THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WILLIAM BARNETTE,	)	OEA Matter No. 2401-0332-10
Employee	)	
	)	
v.	)	Date of Issuance: June 9, 2015
	)	
DEPARTMENT OF GENERAL SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

William Barnette ("Employee") was a Facilities Operations Manager with the Department of General Services ("Agency"). On May 11, 2010, Agency issued a notice to Employee informing him that he was being separated from his position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was June 13, 2010.[1]

Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 13, 2010. He argued that Agency did not properly conduct the RIF. Employee reasoned that he had more years of service than the other senior managers. He also provided that when Agency was established, he was the only manager who was not

[1] *Petition for Appeal,* p. 6 (July 13, 2010).

converted to the District's Scale.[2]

In its response to Employee's Petition for Appeal, Agency explained that a budgetary crisis forced it to abolish twenty-three positions.[3] It explained that it followed the RIF regulations, as defined in Chapter 24 of the District Personnel Manual ("DPM") and the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"). Accordingly, it provided Employee with one round of lateral competition and a written, thirty-day notice prior to his separation date.[4] Hence, Agency believed that Employee failed to state a claim for which relief could be granted and requested that his appeal be dismissed with prejudice.[5]

After the matter was assigned to the OEA Administrative Judge ("AJ"), she ordered the parties to submit legal briefs addressing whether Employee was provided one round of lateral competition and the proper notice prior to his separation date.[6] Agency's brief reiterated that the RIF was properly implemented.[7] Employee's brief provided that Agency failed to submit complete discovery responses.[8] In response to Employee's assertion, Agency provided that Employee's discovery requests were irrelevant, unduly burdensome, and outside of OEA's jurisdiction. Agency opined that it provided Employee the necessary documents for OEA to adjudicate the matter.[9] Agency was subsequently ordered to file supplemental discovery responses, and Employee was ordered to submit a brief following Agency's submission.[10]

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[2] *Id.* at 3.
[3] *Agency's Answer,* p. 1 (August 18, 2010).
[4] Agency provided that Employee occupied the only position within his competitive level.
[5] *Id.*
[6] *Order Requesting Briefs* (August 10, 2012).
[7] *Agency's Statement* (August 27, 2012).
[8] *Petitioner's Post Status Conference Brief* (February 8, 2013).
[9] *The District of Columbia's Post Status Conference Statement* (March 20, 2013).
[10] *Order Addressing Petitioner's Motion to Compel Discovery* (September 10, 2013). Thereafter, Employee filed a Motion for Summary Disposition arguing that Agency failed to submit his Official Personnel File. He requested that OEA reverse Agency's action for its failure to submit the file and reinstate him to his position with back-pay, benefits, and attorney fees. *Petitioner's Motion for Summary Disposition.* (October 17, 2013). Employee's motion was denied; however, Agency was ordered to submit the personnel file by November 8, 2013. *Order Denying Employee's Motion for Summary Disposition* (October 21, 2013). The AJ also denied Employee's motion for

Employee subsequently submitted a brief on December 16, 2013. He argued that Agency failed to establish a lesser competitive area and competitive level; failed to support its assertion that Maintenance was the competitive area; violated DPM § 2409; failed to provide an advanced thirty-day notice;[11] failed to provide an Standard Form 52; and lacked the authority from the Mayor to authorize the RIF.[12] In response, Agency provided that because it is an independent agency, it did not need the Mayor's authority to conduct the RIF. Furthermore, it argued that OEA did not have jurisdiction over Employee's argument that its competitive area was not properly determined.[13] Moreover, Agency stated that even if Employee was placed in a larger competitive area, his position still would have been abolished.[14]

The Initial Decision was issued on January 31, 2014. The AJ found that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF. As a result, she ruled that § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of his separation, and if Agency provided one round of lateral competition within his competitive level. The AJ found that Employee was placed in the correct competitive area and competitive level.[15] However, because Employee was the sole

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reconsideration of his discovery requests.

[11] Employee reasoned that a second RIF notice was issued, but he did not receive a copy of the notice.

[12] *Petitioner William Barnette's Brief,* p. 5-16 (December 16, 2013).

[13] Agency provided that *assuming arguendo* that OEA did have jurisdiction over this argument, its decision to establish a lesser competitive area should not be bothered because it properly determined that Maintenance was the competitive area.

[14] Agency reasoned that there were two other Operations Managers, but they worked in the Operations division with dissimilar duties. Agency explained that the employees were also on a different pay grade. In addition, it provided that the employees within the same grade as Employee could not compete with him because their positions were located in different divisions, and they had different responsibilities. *Respondent Department of General Services' Brief,* p. 3-13 (January 10, 2014).

Thereafter, Employee submitted a reply brief that reiterated arguments provided in his December 16, 2013 brief. He asserted that OEA had jurisdiction to determine whether the retention register was properly established. He also provided that Agency was not exempt from adhering to the requirements of Chapter 24 of the DPM. *Petitioner William Barnette's Reply Brief* (January 23, 2014).

[15] First, the AJ determined that Agency's retention register was properly created in accordance with DPM §§ 2412.2 and 2412.3. She further found that Employee's competitive level was based on his position of record, and ". . . the fact that there may have been other Facilities Operations Manager positions within Agency [did] not mean that these

person within his competitive level, the AJ concluded that the rules pertaining to one round of lateral competition were inapplicable in this matter.

With regard to Employee's assertion that he should have received thirty days' notice from the date of the alleged second RIF notice, the AJ disagreed. She explained that neither Agency nor Employee produced a hard copy of the alleged second notice, and without a hard copy, there was no way to determine whether the document was in fact a RIF notice. As a result, the AJ found that Agency did not issue a second RIF notice and concluded that the May 11, 2010 notice provided Employee thirty days' notice. Accordingly, she ruled that the RIF action was proper and upheld Agency's decision.[16]

Employee filed a Petition for Review with the OEA Board on March 7, 2014. He argues that the Initial Decision was based on an erroneous interpretation of the CMPA and the DPM; the AJ's findings were not based on substantial evidence; and the Initial Decision ignored material issues. Employee asserts that Agency's personnel authority was not intended to apply to RIFs.[17] He reiterates that Agency did not properly prepare the retention register; it did not properly establish the competitive area; he did not receive one round of lateral competition; Agency did not properly establish a lesser competitive level; and although Agency issued two RIF notices, he did not receive proper notice for the second one.[18] Therefore, Employee requests that the OEA

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employees should have competed in the same level." She addressed Employee's contention that Agency needed a mayoral approval to effectuate the RIF, and she found that pursuant to D.C. Official Code § 38-451(b), Agency had independent personnel authority and did not need the Mayor's approval. The AJ held that because Agency was the approving personnel authority, it could establish a lesser competitive areas pursuant to DPM § 2409.4. *Initial Decision*, p. 7-9 (January 31, 2014).

[16] As for Employee's argument that Agency did not provide a basis for its determination that there were excess positions, the AJ found that Agency provided sufficient reasoning for its decision to conduct the RIF. With regard to Employee's argument that Agency was required to provide an SF-52, the AJ found that Employee failed to explain how this requirement related to whether he received one round of lateral competition or a thirty-day notice. Lastly, the AJ held that Employee's arguments related to whether Agency converted him to the District's pay scale were not within OEA's jurisdiction. *Id.*, 9-12.

[17] Furthermore, Employee contends that although Agency was granted authority to establish a personnel system, it did not do so, and therefore, the CMPA applies to its employees.

[18] Employee states that the Initial Decision erred in determining that Maintenance was the lesser competitive area.

Board reverse the Initial Decision; reinstate him with back pay and benefits; and provide an award of nineteen days' pay for Agency's failure to provide the proper notice.[19]

Agency filed an Answer to the Petition for Review on April 11, 2014. It opines that the Initial Decision was supported by substantial evidence. Agency asserts that in accordance with D.C. Official Code § 1-624.08, Employee received one round of lateral competition and a written thirty days' notice. It argues that a June 8, 2010 letter merely revised and corrected Employee's severance pay; however, it was not a second RIF notice. Lastly, Agency reiterates that it did not need Mayoral approval to conduct the RIF, and it properly established the competitive area and competitive level.[20] Accordingly, Agency requests that the Petition for Review be denied.[21]

RIF Statute

OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

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

> (d) An employee affected by the abolishment of a position

He explains that if Agency wanted to establish Maintenance as the lesser competitive area, it needed to follow the rules of DPM § 2409.3. He asserts that other than Agency's organization chart, the record lacked evidence to prove that Agency properly established a lesser competitive area.

[19] *Petition for Review*, p. 11-27 (March 7, 2014).

[20] Agency notes that there were no other Facilities Operations Managers in the Maintenance competitive area. Therefore, Employee was the only employee in his competitive area.

[21] *Respondent Department of General Services' Answer to Petition for Review* (April 11, 2014).

> 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:
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> > (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.

As a result of the above-referenced statutes, this Office is authorized to review RIF cases where an employee claims an agency did not provide one round of lateral competition or where an employee was not given a thirty-day written notice prior to their separation. The plain language of the statute is also made evident in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998). In that matter, the D.C. Court of Appeals held that OEA's authority regarding RIF matters is narrowly prescribed, and it may not determine whether the RIF was bona fide or violated any law, other than the RIF regulations.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[22] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987),

[22]*Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

Mayoral Approval for RIF Action

Employee argues on Petition for Review that Agency was required to seek the Mayor's approval before imposing the RIF action. However, it is clear from the record that Agency had independent authority over personnel matters during the time of Employee's RIF action. During the course of litigation, the Office of Public Education Facilities Modernization was one of several agencies merged into the Department of General Services. The Office of Public Education Facilities Modernization was established on June 12, 2007. It remained in existence until September 14, 2011. Therefore, at the time of Employee's appeal, filed on July 13, 2010, the statutory language pertaining to the Office of Public Education Facilities Modernization was in effect. D.C. Official Code § 38–451 established the Office of Public Education Facilities Modernization. Specifically, D.C. Official Code § 38–451(b) provided that the Office of Public Education Facilities Modernization "shall have independent procurement and personnel authority. The OFM shall promulgate rules to implement this authority." Moreover, as Agency contends, D.C. Official Code § 38–451(e)(1) provided that ". . . the Director of OPEFM shall be the personnel authority for OPEFM and shall have the authority to promulgate personnel rules and regulations . . . ."

It was not until the creation of the Department of General Services in 2011 that independent personnel authority ceased to exist within Agency. In accordance with D.C. Official Code § 10-551.01(a), "there is established, as a subordinate agency within the executive branch of the District government, the Department of General Services ("Department"), which shall be headed by a Director who shall carry out the functions and authorities assigned to the

Department." Additionally, D.C. Official Code § 10-551.03(a) and (b) go on to provide that "the Director shall manage and administer the Department and all functions and personnel assigned thereto, including the power to redelegate to other employees and officials of the Department powers and authority as in the judgment of the Director are warranted in the interests of efficiency and sound administration" and "the Director shall be appointed by the Mayor . . . ." Thus, it is clear that the Director for the Department of General Services no longer has independent personnel authority.

However, as previously provided, Employee was RIFed during the time that the Office of Public Education Facilities Modernization was in existence. Therefore, the statute pertaining to that agency's personnel authority was the prevailing authority. As a result, the Director did not need Mayoral approval for the RIF action taken against Employee. As for Employee's argument that the Director's independent personnel authority did not apply to RIF actions, this Board considers the claim meritless.[23] The plain language of D.C. Official Code § 38–451 did not provide an exception to any personnel actions that could not have been taken by the Director.

Competitive Area

Employee's next argument is that the AJ erred in determining that Agency failed to properly establish lesser competitive areas. As provided in D.C. Official Code § 1-624.08(f), it was acceptable for Agency to establish a competitive area smaller than the entire agency. Specifically, Section 2409 of the DPM provides the following regarding competitive areas:

> 2409.1 Except as provided in this section, each agency shall constitute a single competitive area.
>
> 2409.2 Lesser competitive areas within an agency may be established by the personnel authority.

[23] Similarly, this Board will not consider the actions of D.C. Public Schools as a basis for a reasonable objection to Agency's RIF action. Employee's contention that D.C. Public Schools sought Mayoral approval has no bearing on the issues or outcome of this matter. Therefore, the argument is baseless.

> 2409.4 Any lesser competitive area shall be no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff.
>
> 2409.5 Employees in one competitive area shall not compete with employees in another competitive area.

Maintenance was a division within Agency, and therefore, it was legitimately established as a competitive area. In accordance with DPM § 2409.5, only those employees within this competitive area could compete against each other. As Agency provided, Employee was employed within the Maintenance division. Thus, he was within the proper competitive area and could only compete against those employees within the Maintenance division.[24]

Competitive Level

As for the competitive levels within a competitive area, D.C. Official Code § 1-624.08(d) specifically addresses the requirements for competitive levels. It provides that employees are 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. DPM Section 2410 provides the following:

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[24] As for Employee's claims that Agency was required to submit a written request to establish competitive areas, this Board finds this argument wholly untrue. DPM §2409.3 clearly provides that "an agency head *may* request the personnel authority to establish lesser competitive areas within the agency by submitting a written request which includes all of the following:

> (a) A description of the proposed competitive area or areas which includes a clearly stated mission statement, the operations, functions, and organizational segments affected;
> (b) An organizational chart of the agency which identifies the proposed competitive areas; and
> (c) A justification for the need to establish a lesser competitive area (emphasis added).

The use of the word "may" indicates that such a request is not a requirement to establish a competitive area. Additionally, this Board agrees with the AJ's determination that because Agency's Director was the personnel authority, there was no need to seek approval of the establishment of a lesser competitive area. Moreover, even though Agency was not required to provide the information outlined in DPM §2409.3, the record reflects that Agency did provide a description of the competitive area and level. *Agency's Answer,* p. 23-26 (August 18, 2010). Furthermore, an organizational chart was provided which identified the competitive areas. *Petitioner William Barnette's Brief,* Exhibit H (December 16, 2013).

> 2410.4 A competitive level shall consist of all positions in the competitive area identified pursuant to section 2409 of this chapter 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.
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> 2410.5 The composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions, and other factors prescribed in this section and section 2411 of this chapter.

It is without question that Employee was in the competitive level of Facilities Operations Manager. It is Employee's position that because there were other employees who held Grade 16 positions, they should have been classified within the same competitive level. He also contends that he had more seniority than those employees and would have survived the RIF action.[25]

To the contrary, Agency submits that although there were other Facilities Operations Managers within Agency, Employee was in a single-person competitive level because he was the only Facilities Operations Manager within the Maintenance competitive area.[26] Employee does not deny this assertion. As the AJ provided in her Initial Decision, this office has consistently held that one round of lateral competition does not apply to employees in a single-person competitive level.[27] Agency provided the Retention Register which lists Employee as the only person who held the Facilities Operations Manager position within the Maintenance division.[28] Therefore, the AJ was correct in her determination that the one round of lateral competition is

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[25] *Petition for Review,* p. 23 (March 7, 2014).
[26] *Respondent Department of General Services' Answer to Petition for Review,* p. 8 (April 11, 2014).
[27] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter 2401-0156-99 (January 30, 2003); *Robert T. Mills,* OEA Matter 2401-0109-02 (March 20, 2003); *Deborah J. Bryant,* OEA Matter 2401-0086-01 (July 14, 2003); *Robert James Fagelson,* OEA Matter 2401-0137-99 (August 28, 2003); *Richard Dyson, Jr. v. Department of Mental Health*, OEA Matter No. 2401-0040-03, *Opinion and Order on Petition for Review* (April 14, 2008); and *Lawrence Nwankwo v. Department of Transportation,* OEA Matter No. 2401-0203-09, *Opinion and Order on Petition for Review* (March 21, 2013).
[28] *Agency's Answer,* Tab #5 (August 18, 2010).

inapplicable in this case.

Notice Requirements

D.C. Official Code § 1-624.08(e) provides that:

> (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 (emphasis added).

Furthermore, DPM §§ 2422.1 and 2422.3 provide the notice requirements for RIF actions. The relevant sections state the following:

> 2422.1 Each competing employee selected for release from his or her competitive level under this chapter *shall* be entitled to written notice at least thirty (30) full days before the effective date of the employee's release (emphasis added).
>
> 2422.3 A notice *shall* not be issued less than thirty (30) days before the effective date of the employee's release (emphasis added).

The plain language of the statute and regulation, coupled with the use of the word "shall" in both, clearly provide that the notice requirements are mandatory in nature. The burden rests on Agency to offer proof that it complied with the requirements.

Employee claims that Agency issued two RIF letters, but he did not receive proper notice for the second one. However, there is no indication that this was indeed the case. The record does prove, and Employee does not dispute, that Agency hand delivered a RIF notice to Employee on May 11, 2010. The notice lists the effective date of his removal as June 13, 2010, which is thirty-three days after Employee was notified of the action. Moreover, the notice is signed by the Employee acknowledging his receipt.[29] There is no other RIF notice found in the record. There was a letter correcting Employee's severance pay calculations that was issued as a result of the RIF action. However, this letter was clearly not a second RIF notice.[30] Because

[29] *Agency's Answer*, p. 15-17 (August 18, 2010).
[30] The letter provides the following:

Agency provided the requisite thirty-day notice, it properly complied with the statutory and regulatory requirements.

Conclusion

On Petition for Review, Employee raised nearly all of the same arguments raised on appeal before the AJ. The record indicates that the AJ's ruling was based on substantial evidence. Therefore, this Board must deny Employee's Petition for Review.

> Pursuant to the Reduction in Force letter dated and delivered on Tuesday, May 11, 2010, your severance package has been recalculated and revised to reflect the following changes:
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> > Effective Sunday, June 13, 2010, you will begin receiving severance in the amount of 26.00 weeks of compensation (total severance: $49,850). You will continue to receive biweekly pay from June 13, 2010 until the expiration of your severance allotment . . . .

Petition for Review, Exhibit I (March 7, 2014). The letter was sent to correct a previous Personnel Action Form which provided that the "Reduction-in-Force letter dated 05/11/2010, Employee is entitled to severance pay in the amount of $21,234.67 (total amount) to be paid. . . ." The notice was signed and approved on May 12, 2010. *Petitioner William Barnette's Motion to Compel Complete Discovery Responses and for Extension of Time to Submit Brief*, p. 34 (December 12, 2012).

ORDER

Accordingly, it is hereby ORDERED that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. 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.