

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
Eugene Patrick	)	OEA Matter No. 2401-0050-10
Employee	)	
	)	Date of Issuance: May 4, 2012
v.	)	
	)	Senior Administrative Judge
District Department of Transportation	)	Joseph E. Lim, Esq.
Agency	)	
_____	)	

Clifford Lowery, Employee Representative  
James Fisher, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On October 21, 2009, Employee, an Electronic Mechanic RW 11/5 within the District Department of Transportation (“Agency”), filed a Petition for Appeal with the Office of Employee Appeals (the “Office” or “OEA”), contesting the loss of employment incidental to Agency’s Reduction-in-Force (“RIF”) action. This matter was assigned to me on December 2, 2011. I scheduled a prehearing conference for December 28, 2011, and ordered the parties to submit a prehearing statement. Agency complied, but Employee did not. I then issued a Show Cause Order to Employee to explain why he did not attend the conference and why he failed to submit a statement. To date, Employee has not responded. The record is now closed.

JURISDICTION

Pursuant to *D.C. Official Code* § 1-606.03(a) (2001), the Office has jurisdiction over this matter.

## ISSUE

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

## FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following facts are not subject to genuine dispute:

1. Employee, an Electronic Mechanic RW 11/5, was a Career Service Employee with Agency.
2. On September 30, 2009, Agency issued a notice to Employee informing him that his position would be abolished in a RIF.
3. The RIF was effective as of October 30, 2009, and constituted a notice of at least 30 calendar days prior to the implementation of the RIF.
4. Apart from Employee, there were two other electronic mechanics in his competitive level.
5. All the positions were abolished. (See Agency Answer, Tab 2.)

*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 RIFs. *Section 1-624.02* recites RIF Procedures.

### **§ 1-624.02. Procedures.**

(a) Reduction-in-force procedures shall apply to the Career  
..... [Service] and shall include:

.....

(2) One round of lateral competition limited to positions within the employee's competitive level.

.....

(5) Employee appeal rights.

.....

(d) A reduction-in-force action may not be taken until the employee has been afforded at least 30 days advance notice of such an action.<sup>1</sup> The notification required by this subsection must be in writing and must include information pertaining to the employee's retention standing and appeal

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<sup>1</sup> The only substantive change that occurred in this area was taken in the 1999 OPRAA amendments, which increased the RIF notice period from 15 days to 30 days, to universally align notification time conflicts within D.C. personnel regulation notice provisions of various RIF-related amendments.

rights.

*Section 1-624.08* of Subchapter XXIV pertains to RIFs for the fiscal year ending September 30, 2000, and each subsequent fiscal year. This section states in pertinent part:

(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 pursuant to Chapter 24 of the District of Columbia Personnel Manual, 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.

Therefore, according to the preceding statute, a D.C. Government employee whose position was abolished because of a RIF, may only contest before this Office:

1. That he/she did not receive written notice 30 days notice prior to the effective date of separation from service; and/or
2. That he/she was not afforded one round of lateral competition within the competitive level.

Chapter 24 of the DPM, § 2410.4, 47 D.C. Reg. 2430 (2000), defines “competitive level” as:

[A]ll positions in the competitive area . . . in the same pay system, grade or class, and series which are sufficiently alike in qualification requirements, duties, responsibilities, and

working conditions so that the incumbent in any one (1) position can perform successfully the duties and responsibilities of any other position, 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 his/her 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.*).

As mentioned earlier, Employee was an Electronic Mechanic and his job series was that of RW-2604-11-02-N. According to the record, there were two other employees within Employee’s competitive level. The Administrative Order authorizing the RIF required that all three of the positions within Employee’s competitive level be abolished. Thus, Employee’s position, as well as the other two Electronic Mechanic positions within Employee’s competitive level, was abolished. Even though Employee was entitled to compete for retention, he was limited to competing with only those other employees within his same competitive level. Because all of those positions were abolished, there was no one remaining with whom Employee could compete.

Although Employee never submitted his prehearing statement, his appeal form contained his sole argument wherein he alleged that he had more seniority than the others. Other than this singular statement, Employee has failed to proffer any evidence to prove his claim. Nonetheless, the veracity of this argument is irrelevant since all positions were abolished. Thus, even if he was indeed the most senior employee, his position would not have escaped the RIF.

### **Administrative Judge’s Considerations and Conclusions**

#### *Lateral Competition*

Regarding the “lateral competition” requirement, this Office has consistently held that when a separated employee is the only member of his/her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added by this AJ), “the statutory provision affording [him/her] one round of lateral competition was

inapplicable.” See, e.g., *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), \_\_ D.C. Reg. \_\_ ( ); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005), \_\_ D.C. Reg. \_\_ ( ); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003), \_\_ D.C. Reg. \_\_ ( ). See also *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), \_ D.C. Reg. \_\_ ( ). In the matter at hand, where all the electronic mechanic positions were abolished, after a RIF had been properly structured and the 30-day legal notification properly structured and served, I find that no further lateral competition efforts were required, and conclude that Agency’s action abolishing Employee’s position was done in accordance with applicable law, rule and regulation. Therefore, I further conclude that Agency's action separating Employee from government service pursuant to the RIF must be upheld.

In addition, OEA Rule § 622.3, 46 D.C. Reg. 9313 (1999) provides as follows:

If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant.” Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

The employee was warned in each order that failure to comply could result in sanctions including dismissal. The employee never complied. Employee’s behavior constitutes a failure to prosecute his appeal and that is another sound cause for dismissal.

#### ORDER

This matter having been duly considered, it is hereby ORDERED that Agency’s action of abolishing Employee’s position thru a RIF is UPHeld.

FOR THE OFFICE:

Joseph Lim, Esq.  
Senior Administrative Judge