THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ALEXIS PARKER,	)	
Employee	)	OEA Matter No. 2401-0298-09
	)	
v.	)	Date of Issuance: November 4, 2011
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF HEALTH,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

David Branch, Esq., Employee's Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 29, 2009, Alexis Parker ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Health's ("DOH" or "Agency") action of abolishing her position as a Community Relations Specialist through a Reduction-In-Force ("RIF"). This matter was assigned to me on or around September 6, 2011. Thereafter, I scheduled a Prehearing Conference for September 28, 2011, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. Both parties appeared at the Prehearing Conference. Thereafter, I issued an Order directing the parties to submit a written brief regarding the RIF which resulted in Employee's termination. Agency's written brief was due on October 14, 2011, and Employee's reply brief was due on October 21, 2011. On October 19, 2011, Employee filed a Motion for an Extension of time. This motion was granted and Employee was ordered to submit its written brief on or before October 28, 2011. As of today's date, both parties have submitted a written brief on the issue. After reviewing the record, I have determined that a hearing is not warranted. 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 CONCLUSION

The following facts are not subject to genuine disputes and are based on the evidence presented by the parties during the course of Employee's appeal process with the OEA:

1. According to Employee's personnel record, Employee was a Community Relations Specialist for DOH for about 23 years.
2. On July 31, 2009, upon receiving an administrative order for a RIF, Agency abolished several positions due to a budgetary crisis. Employee did not occupy any of the positions designated for abolishment in this order.
3. Thereafter, on July 31, 2009, Agency created a retention register that listed and abolished Employee's position. On the same day, Agency notified Employee of its decision to abolish Employee's position through a RIF effective September 4, 2009.
4. The retention register shows that Employee's RIF service computation date is January 1, 1987. Because both positions in her competitive level were eliminated, Employee was terminated.
5. On August 13, 2009, Agency filed an amended administrative order for a RIF, abolishing more positions within the agency. Employee occupied one of the positions listed on the amended administration order designated for abolishment.
6. At the conference and in its written documentations to this Office, Employee disputed the budget rationale of the Agency. Employee noted that Agency has failed to provide credible evidence to justify its assertion that the RIF was due to a budgetary shortfall. Employee also alleged the following:[1]
   a. That Employee's separation under the RIF is invalid because she was notified of the separation prior to the approval of the RIF;
   b. That Agency failed to consider job sharing in conducting the RIF;
   c. That Agency did not provide Employee with one round of lateral competition; and
   d. That Agency was not justified to define a lesser competitive area.

[1] *See* Employee's Response to Agency's Brief on the RIF dated November 1, 2011.

7. At the conference and in its written documentation to this Office, Agency noted the following:[2]

    a. That Employee's allegations fall outside of OEA's jurisdiction;

    b. That it did not err in amending the administrative order authorizing the RIF;

    c. That although the retention register for Employee was created before the amended administrative order was approved, it is still valid since "there is nothing in the applicable statute or the DPM that requires Agency to prepare a new retention register after an amended order is approved;"[3]

    d. That the RIF was conducted due to a shortage of funds;

    e. That Agency is not required to consider job sharing, reduced work hours, and agency reemployment prior to conducting the RIF;

    f. That Agency is not required to justify its decision regarding the composition of the competitive area.

Additionally, Employee in her November 1, 2011, brief to this Office challenged Agency's use of D.C. Official Code § 1-624.08 in conducting the RIF. Employee noted that Agency had the option of using D.C. Official Code § 1-624.02 which mandates a broader procedural protection for employees in RIF cases. Employee further noted that, D.C. Official Code § 1-624.02 has not been expressly repealed, and as such, this Office should apply it to the current case, or in the alternative hold a hearing to determine which statute governs the current case. While, I agree with Employee's assertion that D.C. Official Code § 1-624.02 has not been expressly repealed, the Code specifically states that D.C. Official Code § 1-624.08 will be applied to *positions abolished for fiscal year 2000 and subsequent fiscal year* (emphasis added). And because Employee's position was abolished in 2009, D.C. Official Code § 1-624.08 applies.[4] Thus, Employee's request for a hearing pertaining to this issue is unwarranted and therefore denied.

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. I find that in a RIF, I am guided primarily 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:

[2] *See* Agency's Brief on the RIF, dated October 14, 2011.
[3] *Id.* at pg.3.
[4] The heading of D.C. Official Code § 1-624.08 reads as follows: Abolishment of positions for fiscal year 2000 and subsequent fiscal years. See also; *Washington Teacher's Union v. District of Columbia Public Schools, et al.*, 960 A.2d 1123 (D.C. 2008).

> (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.

In instituting the instant RIF, Agency did not meet the procedural requirements listed above. Upon the approval of the amended administrative order, Agency did not create a new retention register to be used in providing Employee with one round of lateral competition nor did it provide her with thirty (30) days written notice prior to the effective date of her RIF. Agency contends that the July 31, 2009, retention register and the notice given to Employee are valid even though Employee's position had not been identified for abolishment on that date. Agency maintained that, the statute and the District Personnel Manual ("DPM") are both silent as to when a retention register should be created and as such it did not have to create a new retention register after the amended administrative order was approved.

While the statutes and DPM do not expressly address the issue of when a retention register is to be created, because a retention register is used to provide employees with one round of lateral competition which is a required RIF procedure, agencies regularly create retention registers only after a RIF has been approved and a position within a competitive area/level is identified for abolishment. Thus, it can be implied that the retention register created on July 31, 2009, was created in response to the approval of the July 31, 2009, administrative order. As such another one had to be created following the approval of the August 13, 2009, amended administrative order. Moreover, because this July 31, 2009, administrative order did not list Employee's position, the retention register created on that date was premature and invalid as to Employee. Furthermore, D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* (emphasis added) give an employee thirty (30) days notice after such employee has been *selected* (emphasis added) for separation pursuant to a RIF. Here, when Agency provided Employee with a thirty (30) days notice, Employee's position had not been identified for abolishment and therefore, the notice too is invalid.

Agency had the responsibility to create a new retention register after the amended administrative order was approved, but failed to do so. DPM 2405.6, 47 D.C. Reg. 2430 (2000) reads as follows:

> An action which was found by….the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

Here, a reconstruction of the retention register will be futile, since it appears that all the positions under Employee's competitive area were Abolish. And for that reason, Agency is not required to provide Employee one round of lateral competition as prescribed in the Code. Nonetheless, Agency is still

required to provide Employee with thirty (30) days notice of its decision to abolish Employee's position, instead of relying on the prior July 31, 2009, RIF notice. Agency's failure to provide Employee with thirty (30) days notice is considered procedural error, and thus, calls for a do-over or reconstruction of the process as oppose to a retroactive reinstatement of Employee.

A retroactive reinstatement of employee is only allowed whereby there is a finding of harmful error in the separation of an employee. DPM 2405.7, 47 D.C. Reg. 2430 (2000). This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level." This is not the case here. Here, Agency's failure to provide Employee with thirty (30) days notice before the RIF effective date does not constitute harmful error. On the other hand, a failure to get approval for the amended administrative order would be considered harmful error, and thereby trigger a retroactive reinstatement. Also, apart from the fact that the retention register was created prior to the approval of the amended administrative order, Employee has not alleged any other defects in the retention register such as invalid RIF service computation date; residency/veteran preferences not taken into consideration, and seniority not being considered. And, again, since the purpose of the retention register is to provide Employee with one round of lateral competition, Agency's negligence is harmless error since all the positions in Employee's competitive area/level were abolished and as such, the statutory provision affording Employee one round of lateral competition is inapplicable. [5]

Employee further contends that she was improperly placed in a competitive area when the instant RIF occurred. I disagree. The July 31, 2009, retention register clearly states that Employee was one of two persons to hold the position of Community Relations Specialist at DOH Addiction Prevention & Recovery Administration. Chapter 24 of the DPM § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> All positions in the competitive area … 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.

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 generally the date on which the employee began D.C. Government service. Regarding the lateral competition requirement, the record shows that all positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[6]

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[5] *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), ___ D.C. Reg. ___ ( ).

[6] See *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010), __ D.C. Reg. __; *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), __ D.C. Reg. __; *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003), __ D.C. Reg. __; *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003), __ D.C. Reg. __; and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001), __ D.C. Reg. __.

Agency maintained that the RIF was conducted due to a shortage of funds. However, Employee questioned the validity of Agency's budget crisis and maintained that the underlying basis for the RIF does not exist because Agency outsourced positions to contractors. According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (December 11, 1998), OEA's authority over RIF matters is narrowly prescribed. The Court explained that 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, OEA no longer has jurisdiction over grievance appeals. I find that given the instant circumstances, it is outside of my authority to decide whether there was in fact a *bona-fide* budget crisis. And, Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I conclude that OEA is precluded from addressing any other issue(s) in this matter. I further find that, while Agency's action of abolishing Employee's position was not done in strict accordance with D.C. Official Code § 1-624.08 (d) and (e), Agency's errors were more procedural in nature and thus, not harmful error.

ORDER

It is hereby ORDERED that:

1. Agency reimburse Employee thirty (30) days pay and benefits commensurate with her last position of record for failure to provide Employee with a thirty (30) days notice following the approval of the August 13, 2011, amended administration order abolishing Employee's position; and

2. Agency's action of abolishing Employee's position as a Community Relations Specialist 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:

_____
MONICA DOHNJI, Esq.
Administrative Judge