THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RAMON GRIFFIN,	)	
Employee	)	OEA Matter No. 2401-0085-19
	)	
v.	)	Date of Issuance: January 22, 2020
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Ramon Griffin, Employee *Pro Se*
Nicole Dillard, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 30, 2019, Ramon Griffin ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the District of Columbia Public Schools' ("Agency") decision to separate him from his position of Administrative Officer pursuant to a Reduction-in-force ("RIF"). Employee was RIF'd effective August 2, 2019.[1] On October 2, 2019, Agency filed its Answer to Employee's Petition for Appeal.

I was assigned this matter on October 3, 2019. Subsequently, on October 4, 2019, I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. While Agency submitted its written brief as requested, Employee did not comply with the October 4, 2019, Order. Subsequently, on November 22, 2019, I issued a Statement of Good Cause, wherein,

[1] Agency attached the original RIF notice to its Answer. This notice was dated May 20, 2019, with a RIF effective date of June 21, 2019. However, Agency issue an updated RIF notice to Employee on June 21, 2019, with a new RIF effective date of August 2, 2019. Employee attached the updated RIF notice to his Petition for Appeal. Also, Employee's SF-50 has an August 2, 2019 RIF effective date. Therefore, the Undersigned will rely on the June 21, 2019, RIF notice submitted by Employee, with a RIF effective date of August 2, 2019, in deciding this matter.

Employee was ordered to explain his failure to submit a response to the October 4, 2019, Order, on or before December 10, 2019. Employee timely filed his response. After considering the arguments herein, I have determined that an Evidentiary Hearing is unwarranted. 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 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction

FINDINGS 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. On June 21, 2019, Employee was notified that his position was being abolished pursuant to a RIF, effective August 2, 2019. While Agency asserts that it properly followed District laws, rules and regulations in conducting the instant RIF, Employee argues that he should not have been RIF'd while on medical leave. Employee further argues that two other employees were hired in his position after he was RIF'd.[2]

In the current matter, Agency noted that the RIF was conducted "due to elimination of positions that will be redundant or unnecessary following a reorganization of functions for the

[2] Petition for Appeal (August 30, 2019)

2020 fiscal year."[3] Consequently, I am guided primarily by D.C. Official Code § 1-624.02, which states in pertinent part that:

> (a) Reduction-in-force procedures shall apply to the Career and Educational Services… and shall include:
>
> (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
>
> (2) One round of lateral competition limited to positions within the employee's competitive level;
>
> (3) Priority reemployment consideration for employees separated;
>
> (4) Consideration of job sharing and reduced hours; and
>
> (5) Employee appeal rights.

One Round of Lateral Competition

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Agency explains that each school was identified as a separate competitive area, and each position title a separate competitive level. According to Agency, Employee was hired as an Administrative Officer at Dunbar High School ("Dunbar"). Dunbar was determined to be a competitive area, and the Administrative Officer position a competitive level. Agency further maintains that Employee was in a single person competitive level since he was the only Administrative Officer at Dunbar. Agency explains that Employee was not entitled to one round of lateral competition since the entire single person competitive level within the competitive area was eliminated. Agency also asserts that it provided Employee with thirty (30) days written notice prior to the RIF effective date.

Pursuant to Chapter 24 of the DPM, § 2409, each Agency shall generally constitute a single competitive area, and Agency personnel are authorized to establish lesser competitive areas when conducting RIFs.[4] In addition, Chapter 24 of the 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.

[3] Agency's Answer to Employee's Petition for Appeal (October 2, 2019).
[4] See *Leon Graves v. Department of Youth Rehabilitation Services*, OEA Matter No. 2401-0018-14 (July 3, 2014).

Furthermore, pursuant to Chapter 24 of the DPM, § 2410.5, 47 D.C. Reg. 2430 (2000) "[t]he 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." Generally, an employee's position of record is shown through the issuance of an SF-50 Notification of Personnel Action.[5]

Here, the instant RIF was approved on March 20, 2019.[6] The Memorandum authorizing the RIF designated Dunbar High School as the competitive area and Administrative Officer as the competitive level to be eliminated.[7] Employee does not argue that he was an Administrative Officer at Dunbar, nor does he argue that he did not receive one round of lateral competition. Moreover, based on Employee's SF-50 Notification of Personnel Action, he was an Administrative Officer when the RIF was conducted.[8] At the time of the RIF, Employee was the only Administrative Officer at Dunbar and Employee does not dispute this fact. Consequently, I conclude that Employee was in a single-person competitive level. I further conclude that the statutory provision of the D.C. Official Code § 1-624.02(a)(2), requiring Employee to have one round of lateral competition is inapplicable because he was the only person with that position in the competitive level and the position was eliminated.

Moreover, this Office has consistently held that, when an employee holds the only position in his competitive level, D.C. Official Code § 1-624.08(d), which affords the employee one round of lateral competition, as well as the related RIF provisions of 5 DCMR 1503.3, are both inapplicable. An agency is therefore not required to go through the rating and ranking process described in that chapter relative to abolishing the employee's position.[9] Employee does not dispute the fact that he was the only Administrative Officer at Dunbar at the time of the RIF. Accordingly, I conclude that Employee was properly placed into a single-person competitive level and Agency was not required to rank or rate Employee according to the rules specified in D.C. Official Code § 1-624.08(d) pertaining to multiple-person competitive levels when it implemented the instant RIF.

Priority Reemployment

D.C. Official Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section are to be afforded consideration for priority reemployment. In the RIF notice dated June 21, 2019, Agency indicated that Employee's position had been eliminated, but that there may be positions at other schools for which Employee may be qualified.[10] Further, the

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[5] *See Armeta Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).
[6] Agency's Answer, *supra*, at Tab 3.
[7] *Id*. at Tab 4.
[8] *Id*. at Tab 1.
[9] *See Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).
[10] Petition for Appeal, *supra*. *See also* Agency Answer, *supra*, at Tab 2.

notice indicated that Employee could apply for any vacancies at Agency or within District Government that may arise in the future.[11]Additionally, the notice indicated that Employee would receive "some priority consideration", but was not guaranteed reemployment.[12] Accordingly, I find that Agency complied with the RIF requirement to consider Employee for priority reemployment.

Consideration of Job Sharing

Pursuant to D.C. Official Code § 1-624.02(a)(4), when a RIF is conducted, an Agency shall consider job sharing and reduced hours for employees separated pursuant to the RIF. In the current matter, Agency did not address the issue of job sharing. Agency however notes that Employee was in a single-person competitive level that was abolished. Employee does not dispute Agency's assertion that he was the only Administrative Officer at Dunbar at the time of the RIF.

Based on Agency's explanation that Employee's entire competitive level was abolished, and because there were no other positions available in Employee's competitive level, I find that job sharing or reduced hours were at the very least considered in this action. Furthermore, the D.C. Court of Appeals in *Johnson v. D.C. Dept. of Health*, 162 A.3d 808 (D.C. 2017) held that, the alternative measure of considering job sharing and reduced hours prior to imposing a RIF has "debatable merit." More specifically, the Court stated that:

> In concluding that budgetary and related exigencies required a RIF of all employees across the competitive area at [Employee's] level, [an agency] arguably may be assumed to have found the lesser measures such a job sharing and reduced hours inadequate to address the need; and OEA's authority to look behind that agency judgment would be open to significant question.[13]

Thus, it may be assumed, based on Agency's explanation, and under the holding in *Johnson*, that the alternative of job sharing, and reduced hours would not have adequately addressed the Agency's need(s).

Furthermore, 6-B DCMR § 2405.7, provides that

> The retroactive reinstatement of a person who was separated by a reduction in force under this chapter may only be made on the basis of a finding of a harmful error as determined by the personnel authority or the Office of Employee Appeals. To be harmful, an error shall be of such magnitude that in its absence the employee would not have been released from his or her competitive level.

[11] *Id.*
[12] *Id.*
[13] *Johnson*, 162 A.3d 808, 812-13 (D.C. 2017).

Because Employee was in a single-person competitive level, I find that even if Agency failed to meet its burden of considering job sharing and reduced hours as part of the RIF, Employee would still have been released from his position because there were no positions to job share, nor were reduced hours an option in Employee's competitive level. Thus, for argument's sake, if Agency failed to meet its burden of proof regarding job sharing or reduced hours, I find such error harmless pursuant to 6-B DCMR § 2405.7.

Notice of Employee Appeal Rights

D.C. Official Code § 1-624.02(a)(5) states that Agency must provide employees separated pursuant to a RIF their appeal rights. Each employee separated pursuant to a RIF shall be entitled to written notice at least thirty (30) days before the employee's separation from service.[14] Here, Employee stated in his Petition for Appeal that he was notified via email on May 21, 2019, that he was subject to separation from service pursuant to a RIF and that the effective date of separation was June 21, 2019. Thereafter, on June 21, 2019, Agency issued an updated RIF Notice changing Employee's RIF effective date to August 2, 2019. The Notice also provided Employee with his appeal rights to OEA, as well as OEA rules and appeal forms. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF. Accordingly, I find that Employee was provided more than the thirty (30) days' notice required by statute.

Federal Medical Leave Act

Employee argues that he should not have been RIF'd while he was on approved Federal Medical Leave Act ("FMLA"). Agency on the other hand argues that the RIF was authorized prior to Employee going out on FMLA. In *Phillipa Mezile v. Department of Disability Services*, the OEA Administrative Judge ("AJ") noted that FMLA does not delay a RIF. While citing to *Price v. Washington Hosp. Ctr.*, 321 F. Supp. 2d 38, 45 (D.D.C. 2004), the AJ in *Mezile*, supra, stated as follows:[15]

> Plaintiff argued that Defendant violated her statutorily protected rights under FMLA and DCFMLA (District of Columbia Family Medical Leave Act) when it terminated her employment pursuant to a RIF while she was on approved medical leave. In addressing this allegation, the court cited 29 C.F.R. § 825.216(a)(1)[16]

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[14] *See* DPM § 2422.

[15] *Phillipa Mezile v. Department of Disability Services*, OEA Matter No. 2401-0158-09R12 (October 10, 2012).

[16] C.F.R. § 825.216(a)(1) provides that:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:
>
> > (1) ***If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off,*** provided the employer has no continuing obligations under a collective bargaining agreement or otherwise**.** An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would

> and held that " . . . Plaintiff cannot demonstrate that the elimination of her position pursuant to a RIF while she was on medical leave violated either medical leave statute" because " . . . [she] ha[d] no greater right to reinstatement or to other benefits and conditions of employment than if [she] had been continuously employed during the FMLA leave period ... "[17] Therefore, since Defendant eliminated her position pursuant to a RIF, the court ruled that Defendant's responsibility to continue her FMLA ceased at the time she was laid off.
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> The court in *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151 (7th Cir. 1997) had the same ruling. In this case, plaintiff claimed that defendant violated her FMLA rights after refusing to return her to work after maternity leave. However, the court cited the Department of Labor Regulation, *supra*, and held that "… [defendant] had no obligation to reinstate [her] because an employer's responsibility to continue FMLA leave and restore an employee "cease at the time the employee is laid off."[18]

Based on the reasoning above, I disagree with Employee's assertion that Agency could not abolish his position while he was on FMLA. Moreover, the decision to conduct the instant RIF was approved prior to Employee going on FMLA.

Grievances

Employee also alleges that Agency hired another Employee into the Administrative Officer position at Dunbar after the RIF. Agency provided in its Answer that the two individuals that Employee referenced work in different positions and not as an Administrative Officer. Specifically, one occupies the position of Administrative Aide, and the other occupies the position of Teacher Leadership Innovation ("TLI") Teacher Leader – Climate and Culture. Consequently, I find that Employee's allegation is without merit.

Moreover, 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.[19] 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 his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

> not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position. (Emphasis added.)

[17] *Id*. at 47.
[18] *Id*. at 1157.
[19] *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).

Based on the foregoing, I find that Agency, in conducting the instant RIF, properly followed all proper District of Columbia statutes, regulations and laws.

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.
SENIOR ADMINISTRATIVE JUDGE