**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| ANTHONY JIMINEZ, | ) | OEA Matter No. 2401-0308-10 |
| Employee | ) | |
| | ) | |
| v. | ) | Date of Issuance: April 11, 2013 |
| | ) | |
| DISTRICT OF COLUMBIA DEPARTMENT OF REAL ESTATE SERVICES, | ) | |
| Agency | ) | |
| | ) | STEPHANIE N. HARRIS, Esq. |
| | ) | Administrative Judge |

Jason C. Crump, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL BACKGROUND

On May 5, 2010, Dr. Anthony Jiminez ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Real Estate Services' ("Agency" or "DRES") action of abolishing his position through a Reduction-in-Force ("RIF"). Agency's RIF notice was dated April 7, 2010, with an effective date of May 7, 2010. At the time his position was abolished, Employee's official position of record within the Agency was an Energy Management Program Specialist with Career Service status. On June 7, 2010, Agency filed an Answer to Employee's Petition for Appeal.

I was assigned this matter on July 10, 2012. On August 10, 2012, I issued an Order ("August 10th Order") directing the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. On August 27, 2012, I granted Agency's consent motion for an extension of time to respond to the August 10th Order. Agency's second request for an extension of time was granted on September 21, 2012. On September 24, 2012, the undersigned conducted a telephonic conference with the parties to discuss the extensions of time in this matter, where the parties were able to reach a consensus regarding deadline submissions. Both parties timely submitted their briefs. After reviewing the record, the undersigned has determined that no further proceedings are needed in this matter and an Evidentiary Hearing is not warranted. The record is now closed.

## JURISDICTION

This 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 the instant RIF was done in accordance with all applicable laws, rules, or regulations.

## BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

## ANALYSIS AND CONCLUSIONS OF LAW

### ***Employee's Position***

In his Petition for Appeal, Employee alleges that Agency failed to recognize his status as a Group I tenure employee.[1] Employee states that he was permanently reassigned to the Office of the Director, Property Management Division in November 2008, but his position description did not change from his previous position with the Portfolio Division of DRES. He also contends that the RIF of his position constituted procedural error and that Agency only "looked at [his] short-lived tenure with the Office of Property Management after reassignment."[2] Employee alleges that his previous department, the Portfolio Division was never abolished and that there are now "five personnel who are effectively performing his position" in that division.[3] Additionally, Employee contends that he was separated from an agency that does not technically exist because the Energy Management Division, which was listed on his RIF Notice, does not employ anyone and is currently not a division within DRES. He also claims that Agency allowed employees with less creditable service to retain their employment and attempted to hire additional personnel to fill vacant positions since the instant RIF.

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[1] *See* Petition for Appeal (May 5, 2010).
[2] *Id*. at p. 5.
[3] *Id*.

In his Brief,[4] Employee acknowledges that he received thirty (30) days notice of his separation via the instant RIF on April 7, 2010 and makes the following contentions:

1) The reasons for the RIF were not specified in his RIF Notice.
2) The creation of the Department of General Services ("DGS") in October 2011, which included the merger of DRES, did not abolish the functions and purpose of DRES or any of its divisions.
3) He was not given the opportunity to compete for his position through one round of lateral competition within his competitive level because DRES' operational divisions remained intact after the DGS merger.
4) D.C. Code 1-624.08 does not apply to mergers of several agencies.
5) D.C. Code 1-624.02 is applicable because Employee's position was never abolished after the RIF was implemented, but instead was merged with other District agencies.
6) Employee's entire unit was simply renamed after DRES was subsumed with other District agencies to form DGS in October 2011.
7) The existence of a division similar in scope to the one Employee worked for at DRES creates the un-rebuttable presumption that an Energy Management Specialist position was still needed and still relevant after the merger.
8) He should have been afforded the opportunity to compete for his position at DGS through lateral competition after the merger because no abolishment of his unit or position ever occurred.
9) DRES was actively recruiting someone to fill the role of Energy Program Manager within the Office of the Director, as evidenced by an undated job description document.[5]
10) Employee's reassigned position to the Office of the Director was not subject to the instant RIF because the RIF requested abolishment of a position within the Energy Management Division.

***Agency's Position***

Agency asserts that Employee was provided with thirty (30) days notice and because the entire unit containing Employee's position was abolished, the statutory provisions affording him one round of lateral competition were inapplicable.[6] Agency also asserts the following contentions in response to the claims in the Petition for Appeal and the Amended Employee Brief:

1) Agency states that in February 2010, it sought approval for a proposed RIF from the District of Columbia Department of Human Resources ("DCHR") and identified the Energy Management Specialist position for abolishment due to strategic restructuring of functions, new technology, and redistribution of the assignments.[7]

[4] *See* Employee's Amended Brief (October 26, 2012).
[5] *Id*., Exhibit E.
[6] *See* Agency Answer (June 7, 2010); Agency Brief (October 5, 2012).
[7] Agency Brief, Attachment 1 (October 5, 2012).

2) Pursuant to Administrative Order AM-2010-1, Agency identified a lesser competitive area of Energy Management for abolishment, which consisted of one position entitled Energy Management Program Specialist, as shown in the Retention Register for the instant RIF.[8]

3) On March 11, 2010, DCHR approved an Administrative Order and authorized the Agency to conduct the RIF and abolish the Energy Management Program Specialist.[9]

4) Agency notes that "Employee was the only Energy Management Program Specialist employed with Agency or by the District of Columbia in its entirety."[10]

5) On April 7, 2010, Agency provided Employee with notice that his position was the subject of the instant RIF and that he would be separated from service effective May 7, 2010. A copy of the RIF Notice, including Employee's signature was also submitted.[11]

6) Agency explains that DRES consists of six divisions, including the Office of the Director.[12] The Energy Management Division is a work unit within the Office of the Director, as evidenced in the organizational charts provided by Agency.[13]

7) Agency maintains that it recognized Employee as a Group I tenure employee, as shown on Employee's RIF Notice.[14] Agency states that in accordance with DPM § 2413.5, Tenure Group I includes each employee who is not serving a probationary period and Agency acknowledges that Employee is not a probationary employee. Further, Agency contends that since Employee was the only Employee with the position subject to the RIF, the specific tenure group did not alter or effect Employee's separation.

8) Agency asserts that the instant RIF was conducted because of enhanced technological resources and restructuring within Agency, which minimized the need for the position. The new technology provided the reporting capabilities previously provided by Employee and enhanced Agency's forecasting capabilities.

9) Since Employee was the only Energy Management Specialist within Agency, there was no need for selection between competing employees based upon tenure or performance.

10) Agency maintains that the remaining employees within the Portfolio Division are not performing the functions performed by Employee. The remaining employees have positions that are distinct from Employee's former position and no energy management occurs in the Portfolio Division.

11) In response to Employee's allegations that the competitive area identified in his RIF Notice does not exist and therefore, a procedural error exists, Agency asserts that the Energy Management Division is a distinct work unit within the Agency and the RIF Notice appropriately identified the area that Employee was assigned to at the time of the instant RIF. Agency acknowledges that the energy management function was moved

[8] *Id*., Attachment 3.
[9] Agency Answer, Tab 7(June 7, 2010).
[10] *Id.* at p. 2.
[11] *Id*., Tab 8.
[12] *Id.* at p. 1.
[13] *Id*., Tabs 2 and 5.
[14] *Id*., Tab 8.

from the Portfolio Division in November 2008, to the Energy Management Unit, within the Office of the Director.

12) Agency states that creditable service for Employee was not the basis of the instant RIF and that since Employee was the only Energy Management Program Specialist, his amount of creditable service was not a valid consideration. The RIF was conducted based on the competitive area and position classification series, grade, and title.

***Analysis of RIF Regulations***

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. Additionally, D.C Official Code § 1-624.08, the Abolishment Act, applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The Act provides that, "notwithstanding any rights or procedures established by any other provision of this subchapter," which indicates that it supersedes any other RIF regulations.[15] The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[16] Further, "it is well established that the use of such a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[17]

Accordingly, 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:

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[15] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[16] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[17] *Id.; See also Washington Teachers' Union v. District of Columbia Public Schools v. District of Columbia Public Schools* (D.C. 2008) (The Court of Appeals found that the "ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF"); *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012) (The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency).

> (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
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> (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 did not receive written notice thirty (30) days prior to the effective date of his separation from service; and/or

2. That he was not afforded one round of lateral competition within his competitive level.

***Competitive Area and Level***

Employee alleges that he was placed in the wrong competitive area because the RIF referenced a position in the Energy Management Division, while he maintains that he worked in the Office of the Director. Employee also claims that he was separated from an Agency division that does not exist because the Energy Management Division does not employ anyone and is not currently a division within DRES. Agency asserts that the Energy Management Division is a work unit within the Office of the Director. Agency has submitted Employee's Position Description, which lists the Energy Management Division as a subdivision of the Office of Director.[18] Pursuant to the District of Columbia Personnel Manual ("DPM") §2409, each Agency shall generally constitute a single competitive area and lesser competitive areas ("LCA") may be established by the approving personnel authority. Additionally, DPM §2409.4 also states that LCA may be established where they are no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff. Administrative Order AM-2010-01 shows that the Energy Management LCA was approved and that the Energy Management Program Specialist was subject to the instant RIF.[19] Therefore, I find that Employee was placed in the correct competitive area for the instant RIF because the record shows that his position was located in the Energy Management subdivision of the Office of the Director at the time of the instant RIF.

According to DPM § 2410.2, "assignment to a competitive level shall be based upon the employee's position of record." The record shows that Employee was placed into a competitive level according to his job title, Energy Management Program Specialist.[20] The Retention Register provided by Agency shows that Employee was the only Energy Management Program Specialist in his competitive level.[21] Further, Agency maintains that while Employee was allowed one round of lateral

[18] Agency Answer, Tab 6 (June 7, 2010).
[19] Agency Brief, Attachment 2 (October 5, 2012).
[20] *Id*., Attachment 5; *see also* Petition for Appeal, p. 2 (May 5, 2010).
[21] *Id*., Attachment 3.

competition, Employee's position was completely abolished within the Agency. This Office has consistently held that when an employee holds the only position in his competitive level or *when an entire competitive level is abolished pursuant to a RIF*, D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of Title 6-B of the District of Columbia Municipal Regulations (DCMR), §2420.3, are both inapplicable (emphasis added).[22] Based on the documents of record, I find that the entire competitive level in which Employee's position was located was abolished. I further find that no further lateral competition efforts were required and that Agency was in compliance with the lateral requirements of the law.

Additionally, Employee claims that the RIF of his position constituted procedural error because Agency only looked at his "short-lived tenure" after reassignment to a new division in 2008. The undersigned finds that there is no procedural error based on this claim because Agency was not required to look at Employee's tenure or performance throughout his career because the RIF was not conducted based on a lack of performance. An evaluation of Employee's performance may have been applicable if one round of lateral competition was used, but as noted above, Employee's entire competitive level was abolished.

Employee also alleges that his previous department, the Portfolio Division, was never abolished and that there are now five employees who are performing the work of his position. However, by Employee's own admission he last worked in the Portfolio Division in 2008 and the blanket allegation that there are other Employees who may be performing similar job duties in a different division, with no supporting documentation, has no impact on Employee's RIF, which is limited to his specific competitive area and level.

Further, Employee states that Agency allowed employees with less creditable service to retain their employment, while he was subject to the instant RIF. However, Employee has not provided any credible supporting documentation to show that any of these alleged employees with less creditable service were in Employee's competitive level. As discussed above, the Retention Register shows that Employee was the only person in his competitive level, which was abolished.[23]

Moreover, the undersigned finds Employee's arguments that his position was never abolished and that he was entitled to one round of lateral competition after the DGS merger wholly unpersuasive. With the creation of DGS in September 2011, DRES was subsumed into DGS. The creation of DGS and its acquisition of Agency occurred more than a year after the instant RIF and has no bearing on the application of the instant RIF. Employee's position was indeed abolished as shown by the approved Administrative Order and the Retention Register for the instant RIF.[24] Employee is only entitled to receive one round of competition based on the facts **at the time of the instant RIF** (emphasis added). As noted above, D.C. Code §1-624.08 governs the instant RIF and the applicability of that statute is not determined by the merger of agencies or the creation of a new

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[22] *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).

[23] Agency Brief, Attachment 3.

[24] *Id*. Attachments 2 and 3.

agency. [25] Further, in contrast to Employee's claims, the undersigned also finds that the mere existence of a division similar in scope to Employee's former division **does not** create an un-rebuttable presumption that Employee's last position of record was still needed and relevant after the creation of a new agency more than a year later (emphasis added). Employee has not provided any case law or statutory requirements corroborating that he should be entitled to one round of lateral competition at a different agency more than a year later.

***Thirty (30) Days Written Notice***

Title 6-B, § 2422 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 2422.1 states that "[a]n employee selected for release from his or her competitive level … shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release." 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.[26] Additionally, D.C. Official Code § 1-624.08(e), which governs RIFs, provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Agency's RIF notice was dated April 7, 2010, with an effective date of May 7, 2010. The RIF notice stated that Employee's position was eliminated as part of a RIF and provided Employee with information about his appeal rights and listed him as Tenure Group I employee. The record shows that Employee signed and acknowledged receipt of his RIF notice on April 7, 2010.[27] Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

In his brief, Employee states that the reasons for the RIF should have been specified in his RIF Notice. The undersigned notes that DPM § 2423, which governs the content of the RIF Notice, does not require that the reasons for the RIF be enumerated in the notice.

***Alleged Post-RIF Activity***

Employee claims that Agency attempted to hire additional personnel to fill vacant positions after the instant RIF and was actively recruiting someone to fill the role of an Energy Program Manager within the Office of the Director. Employee also contends that his position was still needed, as evidenced by a division similar in scope at DGS. Regarding Agency's merger with DGS and the alleged continued hiring by Agency after the instant RIF, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity, which may have occurred at an agency.[28] Further, in *Anjuwan v. D.C. Department of Public Works*,[29] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court also noted that OEA does

[25] While D.C. Code §1-624.02 does not govern this RIF, its applicability is not determined by agency mergers or the creation of a new agency.
[26] *See* 6-B DCMR §2423.
[27] *See* Agency Brief, Attachment 4 (October 5, 2012).
[28] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).
[29] 729 A.2d 883 (December 11, 1998).

not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[30]

## CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after his entire competitive level was abolished and he was given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

## ORDER

It is hereby **ORDERED** that Agency's action of abolishing Employee's position through a Reduction-In-Force is **UPHELD**.

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.
Administrative Judge

[30] *Id.*