

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 2401-0036-16
ANISSA NICHOLAS,)	
Employee)	
)	Date of Issuance: March 20, 2017
v.)	
)	
DISTRICT OF COLUMBIA WATER AND)	
SEWER AUTHORITY,)	
Agency)	
_____)	
)	Arien P. Cannon, Esq.
)	Administrative Judge
Barbara B. Hutchinson, Esq., Employee Representative)	
M. Elizabeth Stachura, Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 16, 2016, Anissa Nicholas (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) challenging a Reduction-in-Force (“RIF”) conducted by the District of Columbia Water and Sewer Authority (“Authority” or “WASA”). At the time the RIF was effectuated, Employee held the position of an Office Assistant III.¹ Agency filed its Answer on April 26, 2016. I was assigned this matter on May 4, 2016.

A Prehearing Conference was convened in this matter on September 9, 2016. A Post Prehearing Conference Order was issued on September 12, 2016, which required the parties to submit legal briefs addressing whether Agency followed the proper RIF procedures in accordance with all applicable laws, rules, and regulations. Agency submitted a Motion to Dismiss on October 18, 2016, which also included its arguments supporting its position that the instant RIF was properly effectuated. Employee submitted her brief on November 10, 2016. The record is now closed.

JURISDICTION

Along with its Post Prehearing Brief, Agency submitted a memorandum in support of its Motion to Dismiss for Lack of Jurisdiction. The basis for Agency’s Motion to Dismiss is untimeliness. Agency argues that it issued the RIF notice on January 19, 2016, and Employee

¹ Petition for Appeal (March 16, 2016).

did not file her appeal with this Office until February 23, 2016, thus asserting that the appeal was filed beyond the time line set forth in OEA Rule 604.

Pursuant to OEA Rule 604, 59 DCR 2129 (March 16, 2012) this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A suspension for ten (10) days or more;
- (e) A *reduction-in-force*; or
- (f) A placement on enforced leave for ten (10) days or more.

This appeal must be filed within thirty (30) calendar days of the *effective* date of the appealed agency action.² Here, Agency issued its Final Notice regarding the RIF on January 19, 2016.³ However, Employee's separation from Agency pursuant to the RIF was not *effective* until February 23, 2016. The thirty (30) day timeline for Employee to file her appeal did not begin to run until the effective date of her separation, which occurred on February 23, 2016. Employee filed her appeal with this office on the March 16, 2016. Thus, I find that Employee's appeal was filed within the time frame set forth in OEA Rule 604, and Agency's Motion to Dismiss for Lack of Jurisdiction must be **DENIED**.

Accordingly, I find that this Office has jurisdiction in this matter pursuant to 21 DCMR §§ 5207.23(b) and (c).⁴

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

Agency was established as an independent authority of the District government through enabling legislation codified in D.C. Code § 34-2201.01, *et. seq.* D.C. Water and Sewer Authority Personnel Regulations were issued by its Board of Directors in 21 DCMR § 5201.1, *et. seq.*, including those for Layoffs and Recall (which include RIFs).

Competitive Areas for RIFs are defined in 21 DCMR § 5207.6:

- (a) The Authority is considered a competitive area for purposes of a reduction in force under this section. Lesser competitive areas within the Authority may, however, be established by the General Manager.

² OEA Rule 604.2, 59 DCR 2129 (March 16, 2012)

³ Agency's Post Pre-hearing, Exhibit I. (October 18, 2016).

⁴ See also D.C. Code § 34-2201.01, *et. seq.* as the enabling legislation of the Authority.

- (b) The General Manager may establish lesser competitive areas within the Authority by submitting a written request to the Authority's Board of the Directors that includes all of the following:
1. A description of the proposed competitive area or areas which includes a clearly stated mission statement, the operations, functions, and organizational segments affected;
 2. An organizational chart of the Authority which identifies the proposed competitive areas; and
 3. A justification for the need to establish a lesser competitive area.
- (c) Any lesser competitive area shall be no smaller than a major subdivision of the Authority or an organizational segment that is clearly identifiable and distinguished from others in the Authority in terms of mission, operation, function, and staff.
- (d) The Board of Directors shall publish the competitive area or areas in which the reduction in force will be conducted.
- (e) Employees in one competitive area shall not compete with employees in another competitive area.

The Authority argues that it followed the proper RIF procedures, including all laws, rules, and regulation pertaining to the instant RIF. The procedures for establishing a lesser competitive area are established in 21 DCMR § 5207.6, as set forth above. On March 3, 2005, the Board of Directors adopted a written request by its General Manager to establish the Procurement & Material Management Department as a lesser competitive areas within the Authority pursuant to 21 DCMR § 5207.6(a).⁵ The written request submitted by the General Manager satisfies all of the requirements set forth in 21 DCMR § 5206.6(b): (1) a description of the proposed competitive areas, including a clearly stated mission statement, the operations, functions, and organizational segments affected⁶; (2) an organizational chart of the Authority which identifies the proposed competitive areas⁷; and (3) a justification of the need to establish lesser competitive areas.⁸ In accordance with § 5207.6(d), the Board of Directors published the required notice of the competitive areas in which a RIF would be conducted.⁹

Resolution #05-19 was adopted by the Authority's Board on March 3, 2005, and established the Procurement division as a lesser competitive area within the Authority. The establishment of the Procurement & Material Management Department as a lesser competitive

⁵ Agency's Post Pre-hearing Brief of District of Columbia Water and Sewer Authority and Memorandum in Support of Motion to Dismiss, Exhibits C & D. (October 18, 2016).

⁶ See Exhibit D.

⁷ *Id.*

⁸ See *Id.*, Discussion section.

⁹ Although the requirements of 21 DCMR § 5206.6(b) are submitted as separate exhibits in the Authority's Post-Prehearing Brief (Exhibits D and E), they are attachments to Resolution #05-19 (Exhibit C), as indicated by the language set forth in the Resolution.

area of the Authority remained unchanged at the time the Authority effectuated the RIF on February 23, 2016.

Employee asserts that the Authority publishes the competitive areas for a RIF on an annual basis, and that it failed to do so for fiscal year 2016. Thus, Employee asserts that the entire Authority was the competitive area here for purposes of a RIF under 21 DCMR § 5207.6(a). Furthermore, Employee maintains that the Procurement department, the department in which the Authority maintains Employee was in at the time of the RIF, was not a proper competitive area to consider when carrying out the RIF.

Employee further argues that after the adoption of Resolution #05-19, the Authority did not pass any further resolutions designating departments as a competitive area for purposes of a reduction in force. The Authority does not dispute this assertion. Despite Employee's ostensible argument that the Authority was required to make annual designations of lesser competitive areas, there is no such requirement of the Authority set forth in 21 DCMR § 5207.6. Thus, I find that the lesser competitive areas adopted in Resolution #05-19, including the Procurement & Material Management Department, were the competitive areas subject to a RIF in the instant case.

Additionally, Employee avers that meeting minutes from a January 19, 2011 meeting, indicate that the Board of Directors' Human Resources/Labor Relations Committee declined to adopt lesser competitive areas based upon departments.¹⁰ The meeting minutes show that the Acting Director of Human Resources gave an overview of designating lesser competitive areas within the Authority for purposes of effectuating a RIF. The minutes imply that the Human Resources Director was seeking to "add three Departments to the list of Departments that could be subject to reduction in force (RIF)" (emphasis added). The list of departments provided in Resolution #05-19, which were previously designated as lesser competitive areas subject to a RIF, is apparently the list that the Human Resources Director was seeking to expand. Thus, the notes seemingly suggest that Human Resources Director was seeking to add three additional departments to an already existing list of lesser competitive areas. Both parties assert that Resolution #05-19 was the last time the Authority designated departments as a lesser competitive areas for purposes of a reduction in force. Because the General Manager established lesser competitive areas subject to a RIF in Resolution #05-19, and the Resolution has since remained in effect, I find that the Procurement & Material Management Department was a lesser competitive area still subject to a RIF at the time the instant RIF was effectuated.

21 DCMR § 5207.7, states in pertinent part that:

5207.7(a). The General Manager or Director of Human Resources shall determine the positions which comprise the competitive level in which employees shall compete with each other for retention.

5207.7(b). Assignment to a competitive level shall be based upon the employee's position of record.

¹⁰ Brief on Behalf of Employee, Exhibit 4, p.3. (November 10, 2016).

5207.7(c). An employee's position of record is the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary basis.

Under 21 DCMR §5207.9, a Retention Register is created to establish the positions that compose the competitive level (here, the Procurement & Material Management Department). On January 18, 2016, a Retention Register was created for Employee's position.¹¹ The register identifies Employee as part of Tenure Group I, indicating that she was not serving a probationary period, that there were no other employees in this Tenure Group, nor were there any other Tenure Groups a part of the Retention Register. As a result, there were no other employees against whom Employee could have competed for retention of her position.

Employee further asserts that her position description shows that her position was not limited to a specific department. However, she does not dispute that she was in the Procurement Department at the time of the RIF. Under 21 DCMR § 5207.7(c), an employee's position of record may be the position for which the employee has been temporarily reassigned. Thus, even if the departments in which Employee worked varied, it is undisputed that her position of record was an Office Assistant III in the Procurement Division at the time of the RIF.

Employee received written notice on January 19, 2016, that her position was identified for abolishment and that she would be release through a RIF. In accordance with the notice requirements of 21 DCMR § 5207.19, the Authority satisfied its obligation to provide Employee with thirty days' notice that her release would become effective on February 23, 2016.¹²

Accordingly, I find that Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of separating Employee from service pursuant to a reduction in force is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

¹¹ Agency's Post Pre-hearing, Exhibit F. (October 18, 2016)

¹² *Id.*, Exhibit I.