THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
William H. Dupree	) OEA Matter No. 2401-0088-01R12
Employee	)
	) Date of Issuance: January 22, 2013
v.	)
	) Senior Administrative Judge
Department of Corrections	) Joseph E. Lim, Esq.
Agency	)
	)

Frank McDougald, Esq., Agency Representative
James Wallington, Esq., Employee Representative

INITIAL DECISION ON REMAND

INTRODUCTION

On August 29, 2001, Employee filed a petition for appeal from Agency's final decision separating him from Government service pursuant to a reduction-in-force (RIF). The effective date of his separation was August 3, 2001. At the time of his separation, Employee occupied the position of Criminal Investigator, DS-11/5, in the Career Service.

On February 6, 2004, Administrative Law Judge (ALJ) Daryl Hollis issued an Initial Decision (ID) which upheld the RIF conducted by Agency. An evidentiary hearing was not held and the appeal was decided based on the submissions of the parties. Employee appealed this ruling to the Office of Employee Appeals (OEA) Board, which affirmed the ALJ's ID in an Opinion and Order dated January 25, 2006. Subsequently, Employee appealed the OEA Board's decision to the District of Columbia Superior Court.

On July 23, 2008, the Superior Court affirmed the decision of the OEA Board. Employee appealed the decision of the Superior Court to the District of Columbia Court of Appeals, and in an opinion dated December 22, 2011, the Court of Appeals remanded the matter to the OEA for additional proceedings in accordance with its rulings. Specifically, the Court made the following rulings: 1) that Employee was entitled to an evidentiary hearing; 2) that OEA determine the effect, if any, of voluntary retirements on the RIF procedures; 3) that OEA determine whether Agency can apply a prior year's performance rating when the current year's performance rating (as required by 6-B DCMR § 2416) is unavailable; 4) that OEA correctly ruled that two junior Criminal Investigators (Internal Affairs) be absent from Employee's Retention Register. As the undersigned did conduct an evidentiary hearing (thereby fulfilling one of the Court's rulings), this ID will focus on the two remaining issues that the Court identified.

This Matter was reassigned to this judge on or around January 20, 2012. I held a Conference on February 8, 2012, and March 7, 2012, and ordered the parties to submit legal briefs on the issues. I then held an evidentiary hearing on April 20 and April 23, 2012. The record is now closed.

JURISDICTION

The Office has jurisdiction over Employee's claim that Agency's action separating him from Government service pursuant to a RIF was unlawful. *See* D.C. Code Ann. § 1-606.3(a) (1999 *repl*.).

ISSUES

1. Whether Agency should have used the prior year's performance review for the RIF retention register since none were available for the current year (April 1, 2000 - March 31, 2001)?

2. Whether three positions vacated by retiring employees—after a RIF has been announced, but before the RIF is implemented—should be counted among the positions abolished under the RIF?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

1. Whether Agency should have used the prior year's performance review for the RIF retention register since none were available for the current year (April 1, 2000 - March 31, 2001)?

D.C. Code Ann. § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. Subchapter XXIV of the Code sets forth the law governing RIFs. Section 1-624.08 of subchapter XXIV pertains to RIFs for "the fiscal year ending September 30, 2000, and each subsequent fiscal year. . . ." Further, § 1-624.08(f)(2) reads as follows: "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." Section 1-624.08(d) states in part that: "[a]n employee affected by the abolishment of a position pursuant to this section . . . shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual [DPM],[1] which shall be limited to positions in the employee's competitive level." Section 1-624.08(e) states that an employee who is "selected for separation" as a result of a RIF is entitled to 30 days written notice prior to the effective date of the RIF. Thus, an employee whose position was abolished as a result of a RIF may only contest the following before this Office: 1) that he was not afforded one round of

[1] Chapter 24 of the DPM contains the regulations implementing the RIF law.

lateral competition within his competitive level; and/or 2) that he was not given 30 days' notice prior to the effective date of his separation.

Chapter 24 of the DPM, § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> [A]ll positions in the competitive area . . . in the same pay system, grade or class, and series which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent in any one (1) position can perform successfully the duties and responsibilities of any other position, 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 usually the date on which the employee began D.C. Government service. However, an employee's standing on the retention register can be enhanced by: 1) an "Outstanding" performance rating for the rating year immediately preceding the RIF (DPM § 2416, 47 D.C. Reg. at 2433); 2) Veteran's preference (DPM § 2417, 47 D.C. Reg. at 2434); and/or 3) D.C. residency preference (DPM § 2418, *id.*). An employee's final standing on the retention register is reflected by the RIF service computation date (RIF-SCD), which is the SCD plus any of the above enhancements to which he is entitled.

An agency is required to calculate an employee's "years of creditable service" before effecting a RIF action against him. According to those years, an employee is assigned a service computation date that determines his standing among those in his competitive level. *See* Vol. IV, DPM Chapter 24, Part I, Subpart I, § 2410, p. 24-I-7. Competing employees are selected for release in the inverse order of their standing in their competitive level. *See* Vol. IV, DPM Chapter 24, Part I, Subpart I, § 2422.3, p. 24-I-13.

Volume IV, DPM Chapter 24, Part I, Subpart I, § 2416.1, p. 24-I-11, provides:

> Each employee who has a current performance rating of "Outstanding" shall be credited with four (4) years of additional service.

This regulation defines "current performance rating" as "the performance rating for the year which ended on the March 31 preceding the date of the reduction-in-force notice." 6-B DCMR §2416.1 and -.2.

DPM Chapter 24, Section 2416, Retention Standing Performance Rating, Subsection 2416.3, provides that:

> To be credited under Section 2416.1, the performance rating must have been officially acted upon with all the necessary approvals, received in the appropriate personnel office maintaining the official personnel folder no later than thirty (30) days before the close of business of the day immediately before the reduction-in-force notice is issued.

DPM Chapter 14, Performance Evaluation, Section 2.4 (D) Outstanding Performance Rating, states:

> All ratings of Outstanding require the signatures of the employee, the rating and reviewing official (Department Head and the approving official or his or her designee…

DPM Chapter 24, Subsection 2416.4, states:

A performance rating received by the personnel authority after the date specified in § 2416.3 shall not change the employee's retention standing.

Further, Vol. III, DPM Chapter 14 (Performance Evaluations), Subpart 2, § 2.4(B), p. 14-9, pertaining to "Outstanding" ratings, reads as follows:

> Ratings of Outstanding shall not be recommended for periods of performance of less than 12 months. This means that an employee, to be rated Outstanding, must have performed his or her assigned duties and responsibilities at the same grade level for a 12-month period (and the duties and responsibilities must be essentially similar if the employee was reassigned during the rating period). Accordingly, if an employee has been promoted and has not occupied the position to which promoted for 12 months as of the end of the rating period (March 31), the employee may not be recommended for an Outstanding rating for the rating period.

The following facts are not subject to genuine dispute:

1. Employee was promoted to the position of Criminal Investigator, DS-1811-11, effective June 28, 1999.

2. By Memorandum dated July 17, 2000, Lloyd C. Jones, Chief of the Warrant Squad, recommended that Employee be given an Outstanding rating for the April 1, 1999 - March 31, 2000 rating year. *See* Attachment 4 to Agency's June 10, 2003 Prehearing

Statement. The rating form that was submitted with Jones' memorandum contains the signatures of Jones (the "Rater") and Employee. It lacks the signatures of a "Reviewer" and an "Approving Authority."

3. On August 8, 2001, the effective date of his RIF, Employee occupied the position of Criminal Investigator, DS-1811, grade 11/5, in the Career Service. His service computation date (SCD) was June 3, 1980.

4. As part of the mandated closure of the Lorton Correctional Facility, Agency Director Odie Washington requested Mayor Williams's approval to abolish 440 positions throughout Agency. Among these positions were five Criminal Investigator, DS-1811, grade 11 positions from the Warrant Squad. The Mayor approved the request on May 10, 2001. *See* Attachment 5 to Agency's June 10, 2003 Prehearing Statement.

5. Pursuant to § 2412 of the RIF regulations, discussed below, Agency established a retention register for Employee's competitive level on June 27, 2001. The register listed the names of Employee with nine other employees. *See* Attachment 8 to Agency's June 10, 2003 Prehearing Statement.[2]

6. Pursuant to § 2416.2 of the RIF regulations, discussed below, Agency was required to apply the current performance rating. Because the RIF notice was sent June 28, 2001, the current performance rating for purposes of the RIF ended on March 31, 2001 (April 1, 2000 – March 31, 2001 rating year). Since the current year's performance ratings have not been completed in time prior to the RIF, Agency instead used the prior year's performance ratings (April 1, 1999 – March 31, 2000 rating year). This was done with the knowledge and concurrence of the D.C. Office of Personnel (DCOP).[3]

7. Employee's fellow Criminal Investigators, DS-11 Jasper Archer, Ethel Woodby, and Michael Clark all retired before the RIF was effected. Criminal Investigator Brenda Wheeles did not have DC residency.

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[2] The following is uncontroverted: Initial retention registers for all affected competitive levels were prepared shortly after the Mayor's May 10, 2001 approval of the proposed RIF. RIF notices were sent to affected employees on May 25, 2001, giving the effective date of their separation as June 28, 2001. However, Employee's Union, the Fraternal Order of Police/Department of Corrections Labor Committee (FOP), of which he was chairman, challenged the correctness of the retention registers, and thereby the entire scheduled RIF. As a result of this challenge, the May 25, 2001 letters were rescinded, and the scheduled RIF was postponed. Corrected retention registers, including the one above for Employee's competitive level, were then prepared.

[3] *See* the October 18, 2001 Memorandum to Employee from Milou Carolan, then-Director of DCOP. I also note that Employee does not claim that he was rated Outstanding for the 2000-2001 Rating Year.

8. Employee did not have an outstanding performance rating for the rating year immediately preceding the RIF, was not entitled to veteran's preference and was not a *bona fide* D.C. resident at the time of the RIF. Thus, he was not given any of these retention register enhancements.

9. Employee did have an outstanding performance rating for the prior year of April 1, 1999 – March 31, 2000, but did not receive the four years enhancement to his RIF-SCD of June 3, 1980. In contrast, fellow employee Brenda Wheeless received credit for her prior year outstanding performance rating and thus her RIF-SCD was June 9, 1979. None of the other criminal investigators in Employee's retention register who were eliminated received any credit for their performance ratings.

10. With a Service Computation Date of June 3, 1980 and none of the retention register enhancements, Employee was ranked 8 out of 10 criminal investigators in terms of seniority in his competitive level. To put it another way, he was placed 3rd from the bottom of the Retention Register. Five employees, including Employee, were separated from service.

11. On June 28, 2001, Employee received the requisite 30-day notice prior to the effective date of his separation.

Evidence on Performance Rating

Testimony of Lewis Clark Norman (April 20, 2012 Transcript pgs. 5-113):

Lewis Clark Norman ("Norman") testified that he is employed by the District of Columbia government in the Department Human Resources (HR), as a lead Human Resource Specialist in Classification. The undersigned qualified Norman as an expert witness in the area of District of Columbia personnel and RIFs.

Norman described the process of effectuating a RIF. Specifically, Norman testified that after an agency's request for a RIF is approved, the administrative order is given to the Department of Human Resources (HR) for implementation of the RIF. In the process of implementing a RIF, HR is required to review the positions to be abolished and utilize the information in the official personnel files to identify the incumbents of the positions that are indicated on the administrative order.

With regard to performance ratings, Norman testified that in order to be given credit for an outstanding performance rating, the rating must be one that occurred during the current performance period. *See* Tr at 42-43, and 57. A *current* performance period ends on the March 31st preceding the date of the RIF; in this case, March 31, 2001. Citing DPM § 2416.2, Norman stated that the rating must be received in the Personnel Office at least 30 days before the RIF notices are issued and have all approvals.

Norman was unaware of any section in District Personnel Manuel ("DPM") Chapter 24 that provided that a prior year's performance evaluation could be used if the current year's evaluation is unavailable. *See* Tr. at 45. Norman was also unaware of any mechanisms or any District government personnel that had the authority to use a prior year's performance evaluation instead of a current year's evaluation. *See* Tr. at 46, 52. Norman stated that if a personnel director used the prior year's performance evaluation, that personnel director would have been in violation of the District's regulations. *See* Tr. at 46.

It was also testified by Norman that the regulations allow for a performance period of less than one year in instances where an employee may have served in a position less than 12 months. *See* Tr. at 53. However, in order to be given credit for a performance rating during a RIF, the rating must be received in the Personnel Office 30 days before the RIF notices are sent out and must contain all the necessary signatures. *See* Tr. at 53-54. Norman stated that if a performance rating was not signed by management within 30 days of the RIF notice being issued, and through no fault of employee, then it would be "unfortunate" and that the rating should not be taken into consideration for that particular RIF. *See* Tr. at 54-55.

Thus, any employee listed on the retention register that were given "outstanding" performance ratings based on ratings from the previous performance period ending on March 31, 2000 were not entitled to an enhancement based on Norman's interpretation of the regulations. *See* Tr. at 57. Norman agreed that even if all of the improper performance ratings for the other employees were taken away, Employee would still have been separated pursuant to the RIF as he would still be among the five positions that were abolished. *See* Tr. at 67.

Norman opined that the personnel authority in the instant case used incorrect information for the performance rating for the current year of the RIF. Specifically, Norman states that the personnel authority used the prior year performance ratings which are not authorized by the regulations. Norman further states that once it was determined, or once it was known that the prior year's performance ratings were used, the personnel authority should have used the current year's performance ratings pursuant to DPM § 2505.5—which were unavailable in the instant matter. *See* Tr. at 96-97. Therefore, all employees should have received a presumed "satisfactory" rating. *See* Tr. at 96-97. A "satisfactory" rating would not have affected the standing of the retention register.

He stated that according to the District Personnel Manual ("DPM") 2416.2, the current performance rating shall be the performance rating for the year which ended on March 31st preceding the date of reduction in force notice. Based on DPM 2416.3, performance rating must be received by Office of Personnel, thirty days before the close of business of the day immediately before the reduction in force was issued. Employee did not have credit for an outstanding performance rating for the period prior to the RIF. The performance review from the prior year was used. According to regulations Agency was not allowed to use the prior year performance.

Norman did not know why the performance rating was not available, but assumed that

the agency did not complete them in a timely manner. He did note that performance reviews for less than a year are allowed particularly if employee only served a certain number of months. The employee not receiving the performance rating would be deemed unfortunate. Although it could impact the employee, the regulation is very clear in terms of the admissibility of a rating during a performance period. Redress is not available for the employee. If the agency did not have a pending Reduction in Force ("RIF') there would have been time provided for the manager to complete the rating and submit it. But if agency is undergoing a RIF, the requirement is that an outstanding rating must be received thirty days before notices are issued.

Testimony of Armetia Mobley (April 20, 2012 Transcript pgs. 113-125):

Mobley was an HR specialist who served as Agency's reference guide regarding any questions in implementing a RIF. Although she was a witness for Employee, Mobley could not answer any of the questions posed to her.

Testimony of Ronald Brady (April 20, 2012 Transcript pgs. 125-147):

Ronald Brady identified himself as a fellow criminal investigator with pay grade 11. With the help of his union, he complained that he did not receive points for his District residency, veteran status, and an outstanding performance rating. Agency corrected his rating and thus, his RIF was rescinded.

Testimony of Earnest Durant (April 20, 2012 Transcript pgs. 148-161):

Earnest Durant identified himself as a retired criminal investigator with pay grade 11. As a Chief Shop Steward with the union, he got Agency to correct initial mistakes with the RIF.

Testimony of Employee William H. Dupree, (April 23, 2012 Transcript pgs.173-228):

Employee admitted that he had no DC residency, no veteran status, and that his only outstanding performance evaluation was for the period April 1, 1999 through March 31, 2000, a period which was prior to the relevant applicable period for the RIF. *See* Employee Exhibit 4. His RIF-SCD date was June 3, 1980.

Employee testified that apart from attaining the rank of Criminal Investigator at the Department of Corrections, he held top positions in his union. He alluded to a case raised by a fellow employee against Agency for sexual harassment.

Findings of Fact and Analysis regarding the Performance Rating Issue

Employee asserts that pursuant to DPM § 2416.2, the prior year's ratings should not apply, and Agency should have used the current "outstanding" performance ratings, which were performance ratings for the April 1, 2000 to March 31, 2001 rate period. However, it is undisputed that Agency did not provide any ratings for this period. Instead, Agency used the

prior year's "outstanding" performance ratings, which was for the April 1, 1999 to March 31, 2000 rate period. As a result, Employee believes that Agency failed to properly apply the relevant ratings and therefore, it knowingly violated DPM § 2416.2.

Although Employee asserts that Agency did not apply the correct period's performance ratings, he also argues that since the prior year's ratings were used, he should be granted "outstanding" service credit for the purposes of the RIF. He reasons that as a result of Agency's misapplication of "outstanding performance" credit, four of the ten employees in Employee's competitive level were granted the "outstanding" service credit of four additional years and were not affected by the RIF.

From the evidence presented at the hearing, Employee failed to produce any evidence that he had an outstanding performance rating for the relevant time period (April 1, 2000 to March 31, 2001 rating period) that was eligible for enhancing his RIF-SCD as per DPM § 2416.1. *Nor did Employee produce any evidence that he was entitled to an outstanding performance rating for the relevant time period of April 1, 2000 to March 31, 2001.* Both the regulations and the testifying expert are clear that only Employee's *current year's outstanding performance rating* is eligible for enhancing his RIF-SCD. *Emphasis supplied.*

In addition, even if I were to accept Employee's argument that he be awarded four additional years to his RIF-SCD for his prior year's outstanding performance evaluation, the above cited regulations still make it clear that Employee would not be entitled to an enhancement. Because Employee was promoted to the Criminal Investigator's position on June 28, 1999, then as of March 31, 2000 (the end of the rating period), he had served in that position for a little over nine months. Therefore, pursuant to DPM Chapter 14, Subpart 2, § 2.4(B), *supra*, he was ineligible for an Outstanding rating, since he had "not occupied the position to which promoted for 12 months as of the end of the rating period (March 31)." Further, the rating form submitted with Jones's July 17, 2000 memorandum lacked the signatures of a "Reviewer" and an "Approving Authority." Thus, pursuant to § 2416.3, *supra*, the rating (even assuming Employee's eligibility for it) could not have been used for RIF purposes, since it was not "acted upon with all necessary approvals." Additionally, it is undisputed that the rating was not "received in the appropriate personnel office maintaining the official personnel folder [within] thirty (30) days [of] the close of business of the day immediately before the [RIF] notice is issued." *Id.*

Thus, even if we were to accept Employee's contention that his service of less than 12 months was not his fault and thus he should not be penalized for it, he still fails to hurdle the clearly stated requirement that such a rating must have all necessary approvals.

The relevant regulations cited above, plus the expert testimony produced at the hearing, all clearly state that only the current performance ratings, not that of any prior year, can be used to enhance an employee's RIF-SCD. Here, it is clear that Agency was incorrect in using a prior year's performance rating, and thus, all service credits due to the performance ratings should be stricken. In addition, *Coffin v. District of Columbia,* 320 A.2d 301, 304 (D.C. 1974), holds that

the Director's decision to use the prior year's ratings is not binding because he/she lacked authority to bind the District Government beyond the limit of his/her authority.

As the Court of Appeals in the instant matter noted, the regulations are silent as to what happens when the current year's performance ratings have not been completed prior to the RIF, as was the case here. Agency's expert witness is of the opinion that such a situation would be "unfortunate." As the Court of Appeals noted in *Children's Nat'l Med. Ctr. V. District of Columbia Dep't of Emp't Servs*., 992 A.2d 403, 412 (D.C. 2010), a statutory omission "creates ambiguity which an agency charged with administering a statute may resolve." The agency expert witness has declared that this legislative omission is "unfortunate," and then opines that despite this unfortunate development, such a situation does not allow Agency to disregard the relevant regulations and substitute its own desires. Indeed, there is no legislative support for using a prior year's performance evaluation rating instead, as Employee urges. Nor does Employee cite any case law or statute to bolster his contention.

Thus, I find that Employee did not have an outstanding performance rating for the relevant rating year immediately preceding the RIF, was not entitled to veteran's preference and was not a *bona fide* D.C. resident at the time of the RIF. Thus, he was rightfully not given any of these retention register enhancements.

The evidence is likewise clear, however, that even if we were to strip all ineligible outstanding performance ratings from the retention register and deducted the 4 years of service from the affected retention standings, Employee's position would still have been eliminated as he would still have remained third from the bottom and thus would be among the five positions eliminated. *See* Agency Exhibit 6, Employee's Retention Register.

2. Whether three positions vacated by retiring employees—after a RIF has been announced, but before the RIF is implemented—should be counted among the positions abolished under the RIF?

Evidence on Retirement[4]

Norman testified that when an employee retires after a RIF notice is issued, but prior to the effective date of RIF, that retirement creates a vacant position. It then becomes the agency director's decision as to what happens with that vacant position. The agency may leave the position vacant, take no action, or may decide to use the vacancy in another program within the agency. The agency may also use the vacancy to "lessen the impact on someone [who will be] affected by the RIF," although it is not required to do so. *See* Tr. at 70. If Agency did use the vacancy to lessen the effect Employee would endure, then Agency would simply reassign Employee to the position number held by a retiring employee. Employee's former position number would then be abolished pursuant to the RIF.

4 *See* April 20, 2012 Transcript pgs. 5-113.

Norman also testified that when an employee listed on the retention register retires before the effective date of the RIF, there is no regulation that requires that a non-retiring employee, who is subject to removal pursuant to the RIF, shall be automatically placed into the position of the employee who retired before the effective date of the RIF.

Norman further testified that DPM § 2403 covers the regulation that gives agency discretion to leave a position unfilled. *See* Agency's Exhibit 3. Norman stated that DPM § 2403 gives agency management the right to decide when and where to fill vacant positions during a RIF, although it is not required. Norman also asserts that there is no requirement in Chapter 24 which stipulates that the agency must use the vacancies to minimize the RIF.

Norman testified that just because a position number is on the administrative order authorizing the RIF, does not necessarily mean that the person who holds that position number at the time of the RIF is actually separated. Norman indicated that if Employee was reassigned to a position held by a retiring employee, then Employee would be assigned the position number held by the retiring employee.

Norman also testified that when the Personnel Authority and agency are planning the RIF, they review the personnel files of all the employees after the administrative order and RIF is approved. This review of personnel files would then indicate whether employees listed on the retention register are eligible for retirement. However, the review of the personnel files would not necessarily indicate whether one of the employees have contacted the agency about retirement.

As for the other witnesses, none of their testimony concerned the retirement issue.

Analysis on Retirement Issue

In his closing argument, Employee argues that he should have been placed higher on the retention register when three of his fellow criminal investigators retired, because "the mayor's order indicates that those vacant positions created by retirement were to be filled by employees that would have been otherwise reached by the RIF to address attrition problems that the agency was experiencing at the time." (*See* April 23, 2012 Transcript pgs. 225-226.) Looking at the exhibits submitted, I can reasonably surmise that Employee is referring to the second page of Agency's Exhibit 2, which is not a mayor's order, but rather a memorandum regarding the Departmental RIF given to then-Mayor Anthony Williams by the city administrator. Employee's argument is a distortion of said memo, as the memo simply stated that Agency had already "reassigned staff to funded vacancies within the department as a means of maintaining adequate security and safety, as well as court order compliance." Thus, the memorandum simply stated that Agency had already taken measures to maintain security during the process of closing the Lorton Correctional Facility even before the RIF. The memo in no way mandates the Agency to put employees in positions vacated by retirees nor does it hinders Agency from conducting its RIF in accordance with RIF regulations in the way it sees fit.

DPM § 2403.2 provides in pertinent part that: [a]n agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency. An example of such appropriate action would be to [reassign] employees to vacant positions which have been determined to be essential to the continued maintenance of the agency's operation. *See* DPM § 2403.2(b). Here, the position that Employee alleges he should have been reassigned to became vacant after the RIF notice, but prior to the effective date of the RIF, as a result of three employees listed on the retention register retiring. The language in DPM § 2403.2 indicates that the Agency *may* take appropriate action when planning the RIF. There is no mandatory language that requires Agency to reassign Employee to the vacant position that became available as a result of three employees retiring. (Emphasis supplied.)

Further, the agency is responsible for deciding whether to retain or abolish particular positions. *See Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 490 (1997). This is supported by Norman's testimony which provided in pertinent part that: "the agency may leave the position vacant, take no action, or may decide to use the vacancy in another program within the agency." *See* Tr. at 70.

Here, there were ten positions listed on the retention register and five of these positions were slated to be abolished pursuant to the RIF. The other five positions were to be retained. However, of the five employees to be retained, three elected to retire prior to the effective RIF date. Thus, only seven employees listed on the retention register were relevant on the effective RIF date. The crux of Employee's argument is that he should have been reassigned to the fifth position on the retention register, the last position to be retained, after the three employees who were being retained retired.

Chapter 24 of the District Personnel Manual ("DPM), which governs Reductions-in-Force, does not require Agency to automatically place Employee into the position of the employee who retired before the effective date of the RIF. However, Chapter 24 of the DPM does give the agency discretion to leave a vacated position unfilled. Although not explicitly stated, a reasonable interpretation of DPM § 2403, which includes the word "may," would allow Agency to exercise its discretion on whether to fill a vacant position. Accordingly, the undersigned finds that Agency did not abuse its discretion in deciding to still include the positions that were occupied by employees who decided to retire prior to the effective date of the RIF. Thus, Agency properly exercised its discretion that the three positions vacated by retiring employees counted among the positions abolished under the RIF.

Employee has failed to proffer any other evidence that would indicate that he failed to receive the required one round of lateral competition in his RIF. I conclude that Employee's RIF was in accordance with applicable law, rule, or regulation. Therefore, I further conclude that Agency's action separating Employee from government service pursuant to the RIF must be upheld.

ORDER

It is hereby ORDERED that Agency's action separating Employee pursuant to a RIF is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge