THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ERIC DENMARK,	)	
Employee	)	OEA Matter No. 2401-0273-09
	)	
v.	)	Date of Issuance: April 26, 2010
	)	
D.C. DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Eric Denmark, Employee *Pro Se*
James E. Fisher, II, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 30, 2009, Eric Denmark ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District Department of Transportation ("DDOT" or "the Agency") decision to abolish his position through a Reduction-In-Force ("RIF"). I was assigned this matter on or around March 17, 2010. I held a Prehearing Conference on April 1, 2010, so that I could get a better understanding of the relevant facts and circumstances of this matter. During the Prehearing Conference Employee alleged that he had not received Agency's Answer to his petition for appeal. I then related to Employee that the OEA timely received Agency's Answer in this matter. I then verbally denied Employee's motion to dismiss.

As a result of this Prehearing Conference, I decided that an evidentiary hearing was unwarranted. I then issued an Order dated April 2, 2010, wherein I required the parties to submit final legal briefs in this matter. The Agency submitted its brief along with a Motion to Dismiss. However, Employee has not submitted his brief. 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 and testimonial evidence as presented by the parties during the course of Employee's appeal process with this Office.

When the instant RIF occurred, Employee's position of record was Electrical Foreman. Employee contends that he was actually serving as a Traffic Services Electrical Technician ("TSET") when the RIF occurred. He explains that when two fellow colleagues retired, he assumed their duties and responsibilities without a change in rank or salary. Consequently, he should be returned to service since that position allegedly survived the instant RIF. To support this claim, Employee provided several Certificates showing that he had received specialized training ostensibly connected with TSET. Employee asserts that he provided superior service to the Agency and the community as a whole and on this ground argues that the RIF should be overturned in an effort to stop the alleged practices of cronyism and favoritism within DDOT. *See generally* Employee's Petition for Appeal at 1.

Agency agrees that Employee participated in the training outlined within the aforementioned Certificate. DDOT argues that Employee's position of record was Electrical Foreman not TSET and that DDOT adequately followed all portions of the D.C. Official Code § 1-624.08 that are under the OEA's purview when it abolished Employee's last position of record.

D.C. Official Code § 1-624.08 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 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.

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, I find that Employee was the only person in his competitive level after a RIF had been properly structured and a timely 30-day legal notification was properly served.

According to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), the OEA's authority over RIF matters is narrowly prescribed. The Court explained that the OEA does not have jurisdiction to determine whether the RIF at the Agency was bona fide or violated any law, other than the RIF regulations themselves. Further, 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, the OEA 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. Employee's other ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not say that Employee may not press his claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims. Based on the foregoing, I conclude that the Agency's action of abolishing Employee's position was done in accordance with all applicable laws, rules and regulations.

OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), reads in pertinent part as follows:

> If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:
>
> > (b) Submit required documents after being provided with a deadline for such submission…

This Office has consistently held that a matter may be dismissed for failure to prosecute when a party fails to submit required documents. *See, e.g., Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985). Here, Employee did not submit his final legal brief as was required by April 2, 2010 Order. I find that Employee has not exercised the diligence expected of a petitioner pursuing an appeal before this Office. I find that this is another reason why Agency's action should 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:

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ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE