THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DIANE HOWELL-ROBINSON Employee	OEA Matter No. 2401-0043-02
	Date of Issuance: May 17, 2006
DEPARTMENT OF CORRECTIONS Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ms. Diane Howell-Robinson ("Employee") worked for the Department of Corrections ("Agency") as a Correctional Treatment Specialist. On February 19, 2002, Agency notified Employee that she would be removed from her position by a reduction-in-force ("RIF"). The RIF was to become effective on March 22, 2002. Employee's separation was the result of the Lorton, Virginia facility's closure.

On March 8, 2002, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). The petition provided that she served as a Correctional Treatment Specialist and as Deputy Warden of Programs at Lorton. In September of 2000, Employee sustained a work-related injury. She did not return back to work until

October of 2001. Employee argued that Agency used an improper rating to determine if she should be RIFed. Agency used Employee's rating from the period of April 1, 2000 through March 31, 2001 as the basis for Employee's RIF. During that period Employee received a rating of "excellent." Employee argued that she would have received an "outstanding" rating had she been afforded a 90-day rating after her return on October 9, 2001.[1]

In response to Employee's Petition for Appeal, Agency filed a Pre-hearing Statement and Supporting Documents on October 2, 2003. Agency declared that Employee received at least thirty days' notice prior to the effective RIF date, and she was afforded a single round of lateral competition within her competitive level.[2] As previously stated, the rating period in question was from April 1, 2000 until March 31, 2001. As a result of Employee's work-related injury, she was unable to work from September 27, 2000 until October 9, 2001. Therefore, Employee missed six months of work during the relevant rating period (September 27, 2000 through March 31, 2001).

According to Agency, Employee could not have received an "outstanding" rating as outlined in the District Personnel Manual ("DPM") Regulations in Chapter 14, Subpart 2, Section 2.4(B).[3] Agency contends that Employee could not have an "outstanding" rating for the rating period ending on March 31, 2002, nor could she have predicted that

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[1] *Petition for Review,* Exhibits # 4 and 5 (March 8, 2002). Letters were written by the Executive Assistant and Unit Manager Coordinator explaining that Employee was not eligible for a ninety (90) day review as she believed.

[2] *Agency Pre-hearing Statement and Supporting Documents*, p. 2 (October 2, 2003). According to Agency, there were ten other employees within Employee's competitive level who were also RIFed.

[3] The statute regulation that "ratings of outstanding shall not be recommended for periods of performance less than 12 months. This means that an employee, to be rated outstanding, must have performed his or her assigned duties and responsibilities at the same grade level for a 12-month period . . . ."

she would have obtained an "outstanding" rating if she was in active duty status for the entire rating period.[4]

On May 4, 2004, the Administrative Judge ("AJ") issued an Initial Decision. She held that Employee received the requisite 30 days' notice prior to the RIF action. The only issue before the AJ was that of Employee's one round of lateral competition. The AJ heavily relied on the DPM in rendering her decision. According to the Initial Decision, if Employee had a current performance rating of "outstanding" at the time of her RIF, she would have been credited with four (4) additional years of service. The four additional years would have allowed her a higher rank within her competitive level and would have resulted in her retention. However, the AJ held that at the time of the RIF Employee's rating for the period in question was "excellent." Therefore, she is not entitled to the four additional years of service. Moreover, the AJ reasoned that Employee could not rely on a rating that she may have received had she not been out on a work-related injury.

On June 30, 2004, Employee filed a Petition for Review appealing the AJ's decision. She argued that Agency relied on the wrong evaluation to determine her status for the RIF action. Employee stated that there was procedural error in the AJ's reliance on Employee's "excellent" rating. She asserted that the AJ used a partial rating in making her decision.[5] Finally, Employee contends that she was the victim of

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[4] *Agency Pre-hearing Statement and Supporting Documents*, p. 3-4 (October 2, 2003).
[5] Employee claims that the rating period that Agency used included her six-month absence from work. She contends that it is "inherently unfair to require an employee to need to work twelve months to receive an [o]utstanding rating, but then use a rating based on a six[-]month performance to deny a claim as was done herein."

discrimination because she was denied the opportunity to be rated due to her disability.[6]

Agency responded to Employee's Petition for Review on July 12, 2004. It argued that Employee did not raise any issues that were not previously addressed in the Initial Decision. It further contended that OEA lacks jurisdiction to adjudicate complaints of discrimination; discrimination claims should be raised at the D.C. Office of Human Rights or the Equal Employment Opportunity Commission.[7] Again, Agency asserted that Employee received the requisite 30 days' notice as well as a single round of lateral competition.

The Office of Employee Appeals ("OEA") was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). The Code provides that:

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

In an attempt to more clearly define OEA's authority, D.C. Official Code § 1-624.08(d), (e), and (f) establish the circumstances under which the OEA may hear RIFs on appeal.

> "(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

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[6] *Petition for Review,* p. 5-6 (June 30, 2004). Employee's disability reference is the work-related injury that prevented her from returning to work.

[7] *Response of Agency to Employee's Petition for Review,* p. 2 (July 12, 2004).

> District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.
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> (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.
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> (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:
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> > (1) An employee may file a complaint contesting a determination or 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, this Office is authorized to review RIF cases where an employee claims the Agency did not provide one round of lateral competition, or where an employee was not given a 30-day written notice prior to their separation. Employee concedes that she received written notice 30 days prior to the effective RIF date. Furthermore, she does not contend that Agency failed to provide one round of lateral competition. She takes issue with the outcome of the competition.[8]

Employee claims that she should have received a 90-day performance rating after she returned to work from the work-related injury. She cites the DPM, Chapter 14, Part I, Subpart 1, Section 1.5, 7 as her basis. It provides that:

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[8] Employee was ranked number thirty-six (36) of thirty-seven (37) employees within her competitive level. This rank was the result of Agency's one round of lateral competition within Employee's competitive level.

> "Ratings for employees on extended details or special assignments. Ratings for employees in these categories shall be postponed until the employee has been returned to his or her permanent position for a minimum of 90 days from the effective date of return at which time he/ she shall be rated."

Based on the plain language provided in the statute, it appears that Employee could have received a performance rating 90 days after she returned if her absence from work fell under the category of an extended detail or a special assignment. Employee was absent because of a work-related injury. Absence for a work-related injury does not constitute an extended detail or a special assignment. Moreover, the mere opportunity to receive a rating does not guarantee Employee the "outstanding" rating that she needed to avoid the RIF.[9]

Regardless of the possibility of a 90-day rating, the point remains that Employee performed her duties for a period of less than 12 months. According to DPM Chapter 14, Part I, Subpart 2, Section 2.4(B):

> "Ratings of Outstanding shall not be recommended for periods of performance of less than 12 months. This means that an employee, to be rated Outstanding, must have performed his or her assigned duties and responsibilities at the same grade level for a 12-month period. . ."

Therefore, she could not have received an "outstanding" rating. As a consequence of Employee's six-month absence during the rating period of April 1, 2000 through March 31, 2001, the highest rating that she could have received was "excellent." The DPM did

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[9] Employee's Petition for Review provides that she would have received a 90-day outstanding rating based on a letter that she received from her unit manager, Leona Bennett. *Petition for Review,* p. 5 (June 30, 2004). Agency argued that Leona Bennett's March 5, 2002 memorandum was ill-advised and misrepresented the DPM Personnel Regulations governing "outstanding" performance ratings. Additionally, Ms. Bennett was not the approving official in Employee's rating process. She could only recommend a rating. *Response of Agency to Employee's Petition for Review,* p. 5 (July 12, 2004).

not make any exceptions to the twelve-month rule. Consequently, Employee's "excellent" rating was proper. Accordingly, we hereby deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Jeffrey J. Stewart

Barbara D. Morgan

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.