THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ERNEST HUNTER,	)	OEA Matter No. 2401-0321-10
Employee	)	
	)	Date of Issuance: March 4, 2014
	)	
DISTRICT OF COLUMBIA CHILD	)	
AND FAMILY SERVICES AGENCY,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ernest Hunter ("Employee") worked as a Contracts Compliance Officer with the D.C. Child and Family Services Agency ("Agency"). On May 6, 2010, Agency notified Employee that he was being separated from his position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was June 11, 2010.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 10, 2010. He argued that the RIF action was in retaliation to his complaints of and participation in an investigation of wrongful discrimination, mismanagement, cronyism, and abuse of authority at Agency. Employee also contended that Agency improperly applied the personnel regulations.[2]

In its answer to Employee's Petition for Appeal, Agency explained that it followed the

[1] *Petition for Appeal*, p. 16 (June 10, 2010).
[2] *Id.*, 5-7.

proper RIF procedures by providing Employee with one round of competition. Additionally, it provided that Employee was given a written thirty (30) days' notice that his position was being eliminated. Thus, it believed the RIF action was proper.[3]

Prior to issuing the Initial Decision, the OEA Administrative Judge ("AJ") ordered the parties to submit legal briefs addressing whether Agency followed the District's statutes, regulations, and laws when it conducted the RIF.[4] Agency's brief explained that the RIF was conducted in accordance with D.C. Official Code §1-624.08. However, with regard to the requirement of one round of lateral competition, Agency provided that Employee was unable to compete with other employees because his position was the only one within in his competitive level.[5]

In Employee's brief, he provided that when Agency conducted the RIF, it violated the Whistleblower statute and D.C. Human Rights laws. Further, he submitted that the RIF was not in accordance with D.C. Official Code §1-624.08 because he was not provided one round of lateral competition.[6] Lastly, Employee questioned the legality of the RIF because it lacked the appropriate signature of the City Administrator. Therefore, he believed that Agency did not meet its burden of proof.[7]

The AJ subsequently ordered Agency to submit the documents it sent to the City Administrator for approval to conduct the RIF; a signed Administrative Order; and the positions approved for abolishment.[8] In response to the Order, Agency submitted a memorandum dated April 29, 2010, which was addressed to the City Administrator requesting approval to conduct a

[3] *Agency's Response to Petition for Appeal*, Tab #1 (July 14, 2010).
[4] *Order Requesting Briefs* (July 12, 2012).
[5] *Agency's Brief* (July 26, 2012).
[6] Employee explained that he was not the only employee within his competitive level, and therefore, he should have been able to compete with other employees. He also provided that the RIF violated his collective bargaining agreement with Agency and that his position was never abolished.
[7] *Employee's Brief* (August 7, 2012).
[8] *Order to Agency Requesting Documentation* (August 14, 2012).

RIF of one hundred and twenty-three (123) positions.[9] Additionally, Agency submitted a Consent Order and argued that the order gave its Director the authority to approve RIF actions.[10]

The Initial Decision was issued on October 12, 2012. The AJ agreed with Agency and found that its Director had the authority to approve the RIF pursuant to the Consent Order. The AJ also found that D.C. Official Code § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of his separation and if Agency provided one round of lateral competition within his competitive level.[11] She held that Employee was placed in the proper competitive area and competitive level. Furthermore, because Employee was in a single-person competitive level, the AJ concluded that Agency was not required to rank or rate Employee in accordance with D.C. Official Code § 1-624.08(e).[12] She also found that Agency provided Employee the required thirty-day notice. Accordingly, the RIF action was upheld.[13]

On October 16, 2012, Employee filed a Petition for Review with the OEA Board. He argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy; the AJ's findings are not based on substantial evidence; and the Initial Decision did not address all issues raised in his appeal. Employee explains that the AJ ignored Agency's violations of labor agreements, D.C. laws, and the D.C. Whistleblower laws. Specifically, he provides that the Administrative Order lacked the appropriate signatures and that he should have

[9] *Agency's Submission of Documents,* Exhibit 1 (August 22, 2012).
[10] *Agency's Supplemental Submission of Documents,* Exhibit 1 (September 7, 2012).
[11] With regard to Employee's concerns that the RIF violated D.C. Official Code § 1-624.08 because Agency failed to identify positions for abolishment prior to February of Fiscal Year 2010, the AJ held that this section is silent as to whether or not Agency was required to document or disclose this information to anyone. Further, Employee did not provide credible evidence to show that Agency did not comply with this section. *Initial Decision,* p. 6 (October 12, 2012).
[12] *Id.* at 8.
[13] With regard to Employee's discrimination concerns, the AJ noted that such complaints are reserved for the Office of Human Rights. In addition, the AJ found that Employee failed to provide substantive evidence to substantiate his assertion that Agency violated the Whistleblower statute or to establish that the RIF was created to target him in retaliation or in a discriminatory manner. Lastly, Employee's contention that his position was never abolished was not considered because the AJ found it to be a grievance that was outside of OEA's jurisdiction. *Id.*, 9-10.

been able to compete with other employees within his competitive area and level. Accordingly, he requests that the Board report violations of the D.C. Abolishment Act to the appropriate authorities.[14] Lastly, Employee asks this Board to seek further investigation of Agency by the Office of Inspector General and address ongoing abuses within the Human Resources Division of the District Government.[15]

In response, Agency argues that Employee's arguments were previously made and considered by the AJ, and the Board has no authority to provide the relief that Employee seeks. It submits that the RIF was conducted in accordance with the applicable statutes, policy, and regulation. Therefore, Agency requests that the Initial Decision be affirmed.[16]

On December 14, 2012, Employee filed a Petition for Review with the Superior Court for the District of Columbia. In an Order dated March 29, 2013, the court dismissed Employee's Petition for Review. Thereafter, Employee submitted a letter to OEA's Executive Director which provided, *inter alia,* that the court dismissed his matter because it was still pending before OEA. The letter seems to suggest that Employee wished to have his Petition for Review withdrawn.[17] However, within the same document, he requests that "the Board make[] a decision as to whether they will be granting [his] Petition for Review."[18]

This Board is unsure of Employee's true intent regarding his Petition for Review. Because he suggests that he wanted to withdraw the petition while still requesting that the Board grant the petition, we have decided to err on the side of caution. Therefore, we will address those claims raised in Employee's Petition for Review.

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[14] Additionally, Employee requests that the Board preserve exhibits he submitted in support of his brief and accept them as evidence.
[15] *Petition for Review,* p. 1-8 (October 16, 2012).
[16] *Agency's Opposition to Petition for Review,* p. 3-5 (November 20, 2012).
[17] The letter is addressed to OEA Director, Sheila Barfield. In it, Employee provides "please be aware of how disappointed I am in the fact, that despite my expressly informing you on the phone and reiterating it during a DC Council performance hearing of my desire to withdraw my Petition for Review that the matter is still pending."
[18] *Letter to OEA Executive Director* (April 9, 2013).

Labor Violations and Whistleblower Claims

Employee claims that the AJ failed to address violations of labor agreements. However, OEA is not the proper administrative agency in which to raise those claims. Violations of labor agreements are handled by the D.C. Public Employee Relations Board.[19] Moreover, OEA is only authorized to review D.C. Whistleblower claims which derive from an issue over which we have jurisdiction.[20] As the AJ correctly held, it is unreasonable to suggest that Agency used the 2010 RIF action to retaliate against Employee for a complaint he made against it in 2008. More importantly, Employee offered no credible evidence to support this claim. Finally, OEA lacks jurisdiction to adhere to Employee's request that this Board seek further investigation of Agency by the Office of Inspector General and address ongoing abuses within the Human Resources Division of the District Government. OEA is solely tasked with determining if Agency adhered to the statutory and regulatory requirements for RIF actions.

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[19] It appears that Employee is aware of this because he filed with OEA a copy of an unfair labor complaint that contained a Public Employee Relations Board case number and caption. *Employee's Brief,* p. 32-38 (August 7, 2012).

[20] In accordance with D.C. Official Code § 1-615.51, the Whistleblower Act encourages employees of the District of Columbia government to "report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." To achieve this objective, D.C. Official Code § 1-615.53 provides that "a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order." Furthermore, § 1-615.54(a)(1) states that:

> An employee aggrieved by a violation of § 1-615.53 may bring a civil action against the District, and, in his or her personal capacity, any District employee, supervisor, or official having personal involvement in the prohibited personnel action, before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages . . . .

OEA has held that based on the above-mentioned statute, D.C. Superior Court has original jurisdiction over Whistleblower Act claims and that OEA was not granted original jurisdiction over such claims. *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004); *Marie Vines v. Office of Cable Television and Communications,* OEA Matter No. J-0028-08 (March 18, 2008); *Ernest Hunter v. D.C. Water and Sewer Authority,* OEA Matter No. 2401-0036-05 and 1601-0046-05 (November 9, 2005); *Jason Codling v. Office of the Chief Technology Officer,* OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Gordon Cloney v. Department of Insurance Securities and Banking,* OEA Matter No. 2402-0085-09, *Opinion and Order on Petition for Review* (August 22, 2011). The OEA Board held in *Jason Codling v. Office of the Chief Technology Officer,* OEA Matter No. J-0151-09, p. 5 *Opinion and Order on Petition for Review* (December 6, 2010), that some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to the Office.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence or when the Initial Decision did not address all material issues of law and fact. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[21] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After a thorough review of the record, this Board finds that there is substantial evidence to support the AJ's findings regarding the actual RIF action against Employee. However, there is not substantial evidence to support her conclusion that the Consent Order established Agency's authority to conduct the RIF.

RIF Procedure

The D.C. Court of Appeals held in *Anjuwan v. District of Columbia Department of Public Works,* 729 A.2d 883, 885-86 (D.C. 1998) that OEA's authority regarding RIF matters is narrowly prescribed. OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the

[21] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

> effective date of the appealed agency action.

In an attempt to more clearly define OEA's authority, D.C. Official Code § 1-624.08(d) and (e) establish the circumstances under which the OEA may hear RIFs on appeal.

> (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 be limited to positions in the employee's competitive level.
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> (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.

Thus, in accordance with D.C. Official Code § 1-624.08(d) and (e), the AJ was correct in holding that OEA is tasked with determining if Agency afforded Employee one round of lateral competition within his competitive level and if it provided a thirty-day notice.

The AJ properly ruled that Employee was not entitled to one round of lateral competition. OEA has consistently held that one round of lateral competition does not apply to employees in single-person competitive levels.[22] In its Response to Employee's Petition for Appeal, Agency provided a Retention Register that shows that Employee was the only person within his position title.[23] Additionally, organizational charts provided by Employee clearly show that there was only one Contacts Compliance Officer.[24] Therefore, one round of lateral competition is not applicable to this case.

Moreover, Employee was provided with thirty days' notice. As the AJ properly held,

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[22] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills,* OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant,* OEA Matter No. 2401-0086-01 (July 14, 2003); *Robert James Fagelson v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0137-99 (August 28, 2003); *Richard Dyson, Jr. v. Department of Mental Health,* OEA Matter No. 2401-0040-03, Opinion and Order on Petition for Review (April 14, 2008); and *Gordon Cloney v. Department of Insurance Securities and Banking,* OEA Matter No. 2401-0085-09, Opinion and Order on Petition for Review (August 22, 2011).

[23] *Agency's Response to Petition for Appeal*, Tab #4 (July 14, 2010).

[24] *Employee's Brief,* p. 12-25 (August 7, 2012).

Employee was provided notice of the RIF action on May 6, 2010. The effective date of the action was on June 11, 2010, more than the required thirty days.[25] Therefore, Employee received proper notice.

Administrative Order

Although there is substantial evidence in the record to establish that the RIF procedures were followed, there is no such evidence present to show that the RIF was properly authorized. District Personnel Regulations section 2405.4 provides that "personnel authorities have authority over the preparation for, and implementation of, a reduction in force, provided that agencies under the personnel authority of the Mayor shall *not* plan or conduct the reduction in force *without the Mayor's approval*, as provided in subsection 2406.4 of this chapter (emphasis added)." Therefore, although Agency may have correctly complied with the implementation of the RIF action, it may still be invalid without prior approval from the Mayor to conduct the RIF.

D.C. Personnel Regulations 2406 provide the following:

> 2406.1 If a determination is made that a reduction in personnel is to be conducted pursuant to the provisions of sections 2400 through 2431 of this chapter, the agency shall submit a request to the appropriate personnel authority to conduct a reduction in force (RIF).
>
> 2406.2 Upon approval of the request as provided in subsection 2406.1 of this section, the agency conducting the reduction in force shall prepare a RIF Administrative Order, or an equivalent document, identifying the competitive area of the RIF; the positions to be abolished, by position number, title, series, grade, and organizational location; and the reason for the RIF.
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> 2406.3 Any changes following the submission and approval of the request to conduct a reduction in force shall be made by issuance of an amendment to the administrative order by the agency.
>
> 2406.4 The approval by the appropriate personnel authority of the RIF

[25] *Agency's Response to Petition for Appeal*, Tab #2 (July 14, 2010).

> Administrative Order . . .shall constitute the authority for the agency to conduct a reduction in force.

The record clearly shows that Agency adhered to D.C. Personnel Regulation 2406.1. It provided a copy of its request to the City Administrator, the appropriate personnel authority, for permission to conduct the RIF action. The document is addressed to the City Administrator from Agency's Director.

However, Agency failed to comply with the other requirements of District Personnel Regulation 2406.2 and 2406.4. Specifically, there are no documents indicating the City Administrator's approval of Agency's RIF request. The AJ specifically ordered Agency to provide "a signed approval from the City Administrator or their designated representative (Administrative Order), along with all the positions approved for abolishment."[26] In response to the order, Agency provided that "with respect to the signed approval for the RIF from the 'City Administrator or their designated representative,' . . . it had been unable to locate the signed document."[27]

Moreover, the record does not contain the Administrative Order or an equivalent document. District Personnel Regulation 2406.4 provides plain language which states that approval of the RIF Administrative Order by the appropriate personnel authority is the way for Agency to secure the requisite authority to conduct the RIF. Instead of submitting the Administrative Order, Agency provided an October 23, 2000 Consent Order as proof that it had authority to conduct the RIF. However, the Consent Order does not discuss Agency's authority over RIF actions at all. The Consent Order discusses a Receivership agreement that separated Agency from the Superior Court Social Services. The language cited from the Consent Order by

[26] *Order Requesting Approval of the Instant RIF, the Approved Request, and a List of Positions Approved for Abolishment* (August 14, 2012).
[27] *Agency's Supplemental Submission of Documents* (September 7, 2012).

the AJ that Agency had the authority to hire, retain, and terminate personnel, must be read in context with the rest of the order. The Consent Order is clearly establishing Agency as new agency that is independent and separate from the Superior Court Social Services. As a result of its creation, Agency was given authority to make personnel decisions separate from Superior Court. The Consent Order addresses licensing standards for the foster care system; it establishes Agency's 2001 operating budget; it requires adequate legal staff for Agency; it outlines the selection process of Agency's administrator; and it addresses the need for a memorandum of understanding with other District agencies for mental health and substance abuse services. There is nothing within the Consent Order which grants Agency RIF authority independent of the Mayor. Therefore, this document could not reasonably be viewed as an equivalent to an Administrative Order for the authorization of Agency's RIF action.

Agency clearly falls under the Mayor's authority as evidenced by the D.C. Office of Human Resources website.[28] Moreover, Agency's request for approval from the City Administrator to conduct the RIF is evidence that it knew it was under the Mayor's authority. If Agency was independent, as it alleges, it would not have sought approval for the RIF. As a result of the requirements of District Personnel Regulations 2405.4, 2406.1, 2406.2, and 2406.4, Agency was required to receive approval from the Mayor prior to conducting the RIF. Because it cannot provide any evidence of an Administrative Order from the Mayor, there is no proof that the RIF was actually approved. Furthermore, the AJ's reliance on the Consent Order as proof of Agency's authority to conduct the RIF is not based on substantial evidence. Accordingly, Employee's Petition for Review is GRANTED. As a result, the Initial Decision and Agency's RIF action are REVERSED.[29]

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[28] *See* http://dchr.dc.gov/page/hr-advisors-agencies-under-mayors-full-authority.
[29] This Board believes that because Agency acknowledged that it cannot provide proof of the signed Administrative

ORDER

It is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**. Agency's RIF action and the Initial Decision are **REVERSED.** Accordingly, Agency shall reimburse Employee all back-pay and benefits lost as a result of the RIF action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.

Order, it is futile to remand this matter to the AJ for further consideration. Therefore, this Board is left with no choice but to reverse the Initial Decision and Agency's RIF action.