THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LAURA SMART,	)	OEA Matter No. 2401-0328-10
Employee	)	
	)	Date of Issuance: March 4, 2014
	)	
D.C. CHILD AND FAMILY SERVICES AGENCY,	)	
	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Laura Smart ("Employee") worked as a Social Work Associate with the D.C. Child and Family Services Agency ("Agency"). On June 2, 2010, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF").[1] The effective date of the RIF was June 11, 2010.

Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 8, 2010. She claimed that when Agency conducted the RIF, it violated her due process rights; her express and implied contract rights; and her right to priority placement consideration. She further asserted that Agency did not follow the RIF regulations and that there was no valid reason for the RIF action. Therefore, Employee requested that

[1] Although Agency's RIF notice was dated May 6, 2010, as explained below, the Acknowledgment of Receipt was dated June 2, 2010. *Petition for Appeal*, p. 9 (July 8, 2010).

Agency's action be reversed; that she be reinstated to her position or an equivalent or higher position; and that she receive back pay and economic benefits.[2]

In its response to the Petition for Appeal, Agency denied Employee's allegations and provided that the RIF action was the result of an agency-wide realignment. It explained that additional pressures to reduce staff were added when its budget was reduced. Accordingly, it conducted the RIF in accordance with the D.C. Comprehensive Merit Personnel Act of 1978, D.C. Official Code § 1-624.01, and Title 6, Chapter 24 of the District of Columbia Municipal Regulations ("DCMR").[3]

The OEA Administrative Judge ("AJ") ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF action.[4] In its responsive brief, Agency reiterated its position and submitted that pursuant to D.C. Official Code § 1-624.08, Employee could only contest that she did not receive a written, thirty-day notice prior to the effective date of her separation and that Agency did not provide one round of lateral competition within her competitive level.[5] However, it provided that because Employee's entire competitive level was abolished, the requirement of one round of lateral competition was inapplicable. With regard to the written, thirty-day notice, Agency stated that the Acknowledgment of Receipt for the RIF notice was dated June, 2, 2010, and it was "unable to verify whether [its] May 6, 2010 notice was timely served."[6]

Employee filed her brief on August 10, 2012. In it, she argued that the RIF action was a sham and ". . . was used by the Agency in an attempt to circumvent the Social Work Associates'

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[2] *Id.,* 3-6.
[3] *Agency's Response to Petition for Appeal,* Tab 5 (August 12, 2010).
[4] *Order Requesting Briefs* (July 12, 2012).
[5] Agency provided that the competitive area was agency wide, and the Social Work Associate, Series 0187, Grade 10, was determined to be the competitive level subject to the RIF. *Agency's Brief* (July 27, 2012).
[6] *Id.,* 2-3.

constitutionally protected property interests in their public employment." She believed that the RIF action was based on a reorganization, not a realignment, as Agency contended. Employee further submitted that Agency ignored her rights pursuant to an agreement between the District and her union.[7]

The Initial Decision was issued on August 20, 2012. The AJ found that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[8] As a result, she ruled that § 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 her separation and if Agency provided one round of lateral competition within her competitive level. The AJ concluded that since all of the positions in Employee's competitive level were eliminated, the requirement of one round of lateral competition was inapplicable.[9]

With regard to the written, thirty day notice, the AJ found that Employee received the RIF notice on June 2, 2010, and the effective date of the RIF was June 11, 2010. As a result, she ruled that Employee did not receive the required notice and that Agency committed a procedural error.[10] Accordingly, she upheld Agency's action but ordered it to reimburse Employee with twenty-one days' pay and benefits for its failure to provide her with the required notice.[11]

Employee filed a Petition for Review with the OEA Board on October 5. 2012. She

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[7] *Employee's Brief,* p. 3-5 (August 10, 2012).

[8] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools,* 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision,* p. 2-4 (August 20, 2012).

[9] *Id.*, 2-6.

[10] The AJ ruled that such error did not constitute harmful error as defined in §2405.7 of the District Personnel Manual.

[11] The AJ considered Employee's argument that the RIF was due to reorganization but found that OEA lacked jurisdiction to determine whether the RIF was bona fide. With regard to Employee's arguments concerning priority reemployment, the AJ found that D.C. Official Code § 1-624.08 does not require that Agency engage in priority reemployment procedures. Lastly, the AJ found that there was no violation of Employee's substantive and procedural due process rights, and that OEA did not have jurisdiction to address the merits of her claims concerning a violation of her rights under a Collective Bargaining Agreement. *Initial Decision,* p. 6-9 (August 20, 2012).

asserts that the AJ's findings were not based on substantial evidence, and the Initial Decision did not address all of the issues of law and fact properly raised on appeal. Employee explains that although the AJ found that Agency's action did not violate her due process rights, the onus was actually on Agency to prove that its justification for conducting the RIF was not flawed, arbitrary, or wrongful. Employee cites *Bowers v. Hardwick,* 478 U.S. 186 (1986) and states that Agency " . . . has the burden of demonstrating that the action [was] required to carry out a compelling government interest and [was] the most narrowly tailored means of achieving that state interest."[12]

Agency disagreed and filed an Opposition to the Petition for Review. It submits that the court in *Davis v. University of the District of Columbia,* 603 A.2d 849, 853 (D.C. 1992) properly questioned if an employee has property rights in a RIF action. Agency further provides that Employee carries the burden of proving that the D.C. Council had no rational basis for implementing the relevant laws. Therefore, it believes that the RIF action should be upheld. [13]

Employee invoked the holding of the *Bowers* case to establish that she was denied due process. The *Bowers* matter involved a homosexual man who brought an action challenging the constitutionality of the state of Georgia's sodomy statute. In this matter the Supreme Court of the United States held that Georgia's sodomy statute did not violate the fundamental rights of homosexuals.[14] Nonetheless, this ruling was overturned in the matter of *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in the consensual act of sodomy in the privacy of their home. This Board does not find the *Bowers* case to be on point with this

[12] *Petition for Review*, p. 2 (October 5, 2012).
[13] *Agency's Opposition to Employee's Petition for Review,* p. 2 (November 9, 2012).
[14] *Michael J. Bowers v. Michael Hardwick*, 478 U.S. 186 (1986).

matter. The *Bowers* Court does not address due process rights as it relates to employment matters anywhere in the decision.

In accordance with *Grant v. District of Columbia,* 908 A.2d 1173, 1179 (D.C. 2006) and *Burton v. Office of Employee Appeals,* 30 A.3d 789, 798 (D.C. 2011) (citing *Leonard v. District of Columbia,* 794 A.2d 618, 624 (D.C. 2002) and *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)), "to trigger due process protection in the area of public employment, an employee must 'have a legitimate claim of entitlement to it.'" The Court reasoned that the "employee must show that a protected liberty or property interest is implicated." Thus, the AJ's assessment was correct regarding property rights in some government positions. However, as will be explained below, those rights did not extend to Employee given the facts of this case.

The Court in *Grant* and *Burton* reasoned that in order to invoke due process protections, an employee must show that a protected liberty or property interest is implicated. However, the D.C. Court of Appeals held in *Davis v. Board of Trustees of University of District of Columbia* (citing *American Federation of Government Employees v. Office of Personnel Management,* 261 U.S.App. D.C. 273, 279 (1987), that when the personnel action taken against an employee is a RIF, opposed to an adverse action for cause, "it is by no means obvious that a property interest in continued employment is even implicated . . . ." Furthermore, the Court reasoned that even if a property right is implicated by the RIF action, an employee is not denied due process if they are given notice and the opportunity to be heard.[15] The Court of Appeals offered a similar holding in *Hoage v. Board of Trustees of University of District of Columbia*, 714 A.2d 776, 782 (1998). Thus, this Board finds that Agency's analysis regarding due process and RIF actions is well-founded.

Assuming that Employee's RIF did implicate a property right, if we apply the above-

[15] *Davis v. University of the District of Columbia*, 603 A.2d 849, 853 (D.C. 1992).

mentioned holding to this matter, she was still not denied due process in this case because she was given notice and the opportunity to be heard. Employee was provided notice of her termination.[16] Although not applicable in this case because her entire competitive level was abolished, in accordance with D.C. Official Code § 1-624.08(d), Employee was entitled to one round of lateral competition due to the RIF.[17] Moreover, she was provided an administrative process through OEA in which she could raise any challenges to the RIF action. Finally, Employee has the ability to further judicial appeals in the Superior Court for the District of Columbia and the D.C. Court of Appeals. Therefore, she was not denied due process in this case. Accordingly, Employee's Petition for Review is DENIED.[18]

[16] The AJ properly ordered Agency to reimburse Employee for twenty-one days of back pay and benefits for its failure to provide the required thirty days' notice.

[17] Because Employee's entire competitive level was eliminated, there was no one against whom she could compete. Agency provided the Administrative Order approving the RIF action for it to abolish one hundred and twenty-three positions, which included those positions within Employee's competitive level. Additionally, it provided the Retention Register for competitive level DS-0189-10-01-N, where all of the Social Work Associate positions were eliminated. *Agency's Brief,* Tabs 8 and 9 (July 27, 2012). Therefore, D.C. Official Code § 1-624.08(d) is inapplicable in this matter.

[1818] This Board must note the AJ's improper holding that Employee did not have a right to priority reemployment. Although she did not allege this in her Petition for Review, Employee did properly assert this argument before the AJ. The Superior Court for the District of Columbia held in *Webster v. District of Columbia Public Schools*, 2012 CA 006364 P(MPA), p. 8 (D.C. Super. Ct. December 9, 2013) that in accordance with D.C. Official Code § 1-624.08(h) and DPM section 2427.5, employees ". . . have a right to be added to the priority reemployment list . . . in light of the criteria under the procedures set forth in chapter 24 of the DCPM." Agency did comply with this statutory and regulatory requirement, as was evidenced in Employee's RIF notice. Specifically, the notice provides the following:

> Employees in tenure groups I and II who have received a notice or separation by reduction in force have a right to priority placement consideration through the Agency Reemployment Priority Program. Placement assistance through the D.C. Department of Human Resources Displaced Employee Program for vacancies in other District agencies will also be provided to employees in tenure groups I and II. You may also receive placement assistance through the Department of Employment Services Dislocated Worker Program.

Petition for Appeal, p. 9-10 (July 8, 2010). Thus, the AJ's determination was the result of harmless error and does not change the outcome of this case.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.** However, Agency is ordered to reimburse Employee with twenty-one days' pay and benefits for its failure to provide her with the required notice.

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

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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.