THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FELICIA CARMICHAEL	)	
and	)	
MARTHA CLOYD-WASHINGTON,	)	OEA Matter No. 2401-0026-05
Employees	)	2401-0027-05
	)	
	)	Date of Issuance: September 3, 2008
	)	
	)	
D.C. DEPARTMENT OF	)	
EMPLOYMENT SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Felicia Carmichael and Martha Cloyd-Washington ("Employees") worked as Claim Examiners with the D.C. Department of Employment Services ("Agency"). On January 3, 2005, they received notices from Agency advising them that due to a reduction-in-force ("RIF"), their positions would be abolished effective February 11, 2005. On February 14, 2005, both Employees began new positions as Social Services

Representatives with the D.C. Department of Human Services.[1]

However, on March 10, 2005, Employees filed Petitions for Appeal with the Office of Employee Appeals ("OEA"). They alleged that Agency violated the D.C. Personnel Manual; that errors were made when computing their service dates; and that they were RIFed for personal reasons. There was no request for relief made by either Employee in their Petitions for Appeal.[2]

Agency filed its Response to Employees' Petitions for Appeal on May 6, 2005. Agency argued that after reviewing its 2005 budget, it determined that a reduction in personnel was necessary. Therefore, it submitted a request to the Mayor to effectuate a RIF for forty positions; the Mayor approved Agency's request. Agency provided that there were fifteen employees within Employees' competitive levels, and although Employees claim that errors were made when computing their service dates, they offered no proof.[3] It was Agency's belief that Employees offered no persuasive basis for disturbing the RIF actions taken against them. Therefore, it requested that their Petitions for Appeal be dismissed.[4]

On February 23, 2006, the OEA Administrative Judge ("AJ") issued his Initial

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[1] Employees maintained the salaries, benefits, and service time with the Department of Human Services that they had with the Department of Employment Services. *Agency's Response to Employee's Petition for Appeal,* Tab B, page 3 (May 6, 2005).
[2] *Petition for Appeal,* p. 3-5 (March 10, 2005). It should be noted that the AJ provided that requests were made to reinstate Employees to their pre-RIF positions and promote them to DS-12 positions; provide them with back pay and benefits; and provide them with damages for emotional distress. These requests for relief were made during a Pre-hearing Conference. *Initial Decision,* p. 2 (February 23, 2006).
[3] Agency provided the Retention Register listing all fifteen employees within Employees' competitive levels. The service dates and resident preferences are listed for each employee to show how the RIF was decided. *Agency's Response to Employee's Petition for Appeal,* Tab C, p. 6 (May 6, 2005).
[4] *Id.,* Tab B (May 6, 2005).

Decision. He found there to be no credible evidence that there were any improprieties on Agency's part in creating the Retention Register, calculating the service dates, or enforcing the RIF. Moreover, the AJ held that Employees were afforded one round of lateral competition within their competitive level. He also found that Agency provided them with a thirty-day notice that their positions would be abolished. Finally, the AJ found that because both Employees were placed in comparable positions, there was no relief available to them. Therefore, he upheld the RIF action taken against Employees and granted Agency's Motion to Dismiss.[5]

Employees disagreed with the Initial Decision and filed Petitions for Review on February 28, 2006. They argued that OEA's jurisdiction extends beyond determining whether Agency provided a thirty-day written notice and one round of lateral competition to Employees. They also provided that all employees were not listed on the Retention Register and that the AJ should have compelled their discovery request on this issue as provided in *Levitt v. District of Columbia Office of Employee Appeals,* 869 A.2d 364 (D.C. 2005). Additionally, Employees argued that they were subjected to a one-year probationary period and no promotion potential in their new positions with the Department of Human Services. Accordingly, Employees requested a reversal of the AJ's Initial Decision.[6]

In an attempt to clearly define OEA's authority, D.C. Code § 1-624.08(d), (e), and (f) establishes the circumstances under which the OEA may hear RIFs on appeal.

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[5] *Initial Decision,* p. 3-4 (February 23, 2006).
[6] *Petition for Review,* p. 5-7 (February 28, 2006).

> "(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.
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> (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:
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> > (1) An employee may file a complaint contesting a determination or 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."

Contrary to what Employees argued in their Petitions for Review, this Office is only authorized to review RIF cases where an employee claims the Agency did not provide one round of lateral competition, or where an employee was not given a 30-day written notice prior to their separation. Employees do not assert that they failed to receive written notice 30 days prior to the effective RIF date. Furthermore, they do not contend that Agency failed to provide one round of lateral competition. They take issue with the outcome of the competition, claiming that all employees were not included within their competitive level. However, they offered no names of these additional employees.

As for Employees' argument that the AJ should have compelled discovery, OEA Rule 618.7 provides that "discovery matters before the Office are intended to be of a

simplified nature. Discovery procedures shall be established by the Administrative Judge as appropriate under the circumstance. . . ." Therefore, the AJ has discretion to make his own determination regarding discovery requests. However, it is clear from the record that the AJ allowed Employees' request for production of documents. Agency objected to some of the requests, but the AJ found that the documents within the record satisfactorily proved that Agency afforded Employees one round of lateral competition.[7]

Employees also cite to the *Levitt* case to bolster their argument that the AJ should have compelled discovery. The Court in *Levitt* provided that Agency clearly took action *before* it RIFed employee by transferring him to another agency with a newly established position; changing his status from career service to excepted service; and then abolishing the newly established position and terminating Levitt. The Court of Appeals ruled that this was a clear pre-text to the RIF action. It, therefore, remanded the case to OEA and requested that appropriate discovery and a hearing be conducted.

This case is distinguishable from *Levitt* because there is no clear pre-text to imposing the RIF against Employees. In this case, Agency found positions for Employees within another agency. In *Levitt,* there were obvious steps taken to terminate Employee under the guise of a RIF. In the current case, Agency provides clear evidence that it enforced the RIF action against Employees because of its budget cuts. Employees offered no evidence to prove otherwise.

As to Employees' final argument that they were subjected to a one-year probationary period and have no promotion potential in their new positions with the

[7] *Initial Decision,* p. 3-4 (February 23, 2006).

Department of Human Services, these are issues outside the scope of Agency's RIF action and outside of OEA's authority. Issues involving probationary periods and promotion potential are grievances and do not fall under OEA's purview. This Board is charged with determining any wrongdoing on Agency's part in effectuating the RIF action; we have found none. Accordingly, we deny Employees' Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employees' Petitions for Review is **DENIED**.

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.