THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARK H. LEVITT	)	
Employee	)	
	)	
	)	OEA Matter No. 2401-0001-00
v.	)	
	)	Date of Issuance: May 3, 2005
	)	
DISTRICT OF COLUMBIA OFFICE OF PERSONNEL	)	
Agency	)	
	)	
	)	

OPINION AND ORDER ON REMAND

Employee was a Labor Relations Officer at the time that Agency abolished his position pursuant to a reduction-in-force ("RIF"). Employee appealed that action to this Office. He requested that the Administrative Judge order discovery and hold an evidentiary hearing. The Administrative Judge denied both requests.

In his submission Employee did not argue that Agency had improperly applied the RIF procedures, but rather that Agency had used the RIF process as a pretext to

terminate him without cause. Further, Employee argued that Agency had not given him the required thirty days notice prior to taking its action. The Administrative Jude found that under the law, she could not review Agency's motivation for abolishing Employee's position. However, because Agency had given Employee only fifteen days notice before taking the RIF action, the Administrative Judge held that Agency had erred in this regard. Thus in an Initial Decision issued July 12, 2002, the Administrative Judge upheld Agency's action but ordered Agency to restore to Employee the pay and benefits he would have received had he been given the proper notice. We upheld that decision in an Opinion and Order on Petition for Review issued November 21, 2002.

Employee then appealed to the Superior Court of the District of Columbia. He again argued that Agency had used the RIF process to terminate him unlawfully and further, that the Administrative Judge had erred when she failed to consider this claim.

The court recognized that the law pertaining to RIF's permitted only two bases upon which an employee could contest a RIF action. Because Employee had not contested the RIF on either of the two allowable bases, the court found that the Administrative Judge had not erred when she did not consider the argument Employee had raised. Thus in an October 1, 2002 Order, the court affirmed our November 21, 2002 decision.

Employee appealed that decision to the District of Columbia Court of Appeals. Apparently, Employee argued before the court that the Administrative Judge had erred when she denied his request to engage in discovery and to hold an evidentiary hearing during the administrative trial phase of this appeal. The court, relying on its decision in the case of *Anjuwan v. District of Columbia Dep't of Pub. Works*, 729 A.2d 883, 885-86

(D.C. 1998), stated that "an employee challenging the abolition of the position he occupied needed to demonstrate that his contention was 'non-frivolous' in order to be entitled to a hearing." Based on the assertions Employee had raised in the Petition for Appeal he initially filed in this Office, the court concluded that Employee's contentions were not frivolous and merited discovery and a hearing. Therefore, the court reversed the trial court's decision and ordered us to vacate our November 21, 2002 order and further instructed us to order appropriate discovery and a hearing by an administrative judge. Accordingly, we vacate our decision and remand this appeal to the administrative judge with instructions to order the appropriate discovery and to conduct an evidentiary hearing for the purpose of determining whether Agency's RIF action constituted an illegal adverse action.

ORDER

Accordingly, it is hereby **ORDERED** that the November 21, 2002 decision is **VACATED** and this appeal is **REMANDED.**

FOR THE BOARD:

Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

Jeffrey J. Stewart

Keith E. Washington

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.