THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
IRISH THOMAS,	)	
Employee	)	OEA Matter No. 2401-0294-09
	)	
v.	)	Date of Issuance: November 17, 2011
	)	
DISTRICT OF COLUMBIA OFFICE	)	
OF THE ATTORNEY GENERAL,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Stephen White, Employee's Representative[1]
Justin Zimmerman, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 24, 2009, Irish Thomas ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Office of the Attorney General's ("OAG" or "Agency") action of abolishing her position as a Staff Assistant through a Reduction-In-Force ("RIF"). Agency filed its Answer to Employee's appeal along with a Motion to Dismiss on November 30, 2009. This matter was assigned to me on or around August 8, 2011. Thereafter, I scheduled a Prehearing Conference for August 30, 2011, in order to assess the parties' arguments, and to determine whether an Evidentiary Hearing was necessary. Pursuant to Employee's request for a continuance in this matter, the Prehearing Conference was rescheduled for September 21, 2011, and again for October 28, 2011[2]. Both parties appeared at the October 28, 2011, Prehearing Conference. Thereafter, I issued an Order directing the parties to submit a written brief regarding the RIF which resulted in Employee's termination. In a written notice to this Office, Agency opted to waive its right to submit a Post-hearing brief. Employee's written brief was due on November 14, 2011. As of today's date, Employee has not submitted her written brief on the issue. After reviewing the record, I have determined that a hearing is not warranted. The record is closed.

[1] On October 26, 2011, this Office received Employee's Designation of Representative naming Mr. Stephen White as her representative, replacing Mr. Steven Anderson who was Employee's representative on record when she filed her petition.
[2] In a letter received by this Office on October 26, 2011, Employee's representative requested that the October 28, 2011, Prehearing Conference be rescheduled for a later date. This request was denied by the undersigned in an Order dated October 26, 2011.

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 CONCLUSION

The following findings of facts, analysis, and conclusion of law are based on the documentary and oral evidence presented by the parties during the course of Employee's appeal process with OEA. Employee argues that in conducting the RIF, Agency established an improper competitive area for the applicability of Employee's seniority. Employee further noted that, she was the only Employee in her competitive area for the purposes of the RIF, although, she was one of several who performed the same duties in the agency. Agency contends that it followed all applicable rules and regulations with respect to the instant matter. Agency also noted that it had approval from D.C. Department of Human Resources ("DCHR") to establish a lesser competitive area.

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. I find that in a RIF, I am guided primarily by D.C. Official Code § 1-624.08, which states in pertinent part that:

> (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... 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:
>
> > (1) An employee may file a complaint contesting a determination or a 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.

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 this Office:

> 1. That he/she did not receive written notice thirty (30) days prior to the effective date of his/her separation from service; and/or
>
> 2. That he/she was not afforded one round of lateral competition within his/her competitive level.

In instituting the instant RIF, Agency met the procedural requirements listed above. Employee received her RIF notice on August 26, 2009, and her RIF effective date was September 30, 2009. It is therefore undisputed that Employee was given the required 30 days notice prior to the effective date of her RIF. Employee however contends that, she was improperly placed in a competitive area when the instant RIF occurred. I disagree. The retention register clearly states that Employee was the only persons to hold the position of Staff Assistant at General Litigation Section III, of the OAG. 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.

Generally, employees in a competitive level who are separated as a result of a RIF are separated in inverse order of their standing on the retention register. An employee's standing is determined by his/her RIF service computation date (RIF-SCD), which is generally the date on which the employee began D.C. Government service. Regarding the lateral competition requirement, the record shows that the only position in Employee's competitive level was eliminated in the RIF.

Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[3]

Moreover, Chapter 24 of the DPM § 2409.3, D.C. Reg. 2430 (2000), gives Agency the discretion to establish a lesser competitive area, if such request has been made and approved by personnel authority. Here, Agency received the approval from DCHR on August 26, 2009, to establish a lesser competitive area in the instant RIF. Additionally, neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished shall be subject to review.[4] Therefore, I find that given the instant circumstance, it is outside of my authority to decide this issue.

Based on the foregoing, I conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that OEA is precluded from addressing any other issue(s) in this matter.

ORDER

It is hereby ORDERED that:

1. Agency's action of abolishing Employee's position as a Staff Assistant through a RIF is **UPHELD**; and

2. Agency's Motion to Dismiss is **GRANTED**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[3] See *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010), __ D.C. Reg. __; *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), __ D.C. Reg. __; *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003), __ D.C. Reg. __; *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003), __ D.C. Reg. __; and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001), __ D.C. Reg. __.

[4] D.C. Code § 1-624.08(f)