via the instant RIF. There is nothing in the record to indicate that Employees Prophet and Stevens placement in the aforementioned competitive level and area was anything but proper. I find that the Employees herein were properly placed in their competitive level when the instant RIF occurred; therefore "the statutory provision affording [them] one round of lateral competition [are] inapplicable. *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), ___ D.C. Reg. ___ ( ). In the matters at hand, I find that the entire unit in which Employees Prophet and Stevens positions were located were abolished after a RIF had been properly implemented.

Priority Re-employment

Employees Prophet and Stevens also argue that they were entitled to priority re-employment. Employees explain that they never received any further information from DOH regarding priority re-employment. As discussed above, § 1-624.08 and not § 1-624.02 applies to the instant RIF. Section 1-624.08 does not require an agency to engage in priority re-employment procedures. Considering as much, I find that Employees Stevens and Prophet arguments regarding priority re-employment is wholly unsubstantiated. Given the instant circumstances, I further find that this issue is outside of my purview to adjudicate.

Lack of Budget Crisis

In *Anjuwan v. D.C. Department of Public Works*,[16] the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency's RIF was bona fide. The Court explained that, as long as a RIF is justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF.[17] The Court in *Anjuwan* also noted that OEA does not have the "authority to second-guess the mayor's decision about the shortage of funds…about which positions should be abolished in implementing the RIF."

[16] 729 A.2d 883 (D.C. 1998).
[17] *See Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

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.[18]

Evidentiary Hearing

According to Employee, an evidentiary hearing is needed to explore their non-frivolous sham RIF contentions. OEA Rule 619.2[19] states in part that an Administrative Judge ("AJ") can "require an evidentiary hearing, if appropriate." Additionally, OEA Rule 625.2 indicates that it is within the discretion of the AJ to either grant or deny a request for an evidentiary based on whether or not the AJ believes that a hearing is necessary.[20] Of note, the District of Columbia Superior Court recently held in *Onuche Shaibu v. D.C. Public Schools*, that "if the administrative findings are supported by substantial evidence, we must accept them even if there substantial evidence in the record to contrary finding. *A fortiori*, if administrative findings are supported by substantial evidence, a court must accept them even if substantial evidence not in the record would support contrary findings."[21] After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore Employees Prophet and Stevens request for an evidentiary hearing is denied.

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 a grievances and outside of the OEA's jurisdiction to adjudicate. That is not to say that Employees Prophet and Stevens may not press their claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear their other claims.

Conclusion

Employees herein have failed to proffer any credible argument(s) or evidence that would indicate that the RIF was improperly conducted and implemented. I further find that the Agency's action of abolishing Employees Stevens and Prophet 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.

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[18] *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[19] 59 DCR 2129 (March 16, 2012); *See also* OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).
[20] *See Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2010).
[21] Case No. 2012 CA 003606 P (MPA) at 6 (January 29, 2013) (internal quotation and citation omitted).
[22] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of abolishing Employees Prophet and Stevens positions through a Reduction-In-Force pursuant to D.C. Official Code § 1-624.08 is UPHELD. Moreover, I further find that Employees Prophet and Stevens arguments relative to the instant RIF being a sham are FRIVOLOUS. Accordingly, given the instant circumstances, I further find that an evidentiary hearing exploring Employees Prophet and Stevens sham RIF arguments is unwarranted.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE