

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
CHENG SZU LI	)	OEA Matter No. 2401-0054-08
Employee	)	
	)	
v	)	Date of Issuance: August 25, 2008
	)	
DEPARTMENT OF HUMAN	)	Muriel A. Aikens-Arnold
RESOURCES	)	Administrative Judge

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Anne Fraser, Esq., Employee Representative  
Phillip Lattimore, III, General Counsel

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On March 10, 2008, Employee, a Computer Specialist (Programmer), filed a Petition for Appeal (PFA) with this Office regarding Agency's final decision separating her from Government service pursuant to a modified Reduction-in-Force effective February 16, 2008.

This matter was assigned to this Judge on May 27, 2008. On July 17, 2008, an Order to Convene a Prehearing Conference was issued, scheduling said meeting on August 7, 2008. During that conference, the parties were advised a review of the record reflected that there was a question regarding this Office's authority to consider the arguments presented by Employee. Following discussion of those arguments, the Judge advised that this matter was not within the jurisdiction of this Office. Based on consideration of the record, this Judge determined that this matter could be decided based thereon, and that no further proceedings were necessary. Accordingly, the record is closed.

JURISDICTION

This jurisdiction of this Office has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

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

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 629.2, Id., reads:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness.

POSITIONS OF THE PARTIES

*Employee's Position.*

Employee's appeal raised several arguments: 1) Retaliation by Agency due to Employee's pending discrimination complaint; and 2) Agency's failure to follow RIF procedures in that: (a) Agency manipulated Employee's job series to create a competitive group of one person in violation of District Personnel Manual (DPM) §2410 by converting other employees, in the same job series, to a new job series prior to abolishment of Employee's position; (b) the RIF was conducted without proper authority and justification, ie., failure to prepare and/or disclose specific personnel-related documents, including prior approval for Agency's action by administrative order; and (c) Agency lacked substantive justification for the RIF, ie., purported reorganization and outsourcing of functions.<sup>1</sup>

Employee concedes that her discrimination complaint is pending before the D.C. Office of Human Rights, which is the proper forum for such complaints. Nevertheless, in addition to the remaining issues, she contends that 1) Agency's manipulation of the process should be within the jurisdiction of this Office; and 2) that the notice period should have begun on February 21,

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<sup>1</sup> See Employee's PFA, Attachment 1-4; Employee argued, *inter alia*, that: 1) Agency converted younger employees from Employee's job series 0334 into series 2210, leaving older employees in series 0334, then subsequently abolished Employee's position, thereby limiting the competitive group; and 2) the RIF was not preauthorized by an Administrative Order as required by Subchapter 24, § 2422; and the retention register was later revised from the draft Employee had seen.

2008, the date when Employee received a copy of the retention register, position description, and Administrative Order authorizing the RIF, pursuant to her Freedom of Information Act (FOIA) request.<sup>2</sup>

*Agency's Position.*

Agency, in its initial answer to the PFA, requested that this Office affirm Agency's action and to dismiss this matter based on lack of jurisdiction. Agency denies Employee's allegation of discrimination and asserts that said issue is not subject to review by this Office. Second, Agency denies Employee's allegation that the RIF was conducted without proper authority or justification. The RIF was conducted pursuant to applicable DPM regulations and Administrative Order No. DCHR-07-02, dated December 11, 2007. In addition, Agency states that Employee had not alleged any violation of her right to a single round of lateral competition within her competitive level or that she was denied at least 30 days notice prior to the effective date of the RIF. The allegations Employee does make are outside the scope of jurisdiction of this Office over RIF appeals.<sup>3</sup>

**FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS**

D.C. Official Code, Subchapter XXIV, Reduction in Force, §1-606.03 (2001) bestows upon this Office the authority to review, *inter alia*, appeals from separations as a result of a reduction-in-force (RIF). Pursuant to §1-624.08 of the Code, this Office is not authorized to determine whether an agency has complied with all applicable RIF procedures. Rather, this Office is limited by law to determining: 1) whether an agency afforded an employee, who is entitled to compete for retention, one round of lateral competition pursuant to Chapter 24 of the District Personnel Manual; and 2) that employee was given written notice at least 30 days prior to the effective date of his or her separation.

D.C. Official Code § 1-624.08, Abolishment of positions for fiscal year 2000 and subsequent years (2002), states in pertinent part:

(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

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<sup>2</sup> During the prehearing conference, Employee requested sanctions against Agency due to its delay in providing pertinent pre-RIF documents to Employee which affected her ability to determine in which forum to appeal. That request was denied as this Judge has no authority to address pre-RIF conditions.

<sup>3</sup> See Agency's Answer and Response to Petitioner's Appeal (AARP) filed on 5/2/08; D.C. Official Code §1-624.08 (d) and (e) (2001).

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.

The following facts are not subject to genuine dispute:

1) At the time of the RIF in question, Employee's position of record was Computer Specialist, CS-0334-14-08-N. She was the only person encumbering a position with this designation within her competitive area.

2) The specific notice of RIF was received by Employee on January 2, 2008. Said notice informed her that she would be separated pursuant to the RIF effective February 16, 2008.

3) Consistent with the notice, Employee was separated on February 16, 2008

Pursuant to DPM § 2410, Competitive Levels, agencies are authorized to, *inter alia*, determine which positions comprise a competitive level in which employees shall compete with each other for retention. Here, Employee cites a general violation of DPM § 2410 on which to base her argument that Agency did not convert her, along with younger employees, to job series 2210, leaving *only* her in job series 0334. However, this Office has no jurisdiction over any claims of discrimination. Indeed, Employee acknowledges that she filed a complaint, with the D.C. Office of Human Rights, which is pending.

In a modified RIF appeal, this Office cannot address any arguments pertaining to the necessity of the RIF, the creation of a competitive area smaller than the entire agency, the selection of a specific position to be abolished, any pre-RIF transfers, reassignments, promotions,

demotions, or any claimed violation of post-RIF employment rights.<sup>4</sup> Further, this Office has held that the abolishment of a one-person competitive level is presumptively valid. *See Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003), \_\_ D.C. Reg. \_\_ ( ). Under these circumstances, there was no other position for which Employee would have been entitled to laterally compete for retention.<sup>5</sup> Consequently, even though Employee did not raise the issue, the lateral competitive requirement of § 2410.4 was not applicable here. Likewise, Employee did not challenge the sufficiency of notice received prior to the effective date of the RIF.

Based on the above analysis, this Judge concludes that Employee did not meet the burden of proof regarding jurisdiction and therefore, this matter should be dismissed.

ORDER

It is hereby ORDERED that Agency's Motion to Dismiss is GRANTED;  
and this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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MURIEL A. AIKENS-ARNOLD, ESQ.  
Administrative Judge

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<sup>4</sup> Employee's remaining procedural claims are more appropriately addressed internally within the agency.

<sup>5</sup> See DPM § 2410.4 which reads, in pertinent part: A competitive level shall consist of all positions in the competitive area identified . . . 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.