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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

| | | |
|-----------------------|---|-------------------------------|
| In the Matter of: |) | |
| |) | |
| SHIRLEY BUTLER, |) | |
| Employee |) | OEA Matter No. 2401-0092-09 |
| |) | |
| v. |) | Date of Issuance: May 4, 2010 |
| |) | |
| DEPARTMENT OF HEALTH, |) | |
| Agency |) | ERIC T. ROBINSON, Esq. |
| |) | Administrative Judge |
| |) | |

Jennifer Ku, Esq., and Melinda Holmes, Esq., Employee Representatives
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 2, 2009, Shirley Butler (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Department of Health (“DOH” or “the Agency”) action of abolishing her position through a Reduction-In-Force (“RIF”). At the time her position was abolished, Employee’s official position of record within the Agency was Public Health Technician, DS-0640-06-07-N.

I was assigned this matter on or around October 2, 2009. Thereafter, a prehearing conference was convened in order to assess the parties’ arguments. After considering the parties’ arguments, I decided that an evidentiary hearing was not required. Accordingly, on December 11, 2009, I issued an Order requiring the parties to submit final written briefs in this matter. Since then, both parties have submitted their respective written briefs. 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.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

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

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

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

Employee argues that the OEA's jurisdiction over RIF matters extends to every facet of the construction and implementation of said RIF. Employee goes on to contend that the instant RIF should be set aside because the DOH failed to properly adhere to D.C. Official Code §§ 1-624.02 and 1-624.08. Employee attempts to draw a distinction between these two statutes and the differing operating effect of abolishing a position utilizing one or the other statute.

Employee also argues that the DOH failed to provide her "with assistance and entitlements with regard to placement elsewhere in the Agency and the District government upon the Employee's separation in a RIF". Employee's Final Brief at 6. Such assistance would come under the auspices of the Agency Reemployment Program and the Displaced Employee Program. Both programs are cited in the Code and District Personnel Manual as programs to be implemented for the benefit of employees whose positions were abolished through a RIF.

Lastly, Employee argues that the competitive area of to which she was assigned, Commodity Supplemental Food Program ("CSFP") which is within the Community

Health Administration ("CHA"), was too narrow and that she should have competed for positions within the larger competitive area of the Nutrition and Physical Fitness Bureau ("NPFB"). Employee avers that the abolishment of the CSFP and its duties being assumed by a private contractor necessitated the instant RIF. However, Employee notes that the CSFP was a subset of the NPFB and that Employee should have been allowed to compete with other colleagues within NPFB for positions that survived the instant RIF. *See generally* Employee's Final Brief at 7 – 9. Employee also notes that the retention register created by Agency in furtherance of the instant RIF, notes NPFB as the competitive area.

Agency counters that OEA's authority over RIF matters is limited to an evaluation of whether Agency properly adhered to D.C. Official Code § 1-624.08 (d) and (e) and that the OEA lacks authority to address any other argument when adjudicating a RIF. Agency asserts that it properly complied with this statute in the instant RIF and that any other argument raised by Employee during her appeal process is outside of OEA's purview. Agency also contends that Agency was within its authority to place Employee within the lesser competitive area of CSFP, which is listed in the aforementioned retention register as Employee's competitive area (within the NPFB). I note that Agency asserts that CSFP was a program within CHA.

I disagree with Employee's arguments concerning the breadth and scope of the OEA's authority to review a RIF matter. I find that in a RIF matter that I am guided solely 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 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 she did not receive written notice thirty (30) days prior to the effective date of her separation from service; and/or
2. That she was not afforded one round of lateral competition within her competitive level.

This Office has consistently held that when a separated employee is the only member of his/her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added by this AJ), “the statutory provision affording [him/her] one round of lateral competition was inapplicable.” *See, e.g., Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), __ D.C. Reg. __ (); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005), __ D.C. Reg. __ (); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003), __ D.C. Reg. __ (). *See also Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), __ D.C. Reg. ().

I find that Agency was within its right to classify Employee’s position within the CSFP as opposed to the larger NPFB. Both parties agree that the instant RIF was effectuated so that the entire CSFP could be abolished and its mission and responsibilities transferred to a private contractor. Although, I note that the parties disagree on whether this would in fact result in DOH realizing a cost saving. I further find that given the instant circumstances, it is outside of my authority to decide whether the cost savings alleged by DOH in order to justify the instant RIF were actually realized by the Agency. I further find that the entire unit in which Employee’s position was located was abolished, after a RIF had been properly structured and a timely 30-day legal notification was properly served.

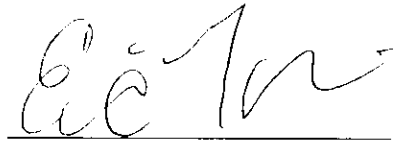
According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), the OEA’s authority over RIF matters is narrowly prescribed. The Court explained that the OEA does not have jurisdiction to determine whether the RIF at the Agency was bona fide or violated any law, other than the RIF regulations themselves. Further, 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, the OEA no longer has jurisdiction over grievance appeals. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee’s other ancillary arguments are best characterized as grievances and outside of the OEA’s jurisdiction to adjudicate. That is not say that Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee’s other claims. Based on the foregoing, I find that the Agency’s action of abolishing Employee’s position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that any other

issue(s) are outside of my authority to review in the instant matter.

ORDER

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

FOR THE OFFICE:



ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE

NOTICE OF APPEAL RIGHTS

This is an initial decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a **petition for review** with the Office. A **petition for review** must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the initial decision in this case.

All petitions for review must set forth objections to the initial decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;
2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation or policy;
3. The findings of the presiding official are not based on substantial evidence; or
4. The initial decision did not address all the issues of law and fact properly raised in the appeal.

All petitions for review should be supported by references to applicable laws or regulations and make specific reference to the record. The petition for review, containing a certificate of service, must be filed with the Administrative Assistant, D.C. Office of Employee Appeals, 717- 14th Street, N.W., 3rd Floor, Washington, D.C. 20006. Four (4) copies of the petition for review must be filed.

Parties wishing to respond to a petition for review must file their response not later than thirty-five (35) calendar days, including holidays and weekends, after the filing of the petition for review.

Instead of filing a petition for review with the Office, either party may file a **petition for review** in the Superior Court of the District of Columbia within 30 days after service of formal notice of the final decision to be reviewed or within 30 days after the decision to be reviewed becomes a final decision under applicable statute or agency rules, whichever is later. To file a petition for review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

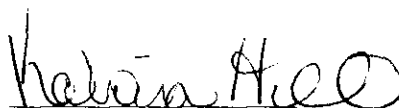
CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail this day to:

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Katrina Hill
Clerk

May 4, 2010
Date