THE DISTRICT OF COLUMBIA

BEFORE THE

OFFICE OF EMPLOYEE APPEALS

IN THE MATTER OF	)	
	)	OEA Matter No.: 2401-0182-99R07
	)	
EDGAR M. KING,	)	
Employee	)	Date of Issuance: April 7, 2008
	)	
V.	)	Rohulamin Quander, Esq.
	)	Senior Administrative Judge
D.C. DEPARTMENT OF CORRECTIONS	)	
Agency	)	
	)	

Edgar M. King, *pro se*
Joan Murphy, Agency Representative

INITIAL DECISION

Background

This matter was returned to the Office of Employee Appeals ("Office") upon Order of Remand, issued June 15, 2007, by Judge Leonard Braman of the Superior Court of the District of Columbia, with instructions. Judge Braman's Order stated, " . . . that this matter is hereby remanded to the District of Columbia Office of Employee Appeals for the limited purpose of considering Petitioner's entitlement to reopen OEA Matter No. 2401-0182-99 dealing with Petitioner's reduction-in-force claim and, if the determination is in Petitioner's favor, to determine the claim on its merits."

The case was originally assigned to Blanca Torres, formerly an administrative judge ("AJ") in the Office. Because AJ Torres is no longer a member of the Office staff, upon remand the matter was assigned to this AJ on August 7, 2007. I convened a Status Conference on October 16, 2007, at which time both Edgar M. King, Employee, *pro se*, and Fred Staten, Jr., Agency's representative, were present.

The record reflects that when this matter was previously before the Office, the case was closed upon an indication that it had been "settled." Employee disputes the record as a mischaracterization of what occurred, asserting anew that the effect of closing

out his case and marking it as "settled," deprived him of due process and a timely addressing of the merits of the issues at hand.

Prior to the convening of the Status Conference, each party filed supplemental documents for the record, seeking to narrow the scope of what needs to be decided at this time. Employee requested an evidentiary hearing, further indicating that he wished to have sworn testimony in order to address the issues at hand. Pursuant to OEA Rule 616, Summary Disposition, and OEA Rule 625, Evidentiary Hearings, the discretion of whether an evidentiary hearing is necessary, rests solely with the deciding AJ.

Where there is no genuine dispute on the issues of fact that remain to be decided, an evidentiary hearing is deemed to be unnecessary. I have evaluated the record and determined that, based jupon the submitted documents and record created to date, there are no genuine issues of fact outstanding. Therefore, I am able to find and note the relevant facts, make the appropriate conclusions of law required, and then apply the applicable law, incidental to this Initial Decision. As such, there is no need to convene an evidentiary hearing. The record is now closed.

ISSUES

The issues to be decided are:

1) Whether Agency correctly adhered to the one round of lateral competition procedures outlined in *D.C. Official Code* § 1-624.08(d) when determining Employee's reduction in force service computation date (RIF-SCD), pursuant to Chapter 24 of the D.C. Personnel Manual?
2) If the Office determines that Agency adhered to the RIF-SCD procedures when Employee was separated from service, does the Office have jurisdiction to award Employee severance pay?
3) If the Office determines that Agency failed to adhere to the RIF-SCD procedure and Employee is ordered to be reinstated, with back benefits awarded, does the Office have jurisdiction to determine whether the benefit includes an Employee entitlement to receive severance pay?[1]

FINDINGS OF FACT

1) Employee was a Vocational Development Specialist, DS-11, with the Agency, assigned to Agency's Youth Center in Lorton, Virginia. Employee was RIFed from the Agency, effective September 25, 1999, due to the mandated closure of all of Agency's facilities and operations at that site.
2) Employee's Competitive Level was DS-1715-11-03-N (Union). His initial SCD was listed as January 26, 1982. At the time of the RIF, Employee received four

[1] The issue of Severance Pay, as addressed in detail in *D.C. Official Code* § 1-624.09, is not an issue which this Office generally addresses. I will discuss severance pay in my Legal Analysis.

(4) years of creditable service for an Outstanding Performance Evaluation, plus three (3) years of creditable service for being a District of Columbia Resident. The additional seven (7) years of creditable service gave Employee a recalculated RIF-SCD to January 26, 1975. *See* Agency Exhibit No. 1, Retention Register dated August 24, 1999.[2]

3) There were eight (8) employees in Employee's competitive level. After all of the relevant and mandatory SCD calculations were made, Employee was calculated as the third most junior employee in his competitive level, and eventually awarded the number seven position on the retention register. All three of the most junior personnel, employees #6, #7, and #8, including Employee, were separated from the Agency when three Vocational Development Specialist positions were abolished.
4) Had Employee been credited with four additional years for a veteran's preference, his RIF-SCD would have been adjusted to January 26, 1971, and his position on the Register moved from position seven to position six. However, he still would have been subjected to the RIF.
5) Employee timely filed a Petition for Appeal with the Office on September 8, 1999, and thereafter filed a brief with attachments on June 27, 2000. Both documents essentially allege that Employee had been improperly RIFed. The essence of Employee's petition concentrated upon his assertions that, at the time of his separation from the Agency, he was not given proper credit based on his military status as a retiree "below the rank of Major," the effect of which denied his claim for entitlement to receive severance pay.
6) On January 16, 2001, AJ Blanca Torres, formerly of this office, issued an *Initial Decision* which reflected that the matter had been settled. It is this decision which Employee disputes, noting that the matter was certainly not settled, but more the result of a miscommunication between the AJ and himself, which resulted in his filing documents that perhaps gave the impression that a settlement between Employee and the Agency had occurred, when such was clearly not the case.
7) Employee filed a subsequent Petition for Appeal with OEA on April 16, 2001, and not gaining the desired satisfaction on appeal, the matter subsequently was referred to the Superior Court of the District of Columbia, which has appellate authority over OEA Board decisions.
8) On June 15, 2007, the Superior Court remanded this case to the Office, with a directive that the Office determine whether the Employee/Petitioner is entitled to reopen the matter, and the relevant issues related thereto, for the purpose of deciding if Employee can pursue his claim on its merits.
9) It is the position of the Agency that the results were correct as enumerated in the Retention Register calculation created on or about August 24, 1999, in anticipation of the RIF of September 1999. Further, an earlier retention

[2] Over the long history of this matter, several of the relevant documents have been submitted many times, and assigned different exhibit numbers. Therefore, in order to make it easier to follow, I will place more emphasis upon the nature and date of the document, rather than a previously assigned exhibit number, which will change as the history of the case unfolds.

calculation made on or about April 19, 1999, was an incorrect calculation under the law and guidelines. The error credited Employee with a four-year veteran's preference, in addition to credit for outstanding job performance and D.C. residency, and also mis-adjusted his RIF-SCD to January 26, 1971.

10) An evaluation of official D.C. Personnel Action forms reflects the following:
    a) Personnel Action dated 07-29-98 (effective 08-10-98), Item No. 9, Veterans Preference, lists five categories for consideration. Preference No. 1, is "None", reflecting that the affected veteran has no preference consideration. Preference No. 2., is a "5 point" consideration. Employee was listed as Category No. 2, and assigned a "5 point" consideration;
    b) Personnel Action dated 08-23-99 (effective 08-23-99), Item No. 9, Veterans Preference, listed a change in this Employee's veteran's preference from Preference No. 2, to Preference No. 1, which is "None", as his adjusted status. In the Remarks box at the bottom of the form, it states, "This changes the veterans preference from 2."
    c) The undated Office of Personnel Severance Pay Worksheet, a form which is generally utilized to determine whether an employee is eligible to receive severance pay, noted that Employee was ineligible, with the notation, "Ineligible – Retired Military" inserted as the basis for non consideration. Although undated, this form was apparently prepared during the same general time frame as the two Personnel Actions dated 08-23-99, and 09-15-99, with the concomitant determination that Employee's status at the time of the RIF did not entitle him to receive severance pay
    d) Personnel Action dated 09-15-99 (effective 09-25-99), the effective date of the RIF, Item No. 9, again reflects Employee's veteran's preference as Preference No. 1, which is "none" and the following comment in the Remarks box: "Reduction in Force letter dated 08-19-99. Employee not entitled to severance pay."
11) Employee's Petition for Appeal did not challenge Agency's authority and action to impose the RIF. Further, Employee did not raise any issue challenging the method or manner by which he was subjected to one round of lateral completion within his competitive level, for the purpose of calculating either his basic SCD, or challenging how his RIF-SCD was calculated, within the guidelines of *D.C. Office Code* § 1-624.08(d).
12) Rather, he challenged the severance pay eligibility requirements, including Agency's determination that Employee was an excluded employee, and as such, not eligible to receive severance pay.
13) Agency's position in response, and against the granting of severance pay, relied upon two provisions of DPM, Chapter 11B, Subpart 5, Severance Pay, Paragraph 5.3 and 5.14. Under Excluded Employees, Paragraph 5.3.3 recites that the eligibility and entitlement to receive severance pay does not apply to "an employee who is subject to any retirement law or retirement system applicable to employees of the D.C. government . . ."
14) DPM Paragraph 5.3.14, Entitlement to Severance Pay, addresses how a District government employee could potentially qualify for severance pay, but likewise sets forth eight categories of exceptions, noting that persons who fit into any of

these categories, do not qualify to receive the benefit. Section D., Employee coverage, provides that non qualifiers include, "an employee who, at the time of separation, has fulfilled the requirements for an immediate annuity or is receiving an annuity under any District of Columbia or federal retirement system, including a member of the uniformed services."

15) It is the above-noted provision in the regulation upon which Agency placed reliance in asserting that, when the RIF was effectuated, Employee was not entitled to be awarded any severance pay, because, based upon all information that was available in the record, including his D.C. personnel and military records, he had already met the age and years of service annuity threshold while serving in the U.S. military uniformed services, and was either already receiving an annuity as a retired member of the uniformed services, or had fulfilled all of the requirements for an immediate annuity. Therefore, he was ineligible to also receive severance pay at the time the RIF took effect.
16) When Employee was subjected to the RIF, because he was entitled to also receive an immediate annuity, he was not likewise eligible to receive any severance pay pursuant to *D.C. Official Code* § 1-624.09(b)(1).
17) If during a subsequent credentials evaluation conducted by a different D.C. personnel authority when Employee resumed D.C. government employment, any personnel staff who might have accorded Employee full credit for his twenty years of military service, and recalculated his SCD back to August 16, 1963, thereby giving Employee additional veteran's credits, such action would either be clerical error or misapplication of the regulation. This erroneous calculation would not alter the corrected calculated dates, as reflected in Employee's official Office of Personnel documents.
18) The legal standard for veteran retention standing is enumerated in District Personnel Manual (the "DPM"), Chapter 24, Reduction-In-Force, Section 2417, *et seq.*, and related D.C. and federal documents which guide implementation, but likewise clearly indicate why Employee herein was not eligible to receive severance pay incidental to the September 1999-implemented RIF in question.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The essence of Employee's case is that, at the time the RIF was implemented, Agency failed to implement, monitor, and enforce the governing regulations of the District's DPM, Chapter 24, based on compliance with the roughly parallel provisions outlined in federal law. Specifically, Agency failed to credit Employee with the appropriate veterans preference, despite his being preference eligible when the RIF was effectuated. Further, Agency also failed to conduct the RIF in compliance with established laws and procedures.

Employee also noted that at the time of the RIF he was not offered the opportunity to retreat to his previously held position. Further, based upon his prior experience, he was not given the opportunity to fill any vacancy to serve as a correctional administrator or correctional treatment specialist, both of which positions he claimed to be qualified to fill. Agency also allegedly failed to assist Employee to have an

opportunity to transfer to any other position in the Agency. Yet, Agency continued to hire, promote, and detail employees to fill allegedly vacant positions, despite a RIF being conducted. These were positions for which Employee was qualified to fill, but never considered for.

The relief requested included: 1) Cancellation of the RIF action of September 1999, that caused him to be displaced from the Agency; 2) Immediate reinstatement to equivalent employment; 3) Immediate lump sum payment of lost wages and all relevant benefits that should have been accorded to him during the period in question; 4) Immediate enforcement of retreat or transfer rights afforded by law; 5) Immediate compensation of any, every, and all losses sustained as a result of personnel actions; and 6) Review and correction of all improper RIF procedures that were not in compliance with federal law, regulation, or OPM guidelines. Had there been an evidentiary hearing, Employee proposed to call nine witnesses, in additional to testifying on his own behalf.

The issue of severance pay, as referenced in *D.C. Official Code* § 1-624.09, is not an issue which this Office generally addresses, and is not recited by our enabling statute as being specifically within the jurisdiction of this Office to decide. The pay issue herein emanated from the Employee questioning Agency's methods during the creation of the retention register. It was upon this register that Agency based its determination of whether Employee was accorded his one round of lateral competition, and further in deciding which employees would be retained and which would be released.

Agency has correctly pointed out that Employee is not so much challenging the RIF, but has instead raised a claim of entitlement to severance pay upon being RIFed. The posing of this issue, likewise raises a question of whether the Office has justification to consider Employee's case beyond the RIF. It is Agency's assertion that not only is Employee erroneous in his claim of entitlement to severance pay, the Office utterly lacks jurisdiction to even consider such a claim, regardless of whatever other efficacy such a claim might enjoy or be disallowed in another forum.

Agency's position is that federal law is dispositive of the retention standing issue for veterans' preference for military retirees, and not any potentially erroneous calculation made by another D.C. agency or personnel staff person. Further, if said agency or person's incorrect action credited to Employee both twenty years of military service and incorrectly awarded Employee four years of veterans' preference in calculating his RIF-SCD, Agency still relies upon the enumerated provisions of the regulations. Chapter 24, Reductions in Force, Section 2417 of the District Personnel Manual (the "DPM"), addresses the issue of retention standing and veteran's preference.

Subsection 2417.1 provides that:

> In accordance with D.C. Code § 1-625.2(b)(1) (1992 Repl.), veterans preference eligibility shall be determined in accordance with federal law and regulations issued there under by the U.S. Office of Personnel Management.

Section 2417.2 provides that:

> Pursuant to the regulations referred to in Section 2417.1, a retired member of a military service shall be considered a preference eligible under this chapter only if he or she meets at least one (1) of the following conditions:

a) The employee's military retirement is based on disability that either: 1) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or 2) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by Section 101 and 301 of title 38, U..S. Code;
b) The employee's military service does not include twenty (20) years of full time active service, regardless of when performed. However, this total does not include periods of active service for training; or
c) The employee has been employed continuously since November 30, 1994, in a position without a break in service of more than thirty (30) days.

Section 2417.3 provides that:

> An employee who would otherwise be considered preference eligible under conditions in Section 2417.2(b) or (c) shall not be considered a preference eligible for purposes of this chapter if the employee retired at or above the rank of major or its equivalent. *See* DPM, Chapter 24, Reductions in Force Policy.

While DPM, Chapter 24, Section 2417 does not address the issue of veterans preference for military retirees *below* (emphasis added) the rank of major, the provisions of Section 2417.1 provides that "veterans preference eligibility shall be determined in accordance with federal law and regulations issued there under by the U.S. Office of Personnel Management (the "OPM"). OPM issued a Federal Employment Policy Handbook, April 1997, which addresses this issue at Page 19, under the heading, "Veterans Preference in Reduction In Force, Eligibility for Veterans Preference in RIF. The subsection provides that retirees below the rank of major (or equivalent) get preference if:

- Retirement from the uniformed services is based on disability that either resulted from injury or disease received in the line of duty as a direct result of armed conflict, or was caused by an instrumentality of was and was incurred in the line of duty during a period of war as defined in section (101)(11) or title 38, U.S.C.…; or

- The employee's retired pay from a uniformed service is not based on 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training; or

- The employee has been continuously employed in a position covered by 5 U.S.C. Chapter 35 since November 30, 1964, without a break in service of more than 30 days.

As has been posited in this record, the Employee herein is below the rank of major, and became entitled to receive military-related retirement pay, allegedly based upon having completed 20 or more years of full-time active service. This circumstance of having immediate retirement eligibility status is a category that is specifically recited as excluded from veteran's preference consideration.

Employee has provided to the record pages of documents addressing the subject of veterans preference. He has listed citations to certain regulations and also provided copies of selected regulations, to include: 1) A cross-section of federal guidelines which address an employee's rights during a RIF; 2) U.S. Veterans' Administration regulations and policies; 3) effects of immediate retirement under certain age-related and years of service combinations; and 4) copies of selected military and personnel records. He has also placed reliance upon federal RIF-related regulations and guidelines, which are not the same as those implemented under the District of Columbia government's RIF process.

Having reviewed his filings and Agency's responses, in my opinion Employee did not successfully dispute any of the three prongs in the Office of Personnel Management Federal Policy Handbook, Page 19, Veterans Preference in Reduction In Force provisions. More substantially, despite the plethora of documents Employee filed both prior to and subsequent to the Status Conference, his documents do not support his claim for veterans preference severance pay pertaining to his RIF, or dispute Agency's legal assertions as to why no pay benefits were due, as a result of implementation of the one round of lateral competition and subsequent lay off due to the RIF.

The inundation of the record with multiple copies of the same regulations does not benefit the Employee, as the law does not change and the regulations remain the same, despite the subsequent repeated filing. Further, the personnel regulations of the District of Columbia are not necessarily the same as those adopted under federal law. However, the fact that the law is different, does not of itself make the difference a violation of federal law, so long as certain components in the D.C. law and regulations are present, including those which respect the rights of veterans who are considered for preference eligibility, where appropriate.

Shortly before Employee was RIFed in September 1999, the D.C. Office of Personnel completed the standard Severance Pay Worksheet, a document that is used government-wide to determine who is or is not eligible to receive severance pay. Although the worksheet is undated, it was apparently created to coincide with the RIF that separated Employee from D.C. government service in September 1999. Section One of the Worksheet, Eligibility, provides that in order for an employee to be eligible to receive severance pay, ***all*** (agency added) items must be true. In this circumstance, to be eligible, the employee:

1) Is not serving under an appointment that excluded severance pay;
2) Had at least 12 months of continuous service;
3) Has not fulfilled the requirements for an immediate annuity or is not receiving an annuity under any District of Columbia or federal retirement, including a member of the unformed services;
4) Is not receiving disability compensation for a work-related injury covered under *D.C. Official Code* 1-624.1 *et seq.* (1992 Repl.); and
5) Has not declined an offer of an equivalent position.

In this Employee's case, Items ## 1, 2, 4, and 5 were marked as "true." However, Items #3, was left blank, with a handwritten notation inserted on the form, "ineligible – Retired Military."

A review of the supplied military and D.C. personnel records that Employee provided notes the following:

1) Employee's military service spanned from March 23, 1957, to February 1, 1978, just shy of 21 years;
2) He was honorably discharged from the military, with "Retirement" listed as the type of separation that was put into place, with 20 years, 10 months, and five days of creditable military service;
3) A D.C. Personnel Action form, dated July 29, 1998, listed Employee's veterans preference as "2", indicative of a five-point veteran's preference;
4) A second D.C. Personnel Action form, dated August 23, 1999, and recites under Remarks, "This changes the veterans preference from 2.", with an above notation of "1" (none), where "2" had formerly been inserted;
5) A third D.C. Personnel Action form, dated September 15, 1999, the actual RIF action, recited under Remarks, " . . . Employee not entitled to severance pay. …";
6) The Retention Register that was prepared and dated August 24, 1999, listed "0" credits in the Employee's veteran's preference column, but listed a veteran's preference of "4" for two of the other seven persons, who, along with Employee, comprised the eight-person Retention Register DS-1715-11-03-N, Vocational Development Specialist;
7) Although Employee did receive "4" credits for Outstanding job performance, plus "3" credits for being a D.C. resident, the effect of which adjusted his SCD from 1-26-82, to a RIF-SCD of 1-26-75, the addition of those seven credits still left him in seventh place on the eight-person register; and
8) However, had he been credited with an additional four points for veteran's preference, his position on the register would have changed from seventh to sixth, but he still would have been subjected to the RIF.

There were eight (8) employees in Employee's Competitive Level. In the Chapter 24 Reduction In Force procedures, employees could only bump employees with less seniority. Here, Antoinette Gorham, with RIF-SCD 06/21/73, and Thomas Long, with RIF-SCD 11/15/78, Employee's fellow junior Retention Register members, were each

RIFed. Consequently, there was no one for Employee to bump. This evaluation constituted his single round of lateral competition. I find that the evidence makes clear that Employee received a written RIF notice of at least thirty (30) days prior to his separation, that he was in the proper Competitive Level and that he received his single round of lateral competition.

While the jurisdiction of the Office does extend to the authority to award back pay and benefits to an employee who successfully pursues his claim, which could potentially be calculated to include severance pay as a component of back wages, Employee herein has not established that he is entitled to such, and none will be awarded.

The OPM regulations make it clear that Employee is not entitled to veterans preference in this RIF matter, because his military retirement status was based on 20 or more years of full time service, notwithstanding that he was improperly given credit for four (4) years for veterans preference on the Retention Register. The error was harmless. It did not affect any of the competing employees ranked above him. Even if his erroneous ranking had affected Ms. Gorham's place on the register, by Employee's reflecting the additional four years for veterans preference, and a RIF-SCD of 1-26-71, instead of the correct RIF-SCD of 01/26/75, Gorham would still have been laid off. The one person shift in placement on the register made no difference, as she still shared the three-person most junior employee category with Employee and one other staff person.

Any improper calculations that accorded Employee a four-year veteran's preference cannot take precedence over the law. The evidence substantiates that Employee received all of his due process rights pertaining to his RIF separation that was effected on September 25, 1999, and consequently there are no genuine issues of material dispute in the matter at bar.

The OPM also makes it clear that employees who are retired from military service below the rank of major, are only entitled to veterans preference in a RIF, if their retirement is "based on disability that either results from injury or disease in the line of duty as a direct result of armed conflict, or was caused by an instrumentality of war and incurred in the line of duty during a war period. . . ." The Employee admitted that he retired from the military below the rank of major, but was not in the capacity of being a disabled veterans.

Therefore, I conclude that he was not entitled to be accorded a veterans preference status during the evaluation and assignment of entitlement to retention rights during the RIF process.

ORDER

The foregoing having been considered, it is

ORDERED, that Agency's actions during the implementation of the RIF, including according Employee one round of lateral competition during the process, is UPHELD as being consistent with the requirements of the RIF laws; and, it is

FURTHER ORDERED, that Employee's Motion to Reopen his Petition for Appeal, including to an evidentiary hearing on the merits, to pursue a claim of entitlement to RIF-related benefits, including back pay, of which severance pay could be a component, is DENIED; and, it is

FURTHER ORDERED, that Agency's Motion to Dismiss Employee's Petition for Appeal, is GRANTED, and said Petition is dismissed.

FOR THE OFFICE / s /

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge