THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
TESHOME WONDAFRASH, Employee	OEA Matter No. 2401-0031-03
	Date of Issuance: February 25, 2009
DEPARTMENT OF MENTAL HEALTH, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Teshome Wondafrash ("Employee") worked as a Senior Sanitarian at the Department of Mental Health ("Agency"). Employee filed a previous case with the Office of Employee Appeals ("OEA").[1] In that case, the Administrative Judge ("AJ") found that the action taken against Employee was not for cause. Therefore, he ordered that Employee be returned to the position that he occupied at the time of his removal with back pay and benefits within 30 days.[2]

On March 8, 2005, the AJ ruled that Employee was properly reinstated to his Sanitarian position and received all the back pay to which he was entitled. However,

[1] The case number was 1601-0126-96.
[2] *Initial Decision*, OEA Matter No. 1601-0126-96, p. 18-19 (May 1, 2002).

Employee claimed that the Sanitarian position was scheduled to be abolished due to a reduction-in-force ("RIF"). Consequently, there was no work available for him as a Sanitarian. It was Employee's belief that Agency should have assigned him to another DS-12 position. However, the OEA Board decided that there was no basis to grant Employee's Petition for Review because Agency returned Employee to the position he occupied at the time of his removal with back pay and benefits. Moreover, the Board found that because the RIF had not yet occurred, this was a moot issue. Therefore, Employee's Petition for Review was denied.[3]

Approximately thirty days after being reinstated to the Sanitarian position, Employee received a RIF notice on January 24, 2003. The notice provided that as a result of a major reorganization, a RIF was conducted within his competitive area, and he was released from his position. Because this issue was now ripe for review, Employee filed a Petition for Appeal with OEA on February 14, 2003. He provided that he should have been placed in a comparable position within his grade instead of being RIFed. Therefore, he requested that the RIF action against him be reversed.[4]

Agency filed its Response to Employee's Petition for Appeal on December 17, 2003. It alleged that the RIF was conducted in conformance with the District Personnel Regulations outlined in Chapter 24. Agency provided that the AJ issued an order on May 26, 2002, which reinstated Employee to his position of record as a Sanitarian. Employee was reinstated on December 30, 2002, and he received back pay and benefits from May 21, 1996 through December 29, 2002. During this time a RIF was taking place within

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[3] *Opinion and Order on Petition for Review*, OEA Matter No. 1601-0126-96 (April 14, 2008).
[4] *Petition for Appeal,* p. 3-4 (February 14, 2003).

Agency, and Employee's position was identified for abolishment. Therefore, Agency issued a RIF notice to him on January 24, 2003. Agency went on to note that a qualifications analysis was conducted for Employee to determine placement options for him within the District-wide government. Agency also registered him in the Agency Reemployment Priority Program and the Displaced Employee Program.[5]

On June 26, 2006, AJ Quander issued an Initial Decision in this matter. He held that in accordance with Administrative Order DPM-03-06, dated January 24, 2003, Employee's position was identified as one of thirty-one positions selected for abolishment. Employee provided that he was RIFed from his position to cover up what was really an adverse action taken against him. However, the AJ found that Agency was in the process of abolishing his position because of programmatic and service realignments within Agency. Therefore, this was not a RIF as a pretext for adverse action as argued in *Levitt v. District of Columbia Office of Employee Appeals*, 869 A.2d 364 (D.C. 2005). The AJ found that the cases are distinguishable because in the current case Employee was returned to his position of record which still existed and was unencumbered by anyone else.[6]

Accordingly, the AJ reasoned that Employee may only contest the RIF action against him if he was not afforded one round of lateral competition or if he failed to receive thirty days written notice prior to his date of separation. The AJ found that at the time of the RIF action, Employee was the only Sanitarian within his competitive level. Therefore, he held that one round of lateral competition was not applicable in this matter

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[5] *Agency's Response to Employee's Petition for Appeal,* Tab 6 (December 17, 2003).
[6] *Initial Decision,* p. 5-6 (June 28, 2006).

because Employee was the sole person employed in his competitive level. He also held that Employee was provided with the required thirty days notice. Employee received his RIF notice on January 24, 2003, which was effective on February 28, 2003. Accordingly, Agency's Motion to Dismiss Employee's Petition for Appeal was granted, and Employee's RIF action was upheld.[7]

Employee disagreed with AJ Quander's ruling and filed a Petition for Review on August 4, 2006. He argued that Agency failed to adhere to the Initial Decision issued by AJ Hollis on May 1, 2002, because he was not reinstated until December 30, 2002. He went on to assert that because his position number before his termination (DS-688-12, position #0158486/N) was different than his position number after his reinstatement (DS-688-12, position #0165731/N), then he was placed into a newly established position and not his official position of record. Employee also provided that Agency violated DPM 11A-27, paragraph 4A when it placed him in a position scheduled to be abolished. Lastly, he argued that because he was placed in an un-established position that the RIF action was invalid. Therefore, he requested that the OEA Board reverse the Initial Decision and overturn Agency's RIF action against him.[8]

Agency filed its Response to Employee's Petition for Review where it alleged that Employee's position of record was Sanitarian, DS-0688-12-00-N and that this was the position approved for abolishment in Administrative Order DMH-03-06. It further provided that Employee was given thirty days notice. Agency asserted that the Initial Decision was based on substantial evidence. Therefore, Employee's Petition for Review

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[7] *Id.*
[8] *Petition for Review*, p. 2-3 (August 4, 2006).

should be denied.[9]

This Board must first determine if this matter rises to the level of *Levitt* by deciding if Employee's termination was a pre-text to the RIF action. The Court in *Levitt* provided that Agency clearly took action *before* it RIFed employee by transferring him to another agency with a newly established position; changing his status from career service to excepted service; and then abolishing the newly established position and terminating Levitt. The Court of Appeals ruled that this was a clear pre-text to the RIF action.

Although Employee claims that his case is similar to *Levitt*, he offers no examples which outline the similarities. It is this Board's belief that this case is distinguishable from *Levitt* because there is no clear pre-text to imposing the RIF against Employee. In *Levitt,* there were obvious steps taken to terminate Employee under the guise of a RIF. He was transferred to a newly established position; his classification was changed; and six weeks later his newly established position was abolished. In the current case, Employee was reinstated to his original position of record after an AJ found that he was wrongfully terminated. Despite Employee's claims that he was reinstated to a newly established position, it is clear that he was placed in a DS-12 Sanitarian position – the position that he held before he was terminated.[10]

This case also differs from *Levitt* because in *Levitt* Agency created a RIF to terminate him without cause. In the current matter, Agency provides clear evidence that

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[9] *Agency's Response to Employee's Petition for Review,* p. 1-3 (September 8, 2006).

[10] The position numbers outlined by Employee do not give credence to his argument that the positions are different or that he was placed in a newly established position. AJ Hollis ordered that he be reinstated to the position he occupied at the time of his removal. Agency provided that Employee's position of record was Sanitarian, DS-0688-12-00-N. This is the same position to which he was reinstated, and it was the same position approved for abolishment. *Agency's Response to Employee's Petition for Appeal,* Tabs 1-5 (December 17, 2003).

it enforced the RIF action against Employee's position because of a major reorganization due to programmatic and service realignments. The Court in *Thompson v. District of Columbia,* 428 F.3d 283 (D.C. 2005), found that reductions in force are about terminating positions, not people. Therefore, if this line of reasoning is applied to the current case, then it does not matter that Employee was reinstated to his position for thirty days before it was abolished. Agency was charged with the task of conducting a reorganization which happened to have Employee's position along with thirty others slated to be abolished.

Furthermore, there is no evidence to prove that Employee was reinstated to a temporary position as he claims. He was, however, reinstated to a position that was abolished thirty days after he was reinstated. Being placed in a position scheduled for abolishment is not the same as being placed in a temporary position.

Moreover, it should be noted that Agency made obvious attempts to assist Employee – attempts that were not made by the agency in *Levitt.* In the current case, Agency registered Employee in the Agency Reemployment Priority Program and with the Displaced Employee Program.[11] This was done to locate comparable employment for Employee.

Because Employee did not prove that there was a clear pre-text to the RIF action, we are then left to determine if Agency properly enforced the RIF action against him. OEA was given statutory authority to address RIF cases. According to D.C. Official Code §1-606.3(a):

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[11] *Id.*, Tab 6.

> "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 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), (e), and (f) 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.
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> (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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> > (1) An employee may file a complaint contesting a determination or 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."

As a result of above-referenced statutes, this Office is authorized to review RIF cases where an employee claims the Agency did not provide one round of lateral competition, or where an employee was not given a thirty-day written notice prior to their separation.

As the AJ provided in his Initial Decision, this office has consistently held that one round of lateral competition does not apply to employees in a single-person competitive level.[12] Agency provided that Employee was the only person within his position title.[13] Therefore, one round of lateral competition is inapplicable to this case.

Furthermore, Employee does not dispute that Agency provided the RIF notice on January 24, 2003. The notice clearly states that it is effective on February 28, 2003, thirty days after the date of the letter. Therefore, Agency provided the requisite 30 day notice as required by the D.C. Official Code. Accordingly, because one round of lateral competition was not applicable in this matter and because Employee received thirty days notice, his Petition for Review is denied.

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[12] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter 2401-0156-99 (January 30, 2003), ___ D.C. Reg. ___ ( ); *Robert T. Mills,* OEA Matter 2401-0109-02 (March 20, 2003), ___ D.C. Reg. ___ ( ); *Deborah J. Bryant,* OEA Matter 2401-0086-01 (July 14, 2003), ___ D.C. Reg. ___ ( ); *Robert James Fagelson,* OEA Matter 2401-0137-99 (August 28, 2003), ___D.C. Reg. ___ ( ).

[13] *Agency's Response to Employee's Petition for Appeal,* Tabs 2 and 3 (December 17, 2003).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

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.