THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
THOMAS R. FRAZIER	)	OEA Matter No. 2401-0058-08
Employee	)	
	)	Date of Issuance: August 1, 2008
v.	)	
	)	Rohulamin Quander, Esq.
D.C. DEPARTMENT OF HUMAN RESOURCES	)	Senior Administrative Judge
Agency	)	
	)	

Ross Buchholz, Esq., Agency Representative
Thomas R. Frazier, Employee, *pro se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 14, 2008, Employee, a Computer Specialist, DS-13-06 in the Career Service, filed a Petition for Appeal from Agency's final decision separating him from government service pursuant to a reduction-in-force (RIF). This matter was assigned to me on June 9, 2008. I conducted a Prehearing Conference on July 1, 2008. Since this matter could be decided based on the parties' respective positions as stated at the Prehearing and in the documents of record, no additional proceedings were held. The record is closed.

JURISDICTION

The Office has jurisdiction over Employee's claim that Agency's separating him from Government service pursuant to a RIF was unlawful, *D.C. Official Code* § 1-606.03(a) (2001).

ISSUE

Whether Agency's action separating Employee from Government service pursuant to a RIF was conducted in accordance with applicable law, rule and regulation.

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.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia,* appeals from separations pursuant to a RIF. Subchapter XXIV of the Code sets forth the law governing RIFs. Section 1-624.08 of Subchapter XXIV pertains to RIFs for the fiscal year ending September 30, 2000, and each subsequent fiscal year.

D.C. Official Code § 1-624.08 states in pertinent part:

> (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:
>
> (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.

Therefore, according to the preceding statute, a D.C. Government employee whose position was abolished because of a RIF, may only contest before this Office:

1. That he/she did not receive written notice 30 days notice prior to the effective date

of separation from service; and/or

2. That he/she was not afforded one round of lateral competition within the competitive level.

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.

Section 2412 of the RIF regulations, 47 D.C. Reg. at 2431, requires an agency to establish a retention register for each competitive level, and provides that the retention register "shall document the final action taken, and the effective date of that action, for each employee released from his or her competitive level." 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 usually the date on which the employee began his/her D.C. Government service. However, an employee's standing on the retention register can be enhanced by: 1) an outstanding performance rating for the rating year immediately preceding the RIF (DPM § 2416, 47 D.C. Reg. at 2433); 2) Veteran's preference (DPM § 2417, 47 D.C. Reg. at 2434); and/or 3) D.C. residency preference (DPM § 2418, *id.*).

The following facts are not subject to genuine dispute:

1. On December 5, 2000, Employee, then a computer programmer, was certified as a Computer Specialist, DS-13, and assigned to job series DS-0334. where he remained for several years, including on February 16, 2008, the date that his RIF was effective. At the effective date of his RIF, he had well more than 40 years of governmental service, with a RIF Service Computation Date (the "SCD" of May 14, 1964.
2. After an Agency-wide programmatic realignment and service providing assessment, Agency determined that several positions would be eliminated. Pursuant to Administrative Order No. DCHR-07-02, approved by Mayor Adrian M. Fenty and issued December 19, 2007, the proposed RIF went forward. Among the positions slated for elimination was one Computer Specialist, DS 14, and two Computer Specialists, DS 13, one of which positions was encumbered by the Employee.
3. On December 28, 2007, Agency established a retention register for Employee's competitive level. Thomas R. Frazier, the employee herein, and Charles F. Brooks were

the only two names listed. Both employees were listed as Computer Specialist, DS 13-07, serving in job series CS-0334. Employee's RIF SCD was listed as "5/4/1967," while Brooks' RIF SCD was listed as "1/20/1984." Because the entire job series CS-0334 was abolished, both employees were terminated on the effective date of the RIF.

4. Agency initially erred in calculating Employee's RIF SCD, by not crediting his Residency Preference status, pursuant to DPM §2418.2(b), which accords three years of additional service to those employees who do not reside in the District of Columbia, but who have been in continuous service, without a break, prior to January 1, 1980. Agency admitted the error, adjusted Employee's RIF SCD from "5/4/1967" to "5/4/1964." The clerical error did not affect the outcome of the RIF.
5. On January 2, 2008, Agency issued a formal RIF notification letter to Employee, effective February 16, 2008.
6. Employee received the requisite RIF termination notice at least 30 days prior to the effective date of his separation.

Employee's Arguments

Employee raised issues which challenged whether Agency had followed the proper RIF procedures and had a substantive justification for initiating the RIF. First, he noted that once he and his coworkers learned of the impending RIF action, they raised several questions, including how the RIF retention register list was structured. Instead of being given timely and adequate answers, an opportunity to meet with management, and a set of documents that contained correct information, their inquiries were not satisfactorily addressed.[1] Agency staff constantly put off the Employee and his inquiring two co-workers, with the end result that the effective date of the RIF went into effect, without the three employees being accorded the requested meeting they requested and expected.

Second, Employee questioned management's action of initiating, but apparently not completing, an assessment of Employee's job duties prior to implementation of the RIF.[2] Employee anticipated receiving an updated position description (the "PD"), a replacement of the old and outdated PD for Job Series DS-0334, which was seven years old, and not currently reflective of the job that the Employee was actually performing. Prior to the RIF, and based upon job assessments that were ongoing, Employee anticipated that his position was going to be converted to Job Series DS-2210, which was the job series assigned to those employees who had been hired in more years, and who were doing substantially the same work as the Employee. The effect would have joined him with co-workers who were initially hired into that job series, or already converted to the DS-2210 job series. Had that occurred, according to the Employee,

[1] Employee's RIF SCD was incorrect. However, it was corrected in a timely manner. The erroneous date had no effect upon the outcome of the RIF as both Employee and the sole co-worker were each terminated when the job series was officially abolished.

[2] This assessment is generally referred to as a "desk audit." Employee noted that the process was started but never completed. Further, he never saw any document indicating a written outcome of his job duties having been reassessed for the purpose of adding him to the DS-2210 job series..

when the pre-RIF retention register was prepared, he would have been paired with several less senior and less experienced employees, been accredited higher than they, and been retained.

Rather, because he was left out of the newly established job series, he was not accorded the proper opportunity to compete for job retention. Employee asserted that Agency's failure to follow through and complete the position description change resulted in him being assigned to an incorrect, non reflective competitive level sub-code at the time of the RIF.

Third, Employee challenged whether there was a substantive justification for the RIF, arguing that, due to the actual diversification that emerged with regard to the three affected employees (Employee, his retention register co-worker, and another co-worker who was also in job series DS-0334, but not listed on their register), the three affected individuals discharged significantly divergent job duties. The effect created an anomaly of persons competing on the same RIF retention register, due to the "marriage of convenience" created by an outdated job series and position description, but who, in actuality, performed significantly different work-related tasks. He concluded that he was targeted for termination, under the guise of a RIF, because of his older age and health. Conversely, the younger, healthier, and lower grade employees have assumed many of the job functions that he previously discharged.

Agency's Responses

Agency responded, noting that Employee's separation from Career Service was pursuant to a duly authorized RIF action, initiated by Administrative Order No. DCHR-07-02, executed by Mayor Fenty on December 19, 2007, which authorized the Agency to conduct a RIF. The subsequently implemented RIF was held in full compliance with the law and all of the legal mandates of Chapter 24 of the DPM.

First, Agency was in full compliance with the mandated notice requirement of DPM 2422.3, which required that not less than a thirty (30) day notice be served upon the affected employee, prior to the effective date of the RIF. Employee's notice was issued on January 2, 2008, effective February 16, 2008.

Second, all of the RIF procedures were followed correctly, except for the clerical error of initially listing an erroneous RIF SCD of May 4, 1967, instead of May 4, 1964. The error, which in no way affected the outcome of the RIF, was promptly corrected, to reflect Employee's correct SCD.

Third, Agency denied Employee's assertion that there was no substantive justification for the RIF, including a claim that Agency established a faulty retention register based upon the use of an outdated job series, which created an incorrect competitive level. Despite Employee's meeting with Patricia Harris, a DCHR position classifier, several months before his job was terminated, no changes in either the job series or duties of his position were implemented before February 16, 2008, the date that the RIF was effectuated.

The issue of what is an employee's competitive level has been raised on a number of prior occasions, and likewise resolved. Both District of Columbia and federal case law have consistently defined "competitive level" as the *official position of record* (emphasis added by this AJ). In *District of Columbia v. King,* 766 A.2d 38 (D.C. 2001), the D.C. government argued, and the Court of Appeals agreed, that a District employee's competitive level must be based on his or her official position of record, and the fact that the employee may have been detailed to a different position at the time of his or her RIF does not change the fact that the establishment of the employee's competitive level is based on the official position description. Likewise, in *Estrin v. Social Security Administration,* 24 M.S.P.R. 303, 305 (1984), it was held that when an employee is detailed to or acting in a position, his competitive level is determined by his permanent position, and not the one to which he is detailed or in which he is acting. See also *Bjerke v. Department of Education,* 25 M.S.P.R. 310 (1984) and *Levitt v. District of Columbia,* 869 A.2d 364 (D.C 2005). See also *Otis Reynolds v. D.C. Public Schools,* OEA Matter No. 2401-0192-04, (October 5, 2005).

I find that Employee's competitive level at the time of the RIF was based upon his official position of record, the only existing job series for his position at the time that the RIF was implemented. That some other job-related duties may have been assigned or assumed over a period of time, is not an infrequent occurrence. However, any claim of entitlement for potential consideration or reevaluation of his job duties, as a component of reassessing his job, at the time that the RIF was implemented, and for the purpose of reclassifying his job series or for any other purpose, is totally without precedent or merit.

Fourth, Agency argued that all DCHR employees who were in Employee's competitive area were included on the RIF retention register, and that no covered employee in the affected competitive area was excluded for any reason, consistent with the requirements of DPM § 2407.1.

Fifth, Agency denied that Employee had been targeted for termination, due to his age, noting that a claim of age discrimination, as well as any other RIF-challenging assertions that were beyond the 30-day notice and one round of lateral competition in the affected Employee's competitive area, are all beyond the jurisdiction of this Office to consider and decide.

AJ's Summation

In summation, Employee has alleged that, prior to the RIF: 1) Agency failed to complete the evaluation and reassessment of his job duties and to subsequently create a more current job series and PD; 2) the retention register was faulty, based upon an outdated PD, which incorrectly paired together employees with divergent duties and responsibilities, when in fact the individuals affected were performing work sometimes significantly different from what was recited in the PD; 3) that all of his efforts to obtain information concerning the basis, justification, and implementation of the RIF, were all rebuffed, postponed, and ignored, until after the effective date that the RIF was implemented; and 4) he was the victim of age discrimination, when the RIF was implemented.

Having evaluated the entire record, I find that there is no evidence to suggest, and indeed Employee has admitted, that while employed, he never filed a grievance to address these concerns. Despite the potentially serious nature of each allegation, none of them is relevant here, having been statutorily removed from the jurisdiction of this Office to consider. Employee has raised questions concerning the issue of "pre-RIF conditions," which are long established as being outside of the jurisdiction of this Office, and could have been raised as a grievance at the Agency level, prior to the effective date of Employee's RIF-related termination. Matters such as outdated job duties, operating with an outdated PD, Agency failure to provide RIF information that was timely and reasonably requested, and age discrimination, are all issues that should have been addressed and decided at the Agency level. Had Employee done so, he might have obtained some favorable relief, either at the Agency level, or as a result of an ensuing civil suit in a court of general jurisdiction, if the Agency failed to take his allegations seriously

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 evidence that would indicate that the RIF was improperly conducted. I conclude that Agency's action abolishing Employee's position was done in accordance with applicable law, rule and regulation. Therefore, I further conclude that Agency's action separating Employee from government service pursuant to the RIF must be upheld.

ORDER

This matter having been duly considered, it is hereby;

ORDERED that Agency's Motion to Dismiss the Petition for Appeal is GRANTED; and it is;

FURTHER ORDERED that Agency's action separating Employee pursuant to a RIF is UPHELD.

FOR THE OFFICE: / s /

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge