

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
Brenda Toyer,	)	OEA Matter No. 2401-0022-12
Employee	)	
	)	Date of Issuance: September 16, 2015
	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department,	)	Senior Administrative Judge
Agency	)	
_____	)	
Frank McDougald, Esq., Agency Representative	)	
Robert Shore, Esq., Employee Representative	)	

**INITIAL DECISION**

INTRODUCTION

On November 10, 2011, Brenda Toyer (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting Metropolitan Police Department’s (the “Agency”) final decision to separate her from government service pursuant to a Reduction-in-Force (“RIF”). This matter was assigned to me on August 2, 2013. After several continuances requested by the parties, I conducted a Prehearing Conference on October 3, 2013, at which time I ordered the parties to brief the statutes applicable to this RIF. I decided the applicable statute issue on February 27, 2014, and after a series of status conferences, I ordered the parties to finish discovery by January 5, 2015.<sup>1</sup> On February 2, 2015, I ordered the parties to submit briefs on the RIF by April 17, 2015. The parties have complied. Thereafter, based on a conference held on May 29, 2014, I issued an Order for the parties to submit a joint stipulation of facts and identify potential issues by October 22, 2014. After several motions by the parties, discovery deadlines were extended and finally closed on January 29, 2015. I held an Evidentiary Hearing on July 7, 2015. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Which D.C. RIF statute, D.C. Code §1-624.08 (Abolishment Act) or D.C. Code §1-

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<sup>1</sup> Part of the reasons for the conferences was the busy schedules of the parties, continuing discovery, and the marriage planning and honeymoon of Employee’s attorney which necessitated continuances consented to by Agency. Mr. Shore also represented four other employees versus Agency during this time period.

624.02 and 1-624.04, applies where Agency's stated rationale for its RIF action is realignment and work shortage.

2. Whether Agency's action separating Employee pursuant to a RIF was conducted in accordance with applicable law, rule or regulation.

## POSITION OF THE PARTIES

Based on the documents on record, Employee submits the following:

First, the appropriate D.C. RIF statutes that apply in this appeal are D.C. Official Code §1-624.02 and §1-624.04, and not the Abolishment Act, D.C. Official Code §1-624.08. Secondly, Employee alleges that Agency failed to conduct the RIF in accordance with applicable laws, rules and regulations.

In support of her argument that D.C. Code §1-624.02 and §1-624.04, and not the Abolishment Act, D.C. Code §1-624.08, are the appropriate D.C. RIF statutes applicable in this appeal, Employee alleges that in its Organization Realignment Plan, Agency proposed nine new positions at higher grades and salaries than the abolished positions. One of these new positions was entitled IT Specialist (Customer Support), CS-2210-13, which performed near identical duties as Employee performed under the Computer Clerk position. This new position actually cost Agency more money. Employee also points out that Agency cited realignment and lack of work, not budgetary constraints, to justify its RIF request. In summary, Employee argues that since the RIF was not conducted due to financial reasons, the Abolishment Act does not apply.

In response to Employees' assertions, Agency argues that this Office's jurisdiction is clearly stated by the provisions of D.C. Official Code § 1-624.08 (d) and (e) (2001), and that OEA is limited to determining whether the employees have each received one round of lateral competition for positions in each employee's respective competitive level, and at least 30 days prior written notice before the effective date of his or her separation. Agency supports this argument by pointing out that the Abolishment Act was enacted after the earlier RIF statutes. Agency also denied that it had failed to conduct the RIF properly.

## SUMMARY OF EVIDENCE:

1. Allen Lew (Transcript p. 8-29)

Allen Lew ("Lew") was the District of Columbia's City Administrator at the time of the RIF. In this position, Lew was responsible for the City's operations and its 35,000 employees, its \$11-12 billion operating budget and its \$7-8 million capital budget from 2011 to January 2015. Four deputy mayors reported to him, and he had oversight over 60 to 70 agencies. He also dealt with 30 labor leaders who represented the bulk of the city's public workforce. His support staff would prepare a concise summary of the outstanding issues along with their cost impacts and if needed, the required legislation for the decisions. On personnel issues, the Director of Human Resources would

explain to him what they are trying to do, and what it all means in terms of impact.

Lew explained the RIF process and concluded that before it can be implemented, the Realignment Approval Form must contain the appropriate signatures of approval, such as that of the Agency Head Police Chief Cathy Lanier, Chief Financial Officer Jackson, Human Resources Director, and himself as the City Administrator and final approving authority.<sup>2</sup>

Lew testified that the final signature on the Realignment Approval Form was his and that he signed it on September 13, 2011.

2. Barry Gersten (Transcript p. 30-67)

Barry Gersten (“Gersten”) is the Chief Information Officer of the MPD’s Office of Information Technology. After he was hired in September 2010, Gersten performed an assessment of the staffing and functions performed by his information technology organization and concluded that Agency needed to modernize and streamline its technologies and skillsets in order to cut costs and improve operational performance. He wanted to eliminate redundancies and upgrade personnel with higher technical capabilities. For instance, he outsourced the support of mobile computers in the police squad cars to the Office of Unified Communications, pared down the number of technologies Agency employed to one that they could master, and recommended a staffing realignment to Police Chief Lanier. This involved the elimination of unneeded personnel and the hiring of people with the right technical skill set, work experience, and computer certifications.

After Chief Lanier assented to his plan, Gersten met with Ms. Haynes-Walton of the Human Resources to discuss the steps needed to conduct a RIF. In the information technology (“IT”) field, changes in technology is constant, and he said that employees who did not or could not obtain the necessary technical certifications and training were subject to the RIF.

3. Diana Haynes Walton (Transcript p. 68-125)

Diana Haynes Walton (“Walton”) is Agency’s Director of Human Resources. She testified that Gersten discussed his plan to realignment his IT staff and she then provided the advice and resources to properly implement the RIF in accordance with D.C. rules and regulations. Walton testified that Lewis Norman gave them guidance on the steps towards implementing the RIF. Walton stated that the rationale for the RIF was realignment and shortage of work. She identified the signatures, including her own, on the Realignment Approval Form,<sup>3</sup> which are necessary for the RIF to proceed.

Walton indicated that the retention register was done by a different agency, the District of Columbia Human Resources (“DCHR”). Before sending out the RIF notices to the affected

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<sup>2</sup> See Agency Exhibit 9, p. 3.

<sup>3</sup> See Agency Exhibit 6, p. 3.

employees, she notified the Union and the Office of Labor Relations and Collective Bargaining weeks beforehand. Walton recalled that the new IT positions came into fruition after the RIF. The District Government had adopted the Federal Government's personnel classification system in 1979, and has not replaced it. If a position's pay grade is incorrect, that error would not be relevant if the entire job series was eliminated. For this RIF, Walton testified that it was conducted in accordance with all RIF rules and regulations.

4. Lewis Clark Norman (Transcript p. 129-185)

Lewis Clark Norman ("Norman"), a supervisor and Human Resources Specialist at DCHR, had worked in his field for at least 20 years starting in the Federal government. He testified that he had been involved in at least 75 RIFs and had testified as a RIF expert before various D.C., Federal, and administrative courts.<sup>4</sup> Norman explained the realignment and the RIF process, explaining the various documents in the instant RIF. He also explained that the one instance where the last numeral of the position number was different in two documents was a minor and harmless error as the entire job series was abolished. In conclusion, Norman testified that in his expert opinion, the RIF process was adhered to and the RIF documents were accurate.

5. Samson Abeboye (Transcript p. 186-190)

Samson Abeboye ("Abeboye") worked on Agency's annual personnel IT services budget for 17 years. He testified that before the RIF, he was never informed that he needed to learn new skills. Abeboye testified that he applied for many positions, but was never selected. He also said that Agency's stated rationale of shortage of work was untrue, as he had plenty of work to do at the time.

6. Employee (Transcript p. 190-194)

Employee testified that she was Agency's Computer Clerk for around 26 years, connecting employees to the right technicians to resolve any computer-related issues. Employee testified that she was never warned of a coming RIF, nor were her requests for training ever acknowledged. She also said there was no shortage of work as she was always busy.

7. Zach Gamble (Transcript p. 194-199)

Zach Gamble ("Gamble") worked for Agency for 22 years, first as a Police Officer, and the last 11 years as a Computer Specialist. His job was to provide mobile support, help desk, and develop databases. Gamble testified that he was never given an opportunity to fill any of the new jobs created by Agency despite his experience and knowledge.

8. Darryl Boone (Transcript p. 199-202)

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<sup>4</sup> Employee had no objections to Norman being designated as a RIF expert. Transcript, pg. 133.

With his degree in computer science, Darryl Boone performed applications development of the mainframe system for 20 years. He testified that Agency gave him no warning of the impending RIF nor was he offered any training in Microsoft programs.

9. Francine Thomas (Transcript p. 203-211)

Francine Thomas (“Thomas”) testified that she worked as Agency’s IT Customer Support Specialist for 17 years. She stated that she was never told she needed to upgrade her skills. Thomas admitted that she applied for retirement more than a year after her RIF after exhausting her severance package and unemployment benefits.

FINDINGS OF FACT

Based on the testimonial and documentary evidence received at the hearing, coupled with my assessment of their credibility, probity, and relevance, as well as the parties’ Joint Stipulations of Facts, I make the following findings of facts:

1. The Metropolitan Police Department (“Agency”) is governed by the District Personnel Manual and is a subordinate Agency of the Executive Office of the Mayor.
2. Employee occupies the position of Computer Clerk, DS-0303-05, with the Agency’s Office of the Chief Information Officer (“OCIO”).
3. On or about June 29, 2011, the Chief of Police submitted a memorandum (Memo) “requesting authorization to realign programs and functions within the Office of Chief Information Officer (OCIO), Executive Office of the Chief of Police [to] conduct a Reduction in Force (RIF) to abolish 14 positions in the OCIO.”<sup>5</sup>
4. Attached to the Memo was Administrative Order (“AO”) FA-2011-01, which cited the reasons for the RIF and identified the positions recommended for abolishment by the RIF and the competitive area in which the RIF would be conducted.<sup>6</sup>
5. The reasons cited for the RIF were realignment and shortage of work. No budgetary reason was ever cited as a rationale for the RIF.
6. The competitive area for the RIF was identified as the Executive Office of the Chief of Police, Office of the Chief Information Officer.<sup>7</sup>
7. One of the fourteen (14) positions recommended for abolishment in the AO was Computer Clerk, DS-0303-05, a position encumbered by Employee.

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<sup>5</sup> See Agency Exhibit 9, page 1.

<sup>6</sup> *Id.* page 2.

<sup>7</sup> *Id.*

8. On June 29, 2011, Police Chief Cathy Lanier signed her assent to the RIF, and on June 30, 2011, Chief Financial Officer Jackson signed her approval. On September 8, 2011, Agency's request to conduct a realignment was approved by Shawn Stokes, the Director of the District of Columbia Department of Human Resources, and on September 13, 2011, the City Administrator concurred "in the Realignment action."<sup>8</sup>
9. The required signatures on the RIF documents are authentic, timely, and properly procured in accordance with RIF regulations.
10. Chapter 24 of the District Personnel Manual ("DPM") is entitled *Reduction in Force* and it contains regulations related to the conduct of a RIF.
11. Pursuant to the approval to conduct the RIF, and in accordance with applicable RIF regulations, competitive levels were identified and retention registers were developed. A competitive level encompasses only those positions that are of the same grade and classification series. D.C. Mun. Reg. Tit. 6b § 2410.4. A retention register is a document that lists employees in the same competitive level who are ranked on the retention register according to seniority, which is established in accordance with their reduction-in-force service computation date (RIF-SCD). The most senior person listed on the retention register is ranked first and the least senior person is listed last. D.C. Mun. Reg. Tit. 6b § 2499.
12. A retention register lists all positions in a competitive level and pursuant to DPM Rule 2412.2, a separate retention register is prepared for each competitive level. The retention register identifies the name of the individual who encumbers the positions listed on the retention register.
13. The competitive level for the Computer Clerk position encumbered by Employee was identified as DS-0303-05-04-N.<sup>9</sup> The retention register that was developed for that competitive level (DS-0303-05-04-N) listed only Employee.<sup>10</sup>
14. All the information contained in Employee's retention register that was used to determine her retention standing were accurate.
15. The position encumbered by Employee was abolished.<sup>11</sup>
16. In a letter to Employee dated September 14, 2011, Employee was advised that pursuant to a RIF, she would be "separated from District government effective

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<sup>8</sup> *Id.* page 3.

<sup>9</sup> Agency Exhibit 6, page 5 and Employee Exhibit 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

October 14, 2011.”<sup>12</sup>

17. Employee was separated effective October 14, 2011.<sup>13</sup>

### ANALYSIS AND CONCLUSION

Which D.C. RIF statute, D.C. Code §1-624.08 (Abolishment Act) or D.C. Code §1-624.02 and 1-624.04, applies where Agency’s stated rationale for its RIF action is realignment and work shortage.

The authority for conducting a RIF is primarily set forth in two statutes, D.C. Code §§ 1-624.02 and 1-624.08. In a February 27, 2014 Order, I determined that D.C. Code § 1-624.02 is the more applicable statute in the instant RIF. Based on the undisputed fact that Agency never cited any budgetary rationale for its decision to RIF Employee, and after carefully reviewing the language of D.C. Code § 1-624.02 and § 1-624.08, and the cases interpreting those statutory provisions, the Undersigned finds that D.C. Code § 1-624.02 and 1-624.04, and not the Abolishment Act, D.C. Code § 1-624.08, is the more applicable statute to govern this RIF. I note that D.C. Code § 1- 624.08 was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF. Here, budgetary issues were never stated as a rationale for the RIF.

In *Washington Teachers’ Union*, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”<sup>14</sup> The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act (“the Act”) instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”<sup>15</sup> The Court stated 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.”<sup>16</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>17</sup> There is no indication that the D.C. Council intended to supplant D.C. Official Code § 1-624.02 and 1-624.04 with the Abolishment Act. Rather, it intended to supplement it with a different statute which would govern instances where a RIF is conducted for budgetary reasons. I also based my decision on the D.C. Superior Court ruling in *Stevens & Prophet v. D.C. Dept. of Health*, 2010 CA 003345 P(MPA) and 2010 CA 003345 P(MPA) (February 14, 2014), and the expert opinion of Mr. Norman.

In conclusion, I find that this RIF was conducted for non-budgetary reasons, and thus is

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12 *Id.* page 6.

13 *Id.* page 9.

14 *Washington Teachers’ Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

15 *Id.*

16 *Id.*

17 *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

governed by D.C. Code § 1-624.02 and 1-624.04 and not with the Abolishment Act.

Whether Agency's action separating Employee pursuant to a RIF was conducted in accordance with applicable law, rule or regulation.

Although the RIF statute has been amended a number of times, the controlling language addressing the abolishment of positions for fiscal year 2000 and subsequent years has not changed, and the above-noted provisions have remained intact since Fiscal Year 1996. The relevant statute clearly provided that RIFed employees are entitled to one round of lateral competition within his/her competitive level and thirty (30) days advance notice of the effective date of the RIF. Of specific relevance to this case are D.C. Official Code § 1-624.02, which tracks Omnibus Personnel Reform Amendment Act (OPRAA) of 1998 § 101(x). This section reads in pertinent part as follows:

D.C. Code § 1-624.02. Procedures

(a) Reduction-in-force procedures shall apply to the Career and Educational Services . . . and shall include:

- (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans 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
- (1) Employee appeal rights. *See* D.C. Official Code § 1-624.04.

D.C. Code § 1-624.04. Appeals

An employee who has received a specific notice that he or she has been identified for separation from his or her position through a reduction-in-force action may file an appeal with the Office of Employee Appeals if he or she believes that his or her agency has incorrectly applied the provisions of this subchapter or the rules and regulations issued pursuant to this subchapter. An appeal must be filed no later than 30 calendar days after the effective date of the action. The filing of an appeal shall not serve to delay the effective date of the action.”

Chapter 24 of the District of Columbia Personnel Manual (“DPM”), which set forth the District of Columbia Personnel Regulations regarding RIFs, *see* 6B DCMR § 2400 *et seq.*, state that a competitive level “shall consist of 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...” 6B DCMR § 2410.4; *see also, Dupree v. D.C. O.E.A. & D.C. D.O.C.*, 36 A.3d at 829-30 (describing how RIFs are conducted, including the classification of employees in competitive levels). An employee is



assigned to a competitive level based upon his or her “position of record,” which is “the position for which the employee receives pay.” 6B DCMR §§ 2410.2-2410.3.

As required by the DPM, Employee received a Retention Register, which is “established by the appropriate personnel office whenever a competing employee is to be released from his or her competitive level.” 6B DCMR § 2412.1. “The retention register for each competitive level ... list[s] all positions in the competitive level.” *Id.* at § 2412.6.

Thus, retention registers are created by grouping together all employees in a competitive level and then listing them by tenure group and RIF Service Computation Date (“SCD”).<sup>18</sup> The retention register is then used to effectuate the RIF, with employees being released in inverse order of their RIF SCD.<sup>19</sup>

#### Prescribed order and one round of lateral competition

The first two provisions enumerated in §1-624.02(a) are closely related. The prescribed order of separation must take into account the one round of lateral competition that an employee must be afforded.

The prescribed order mentioned in subsection (a)(1) above is for the purpose of developing a Retention Register so that employees may be afforded one round of lateral competition when an agency intends to effectuate a RIF. The factors mention in subsection (a)(1) above shall determine the retention standing of each competing employee. Together these factors determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released. According to the DPM, assignment to a competitive level shall be based upon an employee’s position of record.<sup>20</sup> The issue of what is an employee’s competitive level has been raised on a number of prior occasions, and likewise resolved. Both District of Columbia and federal case law have consistently defined “competitive level” as the official position of record. In *District of Columbia v. King*, 766 A.2d 38 (D.C. 2001), the D.C. government argued, and the Court of

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<sup>18</sup> "Tenure group" is defined as "the retention group in which competing employees shall be categorized according to their current type of employment [*i.e.*, an employee not serving a probationary period; an employee serving a probationary period; an employee on a term appointment, etc.]."

"Service computation date" is initially the date on which an employee began government service. For purposes of the modified RIF, the initial SCD could be enhanced by: 1) an outstanding rating for the year preceding the RIF; 2) veterans preference; and/or 3) District residency preference. *See* §§ 2474, 2475, and 2476 of the modified RIF regulations.

<sup>19</sup> For example, on a retention register Employee A has a RIF SCD of 5/27/76; Employee B, 10/22/84; Employee C, 2/7/89. If two (2) positions on that register are to be abolished, then Employees B and C would be separated from service.

Appeals agreed, that a District employee's competitive level must be based on his or her official position of record, and the fact that the employee may have been detailed to a different position at the time of his or her RIF does not change the fact that the establishment of the employee's competitive level is based on the official position description.

Additionally, the DPM specifies that competitive levels shall include positions in the same grade (or occupational level) and classification series, and which are sufficiently alike in qualifications requirements, duties, responsibilities, and working conditions so that the incumbent of one 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.<sup>21</sup>

In accordance with D.C. Official Code § 1-624.01 *et seq.* (2008 Repl.) and the implementing regulations set forth in Chapter 24, Reductions-in-Force, of Title 6 of the District of Columbia Municipal Regulations, and pursuant to Mayor's Order 2008-92, dated June 26, 2008, Agency established lesser competitive areas for conducting its RIF. Here, Employee's official position of record is Computer Clerk, DS-0303-05, as evidenced by her Standard Form 50, Notification of Personnel Action, effective October 14, 2011.<sup>22</sup> The SF-50 indicated that her competitive level was Grade 05 and Classification Series 0303.<sup>23</sup> The Administrative Order, dated August 24, 2011, provides that the Computer Clerk, DS-0303-05 position was identified for abolishment. This position was encumbered by Employee.

Several other documents also identified Employee's competitive level as Grade 5, Classification Series 0303.<sup>24</sup> Even the notification of RIF that Employee received on September 14, 2011, indicates that Employee's Competitive Level is Computer Clerk, DS-0303-05-04-N.<sup>25</sup> Although Employee argues that her Pay Grade Step is listed inconsistently in some of the documentation, her competitive level is not determined by her pay grade step. *See, e.g.*, 6B DCMR §§ 2410.4-2410.5; *id.* at § 2412.4 ("Each competitive level shall be identified by the title, series and grade of the position(s) that composed the competitive level").

Pursuant to Administrative Order FA-2011-01, the position of Computer Clerk, DS-0303-05, encumbered by Employee was identified for abolishment. At the time of the RIF in question, Employee was a career service employee.

On September 14, 2011, Employee received a detailed letter of final action from Agency, advising her that, effective October 14, 2011, her position was being abolished due to a RIF. In addition to the above, the letter also provided to Employee: (1) a listing of her respective

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<sup>21</sup> 6-B DCMR § 2410.4.

<sup>22</sup> Agency Exhibit 6, Page 9 and Employee Exhibit 5.

<sup>23</sup> *Id.*

<sup>24</sup> *See also* Request for Approval of Realignment and RIF in the Metropolitan Police Department and Administrative Order for RIF.

<sup>25</sup> *Supra.*

competitive area and competitive level, tenure group and RIF service computation date; (2) the location where the official regulations and records pertinent to her respective case may be reviewed; (3) the Employee's appeal rights; and (4) information concerning priority placement consideration. This information was in compliance with the requirements of 6 DCMR 2423.1 (2012).

Employee alleges that Agency failed to conduct the RIF in accordance with applicable law, rule or regulation. Employee posits that the City Administrator Lew's signature on the RIF documents is untimely and inauthentic. However, I have found that all the signatures were timely and authentic. Employee also argues that since not all the information on her Personnel Standard Form 50s are accurate, then Agency must have failed to allow her one round of lateral competition for positions within her competitive level. However, I have found that Employee has failed to prove these alleged Standard Form 50s are official because they do not contain the required signatures of any approving authority.

I have found that the information on Employee's Retention Register was accurate and that she was the sole occupant of the Computer Clerk, DS-0303-05, position that was eliminated. Regarding the lateral competition requirement, the record shows that all positions in Employee's competitive level were eliminated in the RIF.

The Administrative Order authorizing the RIF required that all the positions within Employee's competitive level be abolished. Thus, Employee's position was abolished. Even though Employee was entitled to compete for retention, she was limited to competing with only those employees within her same competitive level. Because she was the only one in her level, there was no one with whom Employee could compete.

OEA has consistently held that when an entire competitive level is abolished pursuant to a RIF or when a separated employee is the only member of his or her competitive level, then the statutory provision affording him or her one round of lateral competition is inapplicable.<sup>26</sup> Therefore, I conclude that the statutory provision of Code § 1-624.02(2), according Employee one round of lateral competition, as well as the related RIF provisions of 24 DPM § 2408.1, 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.

Accordingly, I conclude that Agency provided Employee with one round of lateral competition in accordance with D.C. Code §1-624.02.

#### Thirty day Notice of RIF

Employee does not allege that Agency failed to provide her proper notice. 6B DCMR

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<sup>26</sup> See, e.g., *Johnny Mulligan v. District of Columbia Office of Employee Appeals, et al*, Case No. 11 CA 9981 P(MPA) (D.C. Super. Ct. June 28, 2013); and *May v. DCDMH*, OEA Matter No. 2401-0129-09, *Opinion and Order on Petition for Review* (May 23, 2011).

§6422.1.1 or D.C. Official Code §1-624.04 states: “An employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. 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.” Here, Agency notified Employee in writing on September 14, 2011, that she would be separated from service effective October 14, 2011, which is thirty (30) days later. The record establishes that Employee was in fact separated on October 14, 2011. Thus, I find Employee received her mandated notice.

Finally, Employee argues that her position was not abolished because of lack of work. As noted above, “an agency’s decision to abolish a specific position shall not be subject to review *except* where an employee affected by the abolishment was (1) not afforded the one round of lateral competition ...; or (2) not given proper written notice of at least thirty days before the effective date of the employee’s separation.”<sup>27</sup> Additionally, OEA has indicated that it does not have jurisdiction to determine whether an agency’s stated reasons for abolishing a position were *bona fide*.<sup>28</sup> In *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883 (December 11, 1998), the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency’s RIF was *bona fide*. The Court in *Anjuwan* noted that OEA does not have the “authority to second-guess the mayor’s decision about the shortage of funds...about which positions should be abolished in implementing the RIF.” Agency, and not this Office, is responsible for deciding whether to retain or abolish particular positions during a reduction-in-force. When agency has been shown to have invoked reduction-in-force regulations for reasons stated in regulation, this Office has no authority to review management considerations that underlay agency's exercise of its discretion.<sup>29</sup>

I conclude that Agency provided Employee with one round of lateral competition in accordance with D.C. Code §1-624.02. Accordingly, I conclude that Agency complied with all relevant statutes, rules, and regulations in conducting Employee’s RIF and that the RIF must be upheld.

### ORDER

It is hereby ORDERED that Agency’s action of abolishing Employee’s position through

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<sup>27</sup> *Levitt v. District of Columbia Office of Emp. Appeals*, 869 A.2d 364, 366 (D.C. 2005) (emphasis in original).

<sup>28</sup> *See, e.g., Byrd v. OCME*, OEA Matter No. 2401-0290-09, November 14, 2011.

<sup>29</sup> *See Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.  
Senior Administrative Judge