THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DERWIN K. FAISON	)	OEA Matter No. 2401-0166-08
LOUISE J. CLEMONS	)	OEA Matter No. 2401-0167-08
REGINALD M. HARROD	)	OEA Matter No. 2401-0169-08
ALICE B. THOMAS	)	OEA Matter No. 2401-0170-08
JOHN M. WALKER	)	OEA Matter No. 2401-0171-08
RAMONA W. JOHNSON	)	OEA Matter No. 2401-0172-08
Employees	)	
	)	Date of Issuance: January 4, 2010
v.	)	
	)	Rohulamin Quander, Esq.
D.C. DEPARTMENT OF	)	Senior Administrative Judge
YOUTH REHABILITATION SERVICES	)	
Agency	)	

Pamela Smith, Esq., Agency Representative
Leisha Self, Esq., Employees Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 5, 2008, Employees, all Social Service Representatives ("SSR") within the D.C. Department of Youth Rehabilitation Services[1] ("Agency" or "DYRS"), filed individual Petitions for Appeal with the Office of Employee Appeals (the "Office" or "OEA"), contesting the loss of employment incidental to Agency's electing to shut down their employment operational unit. Historically, this Unit provided home detention services for predisposition youth who were under court supervision. The initial six separate matters were individually assigned to me. On March 25, 2009, I conducted six Status Conferences. Agency counsel advised the Office during these conferences that Agency contemplated filing a Motion to Dismiss the Petitions for Appeal. Agency maintained that, prior to the reduction in force (the "RIF") that led to the termination of these Employees, Agency met

[1] The full identification of Employees was "Social Service Representatives," Community Services Division, Detained Services Administration, Home Detention, D.C. Department of Youth Rehabilitation Services,

all of the legal compliances. Therefore, from Agency's perspective, the execution of the RIF was in order.

After evaluating the contents of each appeal, determining that they were of such a similar nature, including raising the identical issue of whether the termination(s) was legal, pursuant to OEA Rule 612, Consolidation and Joinder, I issued an order on March 27, 2009, consolidating the six appeals. On April 3, 2009, Agency filed a formal Motion to Dismiss the appeals. Employees, through counsel, strenuously opposed Agency's motion, and filed an opposition to the motion on April 24, 2009. While the motion was under advisement before this Office, pursuant to OEA Rule 618, Employees initiated discovery, propounding seven detailed interrogatories, supplemented with 28 requests for the production of documents.

Agency did not respond to the discovery request for several months, only after this AJ prodded Agency concerning its seeming intransigence about mutual cooperation in these matters. However, on or about September 1, 2009, Agency did respond to the discovery request. Before providing *seriatim* responses to the detailed interrogatories, Agency noted a series of general objections to the interrogatories, including that much of the information sought via discovery was beyond the scope of the rules and jurisdiction of the Office to consider and decide. Also, even if the responses were provided, they would have no bearing on the outcome of these consolidated matters, due to the Office's limited jurisdiction. Further, Agency asserted that much of the information sought was privileged, irrelevant, not limited in time, as well as unduly vague, ambiguous, overbroad, or unduly burdensome. While Agency did supplement its responses with documents, it was not the plethora that was potentially demanded by the scope of Employees' request for production of documents.

OEA Rule 625 provides that the discretion of whether to hold an evidentiary hearing rests with the AJ. Since this matter could be decided based upon the parties' respective legal positions as stated during the Status Conferences, the documents of record, and the applicability of the existing law and regulations being clear, I determined that no additional proceedings need be held. The record is now closed.

JURISDICTION

Pursuant to *D.C. Official Code* § 1-606.03(a) (2001), the Office has jurisdiction to consider Employees' joint claim that Agency's separating them from government service, pursuant to a RIF, was unlawful.

ISSUE

Whether Agency's action separating Employees 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 1-624.02* recites RIF Procedures.

§ 1-624.02. Procedures.

> (a) Reduction-in-force procedures shall apply to the Career ..... [Service] and shall include:
>
> > .....
> > (2) One round of lateral competition limited to positions within the employee's competitive level.
> > . . . .
> > (5) Employee appeal rights.
>
> . . . .
> (d) A reduction-in-force action may not be taken until the employee has been afforded at least 30 days advance notice of such an action.[2] The notification required by this

[2] The only substantive change that occurred in this area was taken in the 1999 OPRAA amendments, which increased the RIF notice period from 15 days to 30 days, to universally align notification time conflicts within D.C. personnel regulation notice provisions of various RIF-related amendments.

> subsection must be in writing and must include information pertaining to the employee's retention standing and appeal rights.

Section 1-624.08 of Subchapter XXIV pertains to RIFs for the fiscal year ending September 30, 2000, and each subsequent fiscal year. This section 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. Employees Derwin K. Faison ("Faison"), Louise J. Clemons ("Clemons"), Reginald M. Harrod ("Harrod"), Alice B. Thomas ("Thomas"), John M. Walker ("Walker"), and Ramona W. Johnson ("Johnson") were all Career Service Employees within Agency's Home Detention Unit (the "Unit").
2. On or about June 3, 2008, DYRS issued a memorandum to the Unit advising that the DYRS Home Detention Program was underutilized by the D.C. Superior Family Court and that there was a substantial decline in the number of pre-trial youth monitored by the Unit. *See Agency Memorandum to Unit, Tab "A"*.
3. On that same date, DYRS informed representatives from the American Federation of Government Employees (AFGE) Local #383 that the Unit no longer supervised any pre-trial youth, which was the essential function of the Unit.[3] Therefore, the Unit would be eliminated effective October 2008. The memorandum informed Unit staff that the Agency was committed to finding suitable positions within DYRS and

[3] There is a semantical dispute over the use of the term, "no longer supervised any pre-trial youth." From Agency's perspective, this is a correct statement, as no new youth were being assigned to the Unit. However, and from Employee's point of view, there was some residual resident population left in the system who still required home detention monitoring, even during the phase out of the duplicative services shared with the Superior Court. Nothing in this record reflects that any additional youth had been referred to the Unit during the phase out and elimination of the Unit.

suggested they apply for one of the vacancies within the Detention Review Unit. *See Agency Memorandum to Unit, Tab "A".*

4. On July 10, 2008, DYRS submitted to Mayor Adrian Fenty, a Request for Approval of Reduction In Force ("RIF"), seeking authority to eliminate 13 positions in the Unit as a result of a lack of work. *See Agency Tab "B"*. The underlying basis for the reduction in force arose after the Presiding D.C. Family Court Judge and Court Social Services staff met to review the detention alternatives, and to clarify the roles and responsibilities of key juvenile departments. Attached to the RIF request was proposed Mayor's Administrative Order 08-01, dated July 10, 2008.
5. Family Court informed DYRS that the Court would cease making referrals to the Home Detention Program because the Unit's function was duplicative of the Court Social Services ("CSS") community supervision and monitoring responsibilities, and that CSS, itself, was required by statute to perform this level of community supervision. *See Agency Tab "B"*.
6. On July 24, 2008, the Mayor approved DYRS's reduction-in-force, which listed all 13 positions by individualized position numbers, position titles, job series and grade levels, and the organizational location of the jobs to be eliminated. All six of the above-noted Employee/Petitioners were among the 13 persons who were potentially subjected to the RIF. The effect of the RIF resulted in the elimination of the entire Home Detention Unit in the Detained Services Administration (the "Unit").
7. Of the 13 affected persons, one person was supervisory and one person was support. Of the remaining 11 persons, three found jobs elsewhere at the Agency, and were hired as Detention Review Specialists. On August 19, 2008, Agency crafted a proposed Retention Register, a copy of which was provided to Employees' union representative. The Register listed all eight of the remaining, displaced DS Grade 9 (DS-0187-09-02-N) Social Service Representatives. *See Agency Tab "C"*.
8. On August 22, 2008, DYRS issued an official Reduction-In-Force notice to the eight[4] remaining Unit staff: Louise Clemons, Venita Clinton,[5] Derwin Faison, Reginald Harrod, Ramona Johnson, D'Jomaon Kweku Tackie,[6] Alice Thomas, and John Walker. The RIF was effective as of September 26, 2008, and constituted a notice of at least 30 calendar days prior to the implementation of the RIF.[7] *See*

[4] Unit employees Tina Grear, Leon Graves and Kenneth Smith ultimately did not receive a RIF notice as they each applied for and were selected for Detention Review Specialist positions prior to the effective date of the RIF.

[5] Home Detention Unit Social Services Representative Venita Clinton has not filed a petition for appeal to OEA.

[6] Mr. Tackie elected to retire, and subsequently withdrew his appeal (OEA Matter No. 2401-0168-09).

[7] Mr. Harrod was on annual leave and apparently was never served a 30-day notice upon his return to duty.

Agency Tab "D".

9. The effect of the RIF was to abolish Agency's Home Detention Program, and the entire Home Detention Unit as well, by the end of FY 2008 (September 30, 2008).
10. On August 27, 2008, Agency convened a RIF seminar for employees who were being laid off. The purpose of the seminar was to acquaint the RIFtees with RIF regulations and procedures, benefits information, the Displaced Employee Program, the Agency Reemployment Priority Program, retraining and job search opportunities, unemployment compensation, the Employee Assistance Program, RIF counseling, and RIF appeal rights. *See Agency Tab "E"*.
11. Shortly prior to the effective date of the RIF, the Unit's Employees were detailed to Child and Family Services and/or Human Resources Departments, both of which assignments proved to be very hectic, stressful, and somewhat unfamiliar. The situation was not conducive to Employees' initial thoughts and plans to use the 30-day notice period as a time to research and possibly locate other suitable job vacancies for which they were qualified.

Employees' Case

Employees raised several issues which challenged whether Agency had followed the proper RIF procedures and had a substantive justification for initiating the RIF. The essence of Employees' case was built around three elements, i.e., whether: 1) the statutory requirements for the implementation of the RIF had been adhered to; 2) the mandate of according each affected employee one round of lateral competition had been complied with; and 3) written notice of at least 30 days before the effective date of the RIF had been served upon each affected employee.

A/ Agency failed to establish that each Employee received the appropriate 30-days advanced written notice prior to separation

Employee Reginald Harrod was on leave when the 30-day notices were presented, and subsequently, upon his return to work, was never served a notice of separation. As such, Agency's notice of RIF to Harrod was fatally defective. As to the other affected Employees, their notices were likewise defective, as: 1) they failed to explain or state a reason why other supposedly lower-standing employees, former co-workers, were retained; and 2) the act of detailing the affected Employees to a chaotic, high pressure different agency during the 30-day period nullified Employee's opportunities to adjust to the impending RIF, including the opportunity to search for new employment.

B/ Agency failed to establish that it provided Employees with a round of lateral competition

The language of *D.C. Official Code*, § 1-624.08(d), which provides for one round of lateral competition upon the implementation of a RIF, contemplates that the referred lateral competition should be limited to positions in that employee's competitive level.

These positions should not be a competition for otherwise publicly available positions, open to all applicants, but rather is an internal competition among employees affected by a RIF.[8] Agency failed to take this into consideration, treated the process as an open and publicly competitive operation. The failure to specifically notify the affected RIFtees, that this minimum notification was indeed the intended and mandated "round of lateral competition" was deficient. Employees neither initially expected to be subjected to a RIF, and likewise never considered the five positions as those to be considered for refilling from the lateral competition Register, since the positions were open vacancies for which anyone could apply.

C/ Agency failed to establish that it met the requirements of Chapter 24 of the DPM

DPM 2407.1 provides that no covered employee in the affected competitive area is to be serving on an unauthorized detail at the time that a RIF is initiated. Ramona Johnson, one of the Employees herein, was on an extended detail away from the Unit, serving as a "liaison/coordinator[9]**,** to the Interstate Compact Division (the "ICD"), a totally different operation. Employees challenged the extended absence of this Employee from the Unit and the legality of this extended detailed to ICD. Although her grade (DS – 9), job series (DS-0187-09-02-N), and her title ("Social Service Representative"), were identical to the other RIFtees, she was not working as an SSR in the Unit at the time that the RIF became effective.

With regard to Employees' reemployment rights, Employees disputed Agency's claim that it had not posted positions for which these affected Employees were qualified to compete for. To the converse, Employees asserted that Agency has posted numerous vacancies for which these Employees are most qualified, but has not advised the Employees of any of them, despite the D.C. government's official reemployment rights policy and notification obligation.

Employees' challenged the truthfulness of a statement given by Director Vincent Schiraldi, to the D.C. Council on February 9, 2008, to the effect that the program has had no youth under its supervision for several months.[10] Rather, the home detention program continued until the date that the RIF was implemented, and on that same date still had several youth under its direct supervision.

D/ Agency maintains an anti-union animus. The RIF was a pretext to contract out work previously performed by union members (the Employees), which action violated both the CBA and privatization contract requirements of the D.C. Official Code

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[8] Other than the basic assertion that the advertisement of the positions and acclimations for hiring should have been limited solely to incumbents at DYRS, Employees cited no law, regulation, or policy to support their position.

[9] Ms. Johnson's exact job title or capacity at the ICD was not reflected in this record.

[10] See Footnote # 3, *Supra.*

The Office should look behind Agency's action and determine the true nature and intent of Agency's actions. Although Agency calls its actions a RIF, i.e., lack of work, Agency's actions were a privatization/contracting out action that violated both the requirements of *D.C. Official Code* § 2-301.05b and the CBA, Article 16.[11] Despite a claim of "lack of work" as the alleged underlying basis for abolishing the Unit, on July 29, 2008, Agency issued an e mail which stated that, because the Unit was "no longer in operation," if Agency staff needed "curfew monitoring," they should refer it to Ms. Lisa Smiley. Further, a subsequent Agency-issued e mail (date of issuance unknown) advised Agency staff that electronic monitoring would resume after October 1, 2008. Employees herein urged that their jobs were not abolished either for lack of work, lack of need, or lack of funds, but were in fact contracted out, compensating the contracted employees by using the funds that were initially designated to pay Employees. Alternatively, Agency's actions may also constitute adverse action removals without cause, thus violative of other Agency procedures that govern terminations for cause.

Further, the RIF action removed all of AFGE Local 383's leadership, including John Walker, President and outspoken critic of the Mayoral administration, Louise Clemons and Jamoan Tackie,[12] Shop Stewards, and Rosa Mason,[13] Treasurer. In this context, the RIF of approximately eight persons was targeted, separating the entire AFGE local leadership and wreaks of anti-unionism.

E/ Agency failed to satisfy the CBA's requirements for pre-RIF procedures

Noting that the D.C. Public Employees Relations Board ("PERB") reversed a RIF because the Agency had failed to comply with certain pre-RIF conditions contained in the CBA, Employees herein argue that OEA should determine likewise. Citing *D.C. Department of Public Works and AFGE*, 49 DCR 1140 (Feb. 8, 2002), Employees argue that, conceding that the *D.C. Official Code* sets forth the applicable law for RIF procedures, the CBA represents the parties' legal agreement with respect to pre-RIF procedures. In the PERB case, the Arbitrator found that Agency had violated those pre-RIF conditions, determined that there was jurisdiction, and then reversed the RIF.

Employees entreat the AJ to follow PERB's action, and to do the same, i.e., determine that he has jurisdiction and then reverse the RIF. By way of examples of alleged

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[11] Employees cite specific language from testimony given by Director Vincent Shiraldi to a D.C. Council committee in February 2009, in which he stated that DYRS (Agency) had contracted out the work of the Home Detention Unit.

[12] Mr. Tackie was initially one of the employees herein, but elected to withdraw his complaint.

[13] Ms. Mason was allegedly initially included in the RIF, but detailed to a position outside of the bargaining unit, and was not included among those persons who were subjected to the RIF in question.

pre-RIF violations, Employee cited three examples: 1) Just before the RIF went into effect, Employees were hastily detailed to Child and Family Services or Human Resources Departments, the effect of which denied time to update their personnel folders and resumes; 2) Agency neglected to take steps to minimize the RIF's effects, by exploring options for reassignment, retraining, restructuring, recruitment, etc., to avoid termination of the Employees; and 3) Agency failed to consider alternatives to implementation of a RIF.

Agency's Case

Agency acknowledged that the burden of proof in this matter rested solely with Agency, and must be established by the preponderance of the evidence presented. Personnel authorities are authorized to plan and implement a RIF once the plan is approved by the Mayor or his designee, when the release is required by a lack of work, shortage of funds, or a reorganization or realignment or the exercise of restoration rights. *See DPM Chapter 24, §§ 2401.1 and 2405.4.* DYRS requested a RIF due to lack of work within the Unit. Accordingly, the selection of employees to be RIFed was based solely upon the competitive level within the subset of the Community Supervision Division and not the entire agency.[14]

In the instant case, all eight of the DS-0187-09-02-N Social Services Representative positions, the Grade 6 Program Support Assistant position, and the MS-11 Supervisory Social Services Representative were subjected to the RIF. In the process of implementing the RIF, Agency complied with all procedural requirements outlined in the Chapter 24 of the DPM. §§ 2400- 2499.

A/ Round of Lateral Competition

Employees' allegation that DYRS did not conduct a round of lateral competition before issuing a notice of separation is without merit. On June 3, 2008, more than two months prior to issuing the official notice of the RIF to Employee, DYRS and the Office of Labor Relations and Collective Bargaining (OLRCB) met with AFGE Local 383 representatives to inform them that the Unit would be eliminated at the end of the current fiscal year. At that time, Local 383 representatives were also informed of the Agency's intent to post five positions for open competition and encouraged Unit staff to apply.[15]

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[14] *D.C. Official Code* § 1-624.08 (f), provides that 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. The two stated exceptions, i.e., one round of lateral competition within the competitive area and 30 days notice, are inapplicable in the matter at hand.

[15] It remains disputed just how well informed Employees were of the five positions. Agency says that it was prominently stated that such positions existed, while Employees maintained that it was only casually mentioned that such positions existed, which relaxed

At the request of John Walker, President of Local 383, both David Brown, DYRS Deputy Director, and Jeffrey McInnis, Chief of Detained Services, met with the Unit staff and advised them of the Agency's intent to abolish the Unit. Once again, Agency management encouraged each Employee to apply for any open positions within DYRS. Immediately following this meeting, Walter Crawford, DYRS Management Liaison Specialist, met with the Unit staff and encouraged them to submit applications for any open positions within the agency. Further, he offered to provide assistance with any applications Employees submitted to District agencies.[16] Tina Grear, Leon Graves and Kenneth Smith, all of whom were also in the same job series and DS-9 grade level as the Employees, each applied for and were subsequently hired as Detention Review Specialists. Conversely, none of the affected Employees filed an application for consideration of being hired.

The RIF became effective on September 26, 2008. Since the effective date, DYRS denies that it has posted any positions for which Employees would be best qualified. Employees will remain on the displacement list for two years during which DYRS Human Resources will notify Employees of any Agency position(s) for which Employees are best qualified.

B/ DYRS provided a Retention Register

Agency disputes Employee's claim that the Agency failed to assemble or provide Employee with an accurate or relevant retention register. AFGE Local 383 President Walker requested a copy of the retention register through the Office of Labor Relations and Collective Bargaining ("OLRCB"), on or about August 19, 2008, the same date that the register was issued. He was provided with a copy of the register which was created by Lewis Norman, Human Resources Specialist with the D.C. Department of Human Resources (DCHR).[17] The retention register was specifically created for the competitive level subject to the RIF, with each employee's name placed on the register according to their RIF Service Computation Date ("SCD") retention standing. Consistent with the directives of DPM § 2408, the standing on the retention register was determined on the basis of "tenure of appointment, length of creditable service, veterans preference, residency preference, and relative work performance."[18]

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atmosphere directly contributed to their being not universally aware of the positions in time to make applications for being hired.

[16] See Affidavit of Walter Crawford, Management Liaison Specialist, Tab F.

[17] See Affidavit of Lewis Norman, Tab G.

[18] DPM § 2408.1 provides that the retention standing of each competing employee shall be determined on the basis of tenure of appointment, length of credible service, veterans preference, residency preference, and relative work performance, and on the basis of other selection factors as provided in these regulations. Together these factors shall determine

C/ Determination of Competitive Area and Level

Employee alleges that the Agency improperly narrowed the competitive area, and failed to include other employees in less tenured positions occupying the same competitive level in the RIF. Agency asserted that the allegation is without merit because DYRS requested a RIF in the Community Supervision Division, and narrowly tailored the competitive area to the Home Detention Unit, one of two units within the Community Supervision Division. Unlike the Home Detention Unit, the other unit,[19] performed the distinct function of a detention alternative. Since the Agency was abolishing the Home Detention Unit, an identifiable and distinguishable subset within the Community Supervision Division, the competitive area was correctly identified.[20]

Moreover, pursuant to a properly constituted *Request for Approval of Reduction in Force,* submitted to Mayor Adrian Fenty on July 10, 2008, on July 24, 2008, the Mayor issued Mayor's Administrative Order #08-01, which formally declared that there was a lack of work for the Home Detention Unit, thus constituting the official authorization to initiate a RIF. Agency concluded that DCHR's approval of DYRS' request for the RIF demonstrates that DYRS' classification of the Home Detention Unit as an identifiable competitive area was appropriate.[21]

Employees' allegation that DYRS failed to include other employees in less tenured positions occupying Employee's competitive level in the RIF is without merit. DHR determined the positions within the competitive level that Employees competed with each other for retention.[22] This determination was based upon each Employee's position of

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whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released.

[19] The name of the other unit is not reflected in this record, but was staffed with persons referred to as "Detention Review Specialists.

[20] DPM § 2409.4 Any lesser competitive area shall be no smaller than a major subdivision of an agency or an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function, and staff. Section 2409.5 provides that Employees in one competitive area shall not compete with employees in another competitive area.

[21] See Request for Approval of RIF in the DYRS Memorandum, Tab B.

[22] DPM § 2410.1 Each personnel authority shall determine the positions which comprise the competitive level in which employees shall compete with each other for retention.

record.[23] The positions were all based in the Home Detention Unit, identified as being in the same grade, classification series, "which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one 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."[24]

Employees' competitive levels were each based upon their positions of record as Social Services Representatives within the Unit. In response to Employees' claims that certain less tenured employees were not included in the RIF, Agency underscored that when DYRS informed the Unit staff of the upcoming RIF in June 2008, Tina Grear, Leon Graves and Kenneth Smith, all fellow DS 9 SSRs, plus LaTonya Coard, Program Support Assistant, applied for, and were selected for other positions within DYRS. As such, the names of these employees, who indeed may have been less tenured than the Employees herein, were not listed on the retention register, as they were gainfully employed elsewhere within DYRS on the August 19, 2008, date that the retention register was published.

D/ DYRS complied with the Collective Bargaining Agreement

Agency denied that it failed to comply with the negotiated terms of the collective bargaining agreement (the "CBA") between AFGE Local #383. Conversely, Agency contends that, at all times that this RIF was in the process of being implemented, Agency fully complied with the provisions of Article 18. Noting that Employees' assertion of "non compliance" was broad and generally non descriptive, and enumerating the details of the supposedly noncompliance, Agency elected to comment on each of the 11 sections of Article 18, which outlines due process rights afforded to AFGE members throughout the RIF process.

1. Section One states, in part, that *the Employer agrees to explore and consider possible alternatives prior to implementing a RIF/Furlough.* Prior to Agency's submitting its request for approval of a RIF to the Mayor's Office, Agency staff met with AFGE Local

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[23] § 2410.2 Assignment to a competitive level shall be based upon the employee's position of record.

[24] § 2410.4 A competitive level shall consist of all positions in the competitive area identified pursuant to § 2409 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.

#383 representatives to discuss the Union's proposed alternative to the RIF as a part of "impact and effect" bargaining. Agency reviewed the proposal, denied it, and then submitted its Request for Approval of Reduction-In-Force to the Mayor's Office.[25]

2. Section Two states, in part, that *the Employer agrees to immediately notify the Union in writing of the Mayor's intent to approve the conducting of a RIF/Furlough. Such notice shall be prior to a general notice to employees and will include: 1) the reason for the action to be taken; 2) approximate number of employees who may be affected initially; 3) the types of positions anticipated to be affected initially; and 4) the anticipated effective date.* On June 3, 2008, Jeffrey McInnis, Chief of Detained Services, issued a memorandum to each staff member of the Home Detention Unit summarizing the meeting with Local #383 representatives concerning the anticipated RIF. In the memorandum, McInnis stated that the Court's utilization of the DYRS Home Detention Program had decreased substantially, and that the Home Detention Unit will cease to operate by October 2008.[26]

3. Section Three states, in part, that *the Employer further agrees to minimize the effect on the bargaining unit employees to whatever extent possible through reassignment, retraining, or restructuring recruitment and any other means to avoid separation of employees.* DYRS made attempts to find employment for the Unit staff. Specifically, it contacted other District agencies and inquired if there was a need for detailed employees. As a result of DYRS's efforts, several Unit staff members were temporarily detailed to other District Agencies in July 2008, including Child and Family Services and Resource Management, prior to receiving the official RIF notice. Furthermore, DYRS also tried to minimize the impact of the RIF by informing Employee of the five positions open for competition. None of the Employees consolidated under this appeal elected to apply for any of the five vacant positions.

4. Section Four states, in part, *Once a RIF is announced employee will be granted time to update their personnel folders and provide any other information necessary for retention registers.* Agency attached a DCHR Seminar flyer to the official notice dated August 22, 2008. At the RIF seminar, DCHR staff explained the RIF process, how to update the personnel folder, benefits and entitlements.[27]

5. Section Five states, in part, *Upon request, the Union shall be provided reports on*

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[25] Affidavit of Walter Crawford, Agency Tab F, Items 5-6.

[26] June 3, 2008-issued Memorandum from McInnis to DYRS Home Detention Unit, Agency Tab A

[27] See DC RIF Seminar Flyer, Dated August 27, 2008, Agency Tab E.

positions filled by priority reemployment and any other positions filled. The priority re-employment rights took effect on September 26, 2008, the effective date of the RIF. Since September 26th, DYRS has not filled any position(s) by priority reemployment. Thus, DYRS did not provide the union with any reports.

6. Section Six states, in part, *The Union shall be provided a copy of the relevant retention register.* On or about August 19, 2008, Lewis Norman, Agency's, Human Resources Specialist, provided AFGE Local # 383 with a copy of the retention register, which was more than one month before the RIF became effective, September 26, 2008.[28]

7. Section Seven states, *The Employer shall implement reductions in force in accordance with Title 1, Chapter 6, Subchapter XXV of the D.C. Code (1981 ed.) and Chapter 24 of the D.C. personnel regulations.* Agency complied with Title 1, Chapter 6 of the *D.C. Official Code* and Chapter 24 of the DPM, based on the statements mentioned above.

8. Section Eight states in part that, *furlough days will not effect holiday pay or overtime pay.* Agency asserted that this section of the collective bargaining is inapplicable, pertaining to furloughs, and not RIFs.

9. Section Nine states, *The Agency and Union shall bargain on the impact of furloughs and RIFs.* As previously stated above, on July 11, 2008, DYRS and OLRCB met with AFGE Local # 383 representatives to discuss their proposal for an alternative to the RIF as a part of "impact and effect" bargaining. The Agency reviewed the request but subsequently denied it and submitted the Request for Approval of Reduction-In-Force to the Mayor's Office.[29]

10. Section Ten states, *Any alleged violation(s) of this Article and/or RIF procedures may be grieved in accordance with the negotiated Grievance Procedure or may be appealed to the Office of Employee Appeals (OEA).* Employees individually exercised their appeal rights under this section, and filed timely petitions for appeal, contesting the RIF, to OEA. In addition, on or about September 25, 2008, Employees AFGE Local # 383 filed a civil complaint on behalf of those affected employees with the D.C. Superior Court about this same matter. Presumably, the union raised several RIF-related issues that are beyond the jurisdiction of this Office to consider.

11. Section Eleven states in part, *The Employer shall implement the provision of the Compensation Agreement for Compensation Units 1 and 2 concerning layoffs and furloughs.* Agency attached a D.C. Seminar flyer to the official RIF notice. DCHR provided an explanation of benefits and entitlements to Employees at the RIF seminar,

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[28] See Affidavit of Lewis Norman, dated October 29, 2008, Tab G.

[29] See Agency Tab "B."

convened on August 27, 2008.

Agency concluded its pleadings by asserting that DYRS has complied with the provisions of the AFGE CBA and Chapter 24 of the DPM, and that there were no issues outstanding that would generate the necessity of a fact finding hearing, or entitle Employees to a favorable ruling at this time. Agency then requested that the matter be dismissed, which would also include a ruling favorable to Agency's position in this matter.

Administrative Judge's Considerations and Conclusions

Pre-RIF Conditions

The issue of whether pre-RIF conditions at an employee's former agency can be addressed by this Office has been raised previously, and likewise long ago decided. In *In the Matter of Teteja*, 2405-0013-91, 39 D.C. Reg. 7213, (July 2, 1992) a seminal case in the subject area, the Temporary Appeals Panel (the "TAP") determined that the TAP does not have jurisdiction to hear a claim of a prior job misclassification in the process of adjudicating an employee's RIF appeal, and that permitting job classifications to be challenged under the guise of a RIF appeal, would be incompatible with the limited scope of review of RIF determinations. Further, TAP emphasized that its role is limited to reviewing the validity of matters covered by the RIF regulations. See also *Anjuwan v. D.C. Department of Public Works*, 729 A.2d. 883 (12-11-98), which held that this Office's authority is narrowly prescribed, and did not have jurisdiction to determine whether the RIF at the agency was bona fide or violated any law, other than the RIF regulations themselves.

See also *Biddle v. United States,* 195 U.S.App.D.C. 263, 602 F.2d 441 (1979), holding that complaints of pre-RIF treatment are not a proper issue of RIF appeal subject to review of the Federal Employee Appeals Authority. Instead, those issues had to be raised within the negotiated terms of the CBA and Agency's own grievance procedures, initiated while Employees were still employed at the Agency.[30] For further discussion of this same issue, see *Wharton v. District of Columbia Public Schools,* OEA Matter J-0111-02 (Mar. 3, 2003), __ D.C. Reg. __ ( ); *Levitt v. District of Columbia Office of Personnel,* OEA Matter No. 2401-0001-00, *Opinion and Order on Petition for Review* (Nov. 21, 2002), __ D.C. Reg. __ ( ); *Powell v. Office of Property Management,* OEA Matter No. 2401-0127-00 (Feb. 3, 2003), __ D.C. Reg. __ ( ); *Booker v. Department of Human Services,* OEA Matter No. 2401-0190-97 (Oct. 11, 2000), __ D.C. Reg. __ ( ).

[30] The union, acting collectively and on behalf of its total membership, has initiated a civil suit in the Superior Court of the District of Columbia, challenging Agency's RIF action. The allegations and status of that suit is unknown to this AJ, but presumably raised several issues, including pre-RIF conditions, which are beyond this Office's jurisdiction to consider.

Therefore, I find that Employees raising collateral issues when challenging a RIF, does not confer additional authority upon the Office to enforce all laws and regulations. Doing so would exceed the limited statutory authority of this Office, which is to determine whether the RIF complied with applicable District personnel statutes and regulations addressing an employee's right to a single round of lateral competition within his/her competitive level, and whether the employee received at least 30 days advance written notice prior to the effective date of the RIF.

Having reviewed the current status of the RIF law and governing regulations, I conclude that the jurisdiction of this Office in conducting RIF appeals is limited to the authority granted by the plain language of the statute, and particularly the provisions of *D.C. Official Code* § 1-624.08 (d) (one round of lateral competition which shall be limited to positions in his/her competitive level), and (e) (at least 30 days written notice before the effective date of his/her separation). Anything else is beyond both the statute's and this Office authority to address.

Post RIF Reemployment Matters

The appellate Board of this Office has been previously called upon to address the issue of displaced employee RIF reemployment rights, and has likewise consistently determined that the Office lacks jurisdiction to hear post-RIF reemployment matters.[31] As previously provided, the Office is statutorily authorized to address specific types of cases, and an employee's reemployment rights have no bearing on whether the RIF action was proper.

The Gaston Case

Employees have cited this AJ's prior ruling in *Armer Gaston, Sr. et al, vs. D.C. Public Schools,* OEA Matter No. 1601-0024-07, 54 DCR 8104 (July 2, 2007,) which vacated Agency's actions of adopting the use of certain terms, including "reconciliation" to justify laying off personnel who were deemed to be "excess." I determined that Agency's actions were, in reality, a RIF, for which the affected employees were entitled to the proper legal notice. The underlying basis for the termination in both *Gaston* and in the matter at hand is the lack of funds, a statutorily allowed basis for implementing a RIF and separating employees from service.

This matter is distinguishable from *Gaston,* both on the facts and the law. Unlike *Gaston,* the affected positions in this matter now before me were identified, and the persons who occupied the positions were subsequently given a proper RIF notice. This

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[31] See *Wynn v. Dept. of Corrections,* OEA Matter No. 2401-0133-00 (Nov. 19, 2002), __ DCR __; *Siler v. Dept. of Corrections,* OEA Matter No. 2401-0134-00 (Nov. 19, 2002), __ DCR __ ; and *King v. Dept. of Health,* OEA Matter No. J-0052-01 (Jan. 15, 2003), __ DCR __ .

process requires a certain amount of Agency staff time, to assure that the positions are properly identified, that the incumbents are given proper notice, and that all of the statutory compliances have been met. These employees have dedicated years of faithful service to Agency, and are entitled to such consideration, despite the fact that they will, in all likelihood, still be separated from employment, if the pre-RIF legal requirements have all been satisfied?

Further, Employees challenge the legal proprieties followed by Agency in seeking privatization and contracting out for youth detention and monitoring services. Whether Agency violated the legal requirements of *D.C. Official Code* § 2-301.05b, Privatization Contracts and Procedures Requirements and § 16 of the CBA, and what relief is appropriate, if any, is a matter beyond the jurisdiction of this forum, and needs to be decided by a court of competent jurisdiction.[32] No finding from this Office on that issue would have any bearing upon that issue, which is a matter well beyond the authority granted to this Office by our enabling legislation.

Competitive Level

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 conclude that Employee Johnson's competitive level at the time of the RIF was based upon her official position of record, the only existing job series for her position at the time that the RIF was implemented. While she worked for the ICD on an undefined extended detail and several of her job-related duties may have been reworked, modified, or

[32] *D.C. Official Code* § 2-301.05b, Privatization Contracts and Procedures Requirements, sets forth in considerable detail the process that agencies of the D.C. government are required to follow when soliciting contracts for this service. The details are beyond the scope of this *Initial Decision*, and are not recited here. Likewise, no reference is made at this time to § 16 of the CBA, which is not before this forum at this time.

assumed over a period of time, this is not an infrequent occurrence. However, as presented before me, any claim that the detail was either illegal or unauthorized has not been established. As such, when the RIF was implemented, Johnson, factored in with the other SSRs of record, was subjected to the same RIF as the other affected Employees.

I further conclude that, considering that the entire Unit was abolished, consistent with and pursuant to established RIF procedures, Employees have not successfully alleged that Agency violated their right to a single round of lateral competition within their competitive level.

Lateral Competition

Further, regarding the "lateral competition" requirement, this Office has consistently held that when a separated employee is the only member of his/her competitive level or *when an entire competitive level is abolished pursuant to a RIF* (emphasis added by this AJ), "the statutory provision affording [him/her] one round of lateral competition was inapplicable." *See, e.g., Fink v. D.C. Public Schools*, OEA Matter No. 2401-0142-04 (June 5, 2006), __ D.C. Reg. __ ( ); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005), __ D.C. Reg. __ ( ); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003), __ D.C. Reg. __ ( ). *See also Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003), _ D.C. Reg. ___ ( ). In the matter at hand, the entire Unit was abolished, after a RIF had been properly structured and time 30-day legal notifications properly structured and served, except for one notice anomaly. I find that no further lateral competition efforts were required, and conclude that Agency was in compliance with the lateral competition requirements of the law.

30-day Notice Mandate

I conclude that Agency's action separating Employees from service as a result of the RIF was, with one exception, in accordance with applicable law, rule and regulation and will be upheld. However, I find that Employee Harrod did not receive the required 30-day notice prior to the date of his separation. The standard remedy for this anomaly is well-settled. The proper remedy for such a violation is not the reversal of an otherwise valid RIF, but rather an order to reimburse the employee for the period of the violation.[33]

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[33] *See, e.g., Howard v. D.C. Public Schools*, OEA Matter No. 2401-0323-96 (July 21, 2000), _ D.C. Reg. ____ ( ); *Pass v. D.C. Office of Personnel*, OEA Matter No. 2401-0122-99 (October 2, 2000), _ D.C. Reg. ___ ( ); *Harding v. Department of Corrections*, OEA Matter No. 2401-0133-99 (February 21, 2001), _ D.C. Reg. ___ ( ); *Lofton v. D.C. Office of Aging*, OEA Matter No. 2401-0028-00 (September 13, 2002), _ D.C. Reg. ___ ( ); *Scaldaferri v. Office of the Secretary*, OEA Matter No. 2401-0003-00 (June 27, 2003), D.C. Reg. ___ ( ).

Final Determination

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 Employees have made no claim of relief cognizable before this Office, and that Agency's action separating Employee from government service pursuant to the RIF must be upheld. With regard to Employee Reginald Harrod, I find that Agency failed to serve upon him a proper 30-day notice of the RIF, which anomaly can be addressed and corrected at this time.

ORDER

This matter having been duly considered, it is hereby;

1. ORDERED that Agency's Motion to Dismiss the consolidated Petitions for Appeal is GRANTED; and it is;
2. FURTHER ORDERED that Agency's action separating Employees pursuant to a RIF is UPHELD; and it is;
3. FURTHER ORDERED that Agency reimburse Employee Reginald Harrod 30 days pay and all benefits due for the affected period, if any, and it is;
4. FURTHER ORDERED that Agency file with this Office, within 30 days of the date on which this decision becomes final, documents showing compliance with the third term of this ORDER.

FOR THE OFFICE: / s /
ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge