THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
NANCY ALLEN,	)	
Employee	)	OEA Matter No. 2401-0233-09
	)	
v.	)	Date of Issuance: March 25, 2011
	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Nate Nelson, Union Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 27, 2009, Nancy Allen ("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"). According to the Retention Register created in anticipation of the instant RIF, Employee's last position of record with DOH was Program Specialist. Furthermore, her competitive area was Addiction Prevention and Recovery Administration and her competitive level was DS-0301-12-13-N. According the aforementioned Retention Register, Employee's entire competitive area and level was abolished. No positions survived the instant RIF. A Prehearing Conference was scheduled for November 30, 2010. The Agency representative appeared as required, but Employee failed to attend the proceeding. Later that day, I issued an Order wherein Employee and her representative were required to address why they did not appear for the aforementioned Prehearing Conference. Both Employee and her representative responded. I accepted their response and I rescheduled the Prehearing Conference for February 1, 2011. After considering the parties position as stated during the conference, I determined that no further proceedings were warranted. I then ordered the parties to submit final legal briefs in the matter. Both parties have complied with the order. 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 the Office.

DOH contends that the abolishment of Employee's last position of record pursuant to a RIF was conducted within the bounds of the law. DOH notes that it properly obtained approval to conduct the instant RIF pursuant to an Administrative Order. In defending its action before the Office, Agency relies on D.C. Official Code § 1-624.08 §§ (d), (e) and (f). Agency contends that the OEA's review of a RIF matter begins and ends with the aforementioned statute and that the OEA lacks authority to examine any other aspects of a RIF.

With respect to D.C. Official Code § 1-624.08 (e), Agency contends that Employee was given 30 days written notice informing her that her position was to be abolished. Included within Agency's Amended Answer at Exhibit 5A is a letter addressed to Employee notifying her of the then pending RIF. According to this letter, Employee refused to sign said letter

acknowledging her receipt. Employee alleges that she did not receive this notice and that that in the interest of justice she should be reinstated. Employee further asserts that she did not receive other documents related to the instant RIF including the Retention Register or the Administrative Order that authorized the instant RIF. She further contends that the undersigned should deny Agency's motion to amend its Answer, wherein Exhibit 5A, replete with signatures, was submitted to the OEA.

Discussion

I find that in the instant matter, I am guided primarily by D.C. Official Code § 1-624.08, which provides in pertinent part that:

> (d) An employee affected by the abolishment of a position pursuant to the section who, but for the 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 the 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 the 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 the 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 the Office:

1. That s/he did not receive written notice thirty (30) days prior to the effective date of her/her separation from service; and/or

2. That s/he was not afforded one round of lateral competition within her/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. __ ( ). In the matter at hand, I 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. I also find that the missing documents that Employee alleged were not submitted by the Agency were properly included within DOH's Answer in the instant matter. I further 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).

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 conclude that the Agency's action of abolishing Employee's position was done in accordance with all applicable laws, rules and regulations.

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