THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GORDON J. CLONEY, Employee	OEA Matter No. 2401-0085-09
	Date of Issuance: August 22, 2011
DEPARTMENT OF INSURANCE SECURITIES AND BANKING, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Gordon J. Cloney ("Employee") worked as an International Program Manager at the Department of Insurance Securities and Banking ("Agency"). On December 11, 2008, Employee received a removal notice from Agency. The notice provided that a reduction-in-force ("RIF") action would be imposed, and Employee's position would be abolished due to a lack of work.[1] Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA").

Employee made several arguments in his Petition for Appeal. However, his main argument was that Agency took the RIF action against him because of a Whistleblower claim that he made against the Agency's Commissioner. Accordingly, he sought financial damages to

[1] *Petition for Appeal,* Attachment #1 (February 13, 2009).

address the disturbance this RIF action had on his career, health, and family.[2]

Agency filed its response to Employee's Petition for Appeal on April 3, 2009. It provided that Employee was hired as a Project Manager International Insurance Specialist to strategically establish the District of Columbia as an international insurance center. However, after several years, it was determined that the international insurance program did not yield any tangible benefits to the District because Employee failed to attract any meaningful international insurance business to the District. Consequently, Agency issued a formal notice to Employee that his position would be abolished due to lack of work.[3]

Agency provided that it gave Employee a 30-day notice and appeal rights to OEA. Additionally, Agency furnished information regarding the retention register, other benefits, and entitlements to Employee. It contended that Employee was the sole person in his competitive level, thus, negating the need to provide him with one round of lateral competition. Moreover, Agency argued that OEA lacked jurisdiction to adjudicate Whistleblower claims in this matter.[4]

On February 22, 2010, the OEA Administrative Judge ("AJ") issued his Initial Decision. He held that Agency properly implemented the RIF action against Employee and that Employee failed to make any credible claims to prove that the RIF action was improper. He asserted that because Employee was the sole member of his competitive level, there was no further competition efforts required. Finally, the AJ reasoned that OEA was not the proper venue for the Whistleblower claim because it fell outside of OEA's limited authority of review.[5]

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[2] *Id.*, p. 1-9.
[3] *Agency's Answer to Employee's Petition for Appeal of RIF Action and Motion for Summary Disposition*, p. 1-2 (April 3, 2009).
[4] *Id.*, 3-9.
[5] *Initial Decision*, p. 4-7 (February 22, 2010).

Employee disagreed with the AJ's Initial Decision and filed a Petition for Review with the OEA Board on March 29, 2010. He argued that lack of work was not a valid cause upon which Agency could rely to RIF him.[6] Employee also contended that the AJ denied him an opportunity to cross examine Agency by not conducting an evidentiary hearing. Finally, Employee suggested that the AJ improperly commented on a matter between the parties that was decided by the Office of Human Rights. Accordingly, he requested that the outcome of the matter decided by the Office of Human Rights be removed from the record or that he be allowed to address the conclusion reached by that office.[7]

Agency filed a Response to Employee's Petition for Review and presented the same arguments that were outlined in its Response to Employee's Petition for Appeal. It stated that it properly gave Employee 30 days notice to appeal its RIF action. Additionally, it was not necessary to afford Employee one round of lateral competition because he was the sole employee within his competitive level. Finally, Agency presented that the AJ correctly held that OEA lacks jurisdiction over Employee's Whistleblower claims.[8]

In an attempt to define OEA's authority over appeals, 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.

[6] Employee reasoned that there was not a lack of work as evidenced in Agency's creation of a new position description for him in June of 2008. He believed that it was contradictory for Agency to create a position description in June only to remove him in December of 2008. It is his position that this proves that adequate work existed within Agency.
[7] *Employee's Request to Review the Initial Decision,* p. 1, 3-5 (March 29, 2010).
[8] *Agency's Answer to Petition for Review,* p. 4-7 (April 29, 2010).

> (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.
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> (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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> > (1) An employee may file a complaint contesting a determination or separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
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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 above-referenced statute, this Office is authorized to review RIF cases where an employee claims the Agency did not provide one round of lateral competition or where an employee was not given a 30-day written notice prior to their separation.

Employee does not dispute that Agency provided the RIF notice on December 11, 2008. The notice clearly states that it is effective on January 16, 2009, thirty-six days after the date of the letter. Therefore, Agency provided the requisite 30-day notice as required by the D.C. Official Code.

As the AJ provided in his Initial Decision, OEA has historically held that one round of lateral competition does not apply to employees in a single-person competitive levels.[9] According to Agency, Employee was the only person within his position title.[10] Therefore, one

[9] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills,* OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant,* OEA Matter No. 2401-0086-01 (July 14, 2003); *Robert James Fagelson v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0137-99 (August 28, 2003); and *Richard Dyson, Jr. v. Department of Mental Health,* OEA Matter No. 2401-0040-03, Opinion and Order on Petition for Review (April 14, 2008).

round of lateral competition is inapplicable to this case.

As it pertains to Employee's Whistleblower claims, in accordance with D.C. Official Code § 1-615.51, the Whistleblower Act encourages employees of the District of Columbia government to "report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." To achieve this objective, D.C. Official Code § 1-615.53 provides that "a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order." Furthermore, § 1-615.54(a)(1) states that:

> An employee aggrieved by a violation of § 1-615.53 may bring a civil action against the District, and, in his or her personal capacity, any District employee, supervisor, or official having personal involvement in the prohibited personnel action, before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including:
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> (A) an injunction;
> (B) reinstatement to the same position held before the prohibited personnel action or to an equivalent position;
> (C) reinstatement of the employee's seniority rights;
> (D) restoration of lost benefits;
> (E) back pay and interest on back pay;
> (F) compensatory damages; and
> (G) reasonable costs and attorney fees.

OEA has consistently held that based on the above-mentioned statute, D.C. Superior Court has original jurisdiction over Whistleblower Act claims.[11] OEA was not granted original

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[10] *Agency's Answer to Employee's Petition for Appeal of RIF Action and Motion for Summary Disposition*, p. 3-5 (April 3, 2009).

[11] *Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004); *Marie Vines v. Office of Cable Television and Communications,* OEA Matter No. J-0028-08 (March 18, 2008); *Ernest Hunter v. D.C. Water and Sewer Authority,* OEA Matter No. 2401-0036-05 and 1601-0046-05 (November 9, 2005); *Mark James v. Office of the Chief Technology Officer,* OEA Matter No. J-0003-08, Opinion and Order on Petition for

jurisdiction over such claims.[12] OEA has held that some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to this office. If an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office, then they may include, as part of the petition for appeal, any pertinent Whistleblower violations. However, when OEA lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, the Office is also unable to address the merits of the Whistleblower claims contained therein.[13]

In the current case, the RIF action against Employee was properly executed by Agency. He was given 30 days' notice, and there was no requirement for one round of lateral competition in this case. Accordingly, the Board lacks a basis upon which to address the Whistleblower claims. Hence, this Board must deny Employee's Petition for Review.

Review (November 23, 2009); and *James Codling v. Office of the Chief Technology Officer,* OEA Matter No. J-0151-09, Opinion and Order on Petition for Review (December 6, 2010).

[12] The original jurisdiction of this Office was established in D.C. Official Code §1-606.03 which 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 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."

[13] *Id.*

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

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.