THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DIANNE HARRIS	)	OEA Matter No. 2401-0051-05
Employee	)	
	)	
v	)	Date of Issuance: April 18, 2006
	)	
DEPARTMENT OF EMPLOYMENT SERVICES	)	Muriel A. Aikens-Arnold Administrative Judge
	)	

David A. Branch, Esq., Employee's Representative
Andrea G. Comentale, Esq., Assistant Attorney General, D.C.

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 16, 2005, Employee, a Hearings and Appeals Examiner, DS-0930-13-03-N, filed a Petition for Appeal from Agency's action to separate her from service effective April 15, 2005 as a result of a reduction-in-force(RIF).[1] Agency was notified by this Office regarding this appeal on

[1] See Agency's Response (at Tab C) filed on 6/20/05. Employee was initially issued a thirty (30) day notice dated 11/01/04 that she would be separated as a result of a reduction-in-force effective 12/10/04. On 4/1/05, Employee was subsequently issued a second notice advising that the previous separation date had been extended in two-week

May 19, 2005 and directed to respond by June 20, 2005. Agency filed its response as directed.

This matter was assigned to this Judge on October 4, 2005. On November 15, 2005, an Order Convening A Prehearing Conference was issued scheduling said conference on December 7, 2005. The parties appeared for said conference during which it became apparent that Employee's contention raised a jurisdiction issue.[2] The parties were then advised that, according to the rules of this Office, Employee has the burden of proof as to issues of jurisdiction.[3] Thereafter, the parties were directed to submit briefs regarding whether this Office has jurisdiction in this matter. Employee's Brief was filed on January 6, 2006; after which Agency filed its Brief on January 25, 2006. Accordingly, the record is closed.

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increments to afford the D.C. Office of Personnel (DCOP) the opportunity to place her in a qualified position; that the last approved extension was until 4/8/05; and that her separation would be effective 4/15/05. That notice cited D.C. Official Code §2-1831.08(f) which "specifies that any hearing officer who is not appointed or is ineligible to be promoted as an Administrative Law Judge shall be reassigned, without reduction in grade or step, to another position within the agency employing that individual, or by the Mayor to another position in another agency." The notice further advised that Agency and DCOP, on behalf of the Mayor, reviewed available positions for which Employee was qualified, without reduction in grade or step; and determined that Agency and the District government had no such positions.

[2]See footnote #1; and Employee's Brief (hereinafter referred to as "EB") at p. 1. Employee contends that, pursuant to D.C. Official Code §2-1831.08(f), Agency was required to reassign her to another position within the agency or to another agency after she was subjected to a RIF. During the prehearing conference, this Judge advised Employee that this Office is *not* authorized to address all aspects of a RIF; and that our jurisdiction is limited by two provisions of Chapter 24 of the D.C. Official Code, §1-624.08 (d) and (e)(2002); ie., whether the employee was afforded one round of lateral competition in his or her competitive level and/or whether the employee was given written notice at least 30 days before the effective date of his or her separation. This Judge next asked Employee's Counsel, *inter alia,* to identify the legal authority that gives this Office jurisdiction to review Agency's non-compliance with D.C. Official Code § 2-1831.08(f) cited by Employee. At that point, Employee's Counsel requested additional time to research the jurisdiction issue.

[3] See OEA Rule 629.2, Burden of Proof, 46 DCR 9317 (1999).

JURISDICTION

As will be discussed below, the Office lacks jurisdiction over this appeal.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

POSITIONS OF THE PARTIES

Employee's Position.

Employee contends that this Office has jurisdiction: 1) " . . . because she is challenging the fact that she was not afforded one round of lateral competition to positions in [her] competitive level as required by D.C. Code Ann. Sec. 1-624.08"; and 2) " . . . over the Agency's failure to adhere to the requirement that she be placed in a position elsewhere at the Agency, or within another Agency under the Mayor's authority, during and after receipt of the notice of the reduction in force."[4]

Agency's Position.

In response to Employee's arguments, Agency contends that this Office lacks jurisdiction to adjudicate this matter and the appeal should be dismissed based on the following: 1) that Employee was granted the requisite 30-day notice and one round of lateral competition; and 2) that "[E]mployee's assertion that OEA has authority to address Agency's alleged non-compliance with D.C. Official Code § 2-1831.08 (f) is without merit or legal authority." Specifically, Agency contends that Employee failed to establish any relationship between the aforesaid provision and the RIF

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[4] See EB at pp. 3-4. Employee did not initially raise either statutory violation under §1-624.08(d) and (e) in her Petition For Appeal. Rather, she stated that she should have been otherwise reassigned under D.C. Official Code § 2-1831.08(f). Nor were the aforesaid sections cited in Employee's prehearing statement.

procedures set forth in Chapter 24 of the District Personnel Manual (DPM).[5]

BURDEN OF PROOF

OEA Rule 629.1, Burden of Proof , 46 DCR 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of evidence. "Preponderance of evidence" shall mean:
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> > 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 629.2, *id.*, states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."

ANALYSIS AND CONCLUSIONS

This Office was established by the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-606.01 *et seq.* (2001) and has only that jurisdiction conferred upon it by law. Specifically, § 1-606.03, Appeal Procedures, states:

> (a) An employee may appeal a final agency decision affecting . . . a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

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[5] See Agency's Reply Brief (hereinafter referred to as "ARB") at pp. 3-5. Agency cited, *inter alia*, the D.C. Official Code § 1-624.08(a)(c)(d)(e) and (f)(2) (2001), under which the DPM regulations were promulgated. Paragraph (a) provides authorization within the agency head's discretion to identify positions for abolishment; paragraph (c) provides that an employee shall be separated without competition or assignment except as provided in that section. Paragraphs d, e, and f will be cited below.

Section 1-624.04, (Reductions-In-Force Appeals), reads as follows:

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 . . .

Section 1-624.08(d) reads as follows:

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, which shall be limited to positions in the employee's competitive level.

Section 1-624.08(e) reads as follows:

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.

Section 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 the 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.

As will be discussed below, Employee's contention regarding the lateral competition requirement is not, under the circumstances herein, a viable argument for jurisdiction in this matter; nor is Employee's contention that this Office has jurisdiction over Agency's failure to adhere to § 2-1831.08(f).

First, relative to Employee's challenge that she was *not* afforded one round of lateral competition to positions in her competitive level, she asserts that she applied for a position within her competitive level as an Administrative Law Judge, in the Office of Workers Compensation (DOES) and that her application was rejected.[6] However, such competition only arises when, for example, employees compete for job retention when various positions within that group (same job title, same series/grade, same or similar duties and responsibilities) are abolished pursuant to a RIF.[7]

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[6] See EB at pp. 2-3 where Employee states that her competitive area was DOES. However, the RIF regulations at DPM § 2409, 50 DCR 10578-10579 (12/12/03) provide exceptions to agencies as single competitive areas. Specifically, §§ 2409.2, 2409.3 and 2409.4 provide an agency the discretion to establish lesser competitive areas within the agency under particular circumstances. See also ARB at p. 2. In its brief, Agency states that Employee was given one round of lateral competition. However, Agency did not identify any position within Employee's competitive level for which she was considered to support that contention. Nevertheless, based on the record herein, there was no such position available.

[7] See Section 2410.4, *id.,* which reads, in part: 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 so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions . . ; Section 2410.5 which reads: The composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions and other factors prescribed in this section and § 2411; and Section 2412.1 which reads: A retention register shall be established by the appropriate personnel office whenever a competing

Thus, in the event of an improper RIF, an employee must show that not all of the positions within a competitive level were abolished and that there was a position therein, to which he or she could be returned.

In any event, if all of the positions within a competitive level were abolished, there would be no position to which the employee could be returned, and thus there would be no relief available to the employee. Such was the circumstance here as all of the Hearings and Appeals Examiner positions identified on the Retention Register were abolished. Hence, there were no such positions for which employees were entitled to laterally compete in this instance.[8] Further, the process of *application* for other positions, within or outside the agency, does *not* constitute lateral competition in accordance with the provisions of Chapter 24 of the RIF regulations.

Second, Employee makes a bare assertion that, pursuant to § 2-1831.08 (f), *id.*, Agency was required to reassign her to another position within the agency or to another agency after she was subjected to the RIF at issue. Employee's argument is *not* supported by current RIF law and governing regulations, and therefore, does not confer additional jurisdictional authority to the undersigned Judge to address this claim. Contrary to Employee's contention, this Office does *not* have the authority to determine broadly whether an agency RIF violates any law.[9] Rather, it is abundantly clear that the jurisdiction of this Office in reviewing RIF appeals is limited to the authority granted by the plain language of the statute, and

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employee is to be released from his or her competitive level.

[8] See EB at pp 1-2; and Agency's initial response at Tab C which contains Agency's 8/26/04 and 10/15/04 memoranda to the Mayor requesting approval to abolish twelve (12) encumbered positions (five of which were identified as Hearings and Appeals Examiners) in the Office of Unemployment Insurance as a result of the transfer of the adjudication function to the Office of Administrative Hearings; and Agency's Retention Register for the Hearings and Appeals Examiner position, on which Employee's name appears with four others, in order of seniority. Seniority is the primary factor utilized when agencies laterally reassign qualified employees who compete for retention in remaining jobs within their competitive levels.

[9] *See Anjuwan v. District of Columbia Department of Public Works,* 729 A.2d 883 (1998).

particularly the provisions of D.C. Official Code § 1-624.08(d) (one round of lateral competition, pursuant to Chapter 24 of the DPM, which shall be limited to positions in the employee's competitive level), and (e) (at least 30 days notice before the effective date of his or her separation).

Based on RIF law and governing regulations, as well as consideration of the parties' respective jurisdictional arguments, this Judge concludes the following: 1) that the statutory provision of D.C. Official Code §1-624.08(d) is inapplicable; and 2) that in a RIF appeal, this Office lacks jurisdiction to address Employee's argument based on D.C. Official Code §2-1831.08(f). Therefore, this matter should be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

Muriel Aikens Arnold

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge