THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CARMEN JACKSON,	)	
Employee	)	OEA Matter No. 2401-0086-19
	)	
v.	)	Date of Issuance: May 28, 2020
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Administrative Judge
	)	

Carmen Jackson, Employee, *Pro Se*
Lynette A. Collins, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On August 30, 2019, Carmen Jackson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of abolishing her position through a Reduction-In-Force ("RIF"). The effective date of the RIF was August 2, 2019. Agency filed its Answer to Employee's Petition for Appeal on September 18, 2019. This matter was assigned to the undersigned Administrative Judge on October 3, 2019. On October 7, 2019, I issued an Order Convening a Prehearing Conference in this matter for November 19, 2019. A subsequent Order was issued on November 13, 2019, after the undersigned was notified that Employee had not received the October 7, 2019 Order due to an administrative mailing error.

The Prehearing Conference was rescheduled for December 3, 2019. Both parties appeared for the Prehearing Conference on December 3, 2019. That same day, I issued a Post Prehearing Conference Order requiring the parties to submit briefs in this matter. Agency's brief was due on or before January 8, 2020 and Employee's brief was due on or before February 10, 2020. Agency had the option to submit a sur-reply brief on or before February 26, 2020. Both parties submitted their briefs in accordance with the Order. I have determined that an Evidentiary Hearing in this matter is not warranted. The record is now closed.

[1] This Initial Decision was issued during the District of Columbia COVID-19 State of Emergency.

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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The authority for conducting a RIF is primarily set forth in two statutes, D.C. Official Code §§ 1-624.02 and 1-624.08. Because the instant RIF was conducted to "eliminate positions that would be redundant or unnecessary following a reorganization of functions"[2], I have determined that D.C. Code § 1-624.02 is the more applicable statute in the instant RIF. A RIF pursuant to D.C. Official Code § 1-624.02 (a) shall include:

(1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veteran's preference, and relative work performance;
(2) One round of lateral competition limited to positions within the employee's competitive level;
(3) Priority reemployment consideration for employees separated;
(4) Consideration of job sharing and reduced hours; and
(5) Employee appeal rights. D.C. Official Code § 1-624.02.

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF.

Employee's Position

Employee contends that the RIF was improper and that she was subject to retaliation following her complaint of sexual harassment, reporting financial mismanagement and filing a Whistleblower case in a civil action.[3] Employee argues that the administrative officer position served two DCPS schools and that the RIF was based on animosity for Employee's filing of legal actions and her exposing sexual harassment and financial misappropriation. Employee avers that the professional relationship between her and an "Agent" of Soncyree L. Lee, dissolved following her whistleblower claim and ultimately resulted in her termination.[4] Employee asserts that Agency "continues to use the legal RIF process as their defense to the loss of employment and negate/undermine the "Agent's" intent that led to the RIF process, which was retaliation against the whistleblower that ultimately aided in the investigation that cost "Agent" to lose leadership position."[5] Employee further asserts that a RIF requires priority reemployment considerations for

[2] Agency's Prehearing Statement at Page 1 (November 9, 2019).
[3] Employee's Response (February 10, 2020).
[4] *Id.*
[5] *Id.*

employees under D.C. Official Code §1-624.02. Employee argues that Agency claims that the Administrative Officer position was subject to the RIF because of budgetary constraints, but cites that the salary for that position was $85, 492. Employee further asserts that the position that hers was replaced with, "Manager, Strategy & Logistics ("MSL")" cost $96,252. Employee avers that the only differences in the Administrative Officer position and the MSL position, is that the MSL requires supervisory responsibilities over operations, but that neither of the locations have an operations staff that would require this service. Further, Employee explains that the Incarcerated Youth Program ("IYP") is housed within the DC Jail, and the Youth Services Center (YSC) is housed within the Department of Youth Rehabilitation Services Center. Employee states that both facilities manage their own operations and logistics of the staff in those buildings. Additionally, Employee asserts that she was not provided appropriate notice for priority reemployment. Employee avers that she "wasn't notified of the RIF in a timely manner to allow priority status for available positions in March and April of 2019, and that she was not notified of the newly acquired MSL position and wasn't invited to interview or considered for that position."[6] Employee also states that she requested transfers due to a hostile working environment following her whistleblower claim. As a result, Employee requests that she be reinstated and be provided financial compensation for lost wages.

Agency's Position

Agency states that it had authority to conduct the instant RIF and in separating Employee, it complied with the procedures required, as well as the related provisions set forth in Chapter 24 of the District Personnel Manual ("DPM").[7] Agency asserts that a RIF was authorized on March 15, 2019, prior to the 2019-2020 school year. Additionally, DCPS maintains that it informed Employee that her position as an Administrative Officer at the Youth Services Center("YSC") would be abolished and that she was provided information from the DCPS Office of Talent and Culture ("OTC") of job fairs.[8] Agency cites that Employee was provided notice on two separate occasions; first, in a letter dated May 20, 2019, and then again in an email dated June 21, 2019.[9] Agency also proffers that it informed Employee that if she was not able to secure a position by August 2, 2019, that she may be eligible for severance payments and that she may be eligible to retire in lieu of termination.[10]

Agency further asserts that Employee was the only Administrative Officer at the YSC. Pursuant to the RIF authorization, reductions were based on a school by school basis. Competitive areas were defined by the schools where the number of positions for non-instructional staff for the 2018-2019 school year exceeded the number of positions available for the 2019-2020 school year.[11] Further, Agency notes that the Youth Services Center where Employee was the only Administrative Officer was determined to be a competitive area and that Employee's position was subject to the RIF, and was eliminated. Accordingly, Agency avers that Employee's position was a single-person competitive level and one round of lateral competition was not required.[12] Agency asserts that the Chancellor as the head of DCPS has the authority to determine if a RIF is necessary and that in the instant matter, the Chancellor "specifically authorized DCPS to conduct the RIFs pursuant to D.C. Official Code §1-624.02 and 5-E DCMR Chapter 15. Agency argues that the RIF was conducted

[6] *Id.*
[7] Agency's Prehearing Statement (November 9, 2019).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Agency's Brief (January 8, 2020).
[12] *Id*. at Pages 1-2.

properly, and Employee was provided notice in the May 20, 2019 and June 21, 2019 letters that her position would be abolished. Agency notes that with regard to priority reemployment, it notified Employee that while her position was eliminated, there may be other positions for which she was qualified and gave her information about staffing fairs. Additionally, the notice indicated that while Employee would receive some priority considerations, that reemployment could not be guaranteed.[13] Agency asserts that pursuant to the RIF code, the consideration of job sharing is discretionary and not mandatory, and as a result, it had no obligation to consider job sharing.[14] Agency argues that it provided Employee appropriate notice regarding the RIF in the final notice dated June 21, 2019; which indicated the RIF effective date of August 2, 2019, and that was more than the thirty day's notice required by the RIF statute.

Regarding the position that was created after the RIF, Agency asserts that OEA lacks the jurisdiction to "entertain any post-RIF activity." Further, Agency asserts that Employee's claim of discrimination and that the RIF was pretextual are outside of the authority for which OEA may consider RIF matters. Agency avers that OEA's jurisdiction of RIFs is narrowly prescribed and is only to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations."[15] Agency maintains that the instant RIF was administered for budgetary reasons and was not a result of retaliation or otherwise.

ANALYSIS

Round of Lateral Competition

In order to determine if Agency conducted the instant RIF properly, the undersigned must evaluate whether Agency, pursuant to D.C. Official Code § 1-624.02(a)(1) and (2), met the requirements for lateral competition. The DPM provides that each personnel authority has the responsibility to establish the competitive levels, and that these levels shall be based upon employee's position of record.[16] Additionally, the DPM requires that the competitive levels be "sufficiently alike" in the qualification requirements, such that an incumbent of one position could successfully perform the duties and responsibilities of any of the other positions.[17] Generally, an employee's position of record is shown through the issuance of an SF-50 Notification of Personnel Action.[18] Pursuant to 5-E DCMR §1501.1, the "Superintendent is authorized to establish competitive areas based upon all or clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office."[19]

In the instant matter, the March 15, 2019, Memorandum that authorized the instant RIF provided that the competitive areas, which were established on a school by school basis, would include the Youth Services Center.[20] Additionally, the Administrative Officer position was identified as a competitive level that would be eliminated by the RIF. Based on Employee's SF-50 at the time the RIF was conducted, she was employed as the Administrative Officer at the Youth Services

[13] *Id.* at Page 4.
[14] *Id.*
[15] *Id.* at Page 5.
[16] 6-B DCMR §§§ 2410.1, 2410.2, 2410.3.
[17] 6-B DCMR § 2410.4.
[18] *See Armeta Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).
[19] See 5-E DCMR §1501.1
[20] Agency's Brief at Exhibit 1 (January 8, 2020).

Center. As a result of the RIF, Employee's position was eliminated, and she was separated from service. Because Employee was the only person employed in that position at the time of the RIF, I find that the position was a single-person competitive level. Employee does not dispute that she was the only Administrative Officer at the Youth Services Center at this time. Accordingly, I conclude that the statutory provision of D.C. Official Code § 1-624.02(a)(2), requiring Employee to have one round of lateral competition is inapplicable because the position was eliminated. OEA has consistently held that where an entire competitive level is eliminated, there is no one against whom an employee can compete.[21] Consequently, I find that the one round of lateral competition is inapplicable in the instant RIF. I also find that for the aforementioned reasons, that a Retention Register was not required.

Priority Reemployment

D.C. Official Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section are to be afforded consideration for priority reemployment. In the RIF notices dated May 20, 2019, and June 21, 2019, Agency indicated that Employee's position had been eliminated, but that there may be positions at other schools for which Employee may be qualified.[22] Agency included information regarding upcoming staffing fairs and information regarding assistance to help Employee find employment. Further, the notice indicated that Employee could apply for any vacancies at Agency or within District Government that may arise in the future.[23] Additionally, the notice indicated that Employee would receive "some priority consideration", but was not guaranteed reemployment.[24] Accordingly, I find that Agency complied with the RIF requirement to consider Employee for priority reemployment.

Consideration of Job Sharing

Pursuant to D.C. Official Code § 1-624.02(a)(4) and DPM Section 2404, OEA has held that when a RIF is conducted, an Agency should consider job sharing and reduced hours for employees separated pursuant to the RIF.[25] The DPM addresses Agency's responsibility for considering job sharing and reduced working hours. Specifically, DPM section 2404.1 provides:

> An employee may be assigned to job sharing or reduced working hours, provided the following conditions are met :
>
> (a) The employee is not serving under an appointment with specific time limitation; and

[21] *See Laura Smart v. D.C. Child and Family Services Agency*, OEA Matter No. 2401-0328-10, Opinion and Order on Petition for Review (March 4, 2014); *Jessica Edmond v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0344-10, p. 6 (November 6, 2012); *Nicole Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04, p. 3 (December 23, 2005); *Evelyn Lyles v. D.C. Dept. of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).
[22] Agency's Brief (January 8, 2020).
[23] *Id.*
[24] *Id.*
[25] *Ramon Griffin v. District of Columbia Public Schools*, OEA Matter No. 2401-0085-19 (January 22, 2020).

> (b) The employee has voluntarily requested such an assignment in response to agency's request for volunteers for the purpose of considering the provisions of subsection 2403.2(a) of this chapter in order to preclude conducting, or to minimize the adverse impact of, a reduction in force.

Furthermore, DPM section 2403.2 provides that, "[a]n Agency may, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency ."[26] In the instant matter, Agency asserts that these provisions are discretionary in nature, and as a result it did not have to consider job sharing in the instant matter. As previously stated, OEA has held that job sharing considerations should be made during the administration of a RIF.[27] Accordingly, I find that Agency's assertion that this requirement is discretionary and that it did not have to consider job sharing is incorrect. However, in the instant matter, Employee's entire competitive level was abolished and she was the only person who held the position of Administrative Officer at the Youth Services Center. Further, the D.C. Court of Appeals in *Johnson v. D.C. Dept. of Health*, 162 A.2d 808 (D.C. 2017), held that "alternative measures of considering job sharing and reduced hours prior to imposing a RIF has 'debatable merit.' Specifically, the Court noted that:

> "In concluding that budgetary and related exigencies required a RIF of all employees across the competitive level at [Employee's] level, [an agency] arguably may have assumed to have found that the lesser measures such as job sharing and reduced hours inadequate to address the need; and OEA's authority to look behind that agency judgement would be open to significant question."[28]

Accordingly, OEA has held that it can be assumed, and in consideration of the holding in *Johnson*, that in some instances the "alternative of job sharing and reduced hours would not have adequately addressed Agency's needs."[29] Additionally, 6-B DCMR provides that:

> "The retroactive reinstatement of a person who was separated by a reduction in force under this chapter may only be made on the basis of a finding of a harmful error as determined by the personnel authority or the Office of Employee Appeals. To be harmful, an error shall be of such magnitude that in its absence the employee would not have been released his or her competitive level."[30]

In the instant matter, while I find Agency's assertion that it was not required to consider job sharing to be incorrect, I also find that Employee would have been released from her position, given that it was the only position in the competitive level and it was completely abolished pursuant to the RIF. I further find that because hers was the only position available, that there would not have been any positions to share in Employee's competitive level. As a result, I find Agency's failure to consider job sharing in this matter to be harmless error pursuant to 6-B DCMR § 2405.7.

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[26] *Id.*
[27] *Id.*
[28] *Id. citing* to *Johnson v. D.C. Dept. of Health*, 162 A.2d 808 (D.C. 2017).
[29] *Id.*
[30] *Id. citing* to 6-B DCMR §2405.7.

Notice/Employee Appeal Rights

D.C. Official Code § 1-624.02(a)(5) states that Agency must provide employees separated pursuant to a RIF their appeal rights. Each employee separated pursuant to a RIF shall be entitled to written notice at least thirty (30) days before the employee's separation from service.[31] Here, Employee was notified that she was subject to separation from service pursuant to a RIF on June 21, 2019, and that the effective date of separation was August 2, 2019.[32] The undersigned finds that this timeline provided more than the thirty (30) days' notice required by the statute.

Retaliation

Employee submits that the RIF was improper because she was retaliated against following her refusal to falsify documents.[33] To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) she engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) her employer took an adverse personnel action against her; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[34]

A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[35] Here, Employee states that she was terminated because she reported sexual harassment and whistleblowing claims.[36] The instant RIF was effectuated across an entire competitive area within Agency, which included the Youth Services Center where Employee was employed. There is no evidence in the record to suggest that Employee was singled out; rather her position was deemed as one of those that would be eliminated through the RIF. Consequently, I find that Employee's retaliation claims are unsubstantiated regarding the administration of the RIF, and as such, fall outside the scope of OEA's jurisdiction.

Grievances

Employee further indicated that she was subject to harassment and animosity following her reports of sexual harassment and whistleblower claim. She also explained that following her separation from service, a new position was created to fulfill the duties of her eliminated position. Employee argues that the job functionalities of that position were similar in nature, with the exception of the supervisory requirements that were included in the job description.[37] This Office has previously held that it lacks the jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[38] 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. Employee's other ancillary arguments are best characterized as grievances and are 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

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[31] *See* DPM § 2422.
[32] Agency' Brief (January 8, 2020).
[33] Employee's Brief (February 10, 2020).
[34] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[35] *Id.*
[36] Employee's Brief (February 10, 2020).
[37] *Id.*
[38] *Williamson v. DCPS*, OEA Matter No. 2401-0080-04 (January 5, 2015).

jurisdiction to hear Employee's other claims. Accordingly, I find that Agency, in conducting the instant RIF, properly followed all proper District of Columbia statutes, regulations and laws.

ORDER

It is hereby **ORDERED** that Agency's action of separating Employee pursuant to a RIF is **UPHELD.**

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Administrative Judge