THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL WHITE,	)	
Employee	)	OEA Matter No.: 2401-0226-11
	)	
v.	)	Date of Issuance: September 6, 2013
	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Michael White, Employee *Pro Se*
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 20, 2011, Michael White ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Public Works' ("Agency" or "DPW") action of abolishing his position through a Reduction-In-Force ("RIF"). The effective date of the RIF was September 30, 2011. At the time his position was abolished, Employee's official position of record was a Solid Waste Inspector. On October 19, 2011, Agency filed its Answer to Employee's Petition for Appeal.

I was assigned this matter on June 26, 2013, wherein, I issued an Order requiring the parties to submit briefs addressing the issue of whether the RIF was properly conducted in this matter. On July 19, 2013, and subsequently on July 26, 2013, Agency submitted its brief along with a signed copy of Employee's most recent Standard Form ("SF-50"). Because Employee failed to comply with the June 26, 2013, Order, I issued an Order for Statement of Good Cause on August 16, 2013. Employee was ordered to submit a statement of good cause based on his failure to submit a response to the June 26, 2013, Order on or before August 28, 2013. On August 28, 2013, Employee's copy of the August 16, 2013, Order was returned to this Office marked "Return to Sender. Attempted – Not Known. Unable to Forward." As of the date of this decision, Employee has not responded to either Order. 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 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:

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[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).

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

2. That he was not afforded one round of lateral competition within his competitive level.

Employee's Position

In his Petition for Appeal, Employee submits that 1) "the sweep division of DPW was funded 1.3 million from the City Administrator and 1.8 million from Council member Harry Thomas"; 2) neither Employees or the Union (Local 2091) that represents SWEEP saw the Retention Register (which has errors); 3) the Union did not meet with Agency Director prior to the proposed RIF to appropriate funds to secure positions; 4) Agency still has numerous vacancies; and 5) the Director never allowed the Union or employees to see the Administrative Order.[10]

Agency's Position

Agency submits that it conducted the RIF in accordance with D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of the RIF. Agency also notes that 1) Employee failed to state a cognizable claim for relief; 2) Employee's claims regarding funding, and the Retention Register are incorrect; 3) Agency's Director William Howland met with SWEEP employees on April 1, 2011, to discuss the Agency's budget and the possibility that there would be RIFs; and 4) Employee has not identified any error in the Retention Register.[11] Agency further submits that although one round of lateral competition was not required because the entire competitive level was eliminated, it still determined the service computation date of all employees in the competitive level.[12]

In instituting the instant RIF, Agency met the procedural requirements listed above, and Employee does not contest this. Additionally, Agency has submitted Employee's SF-50 which highlights that Employee was reassigned on April 8, 2012. Agency has also submitted a copy of the Administrative Order authorizing the RIF, along with a copy of the Retention Register which highlights that all the positions within Employee's Competitive Area and Competitive Level were abolished pursuant to the RIF.[13]

Furthermore, 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

[10] Petition for Appeal (September 20, 2011).
[11] Agency Answer (October 19, 2011); *See also* Agency Brief (July 19, 2013).
[12] Agency Answer (October 19, 2011).
[13] *Id*. at Tab 13.

> 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 D.C. Government service. Regarding the lateral competition requirement, the record shows that all positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of D.C. Official Code § 1-624.08(e), according Employee one round of lateral competition, as well as the related RIF provisions of 5 D.C. Municipal Regulations 1503.3, are both inapplicable, and that Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[14]

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 "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is 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 written notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added). Here, Employee does not contend that he did not receive the RIF notice thirty (30) days prior to the effective date of the RIF. Moreover, the notice stated that Employee's position was being abolished as a result of a RIF. The Notice also provided Employee with information about his appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Additionally, OEA Rule 621.1 grants an Administrative Judge ("AJ") the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ "in the exercise of sound discretion may dismiss the action or rule for the appellant" if a party fails to take reasonable steps to prosecute or defend an appeal.[15] Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

(a) Appear at a scheduled proceeding after receiving notice;
(b) Submit required documents after being provided with a deadline for such submission; or
(c) Inform this Office of a change of address which results in correspondence being returned.

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[14] *See Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections*, OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (December 3, 2001).
[15] OEA Rule 621.3.

This Office has consistently held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.[16] Here, Employee was warned in the June 26, 2013, and August 16, 2013, Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to either Order. Both were required for a proper resolution of this matter on its merits. I find that Employee's failure to prosecute his appeal is a violation of OEA Rule 621. Accordingly, I further find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office and this represents another reason why this appeal should be dismissed.

ORDER

It is hereby **ORDERED** that the Petition for Appeal in this matter is **DISMISSED**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[16] *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).