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: April 15, 2014
	)	
D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Jessica Edmond ("Employee") worked as a Program Support Specialist with the D.C. Department of Consumer and Regulatory Affairs ("Agency"). On May 21, 2010, Agency issued a notice to Employee informing her that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was June 25, 2010.[1]

Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 26, 2010. She argued that Agency engaged in unfair labor practices and that it violated the District's laws and regulations when it conducted the RIF.[2] Further, Employee submitted that she was not provided a written, thirty-day notice prior to the

[1] *Petition for Appeal,* p. 5-6 (July 26, 2010).
[2] Employee asserted that covered employees were excluded from the competitive areas.

effective date of her separation.[3]

In its response to the Petition for Appeal, Agency claimed that it conducted the RIF in accordance with its legal obligations. It submitted that Employee was provided the requisite thirty-day notice prior to the effective date of her separation. However, because Employee's entire competitive level was abolished, Agency explained that the requirement of one round of lateral competition was inapplicable.[4] Lastly, Agency asserted that OEA did not have jurisdiction to consider Employee's claim of unfair labor practices. Therefore, it requested that OEA dismiss Employee's appeal.[5]

After the matter was assigned to the OEA Administrative Judge ("AJ"), she ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF.[6] In its responsive brief, Agency reiterated its position and submitted that it followed the procedural requirements of Chapter 24 of the District Personnel Manual ("DPM"). It explained that pursuant to DPM § 2406.4, it had authority to eliminate six positions within the Consumer Protection Division.[7] Agency also provided that because it could not hand deliver the RIF notice to Employee, on May 21, 2010, it sent the written RIF notice to her via certified mail.[8]

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[3] *Id.* at 4.
[4] Agency provided that the DS-0301 Program Support Specialist position was determined to be the competitive level subject to the RIF, and it abolished all of these positions.
[5] *Department of Consumer and Regulatory Affairs' Answer to Employee's Petition for Appeal to Employee's Petition for Appeal*, p. 2 (August 20, 2010).
[6] *Order Requesting Briefs* (July 17, 2012).
[7] Agency submitted that its request to eliminate the positions was approved by the Director of Human Resources via an Administrative Order. Employee's position was within the Consumer Protection Division, and the approved request ultimately eliminated the entire competitive area.
[8] It also stated that Employee's union was provided a copy of the retention register; that it complied with Chapter 24 of the Comprehensive Merit Personnel Act; and that it adhered to the collective bargaining agreement between the American Federation of State, County and Municipal Employees and the District of Columbia. *Agency's Response to the Office of Employee Appeals' July 17, 2012 Order Requesting Information on Whether the Department of Consumer and Regulatory Affairs Followed Proper District of Columbia Statutes, Regulations, and Laws in Conducting the Instant Reduction in Force* (July 27, 2012).

Employee submitted her brief on August 17, 2012. In it, she asserted that Agency used the RIF action as a means to terminate employees that it did not want. She explained that after being detailed to another department for nearly a year, Agency detailed her back to the Consumer Protection Division, a department it knew would soon be eliminated.[9] Thus, she requested that the RIF action be reversed and that she be reinstated.[10]

Following the submission of briefs, the AJ ordered Agency to submit documentary evidence confirming the exact date that Employee received the RIF notice.[11] In response, Agency provided that although it was unable to locate a signed acknowledgement of receipt or a return receipt showing that Employee timely received the notice, "Employee's timesheets during the weeks prior to June 25, 2010, demonstrate[ed] that from Monday, May 24, 2010, through June 25, 2010, Employee did not report to work and was placed on Administrative Leave With Pay."[12] It opined that if Employee did not receive the RIF notice, she would have reported to work on Monday, May 24, 2010.[13]

The Initial Decision was issued on November 6, 2012. The AJ found that D.C. Official Code § 1-624.08 was the applicable statute to govern the RIF.[14] As a result, she ruled that § 1-624.08 limited her review of the appeal to determining whether Employee received a written, thirty-day notice prior to the effective date of her separation and if Agency provided one round

[9] Employee explained that Agency detailed two new hires to another agency that were not subject to the RIF but subsequently rehired them. Ultimately, Employee believed that Agency's real intent was to retain younger, less experienced employees in order to save money.
[10] *Brief of Employee* (August 17, 2012).
[11] *Order to Agency* (September 14, 2012).
[12] *Agency's Response to September 14, 2012, Order Requesting Documentary Evidence*, p. 2 (October 11, 2012).
[13] Since Agency could not locate documents evidencing that Employee timely received the RIF notice, on October 24, 2012, the AJ issued an order to Employee to submit a brief highlighting the date she actually received the notice. In response, Employee provided that although she did not remember the date that she received the notice, she did not receive it before May 26, 2010. *Employee Brief* (October 31, 2012).
[14] The AJ cited the District of Columbia Court of Appeals' position in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123 (D.C. 2009) and reasoned that D.C. Official Code § 1-624.08 or the "Abolishment Act" was the applicable statute because the RIF was conducted for budgetary reasons, and the statute's 'notwithstanding' language is used to override conflicting provisions of any other section. *Initial Decision*, p. 2-4 (November 6, 2012).

of lateral competition within her competitive level. The AJ concluded that since Employee occupied the only position within her competitive level, and the entire competitive level was eliminated, the requirement of one round of lateral competition was inapplicable.[15]

With regard to the written, thirty day notice, the AJ found that because Agency failed to provide OEA with a signed document or return receipt proving that Employee timely received the notice, it failed to meet its burden of proof. As a result, she ruled that Employee was not provided the required thirty day written notice prior to the effective date of the RIF and that Agency committed a procedural error.[16] Accordingly, she upheld Agency's action but ordered it to reimburse Employee thirty days' pay and benefits for its failure to provide her with the required notice.[17]

Agency filed a Motion for Reconsideration on December 3, 2012. It argues that the AJ's order to reimburse Employee thirty days' pay and benefits is duplicative and erroneous because Employee was compensated during the thirty-day period. Agency explains that Employee should not be reimbursed for thirty days' pay and benefits during the RIF period because Employee received the amount she normally would have earned if the RIF had not occurred. Agency explains that it placed Employee on Administrative Leave with Pay, and Employee continued to accrue annual and sick leave, health insurance, and other employer paid benefits.[18] Accordingly, it requests that OEA reopen the case and deny Employee's award of thirty days pay

[15] With regard to Employee's allegations that Agency engaged in unfair labor practices and violated the District's laws and regulations, the AJ found that these allegations were unfounded. Further, the AJ explained that while Employee was detailed to another agency, she was still serving in an official capacity with Agency. She held that Employee did not submit any credible evidence to establish that Agency engaged in an unauthorized detail when it conducted the RIF.
[16] The AJ ruled that such error did not constitute harmful error as defined in District Personnel Manual § 2405.7.
[17] The AJ found that OEA lacked jurisdiction to determine whether the RIF was bona fide when considering Employee's argument that Agency wanted to retain younger, less experienced employees. *Id.,* 7-8.
[18] *Motion for Reconsideration,* p. 4 (December 3, 2012).

and benefits.[19]

The Supreme Court of the United Stated held in *N.L.R.B. v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344 (1953), that an order of restoration of back pay should stand unless it can be shown that the order is a patent attempt to achieve some other ends. In this case, the AJ ordered the restoration of thirty days back pay to right the procedural wrong Agency committed in its failure to provide adequate notice to Employee. The ruling has no other objective. As provided in DPM § 2422, Agency had two requirements to properly execute the RIF action in this case. One requirement was to keep Employee on active duty status during the notice period or place her on administrative leave. The other was to provide Employee with thirty days' notice of the RIF action.

Active Duty Status

DPM §§ 2422.9 – 2422.11 provide the following:

> 2422.9 An employee *shall* be retained in an active duty status *during the notice period*, unless on leave pursuant to section 1203 of the CMPA (D.C. Official Code § 1-612.03 (2006 Repl.)) (emphasis added).
>
> 2422.10 Except as provided in subsection 2422.11 of this section, an employee who receives written notice of release from his or her competitive level due to a reduction in force *shall* be entitled to be retained in an active duty status during the notice period (emphasis added).
>
> 2422.11 An employee who receives written notice of release from his or her competitive level due to reduction in force may be placed on administrative leave at the discretion of the agency head (or his or her designee).

Agency did adequately comply with DPM §§ 2422.9, 2422.10, and 2422.11. It offered pay stubs to show that Employee was paid during the entire notice period.[20] Although it complied with

[19] *Id.* at 5.
[20] *Agency's Response to the Office of Employee Appeals' July 17, 2012 Order Requesting Information on Whether*

DPM §§ 2422.8 – 2422.11, it did not comply with other sections of the DPM related to notice when conducting a RIF. As will be discussed below, proof that Employee remained in active duty and received her salary is not proof that she received the required notice. Agency's argument on Petition for Review seems to confuse the separate nature of the requirements to place the Employee on administrative leave and to provide her thirty days' notice.

Notice Requirement

DPM §§ 2422.1 and 2422.3 provide the notice requirements for RIF actions. The relevant sections provide the following:

> 2422.1 Each competing employee selected for release from his or her competitive level under this chapter *shall* be entitled to written notice at least thirty (30) full days before the effective date of the employee's release (emphasis added).
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> 2422.3 A notice *shall* not be issued less than thirty (30) days before the effective date of the employee's release (emphasis added).

Furthermore, in the section pertaining to RIF actions, D.C. Official Code § 1-624.08(e) provides that:

> (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.

The plain language of the regulation and statute and use of the word "shall" in both clearly provide that the notice requirements are mandatory in nature. The burden rests on Agency to offer proof that it complied with the requirements. Agency asserts that it mailed Employee notice of the RIF action taken against her.[21] However, Employee contends that she was not at work on the day Agency claims to have provided the notice.[22]

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the Department of Consumer and Regulatory Affairs Followed Proper District of Columbia Statutes, Regulations, and Laws in Conducting the Instant Reduction in Force, Tab 10 (July 27, 2012).

[21] *Id.* at 5.

[22] *Employee Brief*, p. 1 (October 31, 2012).

Mailing Requirements for Notice

DPM §§ 1608.7 and 1614.6 provide that "if the employee is not in a duty status, i.e., at work, the notice of proposed action and final decision shall be sent to the employee's last known address by courier, or by certified or registered mail, return receipt requested before the time the action becomes effective." Furthermore, OEA has relied on the Superior Court for the District of Columbia holding in *Nursat Aygen v. D.C. Office of Employee Appeals,* 2009 CA 006528 P(MPA) and 2009 CA 008063 P(MPA) (D.C. Super. Ct. April 5, 2012) that a document mailed by certified or registered mail, return receipt requested, is adequate evidence to prove that the document was indeed mailed and received.[23] Because Employee was not in a duty status, Agency was required to send the notice via courier or certified or registered mail with return receipt requested.

It is clear from the record that Agency cannot provide the critical returned receipt to prove that Employee actually received the notice at least thirty days before the effective date of the RIF. Although this was a procedural error on the part of Agency, the AJ ruled that it was minor so as not to reverse the RIF action. As OEA has historically done in matters where agencies fail to offer proof of notice, the AJ ordered that Agency provide payment to the Employee for the number of days it failed to provide notice to her.[24] In this case, Agency could not prove that Employee received notice during the entire thirty-day period required. Because

[23] *Belinda Bryant v. D.C. Public Schools*, OEA Matter No. 2401-0256-10, *Opinion and Order on Petition for Review* (October 29, 2013) and *Charlotte Clipper v. D.C. National Guard,* OEA Matter No. 1601-0125-11, *Opinion and Order on Petition for Review* (February 5, 2013).

[24] *Belinda Bryant v. D.C. Public Schools*, OEA Matter No. 2401-0256-10 (June 13, 2012); *Toya Byrd v. Office of Chief Medical Examiner*, OEA Matter No. 2401-0290-09 (November 14, 2011); *Nathaniel Moone v. D.C. Public Schools*, OEA Matter No. 2401-0054-10 (March 28, 2012); *Marian Dunmore v. D.C. Public Schools*, OEA Matter No. 2401-0101-10 (April 30, 2012); *Alexis Parker v. Department of Health*, OEA Matter No. 2401-0298-09 (November 4, 2011); *Karleane Johnson v. Department of Health*, OEA Matter No. 2401-0295-09 (November 4, 2011); *Laura Smart v. D.C. Child and Family Services*, OEA Matter No. 2401-0328-10 (August 20, 2012); *Dorothy Greer v. Department of Housing & Community Development*, OEA Matter No. 2401-0086-11 (August 24, 2012); and *Deborah Moore v. D.C. Public Schools*, OEA Matter No. 2401-0218-10 (July 27, 2012).

the thirty days' notice is a requirement, the AJ must right Agency's wrong. If the AJ did not award Employee thirty days pay, then Agency would essentially be allowed a waiver of the notice requirement. OEA does not have the authority to waive or negate the requirements of a statute or regulation.

Back Pay Award

DPM § 2422.8 provides that "a reduction-in-force action *shall* not be taken before the effective date of a notice (emphasis added)." As the regulation states, the RIF does not become effective until the effective date of the notice. In this case that was June 25, 2010. Thus, it is not until this date that the Employee is RIFed and has the ability to appeal her case to OEA.

In *Aygen*, the Superior Court for the District of Columbia held that "the ALJ should . . . make a finding of fact as to when [Employee] received the . . . termination letter, so as to determine the effective date of [their] termination. . . ."[25] Thus, in accordance with the *Aygen* holding, in order to remedy Agency's procedural error, OEA would have to adjust Employee's effective RIF date from June 25, 2010 to July 26, 2010. The rationale is that because Employee was no longer employed by the District government after June 25, 2010, the effective date of the RIF action would have to be changed to thirty days after June 25, 2010, to compensate Employee for Agency's lack of notice.[26]

It would be futile of the AJ to remand the case to Agency for the purpose of having it reinstate Employee only to provide her with the requisite thirty-day notice requirement. The AJ's award of the thirty days' back pay was ordered to remedy Agency's failure to provide

[25] *Nursat Aygen v. D.C. Office of Employee Appeals,* 2009 CA 006528 P(MPA) and 2009 CA 008063 P(MPA), p. 11 (D.C. Super. Ct. April 5, 2012)

[26] This ruling is consistent with DPM § 2422.3 which requires that the notice not be issued less than thirty days *before* the effective date of the action (emphasis added). It is also consistent with the D.C. Court of Appeals decision in *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1158 (2005), which held that "had [an employee] already been terminated from his employment via the RIF, . . . he would no longer have been a government employee."

adequate notice to Employee.[27] The award satisfies the requirements of DPM §§ 2422.1 and 2422.3, and it makes Employee whole. Thus, Agency's Petition for Review is DENIED.

[27] To clearly illustrate what the AJ's order did, this Board offers the example below:

Procedural Error:

Date	Event
May 21, 2010	Date of RIF Notice
June 25, 2010	Improper Effective Date of RIF Action

Correcting Procedural Error:

Date	Event
May 21, 2010	Date of RIF Notice
June 25, 2010	Improper Effective Date of RIF Action
June 25, 2010	Employee Reinstated to Comply with RIF Notice Requirements
July 26, 2010	Adjusted Effective Date of RIF Action

ORDER

Accordingly, Agency's Petition for Review is **DENIED**. Accordingly, Agency shall reimburse Employee back-pay and benefits for thirty days, as a result of its failure to provide proper notice of the RIF action.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

_____
Patricia Hobson Wilson

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.