THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DERRICK STEWART,	)	OEA Matter Nos. 2401-0110-10
Employee	)	
	)	
v.	)	Date of Issuance: May 15, 2012
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	STEPHANIE N. HARRIS, Esq.
	)	Administrative Judge

Derrick Stewart, Employee *Pro-Se*
Melissa D. Williams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 30, 2009, Derrick Stewart ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Transportation's ("Agency") action of abolishing his position through a Reduction-in-Force ("RIF"). Agency's RIF notice was dated September 30, 2009, with an effective date of October 30, 2009. At the time his position was abolished, Employee's official position of record within the Agency was a Bridge Maintenance Foreman, in Career Service status. On December 9, 2009, Agency filed an Answer to Employee's appeal.

I was assigned this matter on or around February 8, 2012. On February 15, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations ("February 15th Order"). Pursuant to a request for extension of time by Agency, the undersigned extended the submission deadline for both parties in an Order dated March 6, 2012 ("March 6th Order"). Agency was ordered to submit its brief on or before March 16, 2012. Employee was ordered to submit his brief on March 30, 2012. Agency submitted its brief, a copy of its December 9, 2009 Answer, on March 19, 2012.[1] On March 29, 2012, the undersigned issued an Order ("March 29th Order")

[1] Agency submits that its Answer to Employee's Petition for Appeal addresses whether Agency, in conducting the instant RIF, adequately followed proper District of Columbia statutes, regulations, and laws.

granting Employee's request for an extension of time and directing Employee to submit his legal brief on or by April 18, 2012. On April 18, 2012, Employee submitted an unsigned courtesy copy of his brief to the undersigned via email. On April 27, 2012, the undersigned issued an Order ("April 27th Order") notifying Employee that only signed documents would be considered and reiterating the submission procedures detailed in the initial February 15th Order. The April 27th Order directed Employee to submit a signed copy of his brief on or by May 4, 2012 for consideration in the record. Employee timely submitted his signed brief by mail on May 4, 2012. The undersigned is in receipt of briefs by both parties. After reviewing the record, the undersigned has determined that there are no material facts in dispute and therefore an evidentiary hearing is 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 the Petitioners from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

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:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ANALYSIS AND CONCLUSIONS OF LAW

Employee's Position

In his Petition for Appeal, Employee states that he was RIFed "based on retaliation, due to the fact that I filed an EEO Complaint with the Office of the Inspector General on September 24, 2009."[2] Subsequently, in his legal brief, Employee submits that he is not disputing Agency's assertion that it followed proper procedures in the instant RIF.[3] However, Employee questions whether he was actually laid off for budgetary reasons.[4] Employee also notes that he spent twenty-two years working for D.C. government before his "career was derailed for whatever reason."[5] Additionally, Employee states that while his brief may not be "the legal response that could dispute any legitimate actions put in place" making the RIF legal, he would like an opportunity to complete his "career somewhere in the D.C. Government."[6]

Agency's Position

Agency submits that it properly conducted the instant RIF pursuant to Chapter 24 of the District of Columbia Personnel Regulations by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of the instant RIF.[7] Agency maintains that it utilized the proper competitive factors as denoted in 25 DPM § 2408.1 in determining "whether an employee would be entitled to compete with other employees for employment retention."[8] Agency notes that, as evidenced by the Retention Register,[9] Employee's position was completely abolished within the Agency.[10] Agency further denies Employee's allegations regarding discriminatory treatment and notes that OEA does not have jurisdiction to hear such matters.[11]

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:

> (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

[2] Petition for Appeal (October 30, 2009).
[3] Employee's Brief (May 4, 2012).
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] Agency's Answer (December 9, 2009).
[8] *Id*.
[9] Chapter 24 of the D.C. Personnel Manual §2412, requires an agency to establish a Retention register for each competitive level, which documents the final action taken and the effective date f that action, for each employee released from his or her competitive level.
[10] *Id*.
[11] *Id*.

> round of lateral competition... 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.

According to the preceding statute, I find that a District of Columbia government employee whose position was abolished pursuant to a RIF may only contest before this Office:

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

2. That he was not afforded one round of lateral competition within his competitive level.

According to the Retention Registry provided by Agency, Employee was the only Bridge Maintenance Foreman in his competitive level.[12] Further, Agency maintains that while Employee was allowed one round of lateral competition, Employee's position was completely abolished within the Agency. This Office has consistently held that when an employee holds the only position in his competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added), 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 1503.2, are both inapplicable.[13] Based on the documents of record, I find that the entire competitive level in which Employee's position was located was abolished. I further find that no further lateral

[12] *Id*., Exhibit 2.
[13] *Perkins v. District Department of* Transportation, OEA Matter No. 2401-0288-09 (October 24, 2011); *Allen v. Department of* Health, OEA Matter No. 2401-0233-09 (March 25, 2011); *Wigglesworth v. D.C. Department of Employment* Services, OEA Matter No. 2401-0007-05 (June 11, 2008); *Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools,* OEA Matter No. 2401-0193-04 (December 23, 2005).

competition efforts were required and that the Agency was in compliance with the lateral requirements of the law.

Title 5, § 1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "[a]n employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, D.C. Official Code § 1-624.08(e), which governs RIFs, provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Agency's RIF notice was dated September 30, 2009, with an effective date of October 30, 2009. The RIF notice stated that Employee's position was eliminated as part of a RIF and provided Employee with information about his appeal rights. However, the record shows that Employee refused to sign the RIF notice on September 30, 2009.[14] Subsequently, Agency sent the RIF notice to Employee via certified mail on October 6, 2009.[15] Based on the documents of record, I find that Agency properly attempted to notify Employee of the instant RIF on September 30, 2009. Employee's decision to refuse to sign the acknowledgement section of his RIF notice does not nullify Agency's fulfillment of the notice requirements. Thus, I find that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

In regards to Employee's contention that he was RIFed in retaliation for filing an EEO compliant, the undersigned notes that 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.[16] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan v. D.C. Department of Public Works*[17] held that OEA's authority over RIF matters is narrowly prescribed. 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."[18] Thus, I find that Employee's claims of EEO retaliation fall outside the scope of OEA's jurisdiction.

Employee also questions whether the RIF action was taken for budgetary reasons. In *Anjuwan*,[19] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an

[14] Agency's Answer, Exhibit 1 (December 9, 2009).
[15] *Id*., Exhibit 3 (December 9, 2009).
[16] D.C. Code §§ 1-2501 *et seq.*
[17] 729 A.2d 883 (December 11, 1998).
[18] *See Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).
[19] 729 A.2d at 883.

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…"[20] 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."[21]

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 on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[22]

CONCLUSION

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and given thirty (30) days written notice prior to the effective date of the RIF. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08.

ORDER

It is hereby **ORDERED** that Agency's action of abolishing Employees' position through a Reduction-In-Force is **UPHELD**.

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.
Administrative Judge

[20] *Id*. at 885.
[21] *Anjuwan*, 729 A.2d at 885.
[22] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).