THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 2401-0137-09
ANGELA BALLARD Employee	Date of Issuance: March 10, 2010
v.	Sheryl Sears, Esq. Administrative Judge
DC OFFICE OF CONTRACTING AND PROCUREMENT Agency	

Angela Ballard, Employee, *Pro Se*
Lionel Sims, Esq., Agency Representative

INITIAL DECISION
(ERRATA)[1]

INTRODUCTION AND FINDINGS OF FACT

Angela Ballard ("Employee") was a Program Compliance Specialist for the Office of Contracting and Procurement ("Agency") in the Office of Procurement (Integrity Compliance). By memorandum dated March 24, 2009, David P. Gragan, Chief Procurement Officer of the Office of Contracting and Procurement, sought authorization from Mayor Adrian M. Fenty to conduct a reduction in force (RIF) in various lesser competitive areas of the agency. Gragan cited "lack of funding" and "lack of work" as the reasons. On April 3, 2009, Dan Tangherlini, City Administrator, signed the Administrative Order granting authorization for the RIF.

[1] The previously issued decision did not indicate a date of issuance. For the purpose of any calculations, the official date of issuance of this decision is March 10, 2010.

Agency designated Employee's division as a competitive area and placed her on a retention register with one other employee. The competitive level was DS-1101-12-08-N. Two positions were abolished and both employees were removed. According to the Standard Form 50 for Employee, her separation was effective on May 22, 2009. Agency separated Employee pursuant to a reduction in force (RIF). On June 19, 2009, Employee filed an appeal with the Office of Employee Appeals ("the Office"). Therein, she challenged the separation on several grounds. The parties convened for a pre-hearing conference on March 3, 2010. This matter presented no issued of fact requiring an evidentiary hearing. Therefore, none was convened. The record is now closed.

JURISDICTION

In accordance with D.C. Official Code § 1-606.03 (2001), this Office has jurisdiction over appeals from removals by reduction-in-force.

ISSUES

Whether Employee has stated any claims pursuant to which this Office can afford relief.

If not, whether this appeal should be dismissed.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that "[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." Accordingly, the agency has the burden of proof in this matter. Pursuant to OEA Rule 629.1, *id*., the applicable standard of proof is a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence as "[t]hat 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."

POSITIONS OF THE PARTIES

Employee challenges Agency's assertion that the RIF was conducted for legitimate budgetary reasons. Employee stated that Agency's "budget was never approve[d]," the "unit was not abolished" and Agency was "still hiring as of 6/15/09." Employee also expressed frustration that, for several years before the RIF, while serving in a Staff Assistant position, she performed some duties of the Program Compliance Specialist position. Then, when she was officially assigned to the position, Agency designated it for abolishment. She maintains that she was told, some months prior to the removal, that she was targeted for removal. Employee also contends that she should have been reassigned.

Employee also maintains that the competitive area was not properly designated. Employee acknowledges that the Office of Procurement Integrity Compliance was

created about one year before the RIF. However, she maintains that it was not sufficiently distinguishable from the rest of the agency (because it followed the mission statement of the agency) to be treated as a competitive area for the purpose of the RIF. Employee argues that she should have been allowed to compete Agency-wide for retention.

Agency contends that the RIF was conducted for legitimate budgetary reasons and that Employee's retention register was properly constituted of the two (2) positions in her competitive area at her competitive level. Agency contends that it acted with lawful discretion in deciding to remove rather than reassign Employee. Agency denies singling Employee out for separation. Agency stated that Employee will remain on a displacement list for two years and be notified of any positions for which she is best qualified.

ANALYSIS AND CONCLUSIONS

According to the D.C. Official Code § 1-624.08 (2001), an employee can challenge a RIF as follows:

> 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 as follows--
>
> (1) an employee may file with the Office of Employee Appeals an appeal contesting that separation procedures of subsections (d) and (f) were not properly applied.
>
> 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 1 *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 . . .
>
> (f) 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. (Emphasis added).

In accordance with these provisions, the only facts and legal conclusions that are relevant to this appeal are those that go to establish whether the appellants received a "round of lateral competition" and "written notice of at least 30 days" before the effective dates of their separations.

Employee has not claimed that she did not get the requisite 30 day notice in advance of her removal. She has, however, questioned whether Agency provided her with a lawful round of lateral competition. But she did not set forth any facts that would support a finding that the division in which she served was not sufficiently discrete in its functions to be designated a competitive area for the purpose of the RIF. Employee avers that the division followed the same mission statement as the larger agency. However, this is not a basis upon which this Judge can conclude that the division was not clearly identifiable and distinguishable. In fact, Employee's claim that she was performing tasks specific to the functions of the division even before being assigned there counters her argument.

Chapter 24 of the DPM, § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> [A]ll positions in the competitive area . . . in the same pay system, grade or class, and series which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent in any one (1) position can perform successfully the duties and responsibilities of any other position, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

Employee has not identified any others with whom she could have lawfully competed for retention. Employee named one other person who also served as a Program Compliance Specialist (Samuel Leonard) but, according to her information and belief, he served at a different grade level than she did. Therefore, he could not have been in her competitive level.

Employee has stated no claims pursuant to which this Office can afford her any relief. As there is no relief the Office can afford, no further consideration of this matter is warranted and it must be dismissed.

ORDER

It is hereby ORDERED that this appeal is dismissed for failure to state a claim pursuant to which relief can be granted.

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE