

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DOROTHY GREER,)	
Employee)	OEA Matter No. 2401-0086-11
)	
v.)	Date of Issuance: August 24, 2012
)	
D.C. DEPARTMENT OF HOUSING)	MONICA DOHNJI, Esq.
& COMMUNITY DEVELOPMENT,)	Administrative Judge
Agency)	
_____)	
Dorothy Greer, Employee <i>Pro Se</i>		
Vonda J. Orders, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 17, 2011, Dorothy Greer (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Housing & Community Development’s (“Agency”) decision to abolish her position through a Reduction-in-Force (“RIF”). The effective date of the RIF was March 14, 2011. On March 21, 2011, OEA notified Agency of Employee’s Petition for Appeal in this matter.

I was assigned this matter on July 30, 2012. Upon review of the case file, the undersigned noticed that Agency’s Answer to Employee’s Petition for Appeal was missing. As such, on July 30, 2012, I issued an Order for Statement of Good Cause to Agency. Agency was ordered to submit a statement of good cause based on its failure to submit an Answer to Employee’s petition for appeal. Agency had until August 13, 2012, to respond. On August 2, 2012, Agency, via e-mail, notified this Office that it had submitted an Answer to Employee’s Petition for Appeal on April 20, 2011. Agency attached a copy of the Answer it submitted on April 20, 2011 to its email. Agency noted in its Answer that Employee was not separated pursuant to a RIF, thus, OEA does not have jurisdiction over Employee’s Petition for Appeal. On August 03, 2012, the Undersigned responded to Agency’s email. Agency was notified via this email to disregard

the Statement of Good Cause Order dated July 30, 2012.¹ Subsequently, I issued an Order requiring Employee to address the jurisdiction issue in this matter. Employee's response to this Order was due on August 16, 2012. On August 21, 2012, Employee submitted a response to the Order. Since this matter could be decided based upon the documents of record, no proceedings were conducted. 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.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. I find that in a RIF, I am guided primarily by D.C. Official Code § 1-624.08, which states in pertinent part that:

(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).

¹ OEA's electronic database has a scanned copy of Agency's Answer dated April 20, 2011.

(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.

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.”² 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.”³

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.”⁴ 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.”⁵ 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.”⁶

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.⁷ The Act provides that, “notwithstanding any rights or procedures established by any other provision of this subchapter,”

² *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

³ *Id.* at p. 5.

⁴ *Id.* at 1132.

⁵ *Id.*

⁶ *Id.*

⁷ *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

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.”⁸ 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.”⁹

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹⁰ 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 she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or
2. That she was not afforded one round of lateral competition within their competitive level.

Employee’s Position

In her petition for appeal, Employee submits that “[a] second Rif notice [was] based on bad faith; misuse of the statutory law.”¹¹ Employee explains that Agency used the “Rif Statute to remove [E]mployee when Agency knew or should have known [E]mployee was not eligible for Rif.”¹² Employee also asserts that Agency failed to provide her with the required thirty (30) days written notice, in accordance with the RIF laws and regulations.¹³

Additionally, in her brief, Employee reiterated her previous arguments, noting several allegations specifically against Theresa Lewis, former acting Rent Administrator, and Attorney Vonda Orders. The crux of Employee’s arguments pertains to her belief that Agency engaged in constant harassment and reprisal in its attempt to RIF her. She further notes that Agency’s actions were retaliatory and discriminatory in nature. Employee also questions the budget crisis rationale for the RIF. While conceding that she was rehired by Agency following the reconstruction of the retention register, Employee also maintains that this matter is not moot and is capable of reoccurring. Employee further asserts that she has met her burden of proof on the jurisdiction issue, and as such asks this Office to award her twenty-five (25) hours pay because Agency rehired her days after the effective date of the RIF.¹⁴

⁸ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

⁹ *Id.*

¹⁰ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

¹¹ Petition for Appeal (March 17, 2011).

¹² *Id.*

¹³ *Id.*

¹⁴ Employee’s Brief (August 21, 2012).

Agency's Position

Agency highlights in its Answer that Employee was not separated pursuant to a RIF; therefore, OEA no longer has jurisdiction to hear Employee's appeal. Agency states the following: "after Employee received the RIF Notice, the Employee submitted information to DCHR establishing that the Employee had additional service time. The Employee's additional service time changed her RIF Service Computation Date to May 24, 1990 and caused her to move up the retention register. Based on the revised retention register, the Employee was not eligible for a reduction in force. Once the Agency and DCHR determined that Employee was not subject to a reduction in force, she was not separated from Agency."¹⁵ Agency further asserts that Employee was informed via mail on March 18, 2011, of Agency's decision to retain her, and she was asked to report to work on March 21, 2011.¹⁶

Agency also highlights in its Answer that Employee was rehired and is still employed by Agency and requested that the matter be dismissed as moot. However, Employee argues that the matter is not moot and is capable of reoccurring. This raised an issue of jurisdiction in this matter. This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1¹⁷, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat 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." This Office has no authority to review issues beyond its jurisdiction.¹⁸ Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.¹⁹ Employee notes in her brief that the RIF effective date in

¹⁵ Agency's Answer (April 20, 2011).

¹⁶ *Id.* at Tab 2.

¹⁷ See also, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

¹⁸ See *Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

¹⁹ See *Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and*

this matter was March 14, 2011, and Employee was notified on March 18, 2011, that she was rehired, approximately four (4) days after the effective date of the RIF. Agency's action of rehiring Employee after the effective date of the RIF is a separate and mutually exclusive occurrence as it pertains to the RIF. As such, I find that Employee has met her burden of proof in this matter and OEA has jurisdiction over Employee's petition for Appeal with regards to the March 14, 2011 RIF.

In instituting the instant RIF, Agency did not meet the procedural requirements listed above. The retention register created by Agency was inaccurate. It listed an incorrect Service Computation Date ("SCD") for Employee, thereby leading to the abolishment of her position. A retention register is used to provide employees with one round of lateral competition, which is a required RIF procedure. The retention register is used to determine Employee's standing in his/her competitive level. Chapter 24 of the D.C. Personnel Manual § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

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, 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 generally the date on which the employee began D.C. Government service. Following the RIF, Employee informed Agency about the error in her SCD, and Agency acknowledged its mistake. DPM 2405.6, 47 D.C. Reg. 2430 (2000) reads as follows:

An action which was found by...the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

Agency admits that it utilized the wrong SCD in determining Employee's standing, and therefore, it reconstructed the retention register and determined that it erroneously abolished Employee's position. Based on her standing in the revised retention register, Agency reinstated Employee to her previous position of record, in a letter dated March 18, 2011. However, because Agency rectified its mistake by rescinding its decision to abolish Employee's position after the

effective date of the RIF, Employee is eligible for back pay for the period of March 14, 2011 (effective date of the RIF), to March 21, 2011 (effective date of Employee's rehire).²⁰

Employee further contends that she did not receive thirty (30) days written notice prior to the effective date of the RIF. According to the RIF notice, Employee was not available to sign the RIF notice on February 11, 2011, as such; it was mailed to her address. Employee submits that she received the letter on February 14, 2011, thereby only receiving twenty-eight (28) days written notice. Because the notice was mailed on February 11, 2011, it can be reasonably assumed that Employee received the RIF notice on February 14, 2011, and the RIF effective date was March 14, 2011. This is less than thirty (30) days notice. Agency's failure to provide Employee with at least thirty (30) days notice is considered procedural error, and thus, calls for a "do-over" or reconstruction of this process as opposed to a retroactive reinstatement of Employee.

A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of an employee. DPM 2405.7, 47 D.C. Reg. 2430 (2000). 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." This is not the case here. Here, Agency's failure to provide Employee with thirty (30) days notice before the RIF effective date does not constitute harmful error.

RIF Rationale

Employee further alleges that the Agency's alleged budget crisis did not exist. In *Anjuwan v. D.C. Department of Public Works*,²¹ the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals 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..."²² The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds... [or] management decisions about which position should be abolished in implementing the RIF."²³

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.²⁴

Discrimination

Employee makes a blanket assertion that the RIF was based on discrimination, and that it was retaliatory in nature. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful

²⁰ See March 14, 2011, Letter to Employee signed by Agency's Interim Director Robert L. Trent.

²¹ 729 A.2d 883 (December 11, 1998).

²² *Id.* at 885.

²³ *Id.*

²⁴ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

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.²⁵ Additionally, District Personnel Manual (“DPM”) § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan* held that OEA’s authority over RIF matters is narrowly prescribed.²⁶ This Court explained 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.” This court 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, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*²⁷ stated 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...”²⁸ In the instant case, Employee noted several times that the RIF was both retaliatory and discriminatory in nature. However, Employee has failed to provide any credible evidence to substantiate her assertions or establish that the RIF was specifically created to target her in retaliation or that it was conducted in a discriminatory manner. Consequently, I find that Employee’s claim falls outside the scope of OEA’s jurisdiction.

Grievances

Employee made several allegations regarding her work interactions with Theresa Lewis and Vonda Orders prior to the RIF. She notes that Agency encouraged the aforementioned individuals and others to engage in constant harassment and reprisal towards her. Employee recounts numerous work related incidents that transpired between her and Theresa Lewis, prior to the RIF I find that complaints of this nature are grievances, and do not fall within the purview of OEA’s scope of review. It is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee’s other ancillary arguments are best characterized as grievances and are outside of OEA’s jurisdiction. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee’s other claims.

²⁵ D.C. Code §§ 1-2501 *et seq.*

²⁶ 729 A.2d 883 (December 11, 1998).

²⁷ 730 A.2d 164 (May 27, 1999).

²⁸ *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

CONCLUSION

Based on the foregoing, I conclude that OEA is precluded from addressing any other issue(s) in this matter. I further find that, Agency's action of abolishing Employee's position was not done in strict accordance with D.C. Official Code § 1-624.08 (d) and (e). However, Agency's actions constituted procedural errors and not harmful error.

ORDER

It is hereby ORDERED that:

1. Agency reimburse Employee two (2) days pay and benefits commensurate with her last position of record for failure to provide Employee with a thirty (30) days notice prior to the effective date of the RIF; and
2. Agency reimburse Employee back pay for the period of March 14, 2011 to March 21, 2011, commensurate with her last position of record, for erroneously abolishing her position through a RIF; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge