

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ELLA GILBERT,)	
Employee)	OEA Matter No. 2401-0080-07
)	
v.)	Date of Issuance: August 21, 2008
)	
D.C. DEPARTMENT OF)	
HUMAN RESOURCES,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	

Mitchell Batt, Esq., Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Prior to the abolishment of her position, Ella Gilbert’s (“Employee”) last position of record was Management Analyst, DS Series 343, Grade 14, with the District of Columbia’s Department of Human Resources (“Agency”). On May 29, 2007, the Employee filed a petition for appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Agency’s action of abolishing her position via a reduction in force (“RIF”).

This matter was assigned to the undersigned on or around September 7, 2007. A prehearing conference as well as a status conference was held in the instant matter. After considering the parties’ positions as stated during these conferences, as well as in the documents of record, I decided that an evidentiary hearing was warranted. Accordingly, an evidentiary hearing was held on March 25, 2008. The parties have both submitted their respective written closing arguments. The record is closed.

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.

ISSUE

The Issue to be addressed by this Hearing is as follows:

Whether the Agency’s action of separating the Employee from service pursuant to a RIF was done in accordance with applicable law, rule, or regulation.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

Summary of the Testimony

Lewis Norman

Lewis Norman (“Norman”) testified in relevant part that: he is employed by the Agency as a Human Resources Specialist. His current duties include providing position classification services for various District government agencies as a consultant. As a part of the instant RIF, he reviewed the Employee’s official personnel folder.

Agency Exhibit No. 1 was admitted into evidence through Norman’s testimony. It is a position description for a Management Analyst Series 343, Grade 14. According to this exhibit, the Employee was listed as the incumbent for said position. According to Norman’s testimony, the position description is, in of itself, a generic description for a Management Analyst. It was created for all persons who hold the position of Management Analyst. *See generally*, Tr. at 10 – 11.

Agency’s Exhibit No. 2 was admitted into evidence through Norman’s testimony. It is a two page letter (“RIF Notice”) dated March 28, 2007, addressed to the Employee, wherein she was given written notice of the then impending RIF of her position. According to the RIF Notice, the effective date of the instant RIF was April 30, 2007.

Agency’s Exhibit No. 3 was admitted into evidence through Norman’s testimony. It is Administrative Order No. DCHR-07-01, dated March 27, 2007, and signed by

Mayor Adrian Fenty. This order authorized the abolishment of the Employee's position via a RIF.

Norman described a retention register as "a listing of employees in a competitive level by tenure group and service computation date." Tr. at 19. Norman went on to describe the process of creating a retention register as follows:

The [retention register] is created by reviewing and pulling together a number of data that's connected with the position to be abolished or associated with the position to be abolished and the incumbent of the position.

We pull together information such as the title of the position, series of the position, grade level of the position, we identify the position to be abolished and that's in the administrative order.

Having identified the position to be abolished, we then identify, based on the personnel data system, the employees or employee that encumbers the position.

Once we do that, we are able to go into the official personnel file of the employee and obtain and verify the information that's required to be part of the retention register, such as the tenure group, their length of service, whether or not the employee received an outstanding, whether there's credit to be given for residency preference and so forth.

And based on this information that's required to be part of the retention register, we then develop a retention register listing the employee or employees and retention status.

Tr. at 19 – 20.

Agency's Exhibit No. 4 was admitted into evidence through Norman's testimony. It is the retention register created for the instant RIF. This document lists the position of Management Analyst for abolishment. Also, the Employee is noted as the sole incumbent of said position.

Norman described the difference between a competitive area and competitive level as follows:

The competitive area is the area boundary in which the employees that are [affected] by a [RIF] compete for job retention.

The competitive level consists of positions that are similar in terms of an occupation and the similarity deals with title, series and grade

so that they can be grouped in the same level for retention and [RIF] purposes.

Tr. at 26.

Norman further testified that the requirement of providing a RIFed employee one round of later competition before separating them from service is satisfied if said employee is the sole incumbent listed on a properly constructed retention register. *See generally*, Tr. at 20 – 21. When conducting the instant RIF, the Employee was the only person who encumbered the position of Management Analyst which was ultimately abolished as part of the instant RIF. Norman related that he did not notice anything unusual while reviewing the instant RIF when compared with other RIF's that he has overseen. *See generally*, Tr. at 43 – 44.

Elle Gilbert (“the Employee”)

The Employee testified in relevant part that: prior to the instant RIF she was employed by the Agency as a Management Analyst. The Employee goes on to relate that she has served in various Federal and District government agencies for the better part of her working life. The Employee described her job title of Management Analyst as a “functional job title” noting that she has also worked as a Project Manager. *See generally*, Tr. at 54.

Some of her job related duties included: policy and planning duties; revising the District Personnel Manual (“DPM”); assisting the benefits department of the Agency with setting up software and performing benefits analysis; and assisting the IT department with setting up its software. *See*, Tr. at 55.

At some point in 2006, the Employee was placed on a detail at the Reeves Center. Initially, she was told to work with the recruiting department. However, when she reported for duty, she was tasked with rewriting the employee handbook. *See*, Tr. at 56. She noted that she successfully completed that task and did other assignments as they were given.

Eventually, in or around August 2006, the Employee's detail was finished. The Employee alleges that when she addressed this issue with then Director of the Agency, Lisa Marin, she received no response. Then, Brender Gregory (“Gregory”) was named Director of the Agency. Shortly thereafter, the Employee was given a letter extending said detail for an additional 30 days and tasked with writing up work processes for some unnamed departments of the Agency. *See generally*, Tr. at 58. After the 30 days had elapsed, the Employee was still working towards completing the task of the detail. It was during this period, while the Employee felt that she was working in an unofficial detail, that she received her RIF Notice. The Employee admitted that she was handed said notice on March 28, 2007, while on duty. She reluctantly signed this document acknowledging her receipt of same. *See generally*, Tr. at 61 – 63. The Employee also admitted that she was asked to leave on this date and was paid her salary through the

effective date of the RIF. *See generally*, Tr. at 62 – 63.

Findings of Facts, Analysis and Conclusions of Law

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

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.

According to the second page of the RIF Notice, the Employee acknowledged receipt of her notice on March 28, 2007. Further, during the hearing, the Employee admitted to receiving the RIF Notice on March 28, 2007. She further admitted that after

receiving the notice she was asked to immediately leave her place of employment, but was paid her salary through the effective date of the RIF. Accordingly, I find that the Employee was duly afforded at least 30 days written notice as required by D.C. Official Code § 1-624.08 (e).

Relative to the one round of lateral competition, the Agency presented the testimony of Norman, who related that he has conducted and reviewed several RIF actions through his career for various Federal and District government agencies. Norman went on to argue, credibly, that the instant RIF involving the Employee was not done in an unusual or underhanded manner. Furthermore, he was able to buttress this argument through the introduction of various credible documents that were created specifically for the instant RIF including:

1. Agency Exhibit No. 1, a position description for a Management Analyst Series 343, Grade 14. This form listed the Employee as an incumbent for this position.
2. Agency's Exhibit No. 2, the written RIF Notice dated March 28, 2007, addressed to the Employee. This notice is required to be given to every Employee who encumbers a position subjected to a RIF pursuant to D.C. Official Code § 1-624.08 (e).
3. Agency's Exhibit No. 3, Administrative Order No. DCHR-07-01, dated March 27, 2007, and signed by Mayor Adrian Fenty which duly authorized the abolishment of the Employee's position via a RIF.
4. Agency's Exhibit No. 4, the retention register created for the instant RIF. According to this document, the Employee is listed as the sole incumbent for the position of Management Analyst.

The Employee has contended that I should reverse the RIF because, as she described it, she was working in an unauthorized detail, when her position was RIFed. She has also contended that she should have been able to compete with other persons in the IT department to which her position was located at the time of the instant RIF. The Employee has a compelling story, which does not fall on totally deaf ears, considering her decades of service with various Federal and District agencies. The District of Columbia Court of Appeals found in *District of Columbia v. King*, 766 A.2d 38, 45 (D.C. 2001), "an employee's competitive level in a RIF is based on his official position of record. When an employee is detailed to or acting in a position, her competitive level is determined by her permanent position, and not the one to which she is detailed or in which he is acting." *Citations Omitted*.

I further find that the Employee arguments relative to an unauthorized detail is properly contested as a grievance. The jurisdiction of this Office is expressly limited to performance ratings that result in removals; final agency decisions that result in

removals, reductions in grade; suspensions of ten days or more; enforced leave; or reductions in force. OEA Rule 604.1, 46 D.C. Reg. 9299 (1999). This Office does not have jurisdiction over grievances. Accordingly, the Employee's argument relative to her alleged unauthorized detail in the instant matter must fail.

With the Employee having admitted that she had received the written notice of her RIF in a timely manner, I am left with deciding the issue of whether the Employee was properly afforded one round of lateral competition during the instant RIF. However, this requirement need not be followed when only one person encumbers an abolished position. Alas, I find that such is the case in the instant matter. According to Agency's Exhibit No.4, the Employee was the only person who encumbered the now abolished position of Management Analyst within her competitive area and level. Regardless of the Employee protestations to the contrary, I find that the agency duly complied with D.C. Official Code § 1-624.08 (d) in the instant matter.

ORDER

It is hereby ORDERED that Agency's action of separating the Employee from service as a result of the RIF is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge