THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DERRICK CULLIN,	)	
Employee	)	OEA Matter No. 2401-0262-09
	)	
v.	)	Date of Issuance: March 29, 2011
	)	
OFFICE OF PUBLIC EDUCATION FACILITIES MODERNIZATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Derrick Cullin, Employee *Pro-Se*
Charles J. Brown, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 3, 2009, Derrick Cullin[1] ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Office of Public Education Facilities Modernization ("OPEFM" or "the Agency") action of abolishing his position through a Reduction-In-Force ("RIF"). The effective date of the RIF was September 21, 2009. At the time his position was abolished, Employee's official position of record within the Agency was Boiler Plant Operator III ("BPO"). His competitive area was Operations. According to the Retention Registry provided in Tab 5 of Agency's Answer, there were two other BPO's in Employee's competitive level and area. Only one position survived the instant RIF. Employee was the second lowest ranked BPO out of the three. Agency asserts that Employee was properly afforded one round of lateral competition within his competitive area and level and received 30 days written notice prior to the abolishment of his position.

I was assigned this matter on or about February 9, 2011. Thereafter, a prehearing conference was convened in order to assess the parties' arguments. Employee did not appear for this conference. I then issued an Order dated February 28, 2011, wherein I required Employee to

[1] Employee, in his appeal, and in his submitted documents has used two different last names "Cullin" and "Culler" interchangeably. I find that both names as referenced within the documents of record refer to the same person.

provide a statement of good cause regarding his failure to appear for the aforementioned conference. Employee was required to reply to this Order on or before March 9, 2011. Employee submitted a response indicating that he has had problems with receiving mail at his address of record and that said problems have since been rectified. I then issued another Order Convening a Prehearing Conference set for March 24, 2011. Employee failed to appear – again. I have decided that no further proceedings are required. 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.

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:
>
> > 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. Agency contends that it followed all applicable rules and regulations with respect to the instant matter. I find that in a RIF matter that I am guided primarily by 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:
>
> (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.

According to the preceding statute, I find that a District of Columbia government employee whose position was abolished pursuant to a RIF may only contest before this Office:

1. That he/she did not receive written notice thirty (30) days prior to the effective date of his/her separation from service; and/or
2. That he/she was not afforded one round of lateral competition within his/her competitive level.

Based on the documents of record, I find that Employee's position was abolished, after he properly received one round of lateral competition and a timely 30-day legal notification was properly served. I conclude 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 the OEA is precluded from addressing any other issue(s) in this matter.

OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), reads in pertinent part as follows:

> If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:
>
> (a) Appear at a scheduled proceeding after receiving notice…

This Office has held that a matter may be dismissed for failure to prosecute when a party fails to appear at a scheduled proceeding *See, e.g., Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985). Here, Employee did not appear at the Prehearing Conference. This was required for a proper resolution of this matter on its merit. Employee has

not exercised the diligence expected of an appellant pursuing an appeal before this Office, and I find that that this is another reason why this matter should be dismissed.

ORDER

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

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE