THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BOBBY MATTHEWS,	)	
Employee	)	OEA Matter No. 2401-0247-09
	)	
v.	)	Date of Issuance: February 28, 2011
	)	
OFFICE OF PUBLIC EDUCATION	)	
FACILITIES MODERNIZATION,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Mark J. Murphy, Esq., Employee's Representative
Charles J. Brown, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 28, 2009, Bobby Matthews ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Office of Public Education Facilities Modernization's ("OPEFM" or "Agency") action of abolishing his position as a Motor Vehicle Operator through a Reduction-In-Force ("RIF"). This matter was assigned to me on December 14, 2010. Thereafter, I scheduled a Prehearing Conference for January 31, 2011, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. On January 21, 2011, with the consent of the parties, the Prehearing Conference was rescheduled for February 7, 2011. After considering the parties' arguments, I decided that an evidentiary hearing was not required. And since this matter could be decided based upon the documents of record, and the recited positions of the respective parties, no additional proceedings were conducted. I closed the record after both parties submitted their legal briefs on the issue.

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 documentary and oral evidence presented by the parties during the course of Employee's appeal process with the OEA:

1. According to Employee's personnel records, Employee was a RW 7/10 Motor Vehicle Operator at OPEFM for 28 years.
2. On August 17, 2009, Agency abolished eighty-five (85) positions due to budgetary crisis. Employee occupied one of the positions designated for abolishment.
3. Employee's Retention Register shows that his RIF service computation date is March 08, 1981. Because all five positions in his competitive level were eliminated, Employee was terminated.
4. Employee received the requisite 30-day notice prior to the effective date of his separation.
5. 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.

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:
>
> > (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 met the procedural requirements listed above, and Employee does not contest this. Furthermore, Chapter 24 of the D.C. Personnel Manual § 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.

Section 2412 of the RIF regulations, 47 D.C. Reg. at 2431, requires an agency to establish a "retention register" for each competitive level, and provides that the retention register "shall document the final action taken, and the effective date of that action, for each employee released from his or her competitive level." 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 usually 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.[1]

Agency argued that it based the instant RIF on its good faith belief that it was facing budgetary constraints. However, Employee questioned the validity of Agency's budget crisis and maintained that the underlying basis for the RIF does not exist. According to *Anjuwan v. D.C. Department of Public Works,* 729 A.2d. 883 (12-11-98), 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 his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that OEA is precluded from addressing any other issue(s) in this matter.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[1] 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. __.