THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LAURA SMART,	)	
Employee	)	OEA Matter No. 2401-0328-10
	)	
v.	)	Date of Issuance: August 20, 2012
	)	
DISTRICT OF COLUMBIA CHILD AND FAMILY SERVICES AGENCY,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Lee Boothby, Esq., Employee's Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 8, 2010, Laura Smart ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Child and Family Services Agency's ("Agency" or "CFSA") action of abolishing her position through a Reduction-In-Force ("RIF"). The effective date of the RIF was June 11, 2010. At the time her position was abolished, Employee's official position of record within the Agency was a Social Work Associate.

This matter was assigned to me on or around July 10, 2012. Subsequently on July 12, 2012, I issued an Order wherein, I required the parties to address whether the RIF was properly conducted in this matter. Both parties have timely complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not 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."[1] 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."[2]

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."[3] 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."[4] 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."[5]

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.[6] 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."[7] 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."[8]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[9] 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

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

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 the instant RIF "violated my rights of due process and express and implied contract rights, failed to follow applicable regulations and denied my rights to priority placement consideration."[10] Employee further notes that there was no "valid basis for the reduction in force."[11] She also notes that there was no factual basis for the instant RIF "either as to its scope or stated reason."[12]

Additionally, in her brief, Employee reiterated her previous arguments, noting that, the RIF violated both her procedural and substantive due process. She states that she had a property right in her public employment with Agency. She also asserts that as a third-party beneficiary of the Collective Bargaining Agreement between Agency and the Union, she has been conferred a property protection interest. Employee also notes that the RIF was a sham, used by Agency in an attempt to circumvent the Social Work Associates constitutionally protected property interest in their public Employment.[13] Employee further contends that the RIF was a "reorganization" not a "realignment" which "required approval by the Counsel of the District of Columbia."[14] Additionally, Employee maintains that the positions occupied by former Social Work Associates "have been filed by new hires performing the same duties but with higher education degrees."[15] Employee also highlights that Agency failed to include Employee's personnel file as requested in the July 12, 2012, Order.[16]

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 April 29, 2010, upon receiving an administrative order for a RIF, Agency abolished several positions due to a budgetary crisis and a need for an internal reengineering. Agency explains that all employees with the same competitive level were listed in a Retention Register. The competitive level pertaining to Employee was DS-0187-10-01-N. Agency further concedes that it is unsure as to whether

[10] Petition for Appeal (July 8, 2010).
[11] *Id.*
[12] *Id.*
[13] Employee's Brief (August 10, 2012).
[14] *Id.*
[15] *Id.*
[16] While Agency did not include Employee's entire Personnel file in its brief, Agency did submit all the documents relevant to this case. Thus, this issue will not be addressed.

Employee was given the required thirty (30) days written notice prior to the RIF effective date of the RIF since the Acknowledgement of Receipt of the RIF notice to Employee is dated June 2, 2012. Agency also maintains that because the entire competitive level was abolished pursuant to the RIF, no lateral competition efforts were required.[17]

In instituting the instant RIF, Agency did not meet the procedural requirements listed above, and it does not contest this. Based on Agency's own admission, Employee did not receive the required thirty (30) days written notice prior to the effective date of the RIF. The Acknowledgement of Receipt[18] shows that Employee received the RIF Notice on June 2, 2012, but refused to sign it. Employee received the RIF notice on June 2, 2010, and the RIF effective date was June 11, 2010. This is less than thirty (30) days notice. Agency's failure to provide Employee with at least thirty (30) days notice is considered procedural error, and thus, calls for a do-over or reconstruction of this process as oppose 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. DPM 2405.7, 47 D.C. Reg. 2430 (2000). 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." This is not the case here. Here, Agency's failure to provide Employee with thirty (30) days notice before the RIF effective date does not constitute harmful error.

Employee asserts that Agency did not follow proper RIF Regulations;, she notes that her seniority was not taken into consideration. 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. Regarding the lateral competition requirement, the record shows that all 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

[17] Agency's Brief (July 27, 2012).
[18] Agency's Answer at Tab 3, p.2. (August 12, 2010).

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.[19]

RIF Rationale

Employee alleges that the RIF was a sham. Employee further notes that the RIF was a "reorganization" and not a "realignment" as stated by Agency. In *Anjuwan v. D.C. Department of Public Works,*[20] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals 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…"[21] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[22]

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[23]

Priority Reemployment

Employee further argues that she was denied her rights to priority placement consideration. As discussed above, § 1-624.08 and not § 1-624.02 applies to the instant RIF. Section 1-624.08 does not require Agency to engage in priority reemployment procedures. Furthermore, Employee has not provided any credible evidence to show that she applied to available positions and was not considered for priority reemployment. Considering as much, I conclude that Employee's argument regarding priority reemployment is wholly unsubstantiated.

Due Process

Employee also maintains that she was denied substantive and procedural due process. Employee explains that, "the furnishing of a process (here an appeal) does not in and of its self equate with constitutional due process if the process provided is a sham."[24] Employee also notes that as a public employee, she has property rights in her employment, and as such, Agency violated her constitutional and statutorily protected rights to both substantive and procedural due process. The Fifth Amendment of the U.S. Constitution provides that, a state shall not deprive a

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[19] 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).
[20] 729 A.2d 883 (December 11, 1998).
[21] *Id*. at 885.
[22] *Id*.
[23] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).
[24] Employee's Brief, *supra*.

person of life, liberty and property without due process. For due process to come into play in the area of public employment, Employee must have a legitimate claim of entitlement to it. Specifically, the employee must show that a protected liberty or property interest is implicated.[25] The District of Columbia grants permanent Career Service employees property interest in their employment. Thus, as a Career Service Employee with the District of Columbia, I agree with Employee's assertion that she has a property right in her employment. However, I disagree with Employee's contention that Agency violated her substantive and procedural due process rights.

The Constitutional guarantee of due process of law has "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at *all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[26] Simply put, substantive due process guarantees that a person's life, freedom, and property cannot be taken without appropriate government justification. In this case, I find that Agency's action of abolishing Employee's position was done with appropriate government justification. Agency notes in its brief that it had a need to "conduct a realignment to consolidate functions in accordance with its FY2011 budget and internal re-engineering."[27] Agency submitted a request to conduct a RIF, which was approved. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the undersigned to believe that Agency's justification for conducting the RIF was flawed, arbitrary or wrongful. Accordingly, I find that Employee's substantive due process was not violated.

I further find that, Agency did not violate Employee's procedural due process. "In order to invoke the Fifth Amendment's procedural due process protections, an employee must show that a protected liberty or property interest is implicated."[28] "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[29] A procedural due process violation occurs when state action deprives a person of his/her life, liberty, or property interests without due process of law.[30] Here, as a permanent Career Service employee with the District of Columbia, Employee has a property interest in her employment and is entitled to all the process she is due, which includes notice and a right to be heard. The RIF regulations does not call for a hearing prior to conducting a RIF. However, it does notify employees affected by the RIF of the option to appeal the RIF decision through either their Collective Bargaining Agreement or this Office. And by filing her appeal with OEA, Employee is exercising the procedural due process rights she is entitled to. While Employee consistently refers to the RIF and the appeal procedure as a sham, Employee has failed to proffer any credible evidence to support her allegations. Consequently, I find that, by notifying Employee of the RIF,

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[25] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C., 2011); *See also*, *Grant v. District of Columbia*, 908 A.2d 1173, 1179 (D.C. 2006).
[26] *In Re W.M.*, 851 A.2d 431 (D.C., 2004), *citing Reno v. Flores*, 507 U.S. 292, 302, 113, S.Ct. 1439, 123 L.ED.2d 1 (1993).
[27] Agency's Brief, *Supra*, at Tab 8.
[28] *Burton, supra*.
[29] *Burton, supra; see also, Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting Bd. Of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
[30] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

and according her the option of appealing the RIF decision, Agency did not violate Employee's procedural due process rights.

Grievances

Employee also alleges that after she was terminated, the work she and the other Social Work Associates performed was not discontinued, but instead, was filed by new hires with higher education. This Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[31] A complaint of this nature is a grievance, and does not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. 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. As such, I am unable to address the merits of such claims.

Additionally, Employee asserts that Agency violated her rights as a third party beneficiary of the Collective Bargain agreement between Agency and the Union. The Court in *Anjuwan, supra,* held that OEA's authority over RIF matters is narrowly prescribed.[32] This Court explained that, OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied…the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."[33] Consequently, I find that issues regarding Collective Bargain agreements between an agency and the Union fall outside the scope of OEA's jurisdiction, and for that reason, I am unable to address the merits of such claims.

CONCLUSION

Based on the foregoing, I conclude that OEA is precluded from addressing any other issue(s) in this matter. I further find that, while Agency's action of abolishing Employee's position was not done in strict accordance with D.C. Official Code § 1-624.08 (d) and (e), Agency's errors were more procedural in nature and thus, not harmful error.

ORDER

It is hereby ORDERED that:

1. Agency reimburse Employee twenty-one (21) days pay and benefits commensurate with her last position of record for failure to provide Employee with a thirty (30) days notice prior to the effective date of the RIF; and

[31] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).
[32] 729 A.2d 883 (December 11, 1998).
[33] *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

2. Agency's action of abolishing Employee's position as a Social Work Associate through a RIF 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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MONICA DOHNJI, Esq.
Administrative Judge