THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Phillippa Mezile Employee	OEA Matter No. 2401-0158-09R12
v.	Date of Issuance: October 10, 2012[1]
D.C. Department on Disability Services Agency	Senior Administrative Judge Joseph E. Lim, Esq.

Andrea Comentale, Esq., Agency Representative
David Branch, Esq., Employee Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On July 10, 2009, Phillippa Mezile ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the Department on Disability Services' ("Agency") action of terminating her employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was June 12, 2009. Employee's position of record at the time her position was abolished was a Public Affairs Specialist, DS-1035-13/10. Employee was serving in Career Service status at the time she was terminated.

On April 2, 2010, I issued an Initial Decision ("ID") upholding the RIF. Employee appealed the decision, and on February 2, 2012, the Superior Court of the District of Columbia remanded the matter back to this Office for further findings pursuant to the issues it discussed.[2]

I held a status conference on March 23, 2012, and ordered the parties to submit briefs on the issues identified by the Superior Court on remand.

JURISDICTION

[1] This is issued to correct a typographical error on the Initial Decision on Remand issued October 1, 2012.

[2] See *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUES

1. Which RIF regulation, §1-624.02 or §1-624.08, applies in this Matter.
2. What are Employee's specific claims of Agency's alleged violations of RIF procedures, and if these claims are frivolous.
3. Did Agency suffer a shortage of funds to necessitate a RIF, and does this Office have statutory jurisdiction to consider this claim.
4. Does the Family Medical Leave Act (FMLA) toll a RIF notice.
5. Whether Employee received her 30-day notice of the RIF.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are uncontroverted:

1. Employee was a Career Service employee occupying the position of Public Affairs Specialist, DS-1035-13-01-N, within Agency.
2. On April 23, 2009, Agency issued Administrative Order DDS-01-2009 advising that several positions had been identified for abolishment due to a realignment and shortage of funds for the 2010 fiscal year. One of the positions identified was the one occupied by Employee.
3. Nine filled positions, including that of Employee's, were abolished. In addition, 35 vacant positions were also abolished.
4. The competitive area was the "Office of Public Information." A Retention Register prepared for Employee showed that she occupied the sole Public Affairs Specialist position at the DS-1035-01-N level being abolished. Employee's RIF service comp date was November 2, 1985.
5. On May 12, 2009, Agency mailed an official Reduction-In-Force ("RIF") notice to Employee, informing her that her RIF was effective as of June 12, 2009.
6. Employee admits receiving her RIF notice on May 18, 2009. (See Employee's Response to Order dated September 20, 2012.) Agency admits that it has no documentation to show when Employee actually received her RIF notice, but it relies on Employee's admission that she received her notice on May 18, 2009. (See Agency's Response to Order dated September 20, 2012.)

1. Which RIF regulation, §1-624.02 or §1-624.08, applies in this Matter.

On April 23, 2009, Agency issued Administrative Order DDS-01-2009 pursuant to Title XXIV of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Code § 1-624.01 *et seq*.,) (2006); Mayor's Order 2008-92 (June 26, 2008), and Chapter 24, Reductions-In-Force, of Title 6 of the District of Columbia Municipal Regulations, authorizing a Reduction-in-Force ("RIF"). The Order advised

that several positions had been identified for abolishment. Director Judith Heumann stated that the RIF was necessary due to a realignment and shortage of funds for the 2010 fiscal year. [3]

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,[4] which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, 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).
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> (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.
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> (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

[3] *See Agency's Exhibit 9*, Administrative Order DDS-01-2009.

[4] 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.

> 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.

In the instant matter, 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."[5] 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."[6]

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."[7] 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."[8] 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."[9]

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.[10] 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."[11] 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."[12]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[13] 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:

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

1. That she did not receive written notice thirty (30) days prior to the effective date of her separation from service; and/or

2. That she was not afforded one round of lateral competition within his/her competitive level.

Single Level Competitive Level

Regarding the lateral competition requirement, this Office has consistently held that, when an employee holds the only position in her 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 both 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.[14]

According to the Retention Register produced by Agency, Employee was the sole Public Affairs Specialist, DS-1035-13-01-N, within Agency. 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. In addition, D.C. Official Code § 1-624.08(f) specifically states that the size of the competitive area is not subject to review.

2. <u>What are Employee's specific claims of Agency's alleged violations of RIF procedures, and if these claims are frivolous.</u>

Employee made many claims to support her contention that Agency violated RIF rules and regulations: 1) There was no mayor's order for a RIF; 2) There was no approval of the April 23, 2009, administrative order to conduct a RIF; 3) The RIF was defective as it included vacant positions; 4) the retention register prepared for Employee was defective; 5) There was no real shortage of funds to justify a RIF and lastly, 6) Employee did not receive her thirty days of notice since the Family Medical Leave Act (FMLA) tolls a RIF notice.

Apart from these bare allegations, Employee did not present any documents or proffer any evidence to support her contentions. She does not present any statute or regulation which states that vacant positions cannot be included in a RIF. Nor do her allegations contain any specifics. For instance, she does not specify how her retention register was defective. In addition, because she was in a one-person competitive level, her retention register would be defective only if her official position of record was incorrect, a claim that she does not make.

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[14] 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).

In addition, apart from the thirty-day RIF notice, none of these arguments can be heard by this Office in a RIF appeal. As set forth above, an employee whose position was abolished as a result of a RIF may only contest the following before this Office: 1) that she was not afforded one round of lateral competition within her competitive level; and/or 2) that she was not given thirty (30) days notice prior to the effective date of her separation. Employee's arguments do not fall within the first of these areas. Nonetheless, Employee's fifth allegation that there was no real shortage of funds to justify a RIF will be discussed in the next section below. As for the issue of notice, that will be discussed below as well.

3. Did Agency suffer a shortage of funds to necessitate a RIF, and does this Office have statutory jurisdiction to consider this claim.

Employee alleges that the instant RIF was not conducted due to a shortage of funds, but was a pretext to get rid of her position and that of others. Employee also alleges that new employees were hired to take over her prior job responsibilities, and that Agency's post-RIF actions proved that there was no budget shortfall.

In *Anjuwan v. D.C. Department of Public Works*,[15] 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.[16] The Court in *Anjuan* 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."

OEA has interpreted the ruling in *Anjuan* 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 claim regarding how an agency elects to use its monetary resources for personnel services. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this Administrative Judge ("AJ") have any control.[17]

According to Employee, an evidentiary hearing is needed to validate the truthfulness of Agency's statements regarding its need for a RIF and the circumstances surrounding her removal. Employee cites to the holding *Levitt v. D.C. Office of Employee Appeals*, 869 A.2d 364 (D.C. 2005), in support of its position that Employee should be afforded an evidentiary hearing.[18] Employee insists that her claims of Agency's violations of RIF procedures are not frivolous and places her in the same standing as Levitt.

The facts in *Levitt*; however, are not even remotely on point with those in the instant appeal. In *Levitt*, the D.C. Court of Appeals held that OEA erroneously dismissed the employee's petition for appeal by not affording him an opportunity for discovery and remanded the case so that the Administrative Judge could conduct a hearing regarding the employee's

[15] 729 A.2d 883 (D.C. 1998).
[16] See *Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).
[17] *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[18] Employee Brief at p. 6-8 (May 4, 2012).

allegations of "improper employment actions."[19] The employee in *Levitt* was transferred after several years in a Career Service position, to a position in the Excepted Service. The agency subsequently transferred the employee back to a newly-created supervisory position in Career Service, yet he had no employees to supervise. Several weeks later, the employee in *Levitt* was terminated, via a RIF, from the same position the agency had recently and specifically created for him.

Here, there is no allegation that Employee was ever placed in a newly created position that was almost immediately terminated. In fact, Employee had occupied her position as Public Affairs Specialist for more than twenty-three (23) years prior to receiving notice that her position was subject to the RIF. Employee was not shuffled around to different positions prior to being terminated like the employee in *Levitt*. Although the circumstances surrounding Employee's termination in this case were unfortunate, the mere assertion that being terminated as a result of Agency's budgetary constraints shortly after being hired does not rise to the level of "unusual" or "cavalier" under the holding in *Levitt*.

OEA Rule 619.2[20] states in part that an 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.[21] After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore Employee's request for an evidentiary hearing is denied.

Employee also alleges that Agency has since filled her former position by promoting two people to perform her prior duties. However, she did not submit any supporting documentation in the record to support her argument. Moreover, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[22] A complaint of this nature is a grievance, and does not fall within the purview of OEA's scope of review. This does not mean that Employee's objections regarding Agency's post-RIF activity cannot be entertained elsewhere; however, the merits of such claims will not be addressed in this case.

4. Does the Family Medical Leave Act (FMLA) toll a RIF notice.

In arguing that the FMLA leave tolls a RIF notice, Employee in this matter is essentially contesting that she did not receive the statutorily required written thirty (30) days notice prior to the effective date of her separation from service.[23] Since Employee was on FMLA when the RIF notice was sent out to her, the issue is whether the notice was properly and timely served to her

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[19] *Id.*
[20] 59 DCR 2129 (March 16, 2012); *See also* OEA Rule 619.2, 59 DCR 2129 (March 16, 2012).
[21] *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).
[22] *Watson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0152 (September 20, 2004); *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005).
[23] The court found that Employee made the following two claims:
1. she was on FMLA leave when the RIF notice was sent out to her; and
2. she received the RIF notice less than thirty days before her termination.

home address of agency record. However, even if you were to address whether FMLA leave tolls a RIF notice; it is clear from case law that FMLA leave does not delay a RIF.

In *Price v. Washington Hosp. Ctr.*, 321 F. Supp. 2d 38, 45 (D.D.C. 2004), Plaintiff argued that Defendant violated her statutorily protected rights under FMLA and DCFMLA (District of Columbia Family Medical Leave Act) when it terminated her employment pursuant to a RIF while she was on approved medical leave. In addressing this allegation, the court cited 29 C.F.R. § 825.216(a)(1)[24] and held that " . . . Plaintiff cannot demonstrate that the elimination of her position pursuant to a RIF while she was on medical leave violated either medical leave statute" because " . . . [she] ha[d] no greater right to reinstatement or to other benefits and conditions of employment than if the [she] had been continuously employed during the FMLA leave period . . "[25] Therefore, since Defendant eliminated her position pursuant to a RIF, the court ruled that Defendant's responsibility to continue her FMLA ceased at the time she was laid off.

The court in *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151 (7th Cir. 1997) had the same ruling. In this case, plaintiff claimed that defendant violated her FMLA rights after refusing to return her to work after maternity leave. However, the court cited the Department of Labor Regulation, *supra,* and held that " . . . [defendant] had no obligation to reinstate [her] because an employer's responsibility to continue FMLA leave and restore an employee "cease at the time the employee is laid off ."[26]

It is clear from case law that FMLA Leave does not toll a RIF notice because an employee has no greater right to reinstatement or to other benefits and conditions of employment than if he/she had been continuously employed during the FMLA leave period. The RIF would have occurred regardless of employee's leave status. However, it is also clear from 29 C.F.R. § 825.216(a)(1) that agency must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

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[24] C.F.R. § 825.216(a)(1) provides that:

> *An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.* An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:
>
> > (1) ***If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off***, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.
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> > (Emphasis added.)

[25] Id. at 47.
[26] Id. at 1157.

Further, since it is clear that no FMLA discrimination claim has been made and that Employee is essentially stating that she did not receive 30 days notice, the issue is whether the notice was sent to her home address in a timely manner.

5. Whether Employee received her 30-day notice of the RIF.

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 admits receiving her RIF notice on May 18, 2009, and the RIF effective date was June 12, 2009. The notice states that Employee's position is being abolished as a result of a RIF. The Notice also provides Employee with information about her appeal rights. For Employee to receive thirty-day notice, she should have received her letter on May 13, 2009. Based on the parties' admissions, it is undisputed that Employee only received twenty-six (26) days notice instead of the required thirty (30) days written notice prior to the effective date of the RIF.

DPM 2405.6, 47 D.C. Reg. 2430 (2000) reads as follows:

> An action which was found by….the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus, calls for a do-over or reconstruction of this process as opposed to a retroactive reinstatement of Employee. A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of an employee.[27] This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level." I find that Agency's failure to provide Employee with thirty (30) days written notice prior to the RIF effective date of termination was a procedural error. Such an error will not serve to negate or overturn Employee's termination and does not constitute harmful error.

Conclusion

Based on the foregoing, I find that Employee's position was abolished after she was properly placed in a single person competitive level. I also find that she received only twenty-

[27] DPM 2405.7, 47 D.C. Reg. 2430 (2000).

six (26) days notice instead of the required thirty (30) days written notice prior to the effective date of the RIF.

I therefore conclude that Agency must reimburse Employee four (4) days pay and benefits but that Agency's action of abolishing Employee's position was otherwise done in accordance with D.C. Official Code § 1-624.08 and thus will be upheld.

ORDER

It is hereby ORDERED that:

1. Agency reimburse the Employee four (4) days pay and benefits commensurate with her last position of record; and

2. Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD; and

3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Joseph E. Lim, Esq.
Senior Administrative Judge