THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GREGORY SHORTER,	)	
Employee	)	OEA Matter No. 2401-0286-09
	)	
v.	)	Date of Issuance: October 25, 2011
	)	
DISTRICT DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Clifford Lowery, Union Representative
Melissa Williams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 21, 2009, Gregory Shorter ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District Department of Transportation ("DDOT" or "the Agency") action of abolishing his position through a Reduction-In-Force ("RIF"). According to the Retention Register created in anticipation of the instant RIF, Employee's last position of record with DDOT was Masonry Worker. I was assigned this matter on or around June 6, 2011. A Prehearing Conference was held on June 30, 2011. After considering the parties' respective arguments I determined that no further in-person proceedings were warranted in this matter. I then issued an Order dated July 1, 2011, wherein the parties were required to submit their final legal briefs in this matter. The Agency has complied with this order. To date, Employee has not submitted his final legal brief. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

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

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of the Employee's appeal process with this Office.

DDOT contends that the abolishment of Employee's last position of record pursuant to a RIF was conducted within the bounds of the law. In defending its action before this Office, Agency relies on D.C. Official Code § 1-624.08 §§ (d), (e) and (f). Agency contends that the OEA review of a RIF matter begins and ends with the aforementioned statute and that the OEA lacks authority to examine any other aspects of a RIF.

With respect to D.C. Official Code § 1-624.08 (e), Agency contends that Employee was given 30 days written notice informing him that his position was going to be abolished pursuant to the instant RIF. Included within Agency's Answer at Exhibit 1 is a copy of the aforementioned notice provided to Employee ("RIF Notice"). The RIF Notice was signed by Employee on July 17, 2009. According to the RIF Notice, Employee's position was abolished effective on August 21, 2009.

In accordance with D.C. Official Code § 1-624.08 (d), Agency argues that a District government employee, whose position has been abolished, is generally entitled to one round of lateral competition for positions within their competitive area and level that survive the RIF. Agency submits as evidence the retention register it utilized in effectuating the instant RIF. *See*

Agency's Answer at Exhibit 2. Agency contends that the Employee was properly afforded one round of lateral completion before his position was abolished through the RIF.

I find that in the instant matter, I am guided primarily by D.C. Official Code § 1-624.08, which provides in pertinent part that:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition... which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> (1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
>
> (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

According to the preceding statute, I find that a District of Columbia government employee whose position was abolished pursuant to a RIF may only contest before this Office:

1. That s/he did not receive written notice thirty (30) days prior to the effective date of his/her separation from service; and/or

2. That s/he was not afforded one round of lateral competition within his/her competitive level.

There exists a major discrepancy with respect to the retention register submitted in this matter. According to the retention register there were 11 Masonry Worker positions in the Competitive Area of Department of Transportation – Transportation Operations Administration, Street and Bridge Maintenance (Field Ops Branch) and the Competitive Level of WS-3603-08-03-N. Employee was one of the persons listed on said retention register. According to this register, eight positions were abolished pursuant to the instant RIF. The retention register specifically noted which positions were to be abolished by notating the word "abolish" under the field reserved for each individual employee. However, after reviewing the retention register, the field next to Employee Shorter's name where abolish should be notated is blank. In sum, the Agency explains this discrepancy as follows:

> In many instances, although an employee's position is identified on the retention register as being abolished, it does not automatically follow that the employee was affected by the RIF. Similarly, when an employee's position is not identified on the retention register as being abolished, it does not automatically follow that the employee was not affected by the RIF
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> Agency's Response to Briefing Order on Employee's Petition for Appeal at 3.

Agency's explanation is unsatisfactory. The Agency controlled all of the documentation utilized in effectuating the instant RIF. For the purpose of conducting the instant RIF, it was the Agency that grouped the 11 Masonry Workers together within the same competitive area and level. Based on its explanation, it would seem that DDOT would contend that the documentation generated when it conducts a RIF cannot be implicitly trusted because some other action may occur whereby an employee may be impacted. The only reasonable scenarios that the undersigned can envision where this would occur is when an Employee opts to retire (or resign) before being impacted by the said RIF or the Agency decides not to implement the RIF. In the first instance, the employee is making a conscious choice with respect to his or her career. In the second instance the RIF is not carried out so it does not occur in the first place. In the instant matter, we have a RIF that was implemented, an Employee who was negatively impacted by said RIF, and the Agency arguing that the documentation that it is legally mandated to generate so that the reasoning behind the RIF can be substantiated upon review is allegedly faulty and it further arguing that the undersigned should overlook this inconvenient truth in this matter. This documentation is mandated by D.C. Official Code § 1-624.08 (d). It is by its very nature and purpose required to be a precise and accurate reflection of the information conveyed within. The reasoning why this documentation must be accurate is clear – an employee's job and livelihood is on the line. In order to deprive someone of their livelihood in such a manner they are owed the respect of making sure that the process is clear and accurate. The Agency would seemingly argue that the retention register does not need to be clear and accurate, which is the case in this matter. It further argues that I should overlook that fact in this instance.

The retention register clearly indicates that Employee Shorter's position should have survived the instant RIF. However, the Agency abolished his position in spite of this documentation. It was the Agency that seemingly determined that it could only afford to keep three out of eleven positions going forward. It would seem that DDOT was less than exact with respect to how it constructed its retention register and to how it carried out the instant RIF. Of note, it is the Agency that is utilizing this exact same document to substantiate its conduct with respect to how it implemented the RIF in other matters before the OEA. However, in the instant matter, the Agency would argue that the OEA should overlook the noted discrepancy and uphold its action. Such an error is egregious and cannot be tolerated within the context of an employee seeking reinstatement. I find that DDOT committed an egregious error when it abolished Employee Shorter's position of record.

OEA Rule 629.1, *id*., places the burden of proof in RIF appeals such as the instant matter on the Agency. Further, that burden is by a preponderance of evidence standard, which is defined as "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." It was Agency's burden to show that it conducted the instant RIF in accordance with D.C. Official Code § 1-624.08 (d) and (e). Based on the above findings of fact, I find that the Agency did not meet its burden of proof in this matter. I further find that Employee Shorter was improperly separated pursuant to the instant RIF. I further find that the Agency cannot attempt to ameliorate a RIF action with the explanation that the retention register is not expected to accurately depict the Agency's intended action with respect to a RIF. I find that given the instant facts, to allow such an action to occur would go against the letter and spirit of D.C. Official Code § 1-624.08 (d).

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of abolishing Employee's position through a Reduction-In-Force is **REVERSED**; and

2. The Agency shall reinstate the Employee either to his last position of record or to a comparable position; and

3. The Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and

4. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.
Administrative Judge