THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DALE JACKSON,	)	OEA Matter No. 2401-0089-11
Employee	)	
	)	Date of Issuance: July 24, 2014
D.C. DEPARTMENT OF HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Dale Jackson ("Employee") worked as a Motor Vehicle Operator with the D.C. Department of Health ("Agency"). On August 20, 2010, Agency conducted a reduction-in-force ("RIF"). Employee was terminated from Agency effective September 24, 2010. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 14, 2010.[1]

Employee contended that Agency did not comply with Chapter 24 of the District Personnel Regulations ("DPR"). Moreover, he alleged that Agency did not consider his tenure, creditable service, Veteran's preference, residency preference, or relative work performance. Specifically, Employee alleged that a less tenured employee was retained while he was terminated via the RIF. As a result, he requested that he be reinstated with back pay and

[1] Although Employee's Petition for Appeal is date stamped March 23, 2011, the Administrative Judge ("AJ") determined that the petition was actually filed on October 14, 2010, and accordingly, addressed the merits of Employee's appeal. *Initial Decision,* p. 1 (February 21, 2013).

benefits.[2]

Agency filed its Answer to Employee's Petition for Appeal on April 27, 2011. It provided that Employee's Petition for Appeal was deficient in multiple areas. First, Agency explained that Employee's petition was received on March 23, 2011, as evidenced by OEA's date stamp. Additionally, it opined that the petition failed to provide a copy of the final agency decision per OEA Rule 609. Moreover, Agency explained that as the result of a budget reduction, it was compelled to eliminate Employee's position. As for Employee's claims regarding the retention of other employees, Agency admitted that it retained co-workers of Employee who were less tenured. However, it did so within the regulations because those employees were not within the same positions or grade as Employee. Accordingly, Agency requested that the petition be dismissed.[3]

Before the AJ issued his Initial Decision, both parties filed briefs regarding the RIF action. Agency asserted that the RIF action was proper because it afforded Employee with one round of lateral competition and thirty days' notice. Agency argued that the RIF regulations required that employees who have the same job title, series, and grade are to be placed within the same competitive level. Because Employee was the only Motor Vehicle Operator within his competitive level, it explained that the requirement for one round of lateral competition was inapplicable.[4]

Employee provided the AJ with an excerpt of a deposition from the United States District Court for the District of Columbia. Employee believed that the deposition offered proof of Agency's admission that it did not consider Employee's tenure, length of service, Veteran's or residency preferences, or work performance when conducting his RIF. Employee also claimed

[2] *Petition for Appeal* (March 23, 2011).
[3] *Agency's Answer* (April 27, 2011).
[4] *Agency's Brief,* p. 2-4 (November 13, 2012).

that Agency retained his co-worker, Mr. Flores, and RIFed him, which he believed was a violation of the RIF regulations.[5]

On February 21, 2013, the AJ issued his Initial Decision in this matter. He found that under D.C. Official Code § 1-624.08, he could only determine if Employee received one round of lateral competition and thirty days' notice. The AJ ruled that because Employee was within a single-person competitive level, Agency was not required to provide one round of lateral competition. Additionally, he found that Employee's placement within the competitive level was proper, and he was provided thirty days' notice of the RIF action. Further, the AJ held that in accordance with *Anjuwan v. D.C. Department of Public Works,* 729 A.2d 883 (D.C. 1998), OEA did not have jurisdiction to consider Employee's claims regarding how Agency elected to use its budget for personnel services. He found that Agency's decision to reorganize its structure was a management decision within its discretion. Therefore, Employee's RIF action was upheld.[6]

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on March 27, 2013. He argues that the AJ's decision was not based on substantial evidence because it failed to consider that Agency retained Mr. Flores, who held the same position and was in the same competitive area as Employee. Employee contends that because he and Mr. Flores performed the same job, they should have been classified within the same competitive level. Therefore, he requested that he be afforded one round of lateral competition with Mr. Flores within his competitive level.[7]

On June 11, 2013, Agency filed its response to Employee's Petition for Review. It reiterated the arguments raised on appeal and reasoned that because Employee was in a single-person competitive level, it was not required to provide one round of lateral competition.

[5] *Memorandum of Employee* (November 15, 2012).
[6] *Initial Decision,* p. 4-8 (February 21, 2013).
[7] *Employee's Petition for Review of Initial Decision* (March 27, 2013).

Agency also submitted that Employee's arguments regarding Mr. Flores being in his competitive level was conjecture and unsupported by the Standard Form 50 and Retention Register. Therefore, it requested that the OEA Board deny Employee's Petition for Review.[8]

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 the OEA may hear RIFs on appeal.

> (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:
>
> (2) An employee may file with the Office of Employee

[8] *Agency's Answer to Employee's Petition for Review* (June 11, 2013).

> 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.

Notice Requirements

The merits of the RIF notice requirements are not in dispute in this matter. Agency's notice was dated August 20, 2010. The effective date of the RIF was September 24, 2010. Thus, Agency complied with the thirty-day notice statutory requirement. The issue that is contested on review is the one round of lateral competition.

Competitive Area

Agency provided in its request for approval of the RIF action and the subsequent Administrative Order, that the competitive area was the Department of Health – Health Emergency Preparedness and Response Administration, Public Health Laboratory.[9] As provided in D.C. Official Code § 1-624.08(f), it was acceptable for Agency to establish a competitive area smaller that 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.

[9] *Agency's Answer,* Tabs 2 and 3.

2409.2 Lesser competitive areas within an agency may be established by the personnel authority.

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.

The Health Emergency Preparedness and Response Administration, Public Health Laboratory was a division within Agency, and therefore, it was a legitimate competitive area. In accordance with DPM 2409.5, only those employees within this competitive area could compete against each other.

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:

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.

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 Motor Vehicle

Operators. It is Employee's position that because Mr. Flores held the same position and performed the same job, they should have been classified within the same competitive level.

To the contrary, Agency submits that although there was another Motor Vehicle Operator, Employee was in a single-person competitive level because he was a Grade 6, Step 10, and the other Motor Vehicle Operator was a Grade 5.[10] However, Agency offered no proof that the other employee was a Grade 5, other than its curt assertion. Moreover, DPM Section 2410.4 provides that a competitive level consists of all positions within "the same grade (*or occupational level*), [ ] classification series[,] and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions . . . . (emphasis added)." Therefore, even if Employee and the other Motor Vehicle Operator were in different grades, they could have shared the same occupational level. Because the AJ failed to address this issue on appeal, there is not enough evidence in the record for the Board to conclude that his decision is based on substantial evidence.

In accordance with OEA Rule 633.3(d) ". . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal." The D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), that when the AJ is made aware of material issues in an employee's notice of appeal and there is the absence of any discussion of the employee's arguments in the OEA's initial decision, the determination cannot be made that all the issues were fully considered. Moreover, the court held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801

[10] *Agency's Answer,* p. 6 (April 27, 2011).

A.2d 975, 979 (D.C. 2002)) that it could not assume that "[an] issue has been considered *sub silentio* when there is no discernible evidence that it has." The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C. 2002)) further reasoned that "to pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings."

Employee clearly raised the argument before the AJ that he believed another employee within his competitive level was not included in the RIF. The AJ did not address this issue in the Initial Decision. It appears that he may have considered it a grievance; however, this Board believes it is a material issue that was not addressed. As a result, we cannot conclude that the AJ's decision was based on substantial evidence.[11] Thus, we are required to remand the matter to the AJ for the limited purpose of determining if Employee and any other employees who were Motor Vehicle Operators during the time of the RIF action shared the same grade or occupational level, classification series, and positions that were sufficiently alike in requirements, duties, responsibilities, and working conditions. If there were other employees who fell into this category, then the AJ must consider the merits of this issue and make a determination accordingly.

[11] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *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).

ORDER

Accordingly, it is hereby ORDERED that Employee's Petition for Review is **GRANTED**, and this matter is **REMANDED** to the Administrative Judge for further findings.

FOR THE BOARD:

_____
William Persina, Chair

_____
Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.