THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ARMETA ROSS,	)	
Employee	)	
	)	OEA Matter No.: 2401-0133-09R11
v.	)	
	)	Date of Issuance: April 8, 2013
OFFICE OF CONTRACTING	)	
AND PROCUREMENT,	)	
Agency	)	SOMMER J. MURPHY, Esq.
	)	Administrative Judge

Wendy Kahn, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On June 18, 2009, Armeta Ross ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Office of Contracting and Procurement's ("Agency" or "OCP") action of abolishing her position through a Reduction-in-Force ("RIF"). Employee worked as a Program Analyst for Agency until 2009 when she was terminated. The effective date of the RIF was May 22, 2009.

In response to Employee's appeal, Agency challenged OEA's jurisdiction over this matter. On February 12, 2010, Administrative Judge ("AJ") Sheryl Sears (retired) issued an Order requiring Employee to submit a brief on the issue of whether the Petition for Appeal should be dismissed for lack of jurisdiction. Employee subsequently requested an extension of time in which to file her brief in an effort to obtain counsel. The AJ denied Employee's request.

On March 15, 2010, Employee, through counsel, filed a Motion for Extension of Time to File Employee's Jurisdictional Statement by One Business Day. Employee's counsel explained that the reason for the request of an extension was based on a three (3) day absence from her office because of poor health. On March 16, 2010, Employee's attorney filed a Jurisdictional Brief, which contained arguments supporting the contention that OEA was the proper venue to adjudicate Employee's appeal. The AJ issued an Initial Decision ("ID") on March 30, 2010, dismissing Employee's appeal on jurisdictional grounds. The ID stated in pertinent part:

> "Although Employee was given the opportunity to make a submission supporting her claim that her appeal presents challenges over which this Office has jurisdiction, she missed the deadline for doing so…Employee failed to meet her burden of proving that his Office has jurisdiction over her appeal. Therefore it must be dismissed

Employee subsequently filed an appeal with the District of Columbia Superior Court on May 6, 2010 contesting OEA's dismissal of her appeal on jurisdictional grounds. The Honorable Judge Cheryl M. Long reversed the ID and held that the AJ abused her discretion in denying a request for a one (1) day continuance for Employee's counsel to file a brief on jurisdiction, as was originally ordered by the AJ.[1] Judge Long remanded this matter back to OEA for further proceedings on the merits of both the jurisdictional issue and the Reduction-in-Force.

This matter was assigned to me on or around June of 2011. On July 11, 2011, I issued an Order scheduling a Status Conference ("SC") on August 1, 2011 for the purpose of assessing the current posture of this matter. I subsequently ordered the parties to submit written briefs addressing whether this Office has jurisdiction over Employee's appeal. Counsel for Employee requested extensions of time in which to file her brief on August 19, 2011 and August 31, 2011. Counsel for Employee also filed a motion to extend the time in which to submit a reply to Agency's jurisdictional brief on September 15, 2011. All of Employee's requests for extensions were granted.

On February 23, 2012, I issued an Order on Jurisdiction, finding that this Office may exercise jurisdiction over Employee's appeal. The Order further required the parties to submit additional briefs addressing whether Agency, in conducting the instant RIF, adequately followed proper District of Columbia statutes, regulations and laws. Both parties submitted briefs in response to the Order. After reviewing the documents of record, I determined that an Evidentiary Hearing was not 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 a RIF was done in accordance with all applicable laws, rules, or regulations.

[1] *Ross v. DC Office of Employee Appeals*, 2010 CA 3142 P (MPA).

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:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

In March of 2009, Agency requested the approval of former D.C. Mayor, Adrian Fenty, to conduct the instant RIF. In its request, Agency stated that the need for a RIF was based on the following reason:

> "The need for the positions being abolished has dwindled. In light of the budgetary constraints, the functions previously performed by the positions will be absorbed by other staff within the affected division. Removing the six (6) positions [from] the organizational structure will also yield a cost savings needed to meet the budget reduction for the agency."[2]

In a March 23, 2009 Administrative Order, Agency was authorized to conduct the instant RIF pursuant to D.C. Official Code § 1-624.01 *et seq*. and Mayor's Order 2008-92.[3] The Order stated that the RIF was necessitated based on a lack of funds. Although a RIF may be implemented under D.C. Official Code § 1-624.02,[4] which encompasses more extensive

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[2] *Agency Brief*, Tab 2 (April 12, 2012). *See also* Administrative Order No. OCP-2009-01 (March 23, 2009). The Order authorized Agency to establish lesser competitive areas in accordance with Chapter 24, Section 2409 of the D.C. Municipal Regulations.

[3] *Id.*

[4] D.C. Code § 1-624.02 states in relevant part that:

> (a) Reduction-in-force procedures shall apply to the Career and Educational Services… and shall include:
>
> (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
>
> (2) One round of lateral competition limited to positions within the employee's competitive level;
>
> (3) Priority reemployment consideration for employees separated;
>
> (4) Consideration of job sharing and reduced hours; and

procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act or the Act") is the more applicable statute to govern the instant RIF.

Section § 1-624.08 states in pertinent the following:

> (a) ***Notwithstanding*** *any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect* for the fiscal year ending September 30, 2000, and *each subsequent fiscal year*, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).
>
> (b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.
>
> (c) ***Notwithstanding*** *any rights or procedures established by any other provision of this subchapter*, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).
>
> (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.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that "the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency."[5] The Court also found that both laws were current and that the government triggers the use of the applicable statute by using "specific language and procedures."[6]

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(5) Employee appeal rights.

[5] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[6] *Id.* at p. 5.

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[7] The Court of Appeals found that the 2004 RIF, conducted for budgetary reasons, triggered the Abolishment Act ("the Act") instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[8] The Court stated 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."[9]

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.[10] 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. The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[11] 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."[12]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[13] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory provision to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

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

2. That he or she was not afforded one round of lateral competition within their competitive level.

Discussion

In June of 2005, Employee was hired as a Program Analyst for the Office of Contracting and Procurement's Office of the Chief of Staff.[14] According to Agency, the Business Operations Unit was a subdivision of the Chief of Staff division.[15] In 2008, the Office of Procurement Integrity and Compliance ("OPIC") was created as a new unit within Agency. According to

[7] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[8] *Id.*
[9] *Id.*
[10] *Id*. at 1125.
[11] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[12] *Id.*
[13] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[14] Agency Post-Status Statement (October 15, 2012). Employee was hired as a DS-343-14 Program Analyst.
[15] *Id*. at Exhibit B (Organizational Chart).

Agency, several employees were subsequently reassigned to OPIC.[16] On March 18, 2008, Employee received a memorandum titled "Official Notification of Reassignment." The memo stated that Employee was being officially reassigned from the Business Operations Unit to OPIC, under the supervision of Esther Scarborough.[17] Under the newly established OPIC, Employee served as a Program Analyst with the same grade, step, and salary that she maintained prior to the reassignment.[18] Employee received notice that her position was being abolished pursuant to the RIF, effective May 22, 2009.

Employee argues the following as grounds for contesting her separation under the RIF:

a. Employee did not properly receive a round of lateral competition as required by D.C. law.

b. D.C. Official Code § 1-624.02 should govern the instant RIF, and not § 1-624.08.

c. Employee was informally reassigned to work for the Office of Procurement Integrity Compliance ("OPIC") in 2007; however, she was not officially reassigned or detailed to a new position with that office. In addition, Employee states that while she performed different duties in her new position, she never received an official personnel action form from Human Resources which reflected the change.[19]

d. Agency discriminated against African American women in conducting the RIF.

e. Employee should have been reassigned based upon her seniority, skill level and accomplishments.

f. Employee's position was not actually abolished because Agency posted vacancy announcements, and subsequently hired new employees after she was terminated under the RIF.

g. Employee has not been contacted by Agency since she was terminated under the RIF in 2009 regarding employment under Agency's Priority Reemployment Program.

Agency maintains that it provided Employee with one round of lateral competition, which resulted in her termination under the RIF. Agency further contends that it properly reassigned Employee to OPIC prior to abolishing her position under the RIF. Agency also

[16] *Id*. at Exhibit C (Declaration of Shirley Lanier).
[17] *Id*. at Exhibit D (Official Notification of Reassignment). The memorandum was signed by Carliss C. Barnett, Human Resource Advisor. See also Agency Organizational Chart, Exhibit E (September 8, 2008).
[18] *See* Agency Post-Status Statement, Exhibit F (October 15, 2012).
[19] Employee contends that her new proposed position would have been a Program Compliance Specialist, *See Declaration of Armeta Ross* (March 15, 2010).

submits that it afforded Employee thirty (30) days of written notice prior to the effective date of her termination.

Here, the RIF notice, dated April 20, 2009, identifies Employee's competitive area as the Office of Procurement Integrity Compliance. Employee's competitive level is further identified as DS-343-14-07-N on the notice.[20] The accompanying Notification of Personnel Action form ("Form 50") reflects that Employee's position of record at the time she was terminated was a Program Analyst, Business Operations in the Office of Contracting and Procurement.[21] The Form 50 generated as a result of the RIF action was processed on May 21, 2009, with an effective date of May 22, 2009.

This Office has consistently held that, when an employee holds the only position in their competitive level, D.C. Official Code § 1-624.08(e), which affords Employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[22] However, after reviewing the documents submitted throughout the course of Employee's appeal, I can find no official Notification of Personnel Action form to reflect Employee's official reassignment to OPIC. Agency simply offers an Official Notification of Reassignment memo and two (2) Form 50s, processed on January 6, 2008 and August 3, 2008 respectively, to support its contention that Employee was officially reassigned to the newly created OPIC. The personnel action forms only indicate, in the "Nature of Action" section, that an "automatic update occurred." There are no corresponding notes in the "Remarks" section on either Form 50 to explain or clarify Agency's actions.[23]

This Office is required to make a determination of an employee's position of record based on an agency's issuance of an official Notification of Personnel Action form. A memorandum to an employee indicating their reassignment to a new position without a corresponding Form 50, is insufficient to support Agency's claim that Employee was officially reassigned to OPIC in this case. Employee's personnel record reflects that her last position of record with agency was a Program Analyst (Business Operations) with the Office of Contracting and Procurement.[24] A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of an employee.[25] This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level." I find that Agency committed a harmful error in this case.

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[20] Agency Answer to Petition for Appeal (August 14, 2009).
[21] The Form 50 was processed on May 21, 2009, with an effective date of May 22, 2009. Employee's position of record on the form reflects a position number of 00036795. The same position number was identified in Agency's Administrative Order No. OCP-2009-01 as being a position identified for abolishment. This AJ notes that Employee's final Form 50 states that Employee's maintained a step 8 pay rate, instead of a step 7 pay rate (as listed on the RIF notice.)
[22] See *Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).
[23] Agency Post-Status Statement, Exhibit F (October 15, 2012).
[24] Official Personnel File, Armeta Ross.
[25] DPM 2405.7, 47 D.C. Reg. 2430 (2000). DPM 2405.7, 47 D.C. Reg. 2430 (2000).

Here, Agency did not properly reassign Employee to a new position prior to the RIF, thus Employee was RIF'd from a position that she did not officially occupy. Agency's March 18, 2008 memorandum should have corresponded with an official personnel action form initiated by the Human Resources department. Accordingly, I find that Agency failed to provide Employee with one round of lateral competition under § 1-624.08.

Notice

Under DPM Section 2422.1, a competing employee selected for release from his or her competitive level is required to receive written notice at least thirty (30) full days before the effective date of the employee's release.

Here, Employee received her RIF notice on April 20, 2009, and the RIF effective date was May 22, 2009. The notice states that Employee's position is being abolished as a result of a RIF. The notice also provides Employee with information about her appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Discrimination

With respect to Employee's claim that she was unfairly targeted for termination based on her race, 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 the 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.[26] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. In *Anjuwan v. D.C. Department of Public Works*, the Court of Appeals held that OEA's authority over RIF matters is narrowly prescribed.[27] The Court held 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." The holding in *Anjwuan* 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." *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

However, the Court of Appeals in *El-Amin v. District of Columbia Dept. of Public Works*[28] noted that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing 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…"[29] Here,

[26] D.C. Code §§ 1-2501 *et seq.*
[27] 729 A.2d 883 (December 11, 1998).
[28] 730 A.2d 164 (May 27, 1999).
[29] *El-Amin* (citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994)_.

Employee's claims as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act. I therefore find that Employee's claims with respect to Agency's alleged acts of race discrimination falls outside the scope of OEA's jurisdiction.

Priority Re-employment

Employee also argues that she was entitled to priority re-employment after being separated under the RIF. Employee explains that she never received any further information from Agency regarding priority re-employment. As discussed above, D.C. Official Code § 1-624.08 and not § 1-624.02 applies to the instant RIF. Section 1-624.08 does not require an agency to engage in priority re-employment procedures. Considering as much, I find that Employee's argument regarding priority re-employment is unsubstantiated. Accordingly, I find that this issue is outside of OEA's purview to adjudicate.

Agency's Post-RIF Activities

Employee alleges that her position was not actually abolished because Agency posted vacancy announcements, and subsequently hired new employees after she was terminated under the RIF.

In *Anjuwan v. D.C. Department of Public Works*, *supra*, the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency's RIF was bona fide. The Court 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.[30] The Court in *Anjuwan* also noted that OEA does not have the "authority to second-guess the mayor's decision about the shortage of funds…about which positions should be abolished in implementing the RIF."

OEA has interpreted the ruling in *Anjwuan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee's claim regarding how an agency elects to use its monetary resources for personnel services. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.[31]

Conclusion

Based on the foregoing, Agency has not meet its burden of proof which requires Employee to be provided with one round of lateral competition, as required by D.C. Code § 1-624.08. While Agency may have informed Employee that she was being reassigned to OPIC via "Official Memorandum," there was no coinciding Notification of Personnel Action form to reflect this change. Because Employee's position of record at the time she was terminated under the RIF was not identified in Agency's authorizing Administrative Order, I find that Employee was improperly terminated. For this reason, Agency's action must be reversed.

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[30] *See Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).
[31] *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010). *See also Wainwright v. DC Public Schools*, OEA Matter No. 2401-0162-10 (May 25, 2012).

ORDER

It is hereby **ORDERED** that:

1. Agency's action of terminating Employee is REVERSED; and

2. Agency shall reinstate Employee to the position of record she occupied prior to the effective date of her termination (or a comparable position).

3. Agency shall immediately reimburse Employee all back-pay and benefits lost from the effective date of her termination; and

4. 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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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE