THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TOYA BYRD,	)	
Employee	)	OEA Matter No. 2401-0290-09
	)	
v.	)	Date of Issuance: November 14, 2011
	)	
OFFICE OF THE CHIEF	)	
MEDICAL EXAMINER,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Toya Byrd, Employee *Pro-Se*
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 28, 2009, Toya Byrd ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Office of the Chief Medical Examiner's ("OCME" or "the Agency") action of abolishing her position through a Reduction-In-Force ("RIF"). According to the Retention Register created in anticipation of the instant RIF, Employee's last position of record with OCME was Program Support Assistant. According the aforementioned Retention Register, Employee's entire competitive area and level was abolished. Furthermore, Employee was the only person listed in her competitive area and level. A Prehearing Conference was held on September 9, 2011. After considering the parties position as stated during the conference, I determined that no further proceedings were warranted. I then ordered the parties to submit final legal briefs in the matter. Both parties have complied with the order. The record is now closed.

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.

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.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

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 process with the Office.

OCME contends that the abolishment of Employee's last position of record pursuant to a RIF was conducted within the bounds of the law. OCME notes that it properly obtained approval to conduct the instant RIF pursuant to an Administrative Order. In defending its action before the Office, the Agency relies on D.C. Official Code § 1-624.08 §§ (d), (e) and (f). Agency contends that the OEA's review of a RIF matter begins and ends with the aforementioned statute and that the OEA lacks authority to examine any other aspects of a RIF.

With respect to D.C. Official Code § 1-624.08 (e), Agency contends that Employee was given 30 days written notice informing her that her position was to be abolished. I disagree. Included within Agency's Answer at Exhibit 4 is a letter dated August 28, 2009, addressed to Employee notifying her of the then pending RIF. According to this letter, the effective date of the RIF was September 30, 2009. Of note, Employee signed said letter on September 28, 2009, acknowledging her receipt. It should also be noted that both the person who delivered it as well as the witness to the letter being delivered, acknowledged that Employee received this letter on September 28, 2009. I find that this time frame is far less than the 30 days written notice mandated by D.C. Official Code § 1-624.08 (e).

I find that in the instant matter, I am guided primarily by D.C. Official Code § 1-624.08, which provides in pertinent part that:

> (d) An employee affected by the abolishment of a position pursuant to the section who, but for the 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 the 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 the 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 the 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 the Office:

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

2. That s/he was not afforded one round of lateral competition within her/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 the entire unit in which Employee's position was located was abolished, after a RIF had been properly served. I further find that the Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d).

Given the preceding facts and circumstances, I find that the Agency was unable to meet its

burden of proof as it relates to whether or not Employee was given her written RIF notice in a timely manner. Consequently, I find that Employee did not receive her written RIF Notice within the thirty (30) day time as required by D.C. Official Code § 1-624.08 (e).

In an appeal before this Office I cannot consider the one round of lateral competition issue if I determine that the Employee was properly placed in a single person competitive level. Based on the foregoing, I find that the Employee was properly placed in a single person competitive level when the instant RIF occurred; therefore "the statutory provision affording [her] one round of lateral competition [is] inapplicable. *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), ___ D.C. Reg. ___ ( ). Based on the foregoing, I must uphold Agency's action of abolishing the Employee's position through a RIF.

According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), 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. Employee's other ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not say that Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims. Based on the foregoing, I conclude that the Agency's action of abolishing Employee's position was done in accordance with all applicable laws, rules and regulations.

ORDER

It is hereby ORDERED that:

1. Agency reimburse the Employee thirty (30) days pay and benefits commensurate with her last position of record; and

2. Agency's action of abolishing Employee's position as a Program Support Assistant through a RIF is UPHELD; and

3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE