THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DALE JACKSON,	)	
Employee	)	OEA Matter No. 2401-0089-11R14
	)	
v.	)	
	)	Date of Issuance: January 24, 2017
D.C. DEPARTMENT OF HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON REMAND

This matter has been previously before the Office of Employee ("OEA") Board. By way of background, 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]

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

[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).

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.[2]

Employee provided the AJ with an excerpt of a deposition from the United States District Court for the District of Columbia. He 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 that Agency retained his co-worker, Mr. Flores, and RIFed him, which he believed was a violation of the RIF regulations.[3]

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 him with 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, Agency's RIF action was upheld.[4]

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA

[2] *Agency's Brief,* p. 2-4 (November 13, 2012).
[3] *Memorandum of Employee* (November 15, 2012).
[4] *Initial Decision,* p. 4-8 (February 21, 2013).

Board on March 27, 2013. He argued 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 contended 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.[5]

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 him with one round of lateral competition. 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.[6]

On July 24, 2014, the OEA Board issued its Opinion and Order on Petition for Review. It found that Employee was in the competitive level of Motor Vehicle Operator and provided that Agency offered no proof that the other employee was a Grade 5, other than its curt assertion. Moreover, the Board stated that the AJ failed to address this issue on appeal and that there was not enough evidence in the record for the Board to conclude that his decision was based on substantial evidence. Thus, it remanded the matter to the AJ to determine if Employee was properly placed in a single-person competitive level.[7]

The AJ held a Status Conference and determined that an evidentiary hearing was unwarranted. On November 7, 2014, the AJ ordered the parties to submit written briefs. Agency

---

[5] *Employee's Petition for Review of Initial Decision* (March 27, 2013).
[6] *Agency's Answer to Employee's Petition for Review* (June 11, 2013).
[7] *Dale Jackson v. Department of Health*, OEA Matter No. 2401-0089-11, p. 4-9, *Opinion and Order on Petition for Review* (July 24, 2014).

argued that only positions in the same competitive area and grade are included in the same competitive level and that Employee was properly placed in a single-person competitive level.[8] Employee explained that fellow employee, Mr. Flores, shared the same occupational level and performed the exact same job. Employee provided that a competitive level consisted of all positions within the same grade or occupational level.[9]

On July 10, 2015, the AJ issued an Initial Decision on Remand. He found that DPR § 2410.4 provided Agency with a choice to group employees pursuant to their grade or their occupational level when planning for and implementing a Retention Register as part of a RIF action. In this instance, Agency opted to group its competitive level using an employee's grade and not their occupational level. He held that Mr. Flores should not have been included in the same competitive level as Employee and that no other Agency employee occupied the same competitive level. The AJ reasoned that Employee was properly included in a single-person competitive level; therefore, one round of lateral competition was inapplicable. Accordingly, he upheld Agency's RIF action.[10]

Employee disagreed with the AJ's decision and filed a Petition for Review on Remand on July 22, 2015. He contends that the AJ ignored DPM §2410.4 which provides that a competitive level consists of all positions with the same grade or occupational level. He asserts that he and Mr. Flores shared the same occupational level and performed the same job.[11]

On August 25, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provides that the Administrative Order contained in the record defines the position selected for abolishment in the instant RIF as the Grade 6, Series 5703 level. Agency explains

[8] *Agency's Brief*, p.1-3 (December 11, 2014).
[9] *Memorandum of Employee*, *p.1-3* (January 13, 2015).
[10] *Initial Decision on Remand*, p. 2-8 (July 10, 2015).
[11] *Petition for Review of Initial Decision on Remand*, p. 1-2 (July 22, 2015).

that Mr. Flores should not have been included in the same competitive level as Employee because he occupied a Grade 5 Motor Vehicle Operator Position. It agreed with the AJ that Employee was appropriately placed in a single-person competitive level in this matter. Accordingly, Agency requests that this Board uphold the AJ's Initial Decision on Remand.[12]

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

[12] *Answer to Petition for Review*, p. 1-6 (August 25, 2015).

> 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 that 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. Additionally, the D.C. Court of Appeals held in *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), 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.

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 Mr. Flores was a Grade 5.[13]

Agency seems to ignore DPM Section 2410.4 which 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)." It focused on the fact that Employee and Mr. Flores were different grades, but it is clear from the record that they shared the same occupation code of 5703.[14] However, this Board must uphold the AJ's decision because Employee and Mr. Flores clearly did not share the same classification series, which is another requirement of DPM Section 2410.4. The record provides that Employee held a classification of a "continuing" employee; while Mr. Flores was designated a "term" employee.[15] Thus, Agency did not have to include Mr. Flores in the competitive level for the RIF action.

As the AJ held, this office has consistently held that one round of lateral competition does not apply to employees in a single-person competitive level.[16] Agency provided the Retention Register which lists Employee as the only person who held the Motor Vehicles Operator position within his grade and classification series. Therefore, one round of lateral competition is

---

[13] *Agency's Answer*, p. 6 (April 27, 2011).
[14] *Agency's Brief,* p. 5-11 (January 13, 2015).
[15] *Id.*
[16] *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter 2401-0156-99 (January 30, 2003); *Robert T. Mills,* OEA Matter 2401-0109-02 (March 20, 2003); *Deborah J. Bryant*, OEA Matter 2401-0086-01 (July 14, 2003); *Robert James Fagelson,* OEA Matter 2401-0137-99 (August 28, 2003); *Richard Dyson, Jr. v. Department of Mental Health*, OEA Matter No. 2401-0040-03, *Opinion and Order on Petition for Review* (April 14, 2008); and *Lawrence Nwankwo v. Department of Transportation,* OEA Matter No. 2401-0203-09, *Opinion and Order on Petition for Review* (March 21, 2013).

inapplicable to this case. Accordingly, we must DENY Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition on Remand is **DENIED.**

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

_____
Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.