THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GLORIA ROBERTS-HENRY,	)	
Employee	)	OEA Matter No. 2401-0342-10
	)	
v.	)	Date of Issuance: September 19, 2012
	)	
D.C. DEPARTMENT OF CONSUMER	)	
AND REGULATORY AFFAIRS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Stephen White, Employee's Representative
Adrianne Lord-Sorensen, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 2010, Gloria Roberts-Henry ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Consumer and Regulatory Affairs' ("Agency" or "DCRA") action of abolishing her position through a Reduction-In-Force ("RIF"). The effective date of the RIF was June 25, 2010. At the time her position was abolished, Employee's official position of record was an Investigator with the Office of Consumer Protection ("OCP")[1] within DCRA[2]. On August 20, 2010, Agency filed its Answer to Employee's Petition for Appeal.

This matter was assigned to me on or around July 17, 2012. Subsequently, 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. Agency submitted a timely brief. On August 10, 2012, Employee submitted a request for an extension to file her brief. This request was granted in an email dated August 14, 2012. Employee has complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not

[1] Also referred to as the Consumer Protection Division in the parties' submissions to this Office.
[2] Petition for Appeal at Form 50 (July 26, 2010).

required. And since this matter could be 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."[3] 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."[4]

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."[5] 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."[6] 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."[7]

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.[8] 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."[9] 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."[10]

---

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

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[11] 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 she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

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

Employee's Position

In her Petition for Appeal, Employee submits that "I consider the RIF notice and placement in the competitive [area] to be illegal and resulted in an adverse action."[12] Employee further alleges "unfair labor practices and violation of the District's personnel laws and regulations." She explains that she was "illegally placed on the RIF's competitive area, level and tenure group. She also notes that covered employees were excluded from the competitive area for the R.I.F. purpose."[13]

Additionally, in her brief, Employee states that she was detailed to OCP from the Regulatory Investigations Section ("RIS") in 2006. Employee asserts that she made several requests to Agency to get a copy of her Personnel Action Form, so she could verify whether she was officially an OCP or RIS staff. However, Agency failed to provide her with said document. Employee explains that determining whether she was officially an OCP or RIS staff is critical in deciding whether she should have been RIFed or not, because, if she was still officially a RIS staff when the RIF was conducted, she should not have been subjected to the OCP RIF.[14]

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 her separation. Agency notes that on May 13, 2010, an Administrative Order was issued approving Agency's request to conduct a RIF. Agency abolished several positions due to a budgetary crisis. Agency explains that all employees with the same competitive level were listed in a Retention Register. Agency further explains that it correctly identified Employee's competitive area. Agency also maintains that it provided Employee with the required thirty (30) days written notice prior to the RIF effective date of the RIF. Agency also notes that it consulted with Employee's union ("AFSCME") prior to reaching its decision to conduct a RIF, it provided the union with all appropriate information as requested by the union,

[11] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[12] Petition for Appeal (July 26, 2010).
[13] *Id.*
[14] Employee's Brief (August 17, 2012).

including the Retention Register that listed each affected employee and their retention standing, in compliance with its Collective Bargaining Agreement ("CBA")[15]

Employee makes a blanket allegation that Agency engaged in unfair labor practices and violated District Personnel laws and regulations. She also notes that covered employees were excluded from the competitive area for the RIF. Employee explains that Agency did not follow proper RIF regulations; she notes that she was illegally placed in the OCP competitive area because she was detailed from RIS and was never given a Personnel Action form ("SF-50") informing her as to whether she was an official OCP or RIS employee. I disagree with Employee's contentions. According to the SF-50 submitted by Employee, she was an official employee of OCP, an office within DCRA, at the time of the 2010 RIF. Additionally, contrary to her assertion that she did not receive a Personnel Action form or SF-50, Employee had a copy of her SF-50, which she submitted to this Office, along with her Petition for Appeal.

Moreover, Chapter 24 of the D.C. Personnel Manual § 2409, 47 D.C. Reg. 2430 (2000) authorizes agency personnel to establish lesser competitive areas when conducting RIFs. Here, the RIF authorization letter signed and approved on May 13, 2010, approved OCP as a lesser competitive area for purposes of the instant RIF. Also, Employee has failed to provide any credible evidence to substantiate her allegations of unfair labor practices or in support of her contention that covered employees were excluded from the competitive area in the instant RIF. Consequently, I find that Employee's allegations are unfounded. I further find that Employee was not an official employee of RIS, but rather, an official employee of OCP when the RIF was conducted. And as such, Employee was properly placed in the OCP competitive area, and was therefore subject to the instant RIF.

Chapter 24 of the D.C. Personnel Manual § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> 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.

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. Here, according to the record, Employee was an Investigator in the DS-1801-12-01-N competitive level. Regarding the lateral competition requirement, the record shows that all

[15] Agency's Brief (July 26, 2012).

positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[16]

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 her RIF notice on May 21, 2010, and the RIF effective date was June 25, 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 her appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

CONCLUSION

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 separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[16] See *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003),; *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).