Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
RONALD LEWIS, Employee	OEA Matter No. 2401-0248-09
v.	Date of Issuance: September 30, 2011
DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH, Agency	Sommer J. Murphy, Esq. Administrative Judge

Ronald Lewis, Employee, *Pro Se*
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 28, 2009, Ronald Lewis ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting Department of Mental Health's ("Agency" or "DMH") action of terminating his employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was August 1, 2009. Employee's position of record at the time his position was abolished was a Mental Health Counselor. Employee was serving in Career Service status at the time he was terminated.

I was assigned this matter on or around November of 2010. On July 7, 2011, I held a Status Conference for the purpose of assessing the parties' arguments regarding the RIF. After examining the respective arguments and reviewing the record, I determined that a hearing was not warranted. On July 15, 2011, I ordered the parties to submit briefs on the subject of the RIF. Both parties submitted timely responses to the order. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction

FINDINGS 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 the Employee's appeal with this Office:

1. On August 1, 2009, the effective date of her RIF, Employee occupied the position of DS-0640-08-10N Mental Health Counselor in Career Service status.

2. According to the Retention Register submitted by Agency, Employee's Service Computation Date ("SCD") was August 31, 1998.

3. The Notice of Termination Letter to Employee, dated May 20, 2009 stated that "[t]his letter serves as official notice of at least thirty (30) calendar days that you have been reached for release from your competitive level…effective August 1, 2009."

4. Employee's competitive area was Department of Mental Health Community Services Agency.

5. Employee was one of eight (8) employees in the competitive level of Mental Health Counselor. All eight of the positions in his competitive level were abolished pursuant to the RIF.

Positions of the Parties

Employee made several complaints including that: 1) the RIF was unlawful because Employee received a disciplinary suspension which overlapped the thirty (30) day notice of termination from Agency; 1) he did not receive proper notice of termination; 2) Agency used the RIF as a pretext to retaliate against Employee because he engaged in whistle blowing activities prior to being separated; and 3) Agency denied him certain due process rights.

According to Agency, DMH sought, and was granted authorization to conduct a RIF in the D.C. Community Services Agency ("CSA") as a result of realignment in the public mental health system of DMH. As a result, Administrative Order DMH-09-02 (Amended) was issued and identified one hundred fifteen (115) positions for involuntary separation. Agency submits that it followed all applicable rules and regulations with respect to the implementation of the RIF.

Because Employee's termination was the result of a RIF, I am guided by D.C. Official Code § 1-624.08, which states in pertinent part that:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition... which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> (1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
>
> (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

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

1. That he/she did not receive written notice thirty (30) days prior to the effective date of his/her separation from service; and/or

2. That he/she was not afforded one round of lateral competition within his/her competitive level.

On March 6, 2009, Employee was placed on administrative leave pending an investigation into an allegation of verbal threats towards his supervisor. On June 30, 2009, Employee received final notice that he was being suspended as a result of the verbal altercation with his supervisor. The suspension began on July 2, 2009 and ended on July 31, 2009. During the time of Employee's suspension, he received notice that he was being separated from service as a result of the RIF.

Employee objected to Agency's failure to move him to the Behavioral Support Technician position, which was vacant at the time. Instead Agency terminated him via a RIF. Employee contends that he met the minimum qualifications for the position and was entitled to be reassigned to a new position. In addition, Employee argues that the RIF was unlawful because he was suspended without pay from July 2, 2009 through July 31, 2009 as the result of a previous adverse action, but was not retained in active duty status during the thirty (30) day notice period preceding the effective date of his termination. Employee further alleged that Agency committed several incidents of fraud, communicated threats and assaults over the course of his work with Agency. Lastly, Employee contended that his termination was a result of retaliation against him based on protected speech, intentional infliction of emotional stress, and denial of certain due process rights.

Employee has previously filed grievances with the D.C. City Mayor, Office of the General Counsel, and the Justice Department concerning these issues. Employee also filed an appeal before the D.C. Office of Human Rights and the Public Employee Relations Board. With respect to the appeals filed outside of this Office, it should be noted that Employee's arguments concerning these issues are grievances which are not within the purview of this Office's jurisdiction, and cannot be adjudicated in this forum. According to the ruling in *Anjuwan v. D.C. Department of Public Works*[1], this Office's authority over RIF matters is narrowly prescribed. The court in *Anjuwan* held that OEA does not have the authority to determine whether the agency conducting the RIF was bona fide or violated any law, other than the RIF regulations themselves.

D.C. Official Code § 1-624.08 (d) and (e) (2006 Repl.) requires that employees separated as a result of a RIF be entitled to one round of lateral competition within his/her competitive level. RIF regulations further requires that all employees who have the same job title, series, and grade are placed in the same competitive level. The employees are subsequently placed on a retention register according to seniority, which is based on an employee's service computation date ("SCD").

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, "the statutory provision affording [him/her] one round of lateral competition was inapplicable.[2] In

[1] 729 A.2d. 881 (December 11, 1998).

[2] *See e.g., Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

this case, Employee was one of eight (8) employees in the competitive level of Mental Health Counselor. All employees within Employee's competitive level were abolished as a result of the RIF; therefore, I find that the requirement that Employee be afforded one round of lateral competition does not apply.[3]

The termination letter was dated May 20, 2009. The letter also stated that the effective date of the RIF was August 1, 2009. I find that Employee received thirty (30) days written notice prior to the effective date of her termination as required by D.C. Official Code § 1-624.08.

Based on the record, I find that Agency complied with D.C. Official Code § 1-624.08. Agency properly implemented the RIF which resulted in Employee's termination. Accordingly, this matter should be dismissed.

ORDER

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

FOR THE OFFICE:

_____
SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[3] D.C. Official Code § 1-624.08.