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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
HAILEMICHAEL SEYOUM,	)	OEA Matter No. 2401-0073-15
DARYAO KHATRI,	)	OEA Matter No. 2401-0074-15
SHARON TERRELL,	)	OEA Matter No. 2401-0084-15
LESLIE RICHARDS,	)	OEA Matter No. 2401-0085-15
Employees	)	
	)	
v.	)	Date of Issuance: November 18, 2016
	)	
UNIVERSITY OF THE DISTRICT	)	
OF COLUMBIA,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
_____	)	
Jonathan Axelrod, Esq., Employee Representative	)	
Anessa Abrams, Esq., Agency Representative	)	
Gary Lieber, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

Hailemichael Seyoum, Daryao Khatri, Sharon Terrell, and Leslie Richards (collectively referred to as “Employees”) filed Petitions for Appeal<sup>1</sup> with the Office of Employee Appeals (“OEA” or “the Office”) contesting the University of the District of Columbia action of abolishing their last positions of record through a Reduction in Force (“RIF”). UDC filed its Answer to Employees Petitions for Appeal. As part of its Answer, UDC submitted a Motion to Dismiss.

According to the documents of record, the last position of record for all of the above referenced Employees was Professor. Employees Seyoum and Khatri were Professors of Physics; Employee Terrell was a Professor of Economics; and Employee Richards was a Professor of Sociology. At all times relevant to Employees herein, the terms and conditions of

<sup>1</sup> Hailemichael Seyoum and Daryao Khatri filed their Petitions for Appeal on May 18, 2015. Sharon Terrell filed her Petition for Appeal on June 6, 2015. Leslie Richards filed her Petition for Appeal on June 8, 2015.

their employment with UDC were governed by a collective bargaining agreement, entitled Sixth Master Agreement, between UDC and Employees Union, the University of the District of Columbia Faculty Association/NEA (“Union”).

These matters were assigned to the Undersigned on October 7, 2015. On October 8, 2015, the Undersigned issued an Order Convening Prehearing Conference. Pursuant to this Order, Prehearing Statements were due on November 5, 2015, and a Prehearing Conference was scheduled for November 19, 2015. The Prehearing Conference was held as scheduled and as a result, the Undersigned noted that an Evidentiary Hearing may be unwarranted. Consequently, the parties were required to submit legal briefs on whether the OEA may exercise jurisdiction over these matters. All parties have submitted their written briefs as ordered. After review, I find that that these matters should be joined pursuant to OEA Rule 611.<sup>2</sup> It provides, in pertinent part, as follows:

611.2 If two (2) or more employees have appeals involving similar or identical issues pending before the Office, the Administrative Judge may join the appeals for adjudication as one (1) action.

611.3 The Administrative Judge may consolidate or join appeals on his or her own motion, or on the motion of a party, if to do so would:

- (a) Expedite processing of the cases; and
- (b) Not adversely affect the interests of the parties.

Consistent with OEA Rule 611.3, I find that joining the above captioned matters will expedite the processing of these matters and will not adversely affect the interest of any of the parties. After reviewing the documents of record, I further find that no further proceedings are necessary. The record is now closed.

### JURISDICTION

As will be explained below, OEA lacks jurisdiction to adjudicate the above captioned matters.

### 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

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<sup>2</sup> 59 DCR 2129 (March 16, 2012).

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.”

### ISSUE

Whether the above captioned matters should be dismissed due to lack of jurisdiction.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSION

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

#### Agency's Position

Collectively, UDC filed numerous documents in support of its Motion to Dismiss for the above referenced Employees. The wordings of the arguments within its separate responses were identical in every meaningful way. UDC notes that on February 18, 2014, the UDC Board approved Resolution No. 2014-06, entitled “Termination of Academic Programs.” Resolution No. 2014-06, dated February 18, 2014. Wherein UDC explained that a number of its academic programs had to be eliminated due to “low internal or external demand, do not produce consistent positive outcomes, are not current, require resources not presently available, or display other indicia of under-performance or lack of relevancy.”<sup>3</sup> In carrying out this resolution, Employees herein were affected and lost their full-time positions through the instant RIF.

UDC asserts that Employees are statutorily precluded from exercising the appeal rights contained in subchapter XXIV of the Comprehensive Merit Personnel Act (“CMPA”). This is the subchapter that authorizes an appeal to OEA concerning reductions-in-force. UDC further notes that the D.C. Court of Appeals has concluded that OEA lacks jurisdiction over an appeal filed by an Educational Service employees of UDC challenging a reduction-in-force.<sup>4</sup> UDC also argues that even if OEA had jurisdiction that this body cannot second guess UDC’s decision to conduct a RIF and that OEA cannot adjudicate the instant matters because Employees have

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<sup>3</sup> See Prehearing Conference Statements for Employees at 2 – 3.

<sup>4</sup> See *Davis v. Univ. of D.C.*, 603 A.2d 849, 851 (D.C. 1992).

failed to allege a cognizable violation of subchapter XXIV of the CMPA.

### Employees Position

Collectively, Employees herein replied to Agency's Motion to Dismiss and I note that the wording of the arguments within their four separate responses were identical in every meaningful way. Employees counter that the labeling of this instant action as a RIF is essentially a sham and was done in an effort to rid itself of Employees herein without having to provide Employees the right of review that would otherwise be available or to continue pay RIFFED employees who (prior to the RIF) earned generous wages. Employees further assert that the use of the term "lack of work" to authorize the instant RIF is disingenuous because they allege that the work that they performed continues on after the RIF, albeit at a lower rate of pay for all since they have accepted post-RIF positions as Adjunct Professors (part-time) in their respective fields of expertise.

### Findings of Fact & Analysis

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, **reduction in force (pursuant to subchapter XXIV of this chapter)**, reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action. (Emphasis Added).

Title 1, Chapter 6, **Subchapter XXIV**, D.C. Official Code § 1-624.04 provides 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. An appeal must be filed no later than 30 calendar days after the effective date of the action. The filing of an appeal shall not serve to delay the effective date of the action. (Emphasis Added).

The above referenced rights conferred by the CMPA may be exercised by aggrieved career and educational service employees of the District of Columbia government. However, the CMPA treats educational employees of UDC differently from other District government employees. D.C. Official Code § 1-602.03 (b) provides in relevant part as follows:

Educational employees of the Board of Trustees of the University of the District of Columbia shall not be governed by the provisions of § 1-609.01 relating to the development of job descriptions in consultation with the Mayor. The Board of Trustees of the University of the District of Columbia shall develop policies on classification, appointment, promotion, retention, and tenure of employees consistent with the educational missions of their respective schools and in accordance with the sound policies and practices of the American Bar Association in the case of the School of Law, and of land-grant universities that meet the standards established by the College and Universities Personnel Association in the case of the University of the District of Columbia. **Additionally, educational employees shall not be covered by subchapters VIII, X, XI (except as it provides for pay setting), XIII, XIII-A, XIX, and XXIV of this chapter.** (Emphasis Added).

Of note, the District of Columbia Court of Appeals has held that Educational employees of UDC are expressly excluded from appealing the loss of their last position of record through a RIF to the OEA.<sup>5</sup> Employees' contend the use of "lack of work" to justify the instant RIF was disingenuous and point to the fact that many of them have continued on at UDC as Adjunct Professors. They further note that the academic programs continue and that there was no true need to conduct a RIF. Agency counters by admitting that many of the programs that were targeted in the RIF are currently ongoing, but explain that when the RIF was effected that there were degree seeking students that were currently matriculating at UDC. Completion of coursework towards a degree program of study takes a number of years and UDC has allowed these programs to continue only for those students that remain. UDC notes that no new students are allowed to pursue a degree in the affected programs. I also note that Employees herein have tacitly admitted that UDC has the authority to conduct a RIF and that under most circumstances, D.C. Official Code § 1-602.03 (b) would preclude OEA review of same. Notwithstanding Employees arguments to the contrary, I find that UDC duly authorized the instant RIF due to a lack of work. Moreover, I further find that Employees herein are unable to pursue their Petitions for Appeal before the OEA because D.C. Official Code § 1-602.03 (b) mandates that these actions are not under the OEA's purview to adjudicate.

### Conclusion

Based on the preceding statutes, case law, and regulations, I find that OEA lacks the

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<sup>5</sup> See *Davis v. Univ. of D.C.*, 603 A.2d 849, 851 (D.C. 1992).

jurisdictional authority to review Petitions for Appeal from Educational employees of the University of the District of Columbia who are removed from service through a RIF that is predicated on a lack of work. Since the OEA lacks the authority to adjudicate the instant appeals, I CONCLUDE that these matters should be dismissed for lack of jurisdiction.<sup>6</sup>

ORDER

Based on the foregoing, it is hereby ORDERED that these matters be DISMISSED for lack of jurisdiction.<sup>7</sup>

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.  
Senior Administrative Judge

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<sup>6</sup> Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”).

<sup>7</sup> Since Employees failed to establish the jurisdiction of this Office in this matter, I am unable to address the factual merits (if any) of any arguments that Employees noted in their Petitions for Appeal.