THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Mark Chisholm	)	OEA Matter No. 2401-0125-09
Employee	)	
	)	Date of Issuance: March 24, 2010
v.	)	
	)	Senior Administrative Judge
D.C. Dept. of Parks & Recreation	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Donald Temple, Esq., Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On May 9, 2009, Employee, a Sports Specialist, DS-0030-10-01N, in the Career Service, filed a petition for appeal from Agency's final decision separating him from Government service pursuant to a modified reduction-in-force (RIF).

This matter was assigned to me on December 2, 2009. I conducted a Prehearing Conference on January 20, 2010, after which I ordered the parties to submit briefs on the issue. Since the matter could be decided based on the documentary evidence and the parties' positions as set forth in their legal briefs, no further proceedings were conducted. The record is closed.

JURISDICTION

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

ISSUE

Whether Agency's action separating Employee from service as a result of the RIF was in accordance with applicable law, rule or regulation.

FINDINGS OF FACT

The following facts are not subject to genuine dispute:

1. On May 29, 2009, the effective date of his RIF, Employee had occupied the position of Sports Specialist, DS-0030-10-01N in the Career Service. Pursuant to § 2412 of the RIF regulations, Agency established a retention register for Employee's competitive level. Because he was the only Sports Specialist, DS-10, then for purposes of the RIF, he was properly in a one-person competitive level.

2. Employee's Retention Register shows that his RIF service computation date is February 24, 2001. Because his position was eliminated and because he was the only one in his competitive level, Employee was terminated.

3. Employee received the requisite 30-day notice prior to the effective date of his separation.

4. At the conference, Employee alleged that his competitive level was too narrow. Although ordered to do so, he failed to file his legal brief on the issue.

ANALYSIS AND CONCLUSIONS

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. Subchapter XXIV of the Code sets forth the law governing RIF's. Section 1-624.08 of subchapter XXIV pertains to RIF's for "the fiscal year ending September 30, 2000, and each subsequent fiscal year. . . ." Further, § 1-624.08(f)(2) reads as follows: "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." Section 1-624.08(d) states in part that: "[a]n employee affected by the abolishment of a position pursuant to this section . . . shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual [DPM],[1] which shall be limited to positions in the employee's competitive level."

Section 1-624.08(e) states that an employee who is "selected for separation" as a result of a RIF is entitled to 30 days written notice prior to the effective date of the RIF. Thus, an employee whose position was abolished as a result of a RIF may only contest the following before this Office: 1) that he/she was not afforded one round of lateral competition within his/her competitive level; and/or 2) that he/she was not given 30 days' notice prior to the effective date of his/her separation.

Chapter 24 of the DPM, § 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,

[1] Chapter 24 of the DPM contains the regulations implementing the RIF law.

> 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. However, an employee's standing on the retention register can be enhanced by: 1) an "Outstanding" performance rating for the rating year immediately preceding the RIF (DPM § 2416, 47 D.C. Reg. at 2433); 2) Veteran's preference (DPM § 2417, 47 D.C. Reg. at 2434); and/or 3) D.C. residency preference (DPM § 2418, *id.*).

Employee's arguments:

1) Employee's competitive area was too narrow.

Employee complained that his competitive area was too narrow and that it should have included other sports specialists.

D.C. Official Code § 1-624.08(f) reads as follows:

> 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 action shall be subject to review except that . . . (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.

Section 1-624.08(d) states in part that:

> An employee affected by the abolishment of a position pursuant to this section . . . shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual [DPM],[2] which shall be limited to positions in the employee's competitive level.

[2] Chapter 24 of the DPM contains the regulations implementing the RIF law.

Section 1-624.08(e) states that:

> 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.

Thus, an employee whose position was abolished as a result of a RIF may only contest before this Office: 1) that he was not afforded one round of lateral competition within his competitive level; and/or 2) that he was not given 30 days notice prior to the effective date of his separation.

Regarding the lateral competition requirement, the record shows that Employee was the sole Sports Specialist occupying the position, which placed him into a single person competitive level. Therefore, I conclude that the statutory provision of 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. See *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. __.

In addition, D.C. Official Code § 1-624.08(f) as stated above, specifically states that the size of the competitive area is not subject to review. Based on the foregoing, I must uphold Agency's action of abolishing Employee's position through a RIF.

ORDER

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

FOR THE OFFICE:

Joseph Edward Lim, Esq.
Senior Administrative Judge