THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Lawrence Nwankwo	)	OEA Matter No. 2401-0203-09
Employee	)	
	)	Date of Issuance: November 23, 2011
v.	)	
	)	Senior Administrative Judge
District Department of Transportation	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Melissa Williams, Esq., Agency Representative
James Kestell, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 13, 2009, Lawrence Nwankwo ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District Department of Transportation's ("DDOT" or "the Agency") decision to abolish his position through a Reduction-In-Force ("RIF"). This matter was assigned to Judge Lois Hochhauser, who held a conference on August 24, 2010. After this matter was reassigned to me, I held a Prehearing Conference on March 23, 2011. As a result of this Prehearing Conference, I decided that an evidentiary hearing was unwarranted. I closed the record after the parties submitted final legal briefs in this matter.

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.

Positions of the Parties:

Employee contends that he was not given his one round of lateral competition that he was entitled to because Agency did not prepare the retention register properly. He states that his position was not, in fact, eliminated. Instead, Agency hired Jeff Jennings, a less qualified Caucasian, to take over and perform his duties and responsibilities. Thus, Employee is

convinced that Agency did not eliminate positions, but rather, selected individuals such as himself that it wanted to remove.

Employee also asserts that his position is analogous to that of the Plaintiff in *Levitt v. D.C. Office of Employee Appeals*, 869 A.2d 364 (2005), which held that transferring an employee to a position which was abolished less than a month after it was created raises non-frivolous allegations of a termination without cause.

Agency denies Employee's allegations and maintains that it followed all portions of D.C. Official Code § 1-624.08 and all applicable RIF regulations when it abolished Employee's last position of record. Agency also asserts that *Levitt, ibid.* is not applicable here as the facts and circumstances differ significantly.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documentary and testimonial evidence as presented by the parties during the course of Employee's appeal process with this Office.

In examining the undisputed facts in this matter, I find that the facts in *Levitt* do not pertain here. For one thing, Employee was never transferred to a newly created position. Employee was not subjected to reassignments nor was his position ever changed during his tenure at the Agency. Thus, I find that there were no "unusual personnel actions" as was present in *Levitt*, 869 A.2d at 365.

When the instant RIF occurred, Employee's position of record was General Engineer, DS-801-13-09-N.[1] He had a service computation date of October 14, 1988, and the effective date of his RIF was August 21, 2009. Employee was the only general engineer in Agency's Transportation Policy and Planning Division (TPPA). Since this position was abolished, Employee lost his job. As for Jeff Jennings, a Transportation Management Specialist, he performed the duties of a transportation planner and had worked for Agency for over five years before Employee's RIF. At no time did Jennings perform any of Employee's functions. *See Affidavit of Karina Ricks*.[2]

D.C. Official Code § 1-624.08 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.

[1] Employee's allegation that he had been terminated in May 15, 2009, is unsubstantiated by the Personnel Action Form 50 document that he submitted. The form is unsigned and in any case, was never processed.

[2] Ricks is the Associate Director of Agency's Transportation Policy and Planning Division. It is undisputed that TPPA is now the Policy, Planning and Sustainability Administration (PPSA).

> (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 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 her competitive level.

This Office has consistently held that when a separated employee is the only member of his/her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added by this AJ), "the statutory provision affording [him/her] one round of lateral competition was inapplicable." *See, e.g., Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), __ D.C. Reg. __ ( ); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005), __ D.C. Reg. __ ( ); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003), __ D.C. Reg. __ ( ). *See also Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), _ D.C. Reg. __ ( ). In the matter at hand, I find that Employee was the only person in his competitive level after a RIF had been properly structured and a timely 30-day legal notification was properly served.

According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (1998), the OEA's authority over RIF matters is narrowly prescribed. The Court explained that the OEA does not have jurisdiction to determine whether the RIF at the Agency was bona fide or violated any law, other than the RIF regulations themselves. 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, the OEA no longer has jurisdiction over grievance appeals. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented.

Based on the foregoing, I conclude that Agency's action of abolishing Employee's position was done in accordance with all applicable laws, rules and regulations. I find that

Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge