THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
APRIL DYSON,	)	OEA Matter No. 2401-0315-10
Employee	)	
v.	)	Date of Issuance: January 22, 2015
D.C. DEPARTMENT OF CONSUMER	)	
AND REGULATORY AFFAIRS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

April Dyson ("Employee") worked as a Risk Manager Coordinator with the D.C. Department of Consumer and Regulatory Affairs ("Agency"). On May 21, 2010, Agency provided Employee with a Reduction-in-Force ("RIF") notice which stated that she would be removed from her position effective June 25, 2010.[1] On June 4, 2010, Employee appealed Agency's RIF action to the Office of Employee Appeals ("OEA"). She argued that Agency commenced the RIF action against her while she was on Worker's Compensation which is a violation of D.C. Official Code § 1-623.45.[2]

On July 26, 2010, Agency filed its Answer to Employee's Petition for Appeal. It contended that Employee received one round of lateral competition and thirty days' notice. As

[1] *Petition for Appeal,* Attachment #1 (June 4, 2010).
[2] *Id.* at 4.

proof, Agency provided the Retention Register and the RIF notice.[3]

In its Pre-hearing Statement, Agency explained that it submitted to the City Administrator a request for approval of the RIF action. The request was approved on May 13, 2010. Additionally, it asserted that the RIF action was due to a lack of funding to support Employee's position. Agency provided that Employee was the sole Risk Management Coordinator within her competitive level. Therefore, one round of lateral competition was not required. Because it complied with Chapter 24 of the District Personnel Manual ("DPM"), Agency claimed that the RIF was properly executed.[4] As for Employee's Worker's Compensation argument, Agency submitted that in *Marsha Karim v. D.C. Public Schools,* OEA Matter No. 2401-0103-10 (June 15, 2012), OEA held that "there is no legal requirement that exempts an employee with an approved worker's compensation claim from being subject to a RIF, unless the termination was conducted in retaliation for the filing of the claim."[5]

On March 13, 2013, Employee filed an Amended Pre-hearing Conference Statement. It was her position that Agency violated D.C. Official Code § 1-623.45 because it terminated her before the two-year period for her to overcome her disability.[6] Employee also claimed that Agency terminated her in retaliation for her Worker's Compensation claim. Furthermore, she

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[3] *Department of Consumer and Regulatory Affairs' Answer to Employee's Petition for Appeal* (July 26, 2010).
[4] *Agency's Pre-hearing Statement*, p. 1-3 (March 11, 2013).
[5] *Department of Consumer and Regulatory Affairs' Motion for Summary Disposition,* p. 4 (July 26, 2010).
[6] D.C. Official Code § 1-623.45(b)(1) provides the following:

> (b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:
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> (1) Immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or had a disability, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, provided that the injury or disability has been overcome within two years after the date of commencement of compensation and provision of all necessary medical treatment needed to lessen disability or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government

contended that although the effective date of the RIF action was June 26, 2010, she continued on Leave Without Pay ("LWOP") at Agency for two years. Employee claimed that she received a final paycheck from Agency on July 24, 2012; however, she did not receive a subsequent RIF notice in 2012 terminating her from her position. Thus, she requested that the OEA Administrative Judge ("AJ") grant her appeal.[7]

Agency responded on May 10, 2013. It explained that in accordance with D.C. Official Code § 1-623.45, it was required to provide disability benefits for Employee from February 21, 2009 until February 21, 2011, for a total of two years.[8] However, Agency contended that because it was required to provide Employee with disability benefits, does not mean that it was not also within its authority to take the RIF action. It again cited to the *Karim* case. Agency claimed that the RIF action was properly taken; however, it had to keep Employee on the payroll for two years to comply with the disability benefits statute until Employee was transferred to the Office of Risk Management's payroll. Furthermore, Agency provided that if it generated Employee's Standard Form 50 reflecting the RIF action, it would have resulted in an interruption to her disability benefits. Accordingly, it placed Employee on LWOP during this time.[9]

On October 31, 2013, the AJ issued her Initial Decision. She found that one round of lateral competition was not applicable in this case because Employee was in a single-person competitive level. Moreover, the AJ ruled that Employee received the requisite thirty days' notice. As for Employee's argument that she was not properly RIFed because she remained on the payroll, the AJ was unpersuaded by this claim. She found Agency's explanation of the personnel procedure established to prevent interruption to Employee's disability benefits to be

[7] *Employee's Amended Pre-Conference Hearing Statement* (March 13, 2013).
[8] As of the date of the filing, Agency provided that Employee was still receiving disability benefits from the Office of Risk Management.
[9] *Department of Consumer and Regulatory Affairs' Response to OEA's March 26th Post Pre-hearing Conference and Order*, p. 1-3 (May 10, 2013).

persuasive.[10]

The AJ ruled, as she did in *Karim*, that D.C. Official Code § 1-623.45 does not exempt an employee from being subjected to a RIF action. She further held that Employee offered nothing more than mere allegations and no proof to establish a connection between her Worker's Compensation claim and the RIF action. Finally, the AJ determined that OEA lacked jurisdiction to consider Employee's discrimination claims and grievances. Therefore, the RIF action was upheld.[11]

On December 3, 2013, Employee filed a Petition for Review of the Initial Decision with the OEA Board. She argues that the AJ erred in finding that the RIF was proper while she remained on Agency's payroll for two years. Employee then presents the same arguments raised on appeal regarding the Standard Form 50, as well as her dental and life insurance benefits. Therefore, she requests that the Initial Decision be reversed.[12]

Agency filed its Response to Employee's Petition for Review on January 2, 2014. It provided that Employee was placed in the proper competitive area and level before the RIF action. However, because she was in a single-person competitive level, one round of lateral competition did not apply. Moreover, Agency asserted that Employee received the requisite thirty days' notice.[13]

Employee replied by reiterating the same arguments regarding the Standard Form 50. Additionally, she argues that because Agency never RIFed her in May 21, 2010, then OEA

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[10] Additionally, the AJ held that in accordance with Title 7-1, DMCR § 113, it is not unusual for employees receiving disability benefits to continue to receive life insurance and dental benefits. *Initial Decision*, p. 8-10 (October 31, 2013).
[11] *Id.*, 11-14.
[12] *Employee's Petition for Review of the Initial Decision Dated October 31, 2013* (December 3, 2013).
[13] *Department of Consumer and Regulatory Affairs' Response to Employee's Petition for Review of the Initial Decision dated October 31, 2013* (January 2, 2014).

lacked jurisdiction over her case. Therefore, she asked that the Initial Decision be reversed.[14]

RIF Statute

OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

In an attempt to more clearly define OEA's authority, D.C. Official Code § 1-624.08(d), (e), and (f) establish the circumstances under which the OEA may hear RIFs on appeal.

> (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.
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> (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.
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> (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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> > (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.

[14] *Response to Employer's Answer to Employee's Petition for Review of the Initial Decision dated October 31, 2013* (February 3, 2014).

As a result of the above-referenced statutes, this Office is authorized to review RIF cases where an employee claims an agency did not provide one round of lateral competition or where an employee was not given a thirty-day written notice prior to their separation. The plain language of the statute is also made evident in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998). In that matter, the D.C. Court of Appeals held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations.

Notice Requirements

Agency's notice was dated May 21, 2010. The effective date of the RIF was June 25, 2010. Thus, Agency complied with the thirty-day notice statutory requirement.

Competitive Level

As for the competitive level, D.C. Official Code § 1-624.08(d) provides that employees are 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. However, as the AJ provided in his Initial Decision, this office has consistently held that one round of lateral competition does not apply to employees in a single-person competitive level.[15] Agency provided the Retention Register which lists Employee as the only person who held the Risk Manager Coordinator position. Therefore, one round of lateral competition is inapplicable to this case. Accordingly, the RIF action in this case was proper.

Payroll, Benefits, and Standard Form 50

Employee claims that the AJ erred in her ruling regarding her remaining on Agency's

[15] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter 2401-0156-99 (January 30, 2003); *Robert T. Mills*, OEA Matter 2401-0109-02 (March 20, 2003); *Deborah J. Bryant*, OEA Matter 2401-0086-01 (July 14, 2003); *Robert James Fagelson*, OEA Matter 2401-0137-99 (August 28, 2003); and *Richard Dyson, Jr. v. Department of Mental Health*, OEA Matter No. 2401-0040-03, *Opinion and Order on Petition for Review* (April 14, 2008).

payroll for two years after the RIF action; her continued receipt of dental and life insurance benefits; and her Standard Form 50. However, the AJ thoroughly addressed all of these issues in her Initial Decision. Employee offered no evidence to support that the AJ erred in her ruling on any of these issues and only provided conjecture.

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[16] The AJ's detailed analysis of these issues was not only reasonable, but they were supported by evidence in the record. As a result, we must deny Employee's Petition for Review.

[16]*Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is denied.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.