

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of: )  
)  
Gina Vaughn ) OEA Matter No. 2401-0020-12  
Employee )  
) Date of Issuance: December 11, 2014  
v. )  
) Joseph E. Lim, Esq.  
Metropolitan Police Department ) Senior Administrative Judge  
Agency )  
\_\_\_\_\_  
Frank McDougald, Esq., Agency Representative  
Leslie Deak, Esq., Employee Representative

**INITIAL DECISION**

INTRODUCTION

On November 10, 2011, Gina Vaughn (“Employee”) filed a Petition for Appeal from the Metropolitan Police Department’s (the “Agency”) final decision to separate her from government service pursuant to a Reduction-in-Force (“RIF”). This matter was assigned to me on August 2, 2013. After a continuance requested by the parties, I conducted a Prehearing Conference on October 11, 2013, at which time I ordered the parties to brief the statutes applicable to this RIF. I decided this issue on February 27, 2014, and ordered the parties to finish discovery by May 31, 2014. Thereafter, I issued an Order for the parties to submit a joint stipulation of facts and identify potential issues by September 2, 2014. When Employee failed to do so, I issued an Order for Good Cause to Employee. Employee indicated that she was having trouble reaching her attorney. Later, Employee’s representative wrote that she had been ill and asked for an extension.

On October 22, 2014, I ordered the parties to submit briefs by November 14, 2014. The parties have complied. Since this case could be decided based upon the documents of record, no additional proceedings were conducted. The record is closed.

JURISDICTION

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

ISSUES

1. Which D.C. RIF statute, D.C. Code §1-624.08 (Abolishment Act) or D.C. Code §1-624.02 and 1-624.04, applies where Agency’s stated rationale for its RIF action is

realignment and work shortage.

2. Whether Agency's action separating Employee pursuant to a RIF was conducted in accordance with applicable law, rule or regulation.

## POSITION OF THE PARTIES

Based on the documents on record, Employee submits the following:

First, the appropriate D.C. RIF statutes that apply in this appeal are D.C. Code §1-624.02 and 1-624.04, and not the Abolishment Act, D.C. Code §1-624.08. Secondly, Employee alleges that Agency failed to conduct the RIF in accordance with applicable laws, rules and regulations.

In response to Employees' assertions, Agency argues that this Office's jurisdiction is clearly stated by the provisions of D.C. Official Code § 1-624.08 (d) and (e) (2001), and that OEA is limited to determining whether the Employees have each received one round of lateral competition for positions in each Employee's respective competitive level, and at least 30 days prior written notice before the effective date of his or her separation. Agency supports this argument by pointing out that the Abolishment Act was enacted after the earlier RIF statutes. Agency also denied that it had failed to conduct the RIF properly.

## FINDINGS OF FACT

Based on the submissions of both parties, I make the following findings of facts:

1. In July 1994, Employee was appointed to the position of Computer Specialist, DS-334-09, with the Metropolitan Police Department (Agency). Over time, Employee was promoted to Computer Specialist, CS-334-12.
2. On or about August 24, 2011, the Chief of Police submitted a memorandum (Memo) "requesting authorization to realign programs and functions within the Office of Chief Information Officer (OCIO), Executive Office of the Chief of Police [to] conduct a Reduction in Force (RIF) to abolish 14 positions in the OCIO." Agency Attachment 1.
3. Attached to the Memo was Administrative Order (AO) FA-2011-01, which cited the reasons for the RIF and identified the positions recommended for abolishment by the RIF and the competitive area in which the RIF would be conducted. Agency Attachment 2.
4. The reasons cited for the RIF were shortage of work and realignment. The competitive area for the RIF was identified as the Executive Office of the Chief of Police, Office of the Chief Information Officer. *Id.* One of the fourteen (14) positions recommended for abolishment in the AO was Computer Program Specialist,

- CS-334-12, a position encumbered by Employee.
5. On September 8, 2011, Agency's request to conduct a realignment was approved by Shawn Stokes, the Director of the District of Columbia Department of Human Resources, and on September 13, 2011, the City Administrator concurred "in the Realignment action." Agency Attachment 3.
  6. On September 14, 2011, Agency's request to conduct the RIF was approved. Agency Attachment 4.
  7. Pursuant to the approval to conduct the RIF, and in accordance with applicable RIF regulations, competitive levels were identified and retention registers were developed. A competitive level encompasses only those positions that are of the same grade and classification series. D.C. Mun. Reg. Tit. 6 § 2410.4. A retention register is a document that lists employees in the same competitive level who are ranked on the retention register according to seniority, with the most senior person ranked first and the least senior person ranked last. D.C. Mun. Reg. Tit. 6 § 2499.
  8. The competitive level for the Computer Specialist position encumbered by Employee was identified as DS-0334-12-10-N. Agency Attachment 5. The retention register that was developed for that competitive level (DS-0334-12-07-N) listed Employee and another individual. *Id.*
  9. In a letter to Employee dated September 14, 2011, Employee was advised that pursuant to a RIF, she would be "separated from District government effective October 14, 2011." Agency Attachment 6.
  10. Employee was separated effective October 14, 2011. Agency Attachment 7.

### ANALYSIS AND CONCLUSION

Which D.C. RIF statute, D.C. Code §1-624.08 (Abolishment Act) or D.C. Code §1-624.02 and 1-624.04, applies where Agency's stated rationale for its RIF action is realignment and work shortage.

In support of her argument that D.C. Code §1-624.02 and 1-624.04, and not the Abolishment Act, D.C. Code §1-624.08, are the appropriate D.C. RIF statute applicable in this appeal, Employee alleges that Agency failed to comply with the mandatory procedural requirements of the Abolishment Act, D.C. Code §1-624.08(b), which states that "[p]rior to February 1 of each fiscal year, each personnel authority...shall make a final determination that a position within the personnel authority is to be abolished." Specifically, Employee alleges that Agency did not make a final determination to abolish Employee's position before February 1, 2011. Employee also argues that since the RIF was not conducted due to financial reasons, the Abolishment Act does not apply. Lastly, Employee argues that the U.S. Constitution's Fifth

Amendment due process requirements mandate that the curtailed procedures of the Abolishment Act apply only in RIFs conducted for financial reasons.

Agency argues that this Office's jurisdiction is clearly stated by the provisions of D.C. Official Code § 1-624.08 (d) and (e) (2001), and limited to determining whether the Employees have each received one round of lateral competition for positions in each Employee's respective competitive level, and at least thirty (30) days prior written notice before the effective date of his or her separation as the Abolishment Act was enacted after the earlier RIF statutes.

The authority for conducting a RIF is primarily set forth in two statutes, D.C. Code §§ 1-624.02 and 1-624.08. In a February 27, 2014 Order, I determined that D.C. Code § 1-624.02 is the more applicable statute in the instant RIF. Based on the undisputed fact that Agency never cited any budgetary rationale for its decision to RIF Employee, and after carefully reviewing the language of D.C. Code § 1-624.02 and § 1-624.08, and the cases interpreting those statutory provisions, the Undersigned finds that D.C. Code § 1-624.02 and 1-624.04, and not the Abolishment Act, D.C. Code § 1-624.08, is the more applicable statute to govern this RIF. I note that D.C. Code § 1-624.08 was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF. Here, budgetary issues were never stated as a rationale for the RIF.

Contrary to Agency's rationale, there is no indication that the D.C. Council intended to supplant D.C. Code § 1-624.02 and 1-624.04 with the Abolishment Act. Rather, it intended to supplement it with a different statute which would govern instances where a RIF is conducted for budgetary reasons. I also based my decision on the D.C. Superior Court ruling in *Stevens & Prophet v. D.C. Dept. of Health*, 2010 CA 003345 P(MPA) and 2010 CA 003345 P(MPA) (February 14, 2014).

Whether Agency's action separating Employee pursuant to a RIF was conducted in accordance with applicable law, rule or regulation.

Although the RIF statute has been amended a number of times, the controlling language addressing the abolishment of positions for fiscal year 2000 and subsequent years has not changed, and the above-noted provisions have remained intact since Fiscal Year 1996. The relevant statute clearly provided that RIFed employees are entitled to one round of lateral competition within his/her competitive level and thirty (30) days advance notice of the effective day of the RIF. Of specific relevance to this case are D.C. Official Code § 1-624.02, which tracks Omnibus Personnel Reform Amendment Act (OPRAA) of 1998 § 101(x). This section reads in pertinent part as follows:

D.C. Code § 1-624.02. Procedures

(a) Reduction-in-force procedures shall apply to the Career and Educational Services . . . and shall include:

- (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
- (2) One round of lateral competition limited to positions within the employee's competitive level;
- (3) Priority reemployment consideration for employees separated;
- (4) Consideration of job sharing and reduced hours; and
- (1) Employee appeal rights. *See* D.C. Official Code § 1-624.04.

#### D.C. Code § 1-624.04. Appeals

An employee who has received a specific notice that he or she has been identified for separation from his or her position through a reduction-in-force action may file an appeal with the Office of Employee Appeals if he or she believes that his or her agency has incorrectly applied the provisions of this subchapter or the rules and regulations issued pursuant to this subchapter. An appeal must be filed no later than 30 calendar days after the effective date of the action. The filing of an appeal shall not serve to delay the effective date of the action.”

In accordance with D.C. Official Code § 1-624.01 *et seq.* (2008 Repl.) and the implementing regulations set forth at Chapter 24, Reductions-in-Force, of Title 6 of the District of Columbia Municipal Regulations, and pursuant to Mayor's Order 2008-92, dated June 26, 2008, Agency established lesser competitive areas for conducting its RIF. Pursuant to Administrative Order FA-2011-01, the position of Computer Specialist, DS-0334-12, encumbered by Employee was identified for abolishment. At the time of the RIF in question, Employee was a career service employee.

On September 14, 2011, Employee received a detailed letter of final action from Agency, advising her that, effective October 14, 2011, her position was being abolished due to a RIF. In addition to the above, the letter also provided to Employee: (1) a listing of her respective competitive area and competitive level, tenure group and RIF service computation date; (2) the location where the official regulations and records pertinent to her respective case may be reviewed; (3) the Employee's appeal rights; and (4) information concerning priority placement consideration. This information was in compliance with the requirements of 6 DCMR 2423 (2002).

Employee alleges that Agency failed to conduct the RIF in accordance with applicable law, rule or regulation. Employee posits that Agency failed to allow her one round of lateral competition for positions within her competitive level. Specifically, Employee alleges that she should have been allowed to compete for the grade 12 Information Technology Specialist position held by Karimi Alaoul and four vacant positions.

#### Prescribed order and one round of lateral competition

The first two provisions enumerated in §1-624.02(a) are closely related. The prescribed order of separation must take into account the one round of lateral competition that an employee must be afforded.

The prescribed order mentioned in subsection (a)(1) above is for the purpose of developing a Retention Register so that employees may be afforded one round of lateral competition when an agency intends to effectuate a RIF. The factors mentioned in subsection (a)(1) above shall determine the retention standing of each competing employee. Together these factors determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released. According to the DPM, assignment to a competitive level shall be based upon an employee's position of record.<sup>1</sup> The issue of what is an employee's competitive level has been raised on a number of prior occasions, and likewise resolved. Both District of Columbia and federal case law have consistently defined "competitive level" as the official position of record. In *District of Columbia v. King*, 766 A.2d 38 (D.C. 2001), the D.C. government argued, and the Court of Appeals agreed, that a District employee's competitive level must be based on his or her official position of record, and the fact that the employee may have been detailed to a different position at the time of his or her RIF does not change the fact that the establishment of the employee's competitive level is based on the official position description.

Additionally, the DPM specifies that competitive levels shall include positions in the same grade (or occupational level) and classification series, and which are sufficiently alike in qualifications requirements, duties, responsibilities, and working conditions so that the incumbent of one 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.<sup>2</sup>

Here, Employee's official position of record is Computer Specialist, CS-334-12, Step 8, as evidenced by her Standard Form 50, Notification of Personnel Action, effective date October 14, 2011.<sup>3</sup> The Administrative Order, dated August 24, 2011, provides that two Computer Program Specialist, CS-334-12, positions were identified for abolishment.<sup>4</sup> These Computer Program Analyst position, series 0334, grade 12, were encumbered by Employee and Mr. Gamble.<sup>5</sup>

Employee argues that Agency violated D.P.M. §2423.1(b) when it included only Zach Gamble and not Karim Alaoul and the vacant grade 12 Information Technology Specialist positions in her competitive level. Specifically, Employee alleges that she should have been allowed to compete for the grade 12 Information Technology Specialist position held by Karimi Alaoul and four vacant positions.

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1 6-B DCMR § 2410.2.

2 6-B DCMR § 2410.4.

3 Agency's Answer to the Petition, Tab 7.

4 Agency's Answer to the Petition, Tab 3.

5 *Id.*, Tab 4.

However, Employee does not provide any evidence regarding Karimi Alaoul's position of record to prove Alaoul should have been included in her competitive level. Nor does she cite any statute, regulation, or rule to bolster her contention that even vacant positions should be included in a competitive level.

There does appear to be a major discrepancy between the retention register and the other documents submitted in this matter. According to the retention register, there were 2 Computer Specialist positions in the Competitive Area of Metropolitan Police Department – Office of the Chief Technology Officer and the Competitive Level of DS-0334-12-07-N.<sup>6</sup> Employee was one of the persons listed on said retention register. According to this register, two positions were abolished pursuant to the instant RIF. The retention register specifically noted which positions were to be abolished by notating the word “abolish” under the field reserved for each individual employee.

However, after reviewing the retention register, the two positions identified as slated for abolishment were two Computer Specialists, DS-0334-12-07-N. This meant that positions to be abolished by the RIF were pay grades 12, step 7. Employee's official position of record as evidenced by her Standard Form 50 was Computer Specialist, DS-0334-12-08-N, which meant that Employee was pay grade 12, step 8.<sup>7</sup> The other significant discrepancy is that in her final and official letter of separation dated September 14, 2011, Employee's competitive level was again misidentified as DS-0334-12-10-N.<sup>8</sup>

This shows that Employee's RIF was based on inaccurate documents. It would seem that Agency was less than exact with respect to how it constructed its retention register and how it carried out the instant RIF. Such an error is egregious and cannot be tolerated within the context of an employee seeking reinstatement.

Agency controlled all of the documentation utilized in effectuating the instant RIF. For the purpose of conducting the RIF, it was Agency that grouped the 2 Computer Specialists together within the same competitive area and level. This documentation is mandated by D.C. Official Code § 1-624.02. It is by its very nature and purpose required to be a precise and accurate reflection of the information conveyed within. The reasoning why this documentation must be accurate is clear – an employee's job and livelihood is on the line. In order to deprive someone of their livelihood in such a manner they are owed the respect of making sure that the process is clear and accurate. I find that Agency committed an egregious error when it abolished Employee's position of record. I find that Employee was improperly separated via the instant RIF from a position that she did not officially occupy. Accordingly, I conclude that Agency failed to provide Employee with one round of lateral competition in accordance with D.C. Code §1-624.02.

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6 Agency's Answer to the Petition, Tab 4, Retention Register.

7 Agency's Answer to the Petition, Tab 7, Final Personnel Action (SF 50).

8 Agency's Answer to the Petition, Tab 5, Notification Letter to Employee from the Chief of Police Regarding RIF dated 9/14/2011.

OEA Rule 629.1, 59 DCR 2129 (2012), places the burden of proof in RIF appeals, such as the instant matter, on the agency. Further, that burden is by a preponderance of evidence standard, which is defined as “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.” It was Agency’s burden to show that it conducted the instant RIF in accordance with D.C. Official Code § 1-624.02. Based on the above findings of fact, I find that Agency did not meet its burden of proof in this matter. I further find that Employee was improperly separated pursuant to the instant RIF. Therefore, I find that Employee should be reinstated to her last position of record prior to the instant RIF.

With regards to Employee’s other arguments, Employee also alleges that Agency failed to provide Employee proper notice. Title 5, §1506.1 of the DCMR states: “An employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights. Here, Agency notified Employee in writing on September 14, 2011, that she would be separated from service effective October 14, 2011, which is thirty (30) days later. The record establishes that Employee was in fact separated on October 14, 2011. Thus, I find Employee’s allegation to be without merit.

Finally, Employee argues that Agency failed to place her on the Agency Reemployment Priority Program by September 14, 2011, for grade 12 positions, in violation of D.P.M. §2427.6. However, neither of the parties provided any documents regarding the Agency Reemployment Priority List, thus I am unable to rule on this issue.

### ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency’s action of abolishing Employee’s position through a Reduction-In-Force is REVERSED; and
2. Agency shall reinstate the Employee either to her last position of record or to a comparable position; and
3. Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Joseph E. Lim, Esq.

Senior Administrative Judge