THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JAMES JOHNSON, SR.,	)	OEA Matter No. 2401-0011-11
Employee	)	
	)	Date of Issuance: June 10, 2014
	)	
DISTRICT OF COLUMBIA HOMELAND	)	
SECURITY & EMERGENCY	)	
MANAGEMENT AGENCY,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

James Johnson, Sr. ("Employee") worked as an Emergency Video Interoperability for Public Safety ("VIPS") Technician for the District of Columbia Homeland Security and Emergency Management Agency ("Agency/HSEMA"). On October 15, 2010, Agency notified Employee that he was being separated from his position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 19, 2010.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 21, 2010. In it, he asserted that Agency violated a collective bargaining agreement when it reassigned him to another position within another agency without notifying him. Employee explained that Agency's actions prevented him from receiving a step

[1] *Petition for Appeal,* p. 8 (October 21, 2010).

increase and pay raise. Therefore, he requested to be reinstated to his prior position with back pay including his step and pay increases.[2]

Agency responded to the Petition for Appeal on December 20, 2010. It explained that the VIPS program was a District initiative that caused certain functions of various District Agencies to be consolidated with it. In particular, the Department of Real Estate Services ("DRES"), provided four full time positions to support the program. DRES funded the positions for Fiscal Year ("FY") 2010, but it was not able to support the program for FY2011. As a result, Agency conducted the RIF due to lack of funds budgeted for the program for FY2011.[3]

Prior to issuing the Initial Decision, the OEA Administrative Judge ordered the parties to submit briefs addressing whether Agency followed the District's laws when it conducted the RIF.[4] In its brief, Agency provided that the RIF was conducted pursuant to D.C. Official Code §§ 1-624.01 *et seq.* and Chapter 24 of the District Personnel Manual ("DPM"). It explained that 'Operations' was determined to be the competitive area, and DS-0303-06-18-N was determined to be the competitive level subject to the RIF. However, because Employee's entire competitive level was abolished, Agency was not required to provide him with one round of lateral competition. It did provide Employee a written, thirty-day notice that his position was being eliminated. Therefore, Agency submitted that the RIF action should be upheld.[5]

Employee provided in his brief that he was not within the competitive level that Agency abolished or the position that was indicated in his personnel records. Employee explained that while being trained to be an Emergency Management Specialist, he performed the functions of an Emergency Response Official. Employee argued that "[a] proper round of lateral competition

[2] *Id.*, 4-7.
[3] *Answer to Petition for Appeal,* Tab 11 (December 20, 2010).
[4] *Order Requesting Briefs* (September 7, 2012).
[5] *Agency's Brief* (October 12, 2012).

would have occurred if HSEMA had abolished four positions within the now titled Emergency Management Specialist position." Therefore, Employee requested a modification of his title and series along with back pay.[6]

The Initial Decision was issued on February 11, 2013. The AJ found that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[7] As a result, he ruled that § 1-624.08 limited his 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 level. He also found that because Employee's entire competitive level was abolished, the requirement of one round of lateral competition was inapplicable. Lastly, the AJ found that Agency provided Employee the required thirty-day notice. Accordingly, the RIF action was upheld.[8]

On March 18, 2013, Employee filed a Petition for Review with the OEA Board. He argues that the AJ's findings were not based on substantial evidence and that the Initial Decision did not address all issues of law and fact properly raised in his Petition for Appeal. Employee argues that "[t]he record lacked substantial evidence for the [AJ] to conclude that [he] was properly placed in the abolished competitive level."[9] He again submits that the evidence established that he performed the same functions as other Emergency Management Specialists.[10]

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[6] *Employee's Brief,* p.4 (November 15, 2012).
[7] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools,* 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision,* p. 3-5 (February 11, 2013).
[8] With regard to Employee's allegation that Agency improperly reassigned him to the Emergency VIPS Technician position instead of the Emergency Management Specialist position, the AJ considered this argument to be a grievance over which OEA lacked jurisdiction to hear. *Id.* at 6.
[9] *Petition for Review,* p. 5 (March 18, 2013).
[10] Furthermore, Employee states that the evidence established that there was a legitimate dispute regarding his

Additionally, Employee asserts that he did not submit evidence to prove his reassignment was improper, but rather, he submitted evidence to prove that he did not occupy the position or competitive level that was abolished. Therefore, Employee requests reversal of the Initial Decision; reinstatement with back-pay; a modification of his title and series; and attorney's fees.[11]

In response, Agency provides that Employee's Notification of Personnel Action Form ("Form 50") indicates that for the reassignment and the RIF, his position of record was Emergency VIPS Technician. Agency explains that the Form 50 determines the position of record, not an employee's duties.[12] Furthermore, Agency submits that OEA does not have jurisdiction to consider Employee's grievance that he was performing the duties of an Emergency Management Specialist. Therefore, it believes that there was substantial evidence in the record to support the RIF, and that the AJ addressed all issues of law and fact. Accordingly, it requests that the Petition for Review be denied.[13]

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) 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. After reviewing the record, this Board believes that the AJ's assessment of this matter was based on substantial evidence, as will be explained below.

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proper competitive level. *Id.* at 6.
[11] *Id.* at 7.
[12] *Agency's Answer to Employee's Petition for Review,* p. 5 (April 22, 2013).
[13] *Id.*
[14] *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).

RIF Action

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:
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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
> >
> > (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 the 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. Employee received the RIF notice on October 15, 2010, as evidenced by his signature on the RIF form.[15] The effective date of the RIF was November 19, 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.

Position of Record

To decide Employee's competitive level, this Board must first determine his position of record. DPM § 2410.2 provides that an "assignment to a competitive level shall be based upon the employee's position of record." DPM § 2410.3 goes on to provide that "an employee's position of record is the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary or term basis." Employee argues that his true position of record was an Emergency Management Specialist and not an Emergency VIPS Technician. However, it is evident from the record that Employee's salary was based on the VIPS position. The MOU between the Office of Property Management

[15] *Answer to Employee's Appeal,* Tab # 7 (December 20, 2010).

and Agency clearly provides that "the purpose of this MOU is to allocate to HSEMA for the intended purpose of covering salary expenditures for employees monitoring the Video Interoperability for Public Safety cameras (VIPS)."[16] Moreover, Employee's Standard Form 50 Personnel Action form indicates that effective August 16, 2009, his position was an "Emergency VIPS Technician."[17] Additionally, the reassignment letter signed by Employee on August 12, 2009, specifically provides that he would be "reassigned . . . to the Career Service position of Emergency VIPS Technician."[18] Thus, despite Employee's contentions, his position was VIPS technician. Accordingly, he could only compete against other VIPS technicians within his competitive level.

Lateral Competition

According to Agency, Employee's entire competitive level was abolished. Therefore, he was not entitled to one round of lateral competition due to the RIF. As the AJ provided, OEA has consistently held that where an entire competitive level is eliminated, there is no one against whom an employee can compete. Therefore, one round of lateral competition is inapplicable.[19]

Agency provided the Administrative Order approving the RIF action for it to abolish a total of four VIPS technician positions; two of those positions were within Employee's competitive level.[20] Additionally, it provided the Retention Register for competitive level DS-0303-06-18-N, where both of the VIPS technician positions were eliminated.[21] Therefore, because the entire competitive level was abolished, D.C. Official Code § 1-624.08(d) is

[16] *Employee's Freedom of Information Act Filing*, p, 2 (December 8, 2010).
[17] *Answer to Employee's Appeal,* Tab # 4 (December 20, 2010).
[18] *Id*, Tab #3.
[19] *Laura Smart v. D.C. Child and Family Services Agency*, OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014) ; *Jessica Edmond v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0344-10, p. 6 (November 6, 2012); and *Nicole Sivolella v. D.C. Public Schools,* OEA Matter No. 2401-0193-04, p. 3 (December 23, 2005).
[20] *Agency's Brief,* Attachment #2 (October 12, 2012).
[21] *Id*, Attachment #3.

inapplicable in this matter.

Conclusion

The AJ's decision to uphold Agency's RIF action against Employee was based on substantial evidence. OEA is tasked with determining if notice and one round of lateral competition are provided. Agency did adhere to the notice requirements, and based on Employee's position of record, he was not entitled to one round of lateral competition because his entire competitive level was abolished. Therefore, we must DENY Employee's Petition for Review.

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

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Vera M. Abbott

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A. Gilbert Douglass

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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.