THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DOROTHY GREER,	)	
Employee	)	OEA Matter No. 2401-0025-11
	)	
v.	)	Date of Issuance: February 11, 2013
	)	
D.C. DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT,	)	STEPHANIE N. HARRIS, Esq. Administrative Judge
Agency	)	
	)	

Dorothy Greer, Employee *Pro-Se*
Vonda J. Orders, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 24, 2010, Dorothy Greer ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Housing & Community Development's ("Agency") decision to abolish her position through a Reduction-in-Force ("RIF"). Employee's RIF Notice was dated November 8, 2010, with an effective date of December 10, 2010. On January 10, 2011, Agency filed its Answer in response to Employee's Petition for Appeal in this matter.

I was assigned this matter on July 26, 2012. On September 24, 2012, I ordered the parties to submit briefs addressing whether this matter should be dismissed for lack of jurisdiction because of Agency's contention that Employee was reinstated to her position. Both parties complied and submitted their briefs. Employee also submitted a Motion requesting sanctions on October 25, 2012. Since this matter could be decided based upon the documents of record, no proceedings were conducted. 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.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. I find that in a RIF, I am guided primarily by D.C. Official Code § 1-624.08, which states in pertinent part that:

> (a) ***Notwithstanding*** *any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect* for the fiscal year ending September 30, 2000, and *each subsequent fiscal year*, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).
>
> (b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.
>
> (c) ***Notwithstanding*** *any rights or procedures established by any other provision of this subchapter*, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).
>
> (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.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that "the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency."[1] The Court also found that both laws were current and that the government triggers the use of the applicable statute by using "specific language and procedures."[2]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[3] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act ("the Act") instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[4] The Court stated that the "ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF."[5]

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.[6] The Act provides that, "notwithstanding any rights or procedures established by any other provision of this subchapter," which indicates that it supersedes any other RIF regulations. The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[7] Further, "it is well established that the use of such a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[8]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[9] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory provision to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily

---

[1] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[2] *Id.* at p. 5.
[3] *Id.* at 1132.
[4] *Id.*
[5] *Id.*
[6] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[7] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[8] *Id.*
[9] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

1. That she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

2. That she was not afforded one round of lateral competition within their competitive level.

Employee's Position

In her Petition for Appeal, Employee alleges that Agency failed to follow District personnel rules. She states that Agency incorrectly computed her service computation date by failing to credit her prior government service and her performance evaluation. Employee also claims that Agency failed to give her proper notice of the RIF because she was not notified thirty (30) days prior to the RIF effective date.[10] Additionally, in her brief, Employee reiterated her previous arguments, noting several allegations against several Agency employees. The crux of Employee's arguments pertains to her belief that Agency engaged in constant harassment and reprisal in its attempt to RIF her. She further notes that Agency's actions were retaliatory and discriminatory in nature. Employee also questioned the budget crisis rationale for the RIF. While conceding that she was rehired by Agency following the reconstruction of the Retention Register, Employee also maintains that this matter is not moot and is capable of reoccurring.[11]

Agency's Position

Agency highlights in its Answer that OEA no longer has jurisdiction to hear this matter because Employee was reinstated to her position on December 13, 2010. Agency states the following: "sometime after Employee received her RIF notice [dated November 8, 2010], the Employee submitted information to DCHR [District of Columbia Department of Human Resources] establishing that the Employee had not been given credit for certain federal government service. DCHR corrected the Retention Register based on the Employee's new information…A letter informing the Employee that she was reinstated was mailed to her on December 13, 2010."[12] In its brief, Agency "vehemently denies that it "targeted" the Employee for [the] RIF," noting that several other Employees were separated from Agency during this time. Additionally, Agency argues that Employee's claims of retaliation, discrimination, emotional distress, and harassment should be dismissed based on OEA's lack of jurisdiction.[13]

Jurisdiction

Agency's contention that Employee was reinstated to her position raised a jurisdictional question in this smatter. This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"),

[10] Petition for Appeal (November 24, 2010).
[11] Employee's Brief (October 11, 2012).
[12] Agency's Answer (January 10, 2011).
[13] Agency Brief (October 16, 2012).

D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1[14], this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

(a) A performance rating resulting in removal;
(b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
(c) A reduction-in-force.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined 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." This Office has no authority to review issues beyond its jurisdiction.[15] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[16]

Agency highlights in its Answer and brief that Employee was rehired and is still employed by Agency and requested that the matter be dismissed as moot.[17] However, Employee argues that the matter is not moot and is capable of reoccurring.[18] The record shows that Employee's RIF Notice was dated November 8, 2010, with an effective date of December 10, 2010.[19] Agency contends that a letter was sent to Employee on December 13, 2010, informing her that she was reinstated.[20] In her brief, Employee acknowledged that Agency informed her that her position was not subject to the RIF, but she asserts that she did not receive this notice until approximately December 21, 2010, eleven (11) days after the RIF effective date of December 10, 2010.[21]

Agency's action of *rehiring* Employee *after the effective date of the RIF* is a separate and mutually exclusive occurrence as it pertains to the RIF (emphasis added). As such, I find that because Agency rectified its mistake by rescinding its decision to abolish Employee's position *after* the effective date of the RIF, OEA properly retains jurisdiction in this matter with regards to the instant RIF.

---

[14] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.
[15] *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[16] *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[17] Agency Answer (January 10, 2011); Agency Brief (October 16, 2012).
[18] Employee Brief (October 11, 2012).
[19] Agency Answer, Tab 1 (January 10, 2011).
[20] *Id*. at p. 2.
[21] Employee Brief at p. 2 (October 11, 2012).

In instituting the instant RIF, Agency did not meet the procedural requirements listed above. The Retention Register created by Agency was inaccurate. It listed an incorrect Service Computation Date ("SCD") for Employee, thereby leading to the erroneous abolishment of her position. A Retention Register is the official document used to provide employees with one round of lateral competition, which is a required RIF procedure. The Retention Register is used to determine Employee's standing in her competitive level. Chapter 24 of the D.C. Personnel Manual § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> All positions in the competitive area … in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, 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 her RIF SCD, which is generally the date on which the employee began D.C. Government service. Following the RIF, Employee informed Agency about the error in her SCD, and Agency acknowledged its mistake. DPM 2405.6, 47 D.C. Reg. 2430 (2000) reads as follows:

> An action which was found by….the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

Agency admits that it utilized the wrong SCD in determining Employee's standing, and therefore, it reconstructed the retention register and determined that it erroneously abolished Employee's position. Based on her standing in the revised Retention Register, Agency reinstated Employee to her previous position of record, in a letter dated December 13, 2010. Employee acknowledges that Agency informed her that her position was no longer subject to the RIF, and as such, she was reinstated to her former position.[22] Accordingly, I find that because Employee was reinstated to her position, one round of lateral competition was not warranted in this matter.

Award of Back Pay

Employee is eligible for back pay for the period of Decembers 10, 2010 (the effective date of the RIF), to December 13, 2010 (the effective date of Employee's rehire). However, because the day following the effective date of the RIF (Decembers 11, 2010) fell on a Saturday

[22] *Id.*

and Employee's reinstatement date (December 13, 2010) fell on a Monday, there are no business days eligible for back pay during this period. Employee acknowledged that she received notification from Agency stating that she was rehired as of December 13, 2010.[23] Further, Employee has not provided any documentation showing that there was a loss of pay or benefits prior to her reinstatement. Therefore, I find that Employee is not eligible for an award of back pay.

Notice Period

Title 5, § 1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "[a]n employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The specific notice shall state specifically what action is to be taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, D.C. Official Code § 1-624.08(e), which governs RIFs, provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added).

Employee argues that she did not receive thirty (30) days written notice prior to the effective date of the RIF. According to the RIF notice, Employee was not available to sign the RIF notice on November 8, 2010; as such, it was mailed to her address. Employee acknowledges that she received the RIF Notice on November 13, 2010, which is twenty-seven (27) days prior to the RIF effective date of December 10, 2010.

In *Aygen v. District of Columbia Office of Employee Appeals*,[24] the D.C. Superior Court found that where an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*" (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[25] Additionally, the Court found that where an employee is not in duty status, the notice "must be sent to employee's last known address by courier, or by certified or registered mail, *return receipt requested*, before the time of the action becomes effective" (emphasis added).[26] The court further explained that "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee.[27]

While, Agency maintains that Employee was provided with the required thirty (30) days notice, they have failed to submit any documentary evidence confirming that Employee received the RIF notice on December 10, 2010, such as Employee's signature acknowledging receipt, a signed statement by a witness that Employee refused acknowledgement, or use of certified or registered mail with return receipt acknowledgment. Agency's RIF notice contains a signature stating that Employee was unavailable to sign, but that does not equate to a refusal to sign.

---

[23] *Id.*
[24] No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).
[25] *Id.*
[26] *Id.*
[27] *Id.* at pp. 10-11.

Although Employee likewise failed to submit any corroborating evidence showing that she did not receive the RIF notice on December 10, 2010, the fact remains that Agency has the burden of proving that it gave Employee thirty (30) days written notice prior to the effective date of the RIF. I therefore find that Employee only received twenty-seven (27) days written notice prior to the effective date of the instant RIF.

Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus calls for a reconstruction of this process as opposed to a retroactive reinstatement of Employee.[28] A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of employee.[29] The DCMR defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."[30] I find that Agency's failure to provide Employee with thirty (30) days written notice prior to the RIF effective date of termination was a procedural error. I further find that such an error does not constitute harmful error.

RIF Rationale

Employee further alleges that Agency's alleged budget crisis did not exist and claims that she was specifically targeted for the instant RIF. In *Anjuwan v. D.C. Department of Public Works,*[31] the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF…"[32] The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds… [or] management decisions about which position should be abolished in implementing the RIF."[33]

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.[34]

Discrimination

Employee makes a blanket assertion that the RIF was based on discrimination, and that it was retaliatory in nature. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful

---

[28] *See* District of Columbia Municipal Regulations ("DCMR") § 2405.6, 55 DCR 12899, 12902 (2008), which states in relevant part:

> An action which was found by…the Office of Employee Appeals to be erroneous as a result of procedural error shall be reconstructed and a re-determination made of the appropriate action under the provisions of this chapter.

[29] *See* DCMR § 2405.7, 55 DCR 12899, 12902 (2008).
[30] *Id.*
[31] 729 A.2d 883 (December 11, 1998).
[32] *Id*. at 885.
[33] *Id*.
[34] *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[35] Additionally, DPM §1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Moreover, the Court in *Anjuwan* held that OEA's authority over RIF matters is narrowly prescribed.[36] This Court explained that, OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied…the rules and regulations issued pursuant thereto." This court further explained that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."[37]

However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[38] stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[39] In the instant case, Employee noted several times that the RIF was both retaliatory and discriminatory in nature. However, Employee has failed to provide any credible evidence to substantiate her assertions or establish that the RIF was specifically created to target her in retaliation or that it was conducted in a discriminatory manner. Consequently, I find that Employee's claim falls outside the scope of OEA's jurisdiction.

Motion for Sanctions

Employee submitted a Motion for Sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure. However, OEA is not bound by the Federal Rules of Civil Procedure. Title 6, DCMR § 602 details the Rules governing OEA; specifically, OEA Rule 621 relates to Sanctions. Employee's detailed several arguments, including Agency's failure to present viable legal foundations, improperly incorporating its Answer by reference, and allegations of erroneous mailing procedures. However, none of the arguments presented in Employee's Motion warrant sanctions under OEA Rule 621. Accordingly, Employee's Motion for Sanctions is **DENIED**.

Grievances

Employee made several allegations of harassment and reprisal regarding her work interactions with her supervisor, Theresa Lewis, and the General Counsel, Vonda Orders, prior to the RIF. I find that complaints of this nature are grievances, and do not fall within the purview of OEA's scope of 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, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary

[35] D.C. Code §§ 1-2501 *et seq.*
[36] 729 A.2d 883 (December 11, 1998).
[37] *Citing Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).
[38] 730 A.2d 164 (May 27, 1999).
[39] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

arguments are best characterized as grievances and are outside of OEA's jurisdiction. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

CONCLUSION

Based on the foregoing, I conclude that OEA is precluded from addressing any other issue(s) in this matter. I further find that, Agency's action of abolishing Employee's position was not done in strict accordance with D.C. Official Code § 1-624.08 (d) and (e). However, Agency's actions constituted procedural errors and not harmful error.

ORDER

It is hereby ORDERED that:

1. Agency reimburse Employee three (3) days pay and benefits commensurate with her last position of record for failure to provide Employee with a thirty (30) days notice prior to the effective date of the RIF; and

2. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____

STEPHANIE N. HARRIS, Esq.
Administrative Judge