THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
APRIL DYSON,	)	OEA Matter No. 2401-0315-10
Employee	)	
	)	
v.	)	Date of Issuance: October 31, 2013
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,	)	
Agency	)	
	)	STEPHANIE N. HARRIS, Esq.
	)	Administrative Judge

April Dyson, Employee *Pro-Se*
Adriane Lord-Sorenson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 4, 2010, April Dyson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Consumer and Regulatory Affairs' ("Agency" or "DCRA") action of abolishing her position through a Reduction-in-Force ("RIF"). Employee's RIF notice was dated May 21, 2010, with an effective date of June 25, 2010. Employee's official position of record, at the time of the instant RIF, was a Risk Management Coordinator. On July 26, 2010, Agency filed an Answer to Employee's Petition for Appeal.

I was assigned this matter on July 10, 2012. On February 1, 2013, the undersigned issued an Order scheduling a Prehearing Conference for February 28, 2013, to assess the status of this matter and to address pending issues requiring further review. On February 7, 2013, the undersigned granted Agency's Consent Motion for Enlargement of Time to File a Prehearing Statement and Consent Motion for Continuance, with the Prehearing Conference being rescheduled for March 21, 2013 ("March 21st PHC"). Both parties were present for the March 21st PHC. A Post Prehearing Conference and Jurisdictional Order was issued to the parties on March 26, 2013. Both parties have submitted their required briefs. Based on the record to date, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

This 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 the instant RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ANALYSIS AND CONCLUSIONS OF LAW

Employee's Position

In her Petition for Appeal, Employee alleges that Agency improperly RIF'd her while she was out on a workers' compensation claim in violation of D.C. Code §1-623.45. Employee has submitted various items of documentation in support of her arguments; however, because there are numerous errors to Employee's citation of these documents within her briefs, the undersigned will only reference the documents as they are found in the record. Additionally, Employee details the following allegations and statements in her Petition for Appeal; Prehearing Statements; Response to Agency's Motion for Summary Disposition; Brief in Response to Jurisdictional Order; and Response to Agency's Answer to Jurisdictional Order.[1]:

1) Employee suffered a work related injury on January 14, 2009. She states that she notified Agency on February 24, 2009 that she was being "placed on workers compensation," and that her claim was accepted by the D.C. Office of Risk Management ("ORM") on August 31, 2009. Subsequently, she states that she began receiving payments from an outside company,

[1] *See* Employee Prehearing Statement (March 11, 2013); Employee Amended Prehearing Statement (March 19, 2013); Employee Response to Agency's Motion for Summary Disposition (March 14, 2013); Employee Post-Prehearing Conference Brief and Response to Jurisdictional Order (May 2, 2013); and Employee Response to Agency's Answer to Jurisdictional Order (May 2, 2013).

Sedgwick, who distributes workers' compensation payments for the District of Columbia.[2] Employee also relays that Agency placed her in a leave without pay status on March 10, 2009.

2) She states that she received her RIF Notice on May 21, 2010. The RIF Notice informed Employee that she would be separated from Agency effective June 25, 2010.
3) On June 3, 2010, Employee sent a letter to Agency, requesting that the instant RIF be rescinded immediately. Employee notes that Agency did not respond to her June 3, 2010 correspondence.
4) Employee alleges that Agency did not RIF her position and instead, she continued in a leave without pay status for two additional years. She claims that the RIF was never enacted on June 26, 2010, because she was still being paid by the District of Columbia. In support of this allegation, she submits pay stub documentation for the date range of June 2009 to February 2013.[3]
5) On July 24, 2012, Employee states that she received a pay stub for her terminal leave, but Agency failed to send Employee a letter informing her that she was being subject to a RIF "again in 2012."[4] She claims that on this same date, she spoke with "[Mr.] Jed Ross, Assistant Director for Administration, [who] informed her not to cash the check since the Employee had not been terminated." Employee provided a copy of an email that she states was sent to Mr. Ross to document this conversation.[5] Employee contends that her RIF was actually effectuated in July 2012 and Agency should have issued her a new letter informing her that her position was being subject to a RIF, and therefore she was not provided with thirty (30) days advance written notice.
6) Employee claims that Agency violated her rights when it issued the RIF Notice in May 2010 in retaliation for her being placed on workers' compensation. She states that D.C. Code §1-623.45 affords her protection from a RIF while on workers' compensation. Employee further claims that Agency's RIF Notice did not address that she was on workers compensation at the time of the instant RIF. She also takes issue with the statement in the RIF Notice that she was being placed on administrative leave and was required to return all of Agency's property because she was already placed in a leave without pay status prior to the RIF.
7) Employee also argues that Agency has demonstrated "a pattern and practice of retaliating because she was on workers' compensation." She provides examples of alleged acts of retaliation,[6] including:
    a. Agency's February 2009 request that she provide them with a copy of her workers' compensation folder, despite no other employee being required to do so;
    b. Employee's February 22, 2009 official complaint of employment discrimination against Director, Linda Argo; Chief of Staff, Carl Washington; and Assistant Director

[2] Employee Amended Prehearing Statement, p. 2 (March 19, 2013).
[3] *Id.*, Exhibit 8.
[4] *Id.*, p. 3; Employee's Prehearing Statement, Exhibit 7 (March 11, 2013).
[5] *Id.*, Exhibit 6.
[6] Employee's Amended Prehearing Statement, pp. 4-5 (March 19, 2013).

of Administration, Mary Bucci. She claims that these individuals retaliated against her for reporting entities that pose a potential risk to Agency and for creating a hostile work environment.[7]

c. Agency's action of providing Employee's job description to ORM in an effort to force her back to work. Employee claims that Agency is "precluded from any discussion" with ORM about an employee on workers compensation to alleviate any appearance of conflict of interest;
d. Agency's refusal to grant Employee access to her government email or phone while on workers compensation status on September 17, 2009 ; and
e. Employee's allegation that after subpoenaing Agency employees for her workers compensation hearing, they "refused to cooperate and claim[ed] they could not remember anything pertaining to Employee."

8) Specifically, Employee alleges that her position was submitted for the instant RIF in May 2010 in retaliation for subpoenaing Agency employees, three months prior.
9) She cites a portion of the undersigned's case, *Marsha Karim v. District of Columbia Public Schools*,[8] stating that "there must be a connection between the filing of a workers' compensation claim and a RIF in cases of retaliation." Employee claims that Agency's June 2010 RIF was a discharge in retaliation for her February 2009 filing of a workers compensation claim. Employee contends that the actions she described as Agency's retaliation show a causal connection between her workers compensation claim and the instant RIF.
10) Employee alleges that Agency backdated her Notification of Personnel Action ("SF-50"). She states that the SF-50 indicates that she was terminated effective October 30, 2009, but the form showed that it was processed on July 5, 2012.[9] Employee states that her SF-50 erroneously lists DPM Chapter 31B as its authority to terminate her, but no such section exists. She also disputes the information on the SF-50 showing that she was terminated by ORM, because she only received one letter from Agency, the May 2010 RIF Notice.
11) She contends that she remained an employee of Agency because she continued on a leave without pay status for more than two years after the instant RIF. Employee submits additional evidence to show that she remained an employee after the instant RIF, including an email she received about failing to take an ethics pledge and the continuation of her dental and life insurance benefits.[10]
12) Employee claims that OEA has jurisdiction over her workers compensation retaliation claims pursuant to D.C. Code § 1-623.01, which governs the Public Sector Workers Compensation Program and grants ORM oversight and administrative responsibility for the workers' compensation program, including rendering and issuing Initial and Eligibility

[7] *Id*., Exhibit 10.
[8] OEA Matter No. 2401-0103-10 (June 15, 2012).
[9] Employee Post-Prehearing Conference Brief and Response to Jurisdictional Order, Exhibit 13 (May 2, 2013).
[10] *Id*., p. 2; Exhibits 16, 18.

Determinations. She states, with citation to no authority, that ORM does not have jurisdiction over retaliation claims or personnel matters.

13) She also notes that during her tenure as a Risk Manager with Agency, she was precluded from speaking to ORM about employees on workers' compensation. Therefore, Employee contends that Agency's admission that it was acting on behalf of ORM in terminating Employee proves her assertions that Agency issued the May 2010 RIF in retaliation for her workers' compensation claim.
14) Employee asserts that she has shown that ORM and Agency acted in concert to retaliate against her for filing a workers' compensation claim. She further asserts that Agency improperly tried to effectuate the June 2010 RIF with the receipt of the July 2012 terminal pay stub.

Agency's Position

Agency asserts that Employee was provided with thirty (30) days notice and because the entire unit containing Employee's position was abolished, the statutory provisions affording her one round of lateral competition were inapplicable.[11] Agency also asserts the following in response to Employee's claims:[12]

1) Agency states that on May 6, 2010, Agency submitted a Request for Approval of a Reduction in Force to the District of Columbia's City Administrator to abolish eleven (11) positions. The reasons given for the RIF were that Agency lacked funding for some of the positions and they were eliminating the Consumer Protection Division within the Business and Professional Licensing Administration.[13]
2) On May 13, 2010, the Director of the DCHR issued Administrative Order No. CR-2010-01, approving Agency's RIF request.[14]
3) Agency explains that pursuant to DCMR §2406.4, it had the authority to conduct the RIF, which was approved by Administrative Order No. CR-2010-01.
4) Agency prepared a Retention Register, which included Employee's tenure of appointment, length of creditable service, veterans preference, and residency preference in compliance with DCMR §2408. Employee was the only Risk Management Coordinator in her competitive level. As a result, Agency asserts that it was not required to rank or rate Employee because she was in a single person competitive level.
5) Agency asserts that Employee was given thirty (30) days written notice, and notes that Employee does not allege that she did not receive the required written notice in her Petition for Appeal.
6) According to D.C. Code §1-623.45, a District agency is expected to provide an employee with his or her original position or equivalent position, if the employee is capable of

[11] *See* Agency Answer (July 26, 2010); Agency Brief (October 5, 2012).
[12] *See* Agency Answer (July 26, 2010); Agency Prehearing Statement (March 11, 2013); Agency Post-Prehearing Conference Brief and Response to Jurisdictional Order (May 10, 2013).
[13] *See* Agency Prehearing Statement; Tab 1 (March 11, 2013).
[14] *Id.*

returning to work within two years from the date that disability benefits begin. Agency asserts that it does not have any medical documentation demonstrating that Employee was fit to return to work within the two year period. Further, Agency contends that as of May 2013, Employee was still receiving workers compensation payments.

7) Additionally, Agency contends that although Employee was receiving workers' compensation for a work-related injury, it was not precluded from conducting a RIF that included Employee. Citing to the undersigned's decision in *Karim*, Agency asserts that D.C. Code §1-623.45 does not exempt an employee from being subject to an agency's RIF or entitle an employee to two years of workers' compensation.

8) Agency notes that D.C. Code §1-623.45 states that an employee resuming work with the District government is entitled to the safeguards in RIF procedures, which encompass the District's regulations and statutes pertaining to RIFs granting an Employee thirty (30) days of written notice and one round of lateral competition.

9) In this case, Agency contends that Employee does not refute the fact that Agency complied with the RIF procedures in Chapter 24 of D.C. Personnel Regulations and provided her with one round of lateral competition and thirty (30) advanced written notice.

10) In response to Employee allegations that her position was never RIF'd because she continued to receive paychecks, Agency explains that it properly RIF'd Employee's position in June 2010, but it was required to maintain Employee on payroll until the two-year workers' compensation window expired and ORM transferred her to their payroll.

11) Further, Agency explains that an SF-50 reflecting the 2009 RIF could not be generated without causing an interruption in Employee's workers' compensation benefits. The District of Columbia Department of Human Resources ("DCHR") generated an SF-50 in October 30, 2009, showing that Employee was in a non-pay status. In order to effectuate a smooth payroll transition, DCHR also changed Employee's position title and organization from Risk Management Coordinator to Workers' Compensation Recipient and ORM-Workers' Compensation, respectively.[15] Agency contends that generating an SF-50 to reflect the instant RIF, would have automatically removed Employee from all payrolls, which would have immediately ceased Employee's workers' compensation benefits.

12) Agency notes that Employee continued on Agency's payroll, albeit receiving checks in the amount of $0.00, while ORM took over payments to Employee for workers' compensation.

13) Agency asserts that the Agency-wide RIF was not conducted in retaliation for being subpoenaed to Employee's OHR hearing, nor was it in retaliation for Employee's workers' compensation claim, and states that Employee's claims are otherwise frivolous.

14) Agency argues that there is no temporal connection between Employee's filing for workers' compensation in February 2009 and the instant RIF, which occurred in June 2010, more than a year after her filing. Agency also notes that it did not have an interest in Employee's OHA hearing, dealing with the calculation of her workers compensation benefits.

[15] *See* Agency Post-Prehearing Conference Brief and Response to Jurisdictional Order, Exhibit 4 (May 10, 2013).

Analysis of RIF Regulations

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. Additionally, D.C Official Code § 1-624.08, the Abolishment Act, applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The Act provides that, "notwithstanding any rights or procedures established by any other provision of this subchapter," which indicates that it supersedes any other RIF regulations.[16] The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[17] Further, "it is well established that the use of such a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[18]

Accordingly, 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.

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[16] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[17] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[18] *Id.; See also Washington Teachers' Union v. District of Columbia Public Schools v. District of Columbia Public Schools* (D.C. 2008) (The Court of Appeals found 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"); *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012) (The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency).

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 she did not receive written notice thirty (30) days prior to the effective date of her separation from service; and/or

2. That she was not afforded one round of lateral competition within her competitive level.

The record shows that the instant RIF was approved by DCHR pursuant to Administrative Order No. CR-2010-01.[19] Pursuant to D.C. Code §1-624.08, employees separated due to a RIF are entitled to one of round of lateral competition within their competitive level. According to 6-B DCMR §§ 2410.2, 2410.4, employees who have the same job title, series, and grade are placed in the same competitive level. A separate Retention Register is created for each competitive level within a competitive area. 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."[20] The Retention Register provided by Agency shows that Employee was the only Risk Management Coordinator in her competitive level.[21] Further, Agency maintains that the statutory provision providing one round of lateral competition was inapplicable because Employee was the only individual in her competitive level.

This Office has consistently held that when an employee *holds the only position in her competitive level* or when an entire competitive level is abolished pursuant to a RIF, D.C. Official Code § 1-624.08(d), which affords Employee one round of lateral competition, as well as the related RIF provisions of 6-B DCMR §2420.3, are both inapplicable (emphasis added).[22] Based on the documents of record, I find that Employee was properly placed into a single-person competitive level. I further find that no further lateral competition efforts were required and that Agency was in compliance with the lateral requirements of the law.

Moreover, the undersigned finds Employee's arguments that she was not RIF'd because she remained on Agency's payrolls wholly unpersuasive. Employee's position was indeed abolished as shown by the approved Administrative Order and the Retention Register for the instant RIF.[23] The record shows that from July 2009 to June 2012, Employee received paystubs from Agency, which showed her in leave without pay status during these pay periods. These paystubs also showed that no payments were made to Employee from Agency during this time period, as the amount listed was zero (0) dollars. However, during this time period, Employee received payments from Sedgwick, who processes workers' compensation payments for the District. Additionally, Employee also

[19] Agency Post Prehearing Conference Brief and Response to Jurisdiction Order, Exhibit 1 (May 10, 2013).
[20] 6-B DCMR §2412.3.
[21] Agency Answer, Tab 2 (July 26, 2010).
[22] *Perkins v. District Department of Transportation*, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of Health*, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment Services*, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005).
[23] Agency Answer, Exhibit 2 (July 26, 2010); Agency Prehearing Statement, Tab 1 (March 11, 2013).

submitted documentation showing that as of February 2013, she was still receiving payments from Sedgwick for workers compensation. Remaining on Agency's payroll is not dispositive evidence to show that Employee was not subject to the instant RIF. The undersigned finds that the only reason that Employee received paystubs in the amount of zero dollars ($0) and payments from Sedgwick is due solely to her workers' compensation claim. Employee's own submissions show that she was not receiving payments or a salary from Agency. The undersigned further agrees with Agency's explanation that the reason that Employee was kept on Agency's payroll was due to her status of receiving workers' compensation.

Regarding Employee's claims that she was not RIF'd and still considered an Employee because she received an email about an ethics pledge and still received dental and life insurance benefits, the undersigned also finds these arguments unpersuasive. The fact that she received an email meant for employees only shows that a clerical error occurred, not that she was still considered an employee from Agency's standpoint. Further, Title 7-1, DCMR §113 permits for employees receiving workers' compensation to continue to receive benefits, including dental and life insurance, with the premiums being deducted from the workers' compensation benefits.

Employee also argues that receipt of a terminal paystub on July 24, 2012 should be considered as Agency's action of conducting an additional RIF on her in 2012. Thus, she argues that Agency was required to issue her a new RIF letter giving her thirty (30) days advance written notice. She also claims that she spoke with a District Official, Mr. Jed Ross, who told her not to cash the terminal check because she had not been terminated by the instant RIF. As the undersigned noted in the Mach 22, 2013 Order, there is only one RIF at issue here, which was effective on June 25, 2010. The issuance of a terminal paystub in July 2012 was a result of Employee receiving payments from her workers' compensation claim. If Employee had not been on leave without pay status from workers' compensation, Employee's RIF would have still occurred and a terminal paystub would have been issued at that time. Furthermore, if Employee believed that the July 2012 terminal paystub resulted in another RIF, she failed to file an appeal with this Office within thirty (30) days. The undersigned finds that the delay in issuing Employee's terminal paystub was solely a result of her workers' compensation status and does not equate to Agency enacting an additional RIF or require the issuance of an additional RIF Notice. I further find that Employee's RIF became effective on June 25, 2010, as detailed in her May 2010 RIF Notice.

Additionally, the email document that Employee submitted in support of her claim that Mr. Ross told her that she was not separated via the instant RIF and not to cash her check is unpersuasive.[24] Employee's email does not verify that Mr. Ross told her not to cash the terminal check because she had not been terminated. The email documentation only recites that Employee spoke with Mr. Ross, but it does not provide details about the conversation and it does not provide any response from Mr. Ross to corroborate Employee's claim. Further, *assuming arguendo* that Employee may have received misinformation from Mr. Ross, she was no longer employed by Agency when she received the terminal paystub.

Further, regarding Employee's SF-50, the undersigned finds Agency's arguments persuasive in this matter. While SF-50's are usually generated to document a change in employment status, in this case the undersigned agrees that it is reasonable that Agency would refrain from issuing an SF-

[24] Employee Prehearing Conference Statement, Exhibit 6 (March 11, 2013).

50 for the instant RIF to prevent disruption of Employee's worker's compensation benefits. Agency explains that DCHR generated an SF-50 in June 2012, showing Employee's placement on leave without pay status by ORM in October 2009.[25] June 2012 is also when Employee received her terminal paystub and this SF-50 further corroborates Agency's contention that under the guidance of DCHR, an SF-50 was not generated for the instant RIF to ensure that Employee would continue to receive workers' compensation benefits.[26] The record also shows that Employee initially stopped receiving workers' compensation benefits in July 2012, which is also the timeframe when the aforementioned SF-50 was generated.[27]

Employee also claims that there was an SF-50 that was backdated to reflect the instant RIF.[28] Similar to the SF-50 submitted by Agency, the SF-50 submitted by Employee shows that it was processed in 2012. Specifically, the SF-50 shows that it was processed on July 5, 2012, which is after Employee received her terminal pay from Agency. Thus, based on the above analysis, I find that Employee's Sf-50 showing a termination was properly processed after she initially stopped receiving workers' compensation benefits. Additionally, although both SF-50's cite to outdated sections of the DPM, these sections may have been in existence at the time of issuance. Therefore, I find this to be harmless error because Agency still possesses authority to separate employees via a RIF pursuant to D.C. Code §1-624.08.

Thirty (30) Days Written Notice

Title 6-B, § 2422 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 2422.1 states that "[a]n employee selected for release from his or her competitive level … shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release." 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.[29] Additionally, D.C. Official Code § 1-624.08(e), which governs RIFs, provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Agency's RIF notice was dated May 21, 2010, with an effective date of June 25, 2010. The RIF notice stated that Employee's position was eliminated as part of a RIF and provided Employee with information about her appeal rights. The record shows that in correspondence dated June 3, 2010, Employee acknowledged receipt of the RIF Notice.[30] She also acknowledged that she received her RIF Notice on May 21, 2010, and filed her Petition for Appeal within thirty days of Agency's RIF action.[31] Further, Employee has not disputed Agency's claim that she received the required thirty (30) days written notice prior to the effective date of the June 2010 RIF. Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

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[25] Agency Post Prehearing Conference Brief and Response to Jurisdiction Order, Exhibit 4 (May 10, 2013).
[26] *Id*.; Employee Prehearing Statement, Exhibit 7 (March 11 2013).
[27] *See* Employee Post-Prehearing Conference Brief and Response to Jurisdictional Order, Exhibit 17- July 22, 2011 ORM Letter (May 2, 2013).
[28] Employee's Response to Jurisdiction Order, Exhibit 13 (May 2, 2013).
[29] *See* 6-B DCMR §2423.
[30] *See* Petition for Appeal (June 4, 2010).
[31] *See* Employees Amended Prehearing Conference Statement, p. 2 (March 19, 2013).

Additionally, 6-B DCMR §2423, which governs the content of a RIF Notice, does not require Agency to specify that Employee was on workers' compensation status.

Workers' Compensation Claims

Employee alleges that Agency violated D.C. Code § 1-623.45 by subjecting her to the instant RIF while she was on an approved workers' compensation claim. The record shows that Employee's workers compensation claim was accepted in August 31, 2009.[32] Initially, Employee contended that she should not have been subjected to the RIF pursuant to D.C. Code §1-623.45. However, this statute describing Public Sector Workers' Compensation Career and Educational Service Retention Rights, does not exempt an employee from being subject to an Agency's RIF. Specifically, § 1-623.45 states that an employee resuming work with the District government is entitled to the "safeguards in reduction-in-force procedures." As noted above, under § 1-624.08, an Employee is entitled to contest before this Office that she did not receive one round of lateral competition and/or that she did not receive proper written notification. Further, I find that Agency complied with District laws and regulations, by providing Employee with the provisions of the RIF regulations found at § 1-624.08.

Regarding, Employee's claim of retaliation for filing a workers' compensation claim, the undersigned notes that pursuant to D.C. Code §1-623.02(a) and Title 7, DCMR Chapter 1, claims involving workers' compensation are generally handled by the Department of Employment Services ("DOES") and appeals with the Office of Hearings and Adjudication. Contrary to Employee's assertions, OEA does not have jurisdiction over workers' compensation retaliation claims. The Court in *Anjuwan v. D.C. Department of Public Works*[33] held that OEA's authority over RIF matters is narrowly prescribed. This Court explained that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied…the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."[34]

Accordingly, issues surrounding workers' compensation retaliation generally do not fall within the purview of OEA's scope of review. However, the undersigned will address Employee's workers' compensation retaliation claims, as they relate to whether Agency properly followed the provisions of D.C. Code 1-624.08 for the instant RIF. Private sector employees may contest a termination alleged to have been in retaliation for workplace injuries sustained or the filing of a workers' compensation claim. Further, there is no legal requirement that exempts a District employee with an approved workers' compensation claim from being subject to a RIF.[35]

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[32] *See* Petition for Appeal (June 4, 2010).
[33] 729 A.2d 883 (December 11, 1998).
[34] *See Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).
[35] *See Lyles v. Dist. Of Columbia Dept. of Employment Services*, 572 A.2d 81, 84 (D.C. 1990) (stating that the retaliatory discharge does not reach and would in fact be trivialized if construed to cover the discharge of an employee who the employer in good faith believes has violated work rules); *St. Clair v. District of Columbia Dept. of Employment Services*, 658 A. 2d 1040 (D.C. 1995) (holding that an employer's motivation for terminating an employee must be employee's pursuit of rights under the workers' compensation statute).

Title 1, DCMR Chapter 7 solely governs public sectors workers' compensation claims. While there are provisions for retaliation under workers' compensation for employees in the private sector found at D.C. Code §32-1542, DCMR Chapter 7 does not provide any provisions for District employees to argue retaliation from workers' compensation claims. Further, although citations from *St. Clair v. District of Columbia Department of Employments Services*[36] and *Horst v. Department of Health and Human Services*[37] have been previously used in OEA decisions to give a general understanding of workers' compensation retaliation, this analysis is not applicable for District Employees. The courts have consistently held that the anti-retaliatory provisions of the D.C. Workers' Compensation Act do not apply to District employees.[38]

Moreover, *assuming arguendo* that the retaliatory provisions were applicable to District employees and retaliatory workers' compensation claims were within OEA's jurisdiction, the undersigned does not find a causal or temporal connection between Employee's filing of a workers' compensation claim and the instant RIF. Employee's workers' compensation claim was filed in February 2009, which was more than a year before the effective date of the instant RIF, June 25, 2010. Apart from Employee's mere allegations that Agency retaliated and was not cooperative after she subpoenaed Agency employees for an OHA hearing, there is no evidence to suggest that Agency received approval and conducted an Agency-wide RIF in retaliation because Employee filed a workers' compensation claim the year before. The mere timing of events is not enough to substantiate a retaliation claim and there is no evidence to show that any other employees on workers' compensation were targeted for RIFs.[39] While Employee has attempted to show a pattern of what she alleges as a pattern of retaliation and discrimination against her, this alone is not enough to substantiate an animus to corroborate workers' compensation retaliation. Employee has failed to show that Agency's RIF was in retaliation for filing a workers' compensation claim.

Discrimination Claims

Employee also alleges that she filed an employment discrimination complaint in February 2009, resulting in one of the actions that contributed to "a pattern and practice of retaliating because she was on workers' compensation." She further alleges that her employment discrimination claim included reporting entities that posed a potential risk to Agency and for creating a hostile work environment.

D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[40] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, as noted above, the Court in

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[36] 658 A.2d 1040 (D.C. 1995).
[37] 173 F.3d 436 (Fed. Cir. 1998).
[38] *See Lewis v. D.C.*, 885 F.Supp. 2d 421, 428 (D.D.C. 2012); *Jones v. Quintana*, 658 F. Supp. 2d 183, 200-01 (D.D.C. 2009); *Heasley v. D.C. Gen. Hosp.*, 180 F.Supp. 2d 158, 172-73 (D.D.C. 2002).
[39] *See St. Clair v. District of Columbia Department of Employment Services*, 658 A.2d 1040, 1043 (D.C. 1995) (holding that some additional evidence beyond the firing, such as evidence of a pattern and practice of discriminating against ***employees*** filing compensation claims) (emphasis added).
[40] D.C. Code §§ 1-2501 *et seq.*

Anjuwan[41] held that OEA's authority over RIF matters is narrowly prescribed and OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied…the rules and regulations issued pursuant thereto." Further, this discrimination claim was made more than one year prior to the instant RIF and other than Employee's mere allegations, there is no creditable evidence in the record to corroborate this claim or to show that the filing of this claim resulted in a pattern of retaliation against Employee or others employed with Agency.

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[42] stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistleblowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[43] Here, Employee's claims, as described in her submissions to this Office do not specifically allege any whistleblowing activities as defined under the Whistleblower Protection Act. Furthermore, this discrimination claim was submitted to an entity outside of OEA. Thus, I find that Employee's claims of discrimination and retaliation fall outside the scope of OEA's jurisdiction.

Lack of Budget Crisis

Employee alleges that the instant RIF was not conducted due to a lack of funds. As noted above, in *Anjuwan*, the D.C. Court of Appeals held that OEA's authority over RIF matters is narrowly prescribed. The Court also ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF…"[44] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds…[or] management decisions about which position should be abolished in implementing the RIF."[45]

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge has any control.[46]

Administrative Leave

Employee also contests Agency's decision to place her on paid administrative leave until the effective date of the RIF because she was already placed in a leave without pay status. The

[41] 729 A.2d 883 (December 11, 1998).
[42] 730 A.2d 164 (May 27, 1999).
[43] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).
[44] *Id*. at 885.
[45] *Id*.
[46] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

RIF Notice provided Employee with information about her appeal rights, as well as informing her that she would be immediately placed on administrative leave. The reason for Employee's leave without pay status was due to her pending workers' compensation claim. Pursuant to 6-B DCMR § 2422.11[47], which states in part that an employee who received written notice of release from her competitive level due to a RIF may be placed on administrative leave at the discretion of the agency head. Accordingly, I find that Agency properly attempted to place Employee on administrative leave.

Grievances

Moreover, 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. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments, including Agency's request that she provide a copy of her workers' compensation folder and return work items; denial of access to her government email and phone; and Agency's discussion with ORM, are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

CONCLUSION

Based on the foregoing, I find that Employee was properly separated via the instant RIF after her entire competitive level was abolished and she was given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

ORDER

It is hereby **ORDERED** that Agency's action of abolishing Employee's position through a Reduction-In-Force is **UPHELD**.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

[47] 55 DCR 12899, 12902 (2008).