

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
GORDON J. CLONEY,)	
Employee)	OEA Matter No. 2401-0085-09
)	
v.)	Date of Issuance: February 22, 2010
)	
DEPARTMENT OF INSURANCE,)	
SECURITIES AND BANKING,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	
Gordon J. Cloney, Employee, <i>Pro-Se</i>)	
Rhonda K. Blackshear, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 13, 2009, Gordon J. Cloney (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Department of Insurance, Securities and Banking (“the Agency” or “DISB”) decision to abolish his position through a Reduction in Force (“RIF”). Prior to his position being abolished, Employee was a Project Manager International Insurance Specialist, DS-301-15.

I was assigned this matter on or around September 8, 2009. A Prehearing Conference was held on November 17, 2009. After considering the parties positions as stated in the documents of record and during the aforesaid Prehearing Conference, I decided that an evidentiary hearing was not warranted. Consequently, I ordered the parties, *inter alia*, to submit final legal briefs in this matter. The parties have since complied. 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 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 CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee’s appeal process with this Office.

Agency’s Position

The Agency’s asserts that its decision to abolish Employee’s position through a reduction-in-force due to lack of work was proper and in accordance with District of Columbia personnel law. The Agency received approval and authorization to conduct the RIF described in Administrative Order No. DISB-2008-01, dated October 23, 2008, and signed by the Mayor on December 4, 2008. *See* Agency’s Answer to Employee’s Petition for Appeal of RIF Action and Motion for Summary Disposition at Tab 3. The Notice, which was provided to Employee more than thirty (30) days in advance of the effective date of the abolishment of his position, advised Employee that his separation would become effective January 16, 2009. *Id.* at Tab 5. In its final brief, Agency explains that:

The RIF of Employee’s position as Project Manager International Insurance Specialist was due to “lack of work”, which is a legitimate and bona fide management reason for abolishing Employee’s position pursuant to 6 DCMR § 2401. That regulation sets forth the circumstances under which an agency may properly

invoke a RIF, in relevant part, provides:

Each personnel authority shall follow these regulations when releasing a competing employee from his or her competitive level when the release is required by any of the following:

- (a) *Lack of work*;
- (b) Shortage of funds;
- (c) Reorganization or realignment; or
- (d) The exercise of restoration rights as provided in 38 U.S.C. § 2021 et seq.

(Emphasis added).

See Brief for Agency at 8.

The Agency also argues that in a RIF appeal case, the Office of Employee Appeals does not have jurisdiction to adjudicate Employee's allegations that he has been subjected to retaliation based on his participation in protected activities under Title VII of the Civil Rights Act of 1964, the District of Columbia Human Rights Act of 1977, and the Whistleblower Protection Act. The Agency further notes that "Employee fail[ed] to allege in his Petition for Appeal that the Agency did not provide him with (1) a 30-day notice prior to his separation, or (2) that the Agency failed to provide one round of lateral competition to which he was entitled. Thus, Employee's Appeal is fatally defective because it fails to raise an issue within the purview of the jurisdiction of the OEA." *Id.* at 10. Agency asserts that it provided Employee with 30 days written notice prior to its implementing the instant RIF. Agency also explained that Employee's position was the only one within its competitive level thereby obviating the requirement for one round of lateral competition.

Employee's Position

Employee alleges that the abolishment of his position through a RIF "is in violation of the D.C. Whistleblower protections and a thinly disguised retaliatory act directed against [Employee] by [Thomas Hampton] the then DISB Commissioner." Employee's Final Memorandum at 1. According to the record, he based his allegations in part on his age and whistleblower activities. In his own words, Employee asserts that:

...the RIF action is one in a long series of prohibited personnel actions undertaken by Hampton in concert with former DISB Associate Commissioner Margaret Schruender which began in March 2007. They were directed toward me in response to my

expressed concerns at Hampton's failure to provide any and all support or direction for my work to advance the Department's International Program. It was his responsibility as Commissioner to do so. This negligence had begun in August 2005 when Hampton became Commissioner replacing Commissioner Lawrence Mirel as my sole supervisor. The prohibited actions that began in March 2007 and continued until my departure in December 2008 included but were not limited to denial and withdrawal of work support, but also involved direct interference in the discharge of my job responsibilities, retaliatory harassment, the denial of the right to protest abusive treatment and denial of related due process as provided for in D.C. laws, rules and regulations, and the falsification of related official records. *Id.*

Employee further describes the process through which his last position of record was birthed and goes on to claim that through the machinations of former DISB Commissioner Hampton, among others, the International Program languished. According to Employee, his position, if properly supported over the past few years, would be viable and otherwise would not be RIF worthy due to lack of work. Lastly, Employee argues that Agency has not allowed him full access to his personnel files thereby depriving him of the evidence necessary for corroborating his arguments.

Discussion

Of particular guidance in the instant matter is 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, a District of Columbia government employee whose position was abolished pursuant to a RIF may only contest before this Office:

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

The Agency alleges that it undertook the instant RIF because of a demonstrated lack of work. It further contends that it complied with all applicable laws rules and regulations when it implemented the instant RIF. Employee counters that the Agency did not adequately invest the necessary resources in order to bring lasting viability to his last position of record.

After careful review of the documents of record, it is evident to the undersigned that the Agency properly implemented the instant RIF. Further, Employee has failed to make any credible claims that he did not receive 30 days written notice prior the abolishment of his last position of record.

This Office has consistently held that when a separated employee is the only member of his/her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added by this AJ), “the statutory provision affording [him/her] one round of lateral competition was inapplicable.” *See, e.g., Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), __ D.C. Reg. __ (); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005), __ D.C. Reg. __ (); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003), __ D.C. Reg. __ (). *See also Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), _ D.C. Reg. (). In the matter at hand, the entire Unit was abolished, after a RIF had been properly structured and timely 30-day legal notifications properly structured and served. I find that no further lateral competition efforts were required, and conclude that Agency was in compliance with the lateral competition requirements of the law.

The Employee has argued that this Office should exercise jurisdiction over his causes of action through the Whistleblower Act. This Act encourages employees of the D.C. government to “report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal.” D.C. Official Code § 1-615.51. To achieve this objective, the Whistleblower Act provides that “a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order.” D.C. Official Code § 1-615.53. Furthermore, § 1-615.54 (a) states that:

An employee aggrieved by a violation of § 1-615.53 may bring a civil action before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including but not limited to injunction, reinstatement to the same position held before the prohibited personnel action or to an equivalent position, and reinstatement of the employee's seniority rights, restoration of lost benefits, back pay and interest on back pay, compensatory damages, and reasonable costs and attorney fees. A civil action shall be filed within one year after a violation occurs or within one year after the employee first becomes aware of the violation...

After careful review, I find that, given the instant facts, the OEA is not proper venue for Employee to press his Whistleblower claims. *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), held that the OEA's authority is narrowly prescribed, and that it did not have jurisdiction to determine whether the RIF at the Agency was bona fide or violated any law, other than the RIF regulations themselves. While it is true that this Office may hear Whistleblower claims that are part and parcel with matters that we otherwise have jurisdiction over, such is of little use in the instant matter. Employee's claims relative to his alleged Human Rights and Whistleblower claims are far afield from the limited jurisdiction formally entrusted to the OEA with regard to RIF's. Further, Employee has already benefited from the opportunity of having his Whistleblower and Human Rights claims heard before the District of Columbia Office of Human Rights. To do so again would provide Employee another bite at the apple. I find that relative to adjudicating a RIF appeal, the OEA may only review the circumstances as provided for under D.C. Official Code § 1-624.08 (d) and (e). Given the instant facts, I find that Employee's Whistleblower and Human Right claims do not fall within D.C. Official Code § 1-624.08 (d) and (e) and therefore they fall outside of OEA's limited authority to review.

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, this Office no longer has jurisdiction over grievance appeals. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. I find that Agency's action abolishing Employee's position was done in accordance with all applicable laws, rules and regulations. After reviewing the record, I further find that the Agency has provided Employee with all relevant information from his personnel file in adherence to my Order dated November 20, 2009. I further find that all other claims that Employee has made while prosecuting his appeal are best characterized as grievances and outside of this Office's authority to review. Therefore, I conclude that Employee has made no credible claim of relief cognizable before this Office, and that Agency's action separating Employee from government service pursuant to the RIF must be upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE