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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
CAROLYN KING,	)	
Employee	)	OEA Matter No. 2401-0068-11
	)	
v.	)	Date of Issuance: October 19, 2012
	)	
DEPARTMENT OF INSURANCE	)	
SECURITIES AND BANKING,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
_____	)	
Stephen White, Employee Representative	)	
Rhonda Blackshear, Esq., Agency Representative	)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 17, 2011, Carolyn King (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Department of Insurance Securities and Banking’s (“Agency” or “DISB”) action of abolishing her position through a Reduction-In-Force (“RIF”). The effective date of the RIF was January 21, 2011. At the time her position was abolished, Employee’s official position of record was a Senior Insurance Operations Specialist. On March 23, 2011, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was assigned to me on July 30, 2012. Subsequently, I issued an Order wherein, I required the parties to submit briefs addressing the issue of whether the RIF was properly conducted in this matter. Agency submitted a timely brief, but Employee did not. Thereafter, on August 31, 2012, I issued an Order for Statement of Good Cause. Employee was ordered to submit a statement of good cause based on her failure to submit her brief. On September 12, 2012, Employee submitted a response to the August 31, 2012, Order, requesting additional time to submit her brief. Employee’s request was granted in an email dated September 14, 2012. On September 26, 2012, Employee submitted her brief in this matter. After considering the parties’ arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. And 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).*
- (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.”<sup>1</sup> 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.”<sup>2</sup>

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.”*<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup>

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.<sup>6</sup> The Act provides that, “notwithstanding any rights or procedures established by any other provision of this subchapter,” 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.”<sup>7</sup> 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.”<sup>8</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>9</sup> Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision to

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<sup>1</sup> *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>2</sup> *Id.* at p. 5.

<sup>3</sup> *Id.* at 1132.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

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 her separation from service; and/or
2. That she was not afforded one round of lateral competition within her competitive level.

### ***Employee's Position***

In her submissions to this Office, Employee submits the following:

1. She was never provided a reason why she was not retained above lower standing employees as mandated by the DC Personnel Regulations, Chapter 24, Section 2423.1:<sup>10</sup>
2. She was not allowed to compete for employment as stipulated in Section 2410.4 of the DC Personnel Regulations;
3. She was never offered a vacant position as per Section 2405.2 of the DC Personnel Regulations;
4. Agency failed to fill vacant positions in accordance with Section 2403.2(b) of the DC Personnel Regulations;
5. Employee's seniority was never considered because she was terminated, while two Insurance Operations Specialist with two (2) years of service were retained and she was not allowed to compete for a grade 13 position that was available at the time of the RIF, in the Forms Analyst Division of Agency;
6. Agency listed a vacant position as Non-Union in a deliberate attempt to deter her from applying for the job prior to the RIF and Agency filled vacant positions despite of a hiring freeze effective October 1, 2010; and
7. Agency's cited reasons for the RIF (Insufficient Funds & Lack of Work) are invalid. In support of this assertion, Employee provides a detail explanation of Agency's funding and her work load.

Employee further notes that Agency's action of terminating her is harmful error, as but for the combined gross errors committed by Agency, she would not have been RIFed. Employee also highlights that, all the employees affected by the RIF were African Americans, forty (40) years of age or older.<sup>11</sup>

### ***Agency's Position***

Agency submits that it conducted the RIF in accordance with the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of his separation. Agency notes that there were two (2) employees who qualified for the Retention Register at Employee's competitive level, and both employees were subject to the RIF. Agency further notes that because both positions were eliminated, the statutory provision according

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<sup>10</sup> Employee's Brief (September 26, 2012); *See also* Petition for Appeal (February 17, 2011).

<sup>11</sup> *Id.*

Employee one round of lateral competition is inapplicable. As such, Agency requests that this Office uphold the RIF in this matter and grant a summary disposition of this matter.<sup>12</sup>

### ***Round of Lateral Competition***

Employee asserts that her competitive level was too narrow. She also notes that Agency never gave her the opportunity to compete for employment as specified in section 2410.4 of the DC Personnel Regulations. Chapter 24 of the D.C. Personnel Manual (“DPM”) § 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.

In this matter, the December 6, 2010, Request for Approval of RIF, which was approved December 13, 2010, listed Employee’s competitive area as Agency-wide in compliance with §2409.1.<sup>13</sup> Pursuant to the DPM § 2410 above, Agency was authorized to establish the competitive level, based on the employee’s title of record, and other relevant factors. Employee’s position of record was Senior Insurance Operations Specialist. Further, according to the Retention Register, Employee’s competitive level was DS-0301-13-18-N. According to the record, Employee was one (1) of two (2) employees with the same job title, grade, classification series, and sufficiently alike in qualification in this competitive area. As such, Employee was entitled to compete with the other employee within her competitive level.

Employee also contests that she was not afforded one round of lateral competition since she was not able to compete with other employees. Employee also submits that she was never provided a reason why she was not retained above lower standing employees. Employee explains that her seniority was never considered as she was terminated while two (2) Insurance Operations Specialists with two (2) years of service were retained. Agency explains that Employee was not entitled to one round of lateral competition since the entire competitive level within the competitive area was eliminated. 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. Here, the two (2) Insurance Operations Specialists whom Employee alleged were retained were not within Employee’s competitive level. They had a different job title than Employee. There was only one (1) other employee with the same job title as Employee and this employee was within Employee’s competitive level and as such, Employee was entitled to compete with the other employee in one

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<sup>12</sup> Agency’s Brief (August 10, 2012).

<sup>13</sup> Agency’s Answer Tab 4 (March 24, 2011).

round of lateral competition. The record shows that all positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.<sup>14</sup>

Employee argues that she was never offered a vacant position, and that Agency failed to fill vacant positions in violation of DPM § 2403.2(b) and § 2405.2. Employee notes that Agency had vacant positions when the RIF was conducted. Pursuant to DPM § 2403.2(b), "[a]n agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency. Examples of such actions are the following: Filling vacancies with temporary employees to perform essential work, or contracting out such work, until the reduction in force takes place." (Emphasis added). Additionally, DPM § 2405.2 provides that, "[p]ersonnel authorities and agencies *may*, in order to minimize the adverse impact of a reduction in force, offer a released employee a vacant position for which he or she qualifies." (Emphasis added). These statutes give Agency the discretion to offer employees affected by RIF vacant positions if available. Accordingly, I find that Agency had the discretion to offer Employee and any other employees affected by the RIF vacant positions when implementing the instant RIF. While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. I, therefore, find that Agency did not abuse its discretion in not offering Employee a vacant position or filling the vacant positions available at the time of the RIF. As such, I further find that Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

### ***Thirty (30) Days Written Notice***

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 "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, the 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). Here, Employee received her RIF notice on December 17, 2010, and the RIF effective date was January 21, 2011. The notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provides Employee with information about her appeal rights. Moreover, Employee does not contest that she received the required thirty (30) days notice. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

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<sup>14</sup> See *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).

### ***RIF Rationale***

Employee also contends that Agency's cited reasons for the RIF (Insufficient Funds & Lack of Work) are invalid. In support of this contention, Employee provides a detailed explanation of Agency's funding and her work load. This Office has consistently held that, how Agency elects to spend its funds on personnel services or how Agency elects to reorganize internally is a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.<sup>15</sup> Additionally, in *Anjuwan v. D.C. Department of Public Works*,<sup>16</sup> 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..."<sup>17</sup> 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."<sup>18</sup> 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.

### ***Discrimination***

Employee further submits that only African Americans aged forty (40) or older were affected by the RIF. 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.<sup>19</sup> Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to the OHR. Moreover, the Court in *Anjuwan* 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."<sup>20</sup>

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*<sup>21</sup> 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..."<sup>22</sup> In the instant case, Employee simply alleges that only African Americans aged forty (40) or older were affected by

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<sup>15</sup> *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

<sup>16</sup> 729 A.2d 883 (December 11, 1998).

<sup>17</sup> *Id.* at 885.

<sup>18</sup> *Id.*

<sup>19</sup> D.C. Code §§ 1-2501 *et seq.*

<sup>20</sup> *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

<sup>21</sup> 730 A.2d 164 (May 27, 1999).

<sup>22</sup> *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

the RIF. Employee has not offered any credible evidence in support of her above-referenced assertion. Moreover, Employee's claim as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature. Consequently, I find that Employee's claims are unsubstantiated and as such, fall outside the scope of OEA's jurisdiction.

### ***Grievances***

Employee also submits that Agency listed a vacant position as 'Non-Union' in a deliberate attempt to deter her from applying for the job prior to the RIF. Employee further notes that Agency allowed the new employee hired to this position in February 2011 to be admitted into the Union. Employee also notes that, Agency filled vacant positions despite of a hiring freeze effective October 1, 2010. Complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.<sup>23</sup> 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, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. 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.

Based on the foregoing, I conclude that 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 OEA is precluded from addressing any other issue(s) in this matter.

### **ORDER**

It is hereby ORDERED that Agency's action of separating Employee pursuant to a RIF is UPHELD.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Administrative Judge

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<sup>23</sup> *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).