THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROGER D. WIGGLESWORTH,	)	OEA Matter No. 2401-0007-05
Employee	)	
	)	Date of Issuance: June 11, 2008
v.	)	
	)	Rohulamin Quander, Esq.
	)	Senior Administrative Judge
D.C. DEPARTMENT OF	)	
EMPLOYMENT SERVICES,	)	
Agency	)	

Iris McCollum Green, Esq., Employee's Representative
Thelma Chichester Brown, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On October 29, 2004, Employee, an Information Technology Specialist, DS-2210, Grade 13, Step 7, with the D.C. Department of Employment Services (the "Agency"), filed a Petition for Appeal with the Office of Employee Appeals (the "Office"), contesting Agency's decision separating him from government service pursuant to a reduction-in-force (the "RIF"), effective September 30, 2004.

Agency was served a copy of the Employee's Petition on January 12, 2005, and filed a comprehensive reply with the Office on February 11, 2005, which was supplemented with several detailed exhibits. Agency denied that any error had been committed during the RIF process, or that Employee was entitled to any RIF-related relief due to alleged improper Agency RIF-implementing procedures, Agency requested that the Petition for Appeal be dismissed. The essence of Agency's position was that the RIF implementation was in total compliance with Chapter 24 of the District Personnel Manual (the "DPM"), and that Employee did not state a legally sustainable reason under the law to appeal the abolishment of his former position. This matter was assigned to me on August 2, 2005. On August 5, 2005, I issued an Order Convening A Prehearing Conference for August 30, 2005, which was postponed at Employee's counsel's request, and subsequently convened on September 7, 2005. Each party submitted a pre-hearing statement for my consideration.

Employee, through counsel, sought discovery, which was approved. Several interrogatories were posed, with copies of the answers filed with the Office. Whether there were additional interrogatories or any depositions conducted is not reflected in the record. Follow up status conferences were convened on February 28, 2006, and July 24, 2007.

The essence of Employee's case and assertions are the following:

1. A request for a RIF implementation was issued by the Agency on May 25, 2004, which included the anticipated abolishment of position No. 0020653, Information Technology Specialist, which position Employee did not yet encumber.
2. Roughly contemporaneous to the RIF implementation, several technology-related positions within the D.C. government were undergoing programmatic realignment, including the updating of some of the job-related duties.
3. Employee's job was one of the affected positions. His prior job title and position was Computer Specialist, DS 334/13, a position which he held from about 1992. Effective May 30, 2004, job series DS 334 was abolished, and replaced with job series DS 2210, which carried a new title, Information Technology Specialist. On or about that same date, Employee was transferred into the above-referred position. He was unaware at the time that five days previously an Agency-wide RIF request had been approved, and that the position to which he was newly assigned, was one of the seven positions identified for abolishment.
4. On or about August 16, 2004, Employee was subsequently served with an unsigned Agency-issued letter notification, which purported to advise Employee that a RIF was being implemented, that his newly assigned position had been abolished, and that he would be terminated, effective September 30, 2004, from his DS-0334-13-08-N competitive level position.
5. Agency erred at the time of preparing for the RIF, as Employee's name was the only one listed on the pre-RIF Retention Register, although there allegedly was one additional employee in his same competitive area who occupied a position in the same pay system, grade, class, and series, and whose duties, qualification requirements, and working conditions were sufficiently like Employee's position. As such, both of them should have been placed on the same retention register. Had that occurred, Employee, who had more seniority than the other person, would have been retained when one position was eliminated.
6. The RIF notification letter served upon Employee had not been signed by the agency head or anyone in authority to execute a RIF notice.

Since this case could be decided based upon the applicable law and regulations, plus the documents of record, no evidentiary hearing or additional 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 separating Employee from service as a result of the RIF was in accordance with applicable law, rule or regulation.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On or about May 27, 1992, the Employee was appointed to the position of Computer Specialist, DS-334/13, Step 1 within the Agency's Office of Management Information and Data Systems. As a result of the DS-334 series having been abolished, on May 30 2004, the Employee's position was reclassified to Information Technology Specialist (Operating Systems), DS-2210.

After reviewing its FY 2005 budget and the reductions to that budget, the Agency determined that it would need to reduce its personnel to meet its new budget mark. *Agency Exhibit "C", P. 1.* On May 25, 2004, pursuant to Subsections 2406.1 and 2406.2 of the DPM, the Agency submitted a request to the Mayor, through the D.C. Office of Personnel (the "DCOP") and the Deputy Mayor for Planning and Economic Development, to conduct a reduction in force involving seven (7) positions. On July 9, 2004, the Mayor signed an Administrative Order approving the request. *Agency Exhibit "C", P. 2.* The position of Information Technology Specialist (Operating Systems), DC-2210-13, was one of the seven (7) positions.

The DCOP prepared a retention register as required in Subsection 2412, which register produced only the name of one employee, Roger Wigglesworth, within the relevant competitive level and area. His service computation date of August 20, 1971, was adjusted to credit him with four years for veterans preference, plus three years for D.C. residency. Employee's calculated RIF service computation date was adjusted to August 20, 1964.

Retention Register Challenge

By letter dated August 16, 2004, the Agency officially notified the Employee that his position would be abolished, effective September 30, 2004, due to a reduction in the Agency's Fiscal Year (FY) 2005 budget. *Agency Exhibit "C", P. 3.* The Employee asserts that the retention register was improperly constructed because there was at least one other employee in his competitive area who occupied a position in the same pay system, grade, class and series, and whose duties, qualifications, requirements, and working conditions were sufficiently like the position the Employee previously encumbered. Employee asserted that had the referenced other employee been placed on the same retention register as the Employee herein, the Employee

would have outranked that other employee in both tenure and years of government service, and likewise been retained. A review of relevant sections of the DPM is helpful.

DPM Subsection 2410.4 reads as follows:

> A competitive level shall consist of all positions in the competitive area identified pursuant to §2409 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.

DPM Subsection 2410.5 reads as follows:

> The composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions, and other factors prescribed in section and §2411.

DPM Subsection 2412.2 states the following:

> A separate retention register shall be prepared for each competitive level in the competitive area.

DPM Subsection 2412.4 mandates as follows:

> Each competitive level shall be identified by the title, series and grade of the positions that composed the competitive level.

DPM Subsection 2412.6 requires as follows:

> The retention register for each competitive level shall list all positions in the competitive level. A written justification shall be attached to the retention register when positions of the same title, series, and grade are placed in different competitive levels.

Considering the several above-referred sections of the DPM, I note that the retention register for the competitive level pertaining to the Employee consisted of just one name, i.e. Roger Wigglesworth. The Employee was the only Information Technology Specialist (Operating Systems), DS-2210/13 assigned to DOES's Office of Information Technology. Further, he was the sole Information Technology Specialist (Operating Systems), DS-2210/13 working for the Agency. *Agency Exhibit "C" P. 6.*

Although Employee did not readily indicate who the other person was that he alleged should have been paired with him on the retention register, only one name, that of Donna Blair, emerges. On March 8, 2006, Agency responded to Employee's first set of interrogatories, and in reply to Question #14, listed Donna Blair as the only other Computer Specialist. Like Employee, her job title was converted to Information Technology Specialist (Operating Systems). However, this individual was and remained a DS-12. Further, Agency provided a copy of the job description and duties for the DS-12 position. A quick analysis of the two job descriptions immediately points out several major differences. While the DS-12 job description requires that the incumbent have a knowledge of certain systems, the DS-13 job description requires that the incumbent must master that same system, and includes significantly more evaluative, programmatic, and supervisory responsibilities, than the DS-12 incumbent is expected to perform. Without question, the job descriptions, while containing some similarities, are quite different in scope of work and long term objectives.

I find that none of Employee's other unit members had the same title Information Technology Specialist (Operating Systems), DS Grade 13. Further, his duties were consistent with grade, title and series, but no other member of his unit, including Donna Blair ("Blair"), was tasked with responsibilities just like his. Although Blair may well have had duties similar to Employee's duties, the requisite sameness mandated by Subsection 2410.4 between Employee's job responsibilities and that of others in his unit simply is not present. Even when Blair's job series and title were changed, her incidental job-related duties at grade DS 12, while having some similarities, still remained somewhat different from Employee's.

Contrary to Employee's contention, I find, based on the record, that no other unit member was assigned responsibilities sufficiently similar to Employee's to have qualified for inclusion on the same retention register for consideration at Employee's competitive level.

Non notification of job reclassification

Employee advised that despite having more than 20 years of working as a Computer Specialist for the D.C. government, his job title was changed to Information Technology Specialist (Operating Systems) on or about May 30, 2004, without timely notification to Employee until August 20, 2004, by which date he was already facing the impending RIF. Therefore, he was never knowingly the incumbent in a job that was designated on his Form 1 as being abolished.

A series of D.C. personnel regulations address the components of Employee's concerns.

DPM Subsection 1102.1 reads as follows:

> The D.C. Office of Personnel (DCOP), after consulting with the United States Office of Personnel Management (OPM) and agencies, shall prepare

special guides or standards, or adopt established OPM standards for placing positions in their proper classes, and grades.

DPM Subsection 1102.4 states as follows:

The DCOP, after consulting with the agencies to the extent necessary, shall revise, supplement, or abolish such special guides or standards or prepare new standards, so that, as nearly as may be practicable, positions existing at any given time will be covered by current published standards.

DPM Subsection 1104.2 reads as follows:

The Servicing Personnel Officers and the Chief of the Executive Office of the Mayor Personnel Unit, are delegated authority vested in the Mayor for classifying all positions (including Regular Wage Service and Printing Wage Service positions) in agencies serviced by them, except for the following positions:

(a) Positions for which authority is reserved by the Mayor, which are
    (1) Positions over grade DS-15;
    (2) Department and Office Heads and Deputies; and
    (3) Positions whose incumbents report to the Mayor.
(b) Personnel positions and Expert or Consultant positions for which the Director of Personnel has been delegated specific authority.

DPM Subsection 1104.3 mandates as follows:

(a) Each Servicing Personnel Officer shall place each position within the cluster in its appropriate class and grade in conformance with the accepted standards published by the U.S. Office of Personnel Management and/or special guides or standards published by the D.C. Office of Personnel or, if no published standards apply directly, consistently with published standards.

(b) When facts warrant, an agency may change a position which has been placed in a class or grade under this section from that class or grade to another class or grade.

(c) Subject to permissible grade and pay retention benefits, these actions of an agency are the basis for pay and personnel transactions until changed by a certificate of the D.C. Office of Personnel.

DPM Subsection 1112.5 states as follows:

> If the classification action taken by an agency requires a personnel action which will result in a loss of rank, grade or pay to the occupant of the position, the agency must advise the employee, in writing, of the position action and the proposed date of the personnel action. This notice shall be issued prior to taking a personnel action, in accordance with the notice requirements for reduction in force for employees appointed on or before December 31, 1979; or the notice requirements for adverse actions for employees appointed after that date.

Having considered in concert all of the above-noted sections of the D.C. personnel regulations, I find that the government's actions of reclassifying entire job categories was a global effort designed to bring D.C. Government's employee's into a unified standard for placing positions in their proper classifications and grades. To effectuate the changes, DCOP revised, supplemented, or abolished old standards, replacing same with a new set of standards, as specifically authorized and contemplated by the above-referred DCOP.

I find that the Agency conducted the position action relating to Employee in compliance with all the above cited provisions of the DPM. First, the Agency properly and accurately listed the correct job title and position on Employee's Form 1, which effectuated his RIF action. The position was simply reclassified in the ordinary course of Agency's business.

Second, there was nothing ominous in the job re-classification that Employee's position underwent in May 2004. Further, the reclassification of computer related jobs was conducted throughout the District of Columbia government during this time period, to bring all those job titles and duties in line within the latest standard promulgated by the U.S. Office of Personnel Management, the primary guidance source for District of Columbia job classification. *Agency Exhibit "C", P. 7.* Consistent with the reclassification, the paperwork for Employee's position was forwarded by the Agency's Human Resource Manager, Marilyn Williams, on April 7, 2004, to the District of Columbia Office of Personnel (DCOP). *Agency Exhibit "C", P. 8.*

I find that this action was a mandated administrative action, consistent with the provisions of DPM Subsections 1102.1 and 1102.4. A side effect of that realignment and adoption of new standards and guidelines, coupled with several fiscal constraints, was that seven positions were identified for abolishment. Once DCOP issued the authorization for making the change, as a matter of professional and personal courtesy, it most certainly should have taken the next step by timely notifying each individual employee affected by the reclassification. Employee asserts that he was never timely notified of the change. The records available neither confirm nor deny that Employee was notified of the change, prior to his discovery on or about August 30, 2004, by which date the RIF process was already underway, effective September 30, 2004. I find that Agency was deficient in this respect, and Employee was denied the common courtesy of a written notification that his job had been reclassified.

However, whether Employee was formally advised of the reclassification before that date is a matter different from the appropriateness of the RIF action. Subsection 1112.5 provides that the only time that a notice of position action must be provided to the employee occupying the position, as a condition precedent to further action, is when the action adversely impacts the rank, grade or pay of the incumbent. Such was not the case here, as Employee continued to be classified at the same level of rank, grade, and pay as he had been prior to the reclassification. I find that he sustained no loss as a direct result of the position title change. Accordingly, his belated receipt of notice of the position change was not critical to the Agency being able to move forward with the abolishment of his position. Nor does his lack of prior knowledge of the position reclassification operate to invalidate or taint the propriety of the Agency's decision to abolish his position.

I find that Employee's lack of awareness about the new job title, and likewise non receipt of a new Form 1, does not invalidate the fact that he had been given a new job title. Based upon documents submitted by the Agency to the record, it appears that the Agency's human resource manager worked directly with Employee's supervisor, Leon Jackson, Chief Information Officer, D.C. Department of Employment Services ("DOES"), Office of Information Technology, in developing the position description (the "PD") for the reclassified position. *Agency Exhibit "B", P. 6.* Because the job-related duties had not changed, the new PD mirrored the old PD, reflecting the same duties, responsibilities, and tasks. It was a change in only the title of the position, with the Employee still doing the same job, even after the reclassification, that he had been doing prior to it.

Unsigned notice of separation

The Employee alleges that his separation was erroneous because the August 16, 2004, RIF notice was unsigned by the Agency Director, and therefore fatally defective. .

DPM Subsection 2423.1 states that each RIF notice shall state the following:

> (a) The specific action to be taken and its effective date;
>
> (b) The employee's competitive area, competitive level, tenure group, and reduction-in-force service computation date;
>
> (c) The place where the employee may inspect the regulations and records pertinent to his or her case;
>
> (d) The reasons for retaining a lower-standing employee in the same competitive level, if applicable;
>
> (e) The employee's appeal rights, including the time limit for appeal and the location of the office to which an appeal should be sent; and

> (f) If applicable, specific information concerning the employee's right to priority placement consideration, including the method in which the employee will be referred for agency reemployment priority consideration when the reduction in force was conducted in a lesser competitive area.

While securing an agency director's signature on a RIF notice prior to delivery to the affected employee is the general practice, the regulations do not require that the RIF notice must be signed by any official. Agency asserts that failing to initially provide the Employee with a signed version of the RIF notice was not a fatal error. At best, it was a harmless error, not of the magnitude that if the notice had not been signed, the Employee could not have been released from employment. I concur with Agency's position, and find that it was harmless error in issuing an unsigned letter advising that the position was being abolished.

I find that having the notice signed is more in the nature of a courtesy than a mandate, and that the failure to secure the Director's signature on Employee's RIF notice was an administrative oversight, totally without any impact or effect on the document's ability to abolish the Employee's position. The RIF having been approved at the Mayoral level, through Administrative Order DOES 2004-1, issued on July 9, 2004, and now being subsequently implemented at the Agency level, the lack of a signature on the RIF letter was a harmless error, and did not undermine either the substance or intent of the document. *Agency Exhib. "C" P.2.* It remained an expression of the valid, duly approved authority to end Employee's employment through the RIF process.

Once the error of the Agency having issued an unsigned RIF letter to the Employee was realized, Agency personnel immediately sought to rectify it. Two days later, on August 18, 2004, the Agency Director signed a copy of the re-dated RIF letter, which was then mailed to the Employee's home address on that same day. *Agency Exhibit "C," Pp.4 and 5.* Since the effective date of the RIF was September 30, 2004, Employee was still accorded the requisite of at least thirty (30) days notice prior to his last day of employment.

Pre-RIF conditions

Employee has alleged that Agency committed several errors prior to the implementation of the RIF**.** That circumstance, if it ever did exist, would be characterized as a "pre-RIF condition." The issue of whether pre-RIF conditions at an employee's former agency can be subsequently addressed by this Office has been raised previously, and likewise long ago decided. In *In the Matter of Teteja*, 2405-0013-91, 39 D.C.Reg. 7213 (1992), a seminal case in the subject area, the Temporary Appeals Panel (the "TAP") determined that the TAP does not have jurisdiction to hear a claim of a prior job misclassification in the process of adjudicating an employee's RIF appeal, and that permitting job classifications to be challenged under the guise of a RIF appeal, would be incompatible with the limited scope of review of RIF determinations.

Further, TAP emphasized that its role is limited to reviewing the validity of matters covered by the RIF regulations. See also *Anjuwan v. D.C. Department of Public Works,* 729

A.2d. 883 (D.C. 1998), which held that this Office's authority is narrowly prescribed, and did not have jurisdiction to determine whether the RIF at the agency was bona fide or violative of any law, other than the RIF regulations itself.

In *David A. Gilmore v. University of the District of Columbia*, 695 A.2d 1164, (D.C.1997), the court held that Gilmore could not use the RIF process to belatedly contest the process utilized in his job being reclassified, which position was subsequently abolished during a RIF. The court further noted that Gilmore could have filed a timely grievance with his employer, challenging what he believed was a misclassification of his position. Had he done so, the grievance would have afforded his employer the opportunity to redefine the duties the position entailed, so as to remove uncertainty about its classification and the grounds for any future legal disputes that might arise. And depending upon the outcome of the grievance process, a timely grievance would have enabled Gilmore to decide whether to accept the "good" with the "bad", i.e., the increased vulnerability of his new job reclassification and the promotion that came with it, rather than accepting the benefits when given, and challenging his status only later when the burdens of the higher position, including the ultimate RIF, materialized. *Id* at 1168.

In maintaining this position, this Office is adhering to prior determinations previously made by the federal courts. In *Menoken v. Department of Health and Human Services*, 784 F.2d 365, 368-369 (Fed.Cir.1986), the court held that:

> In determining the retention rights of the former employees of the Community Services Administration, the [Merit Systems Protection] Board necessarily had to look at the situation as it actually existed in that agency when the reduction in force took place on September 30, 1981, and not to the situation that might or should have existed on that date. It would be almost impossible to determine the retention rights of employees affected by a reduction in force or transfer of function if the correctness of the classification of the positions the employees held had to be reexamined. Reductions in force deal with actual and not theoretical or possible situations.

See also *Biddle v. United States,* 195 U.S.App.D.C. 263, 602 F.2d 441 (1979), which held that complaints of pre-RIF treatment are not a proper issue of RIF appeal subject to review of the Federal Employee Appeals Authority. Instead, those issues had to be raised within the agency's own grievance procedures. For further discussion of this issue, see *Wharton v. District of Columbia Public Schools,* OEA Matter J-0111-02 (Mar. 3, 2003), __ D.C. Reg. __ ( ); *Levitt v. District of Columbia Office of Personnel,* OEA Matter No. 2401-0001-00, *Opinion and Order on Petition for Review* (Nov. 21, 2002), __ D.C. Reg. __ ( ); *Powell v. Office of Property Management,* OEA Matter No. 2401-0127-00 (Feb. 3, 2003), __ D.C. Reg. __ ( ); *Booker v. Department of Human Services,* OEA Matter No. 2401-0190-97 (Oct. 11, 2000), __ D.C. Reg. __ ( ).

Therefore, I find that Employee's raising collateral issues when challenging his RIF, does not confer additional authority upon the Office to enforce all other laws and regulations. To

allow such would clearly exceed both the Office's limited statutory authority and the AJ's jurisdiction, which is solely to determine whether the RIF complied with applicable District personnel statutes and regulations addressing an employee's right to a single round of lateral competition within his/her competitive level, and whether the employee received at least 30 days advance written notice prior to the effective date of the RIF. I find that where there is a single person competitive level, as in this case, the statutory provision of *D.C. Official Code* § 1-624.08(e), according Employee one round of lateral competition, is inapplicable. Anything else is beyond this Office's statutory authority to address.

CONCLUSIONS OF LAW

Chapter 24 of the District Personnel Manual (hereinafter, "DPM") governs RIFs for District of Columbia agencies. I conclude that the Agency's September 30, 2004-implemented RIF was conducted in accordance with Chapter 24 of the DPM. Additionally, Chapter 11 provides guidance on classification of positions. I conclude that the Agency reclassified Employee's position properly, in strict compliance with these provisions, without any underhanded purpose or intent.

The retention register and the competitive level were accurate and all inclusive. Employee's retention register was properly structured as he alone qualified for selection to his competitive level. The notice, although unsigned originally, nevertheless satisfied all the necessary criteria for effectuating the RIF. I further conclude that the lateral competition component associated with the implementation of a RIF, is not applicable where the RIFed employee was the sole person employed at that competitive level.

I conclude that the Employee's arguments are too insubstantial to be the foundation for corrective action, and that Employee has not provided a basis for disturbing the RIF. In sum, I conclude that the Employee's action lacks merit and that his request for relief should be denied.

Therefore, based on the record before me and the statutory requirements having been met, I conclude that Agency properly separated Employee from service as a result of the RIF, and that this action must be upheld. Agency's Motion to Dismiss the Petition for Appeal should be **GRANTED.**

ORDER

It is hereby ORDERED that Agency's action separating Employee from service as a result of the RIF is UPHELD, and that Agency's Motion to Dismiss the Petition for Appeal is **GRANTED.**

FOR THE OFFICE: / s /

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge