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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JESSICA EDMOND,)	
Employee)	OEA Matter No. 2401-0344-10
)	
v.)	Date of Issuance: November 6, 2012
)	
D.C. DEPARTMENT OF CONSUMER)	
AND REGULATORY AFFAIRS,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
_____)	
Stephen White, Employee’s Representative)	
Adrienne Lord-Sorensen, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 2010, Jessica Edmond (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Consumer and Regulatory Affairs’ (“Agency” or “DCRA”) action of abolishing her position through a Reduction-In-Force (“RIF”). The effective date of the RIF was June 25, 2010. At the time her position was abolished, Employee’s official position of record was a Program Support Specialist with the Office of Consumer Protection (“OCP”)¹ within DCRA². On August 20, 2010, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was assigned to me on or around July 17, 2012. Subsequently, I issued an Order wherein, I required the parties to submit briefs addressing the issue of whether the RIF was properly conducted in this matter. Agency submitted a timely brief. On August 10, 2012, Employee submitted a request for an extension to file her brief. This request was granted in an email dated August 14, 2012. Employee has complied. Upon further review of the record, the undersigned noticed that there was an issue with the RIF Notice requirement. As such, the undersigned issued an Order dated September 14, 2012, requiring Agency to submit evidence in support of its assertion that Employee received thirty (30) days notice prior to the effective date of the RIF. On September 20, 2012, Agency submitted a motion for Extension of Time to file its response. This motion was granted in an

¹ Also referred to as the Consumer Protection Division in the parties’ submissions to this Office.

² Petition for Appeal at Form 50 (July 26, 2010).

Order dated September 25, 2012. Agency had until October 12, 2012, to submit its response to the September 25, 2012, Order. Agency has complied. Based on Agency's response to the September 14, 2012, Order, The undersigned issued an Order dated October 24, 2012, requiring Employee to submit a brief addressing the thirty (30) days notice RIF requirement. Employee had complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. And since this matter could be decided based upon the documents of record, no proceedings were conducted. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

(a) *Notwithstanding any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).*

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) *Notwithstanding any rights or procedures established by any other provision of this subchapter, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).*

(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to

Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.

(e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

(f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:

(1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and

(2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that “the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency.”³ 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.”⁴

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.”⁵ 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.”⁶ 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.”⁷

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.⁸ 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.”⁹ Further, “it is well established that the use of such a ‘notwithstanding clause’ clearly signals the drafter’s

³ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁴ *Id.* at p. 5.

⁵ *Id.* at 1132.

⁶ *Id.*

⁷ *Id.*

⁸ *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁹ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other sections.”¹⁰

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹¹ 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:

1. That she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or
2. That she was not afforded one round of lateral competition within their competitive level.

Employee’s Position

In her Petition for Appeal, Employee submits that Agency engaged in unfair labor practices and violated the District Personnel laws and regulations.¹² Employee also notes that covered employees were excluded from the competitive area for the RIF purpose.”¹³ Employee also submits that she was not given thirty (30) days notice within the required time frame. Employee notes that although she does not remember the exact date she received the RIF Notice, she is confident that she did not receive the RIF Notice before May 26, 2010. Employee further explains that she did not attend the RIF Seminar was held on May 26, 2010, because had not received the RIF Notice on the May 26, 2010, the date of the RIF Seminar.¹⁴

Additionally, in her brief, Employee states that she worked for OCP for three (3) years before being detailed to another department for about a year, and then detailed back to OCP two (2) months before she was Riffed. Employee also highlights that the RIF was a “blatant example of management using the excuse of needing to reduce the workforce to save money, when in fact their intent is to get rid of workers they don’t want and retain workers, usually younger and less experienced which translate into less money.”¹⁵ Employee explains that as she was detailed back to OCP, Agency detailed out two newly hired employees to another Agency and ultimately rehired them back.¹⁶

Agency’s Position

Agency submits that it conducted the RIF in accordance with the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her separation. Agency notes that on May 13, 2010, an Administrative Order was issued approving Agency’s request to conduct a RIF. Agency abolished several positions due to a budgetary crisis. Agency explains that all employees with the same competitive level were listed in a

¹⁰ *Id.*

¹¹ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

¹² Petition for Appeal (July 26, 2010).

¹³ *Id.*

¹⁴ Employee’s Brief (October 31, 2012).

¹⁵ Employee’s Brief (August 17, 2012).

¹⁶ *Id.*

Retention Register. Agency also notes that it consulted with Employee's union ("AFSCME") prior to reaching its decision to conduct a RIF, it provided the union with all appropriate information as requested, including the Retention Register that listed each affected employee and their retention standing, in compliance with its Collective Bargaining Agreement ("CBA"). Agency also maintains that it provided Employee with the required thirty (30) days written notice prior to the effective date of the RIF. Agency explains that it was unsuccessful in hand-delivering the RIF Notice to Employee on May 21, 2012, and as such, the RIF Notice was mailed to Employee via certified mail.¹⁷ In its supplemental brief to this Office dated October 11, 2012, Agency explains that while it is unable to locate the Employee's signed acknowledgement of receipt or return receipt, the fact that Employee did not report to work on May 24, 2010, three (3) days after the RIF Notice was mailed, this Office should infer that Employee received the RIF Notice by May 23, 2012.¹⁸

Lateral Competition

Employee makes a blanket allegation that Agency engaged in unfair labor practices and violated District Personnel laws and regulations. She also notes that covered employees were excluded from the competitive area for the RIF. Employee explains that as she was detailed back to OCP, Agency detailed out two newly hired employees to another Agency and ultimately rehired them back. Chapter 24 of the D.C. Personnel Manual § 2407, 47 D.C. Reg. 2430 (2000), only provides that, any agency head initiating a RIF shall assure that no covered employee in the affected competitive area is serving on an unauthorized detail. Here, Employee has not provided any credible evidence to establish that Agency engaged in unauthorized detail in conducting the instant RIF. Moreover, Employee has failed to provide any credible evidence to substantiate her allegations of unfair labor practices or in support of her contention that covered employees were excluded from the competitive area in the instant RIF. Consequently, I find that Employee's allegations are unfounded. Section 2409 of this Chapter authorizes agency personnel to establish lesser competitive areas when conducting RIFs. Here, the RIF authorization letter that was signed and approved on May 13, 2010, listed OCP as a lesser competitive area for purposes of the instant RIF. I further find that while Employee was on detail at another agency, she was still an official employee of OCP. And as such, Employee was properly placed in the OCP competitive area, and was therefore subject to the instant RIF.

Chapter 24 of the D.C. Personnel Manual § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

All positions in the competitive area ... in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

Section 2412 of the RIF regulations, 47 D.C. Reg. at 2431, requires an agency to establish a "Retention Register" for each competitive level, and provides that the Retention Register "shall document the final action taken, and the effective date of that action, for each employee released

¹⁷ Agency's Brief (July 27, 2012).

¹⁸ Agency's Response to September 14, 2012, Order requesting documentary evidence (October 11, 2012).

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 generally the date on which the employee began D.C. Government service. Regarding the lateral competition requirement, Employee was the only grade nine (9) Program Support Specialist in the DS-0301-09-13N competitive level. The record shows that Employee’s entire competitive level was eliminated in the RIF. Therefore, I conclude that the statutory provision of the 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.¹⁹

Thirty (30) days written Notice

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, the D.C. Official Code § 1-624.08(e), which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (emphasis added). Here, Employee contends that she did not receive the RIF Notice on May 21, 2010. Agency on the other hand asserts that it mailed the RIF Notice via certified mail on May 21, 2010. Agency explains that because Employee did not show up for work on May 24, 2010, it can be assumed that she received the RIF Notice via certified mail on or before May 23, 2010.

In *Aygen v. District of Columbia Office of Employee Appeals*,²⁰ the D.C. Superior Court found that where an employee is in duty status, “the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*” (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.²¹ Additionally, the Court found that where an employee is not in duty status, the notice “must be sent to employee’s last known address by courier, or *by certified or registered mail, return receipt requested*, before the time of the action becomes effective.”²² The court further explained that “a dated cover letter, by itself, was insufficient evidence” of a mailing date or proof of receipt by an employee (emphasis added).²³

Here, the acknowledgement of receipt of the RIF Notice is signed by a witness; however, it is not signed by Employee. Employee submits that she was not in duty status on May 21, 2012. Because Employee was not in duty status on May 21, 2012, when the RIF was conducted, Agency

¹⁹ 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).

²⁰ No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).

²¹ *Id.*

²² *Id.*

²³ *Id.* at pp. 10-11.

was required to send the RIF Notice to Employee's last known address by courier, or *by certified or registered mail, return receipt requested*, before the effective date of the RIF. Agency has provided this Office with documentation showing that it sent Employee's RIF Notice via certified mail on May 21, 2010; however, it did not provide this Office with a return receipt or a signed document attesting that Employee actually received the RIF Notice.²⁴ Agency asserts that Employee received the RIF Notice on or before May 24, 2010, because Employee did show up for work on May 24, 2010. Employee on the other hand argues that she did not receive the RIF Notice before May 26, 2010, as such, she was not aware of the RIF Seminar that was scheduled to be held on May 26, 2010. Neither party has provided this Office with the exact date that Employee received the RIF Notice. Moreover, Employee's failure to show up for work on May 24, 2010, as required is not sufficient evidence to prove that she received the required thirty (30) days RIF Notice. Agency has the burden of proof in this matter. And while it is unclear as to when Employee actually received the RIF Notice, I find that, by failing to provide this Office with a signed document or return receipt proving that Employee received the required thirty (30) days RIF Notice, Agency has failed to meet its burden of proof.

Accordingly, I find that Employee was not given the required thirty (30) days written notice prior to the effective date of the RIF. Agency's failure to provide Employee with thirty (30) days written notice is considered procedural error, and thus calls for a reconstruction of this process as opposed to a retroactive reinstatement of Employee.²⁵ A retroactive reinstatement of employee is only allowed where there is a finding of harmful error in the separation of employee.²⁶ The DCMR defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."²⁷ I find that Agency's failure to provide Employee with thirty (30) days written notice prior to the RIF effective date was a procedural error, as Employee would have still been released from her competitive level based on the one round of lateral competition procedures. I further find that Agency's error will not serve to negate or overturn Employee's termination and does not constitute harmful error.

RIF Rationale

Employee submits that Agency used the excuse of needing to reduce its workforce and save money as a means to get rid of employees they did not want and retain younger, less experienced employees. In *Anjuwan v. D.C. Department of Public Works*,²⁸ the D.C. Court of Appeals ruled that OEA lacked authority to determine whether an Agency's RIF was bona fide. The Court of Appeals explained that as long as a RIF is "justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF..."²⁹ The Court also noted that OEA does not have the "authority to second guess the mayor's decision about the shortage of funds... [or] management decisions about which position should be abolished in implementing the RIF."³⁰

²⁴ Agency's Brief TAB 2 (July 27, 2012), and Agency's response to September 14, 2012, Order requesting documentary evidence (October 11, 2012).

²⁵ See District of Columbia Municipal Regulations ("DCMR") § 2405.6, 55 DCR 12899, 12902 (2008), which states in relevant part:

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

²⁶ See DCMR § 2405.7, 55 DCR 12899, 12902 (2008).

²⁷ *Id.*

²⁸ 729 A.2d 883 (December 11, 1998).

²⁹ *Id.* at 885.

³⁰ *Id.*

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employees' claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds on personnel services or how Agency elected to reorganize internally was a management decision, over which neither OEA nor this Administrative Judge ("AJ") has any control.³¹

Based on the foregoing, I conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 (d) and (e) and that OEA is precluded from addressing any other issue(s) in this matter.

ORDER

It is hereby **ORDERED** that:

1. Agency reimburse Employee thirty (30) days pay and benefits commensurate with her last position of record; and
2. Agency's action of abolishing Employee's position through a Reduction-In Force is **UPHELD**; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

³¹ *Gatson v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).