THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DARRELL R. MATTHEWS Employee	
v.	OEA Matter No.: 2401-0016-99
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT Agency	Date of Issuance: June 14, 2006

OPINION AND ORDER
ON
PETITION FOR REVIEW

Darrell R. Matthews ("Employee") was a Management Analyst with the Department of Housing and Community Development ("Agency"). On August 21, 1998 Agency notified Employee that his position would be abolished pursuant to a modified reduction-in-force ("RIF") that was to become effective September 25, 1998. On October 19, 1998 Employee appealed the RIF action to the Office of Employee Appeals ("OEA").

Employee argued during the trial of this action that Agency had constructed his competitive level too small.[1] Employee believed that Agency should have included within his competitive level not only the Management Analyst positions but also the Program Analyst positions. He based this argument on his belief that the job requirements of both positions were identical. Additionally, Employee argued that he did not receive any notice of Agency's intention to separate him pursuant to the RIF until September 21, 1998. Thus, according to Employee, Agency failed to give him the requisite 30-days notice prior to taking the action.

In an Initial Decision issued April 11, 2003 the Administrative Judge upheld the RIF action. The Administrative Judge noted that Employee's support for the argument that his competitive level should have also included the Program Analyst positions consisted of his testimony and that of a union official who argued that both positions were interchangeable. On the other hand, the Administrative Judge found that Agency "presented a Personnel employee who credibly testified that these two positions have been determined by position classification specialists to properly be in different competitive levels."[2] Therefore, the Administrative Judge concluded that Employee's argument on this point must fail.

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[1] The significance of this argument rests in the fact that once a competitive level is constructed, a retention register is then created. Each employee within a competitive level is assigned a certain number of points based on very specific criteria. The employees are then placed on the retention register in the order corresponding to the number of points they have received. Thus an employee having the maximum number of points is placed at the top of the register while an employee having the minimum number of points is placed at the bottom of the register. Those employees who are at the bottom of the retention register are the first ones reached for separation. Therefore, it can work to an employee's advantage to have the competitive level to include as many other employees as legally permissible.

[2] *Initial Decision* at 7.

With respect to his second argument, the Administrative Judge found that Agency had indeed failed to provide Employee with the requisite 30 days notice before it abolished his position. Nevertheless, the Administrative Judge determined that this amounted to a harmless procedural error that could be cured by awarding to "Employee the amount of pay and benefits he would have received for the 26 days that notice was deficient."[3] Thus Agency's RIF action was upheld.

On May 16, 2003 Employee filed a Petition for Review. In it he argues that he can now "submit evidence from a certified classifier regarding placement of positions in competitive areas for [the] purpose of [a] RIF. This evidence will not be available until May 20, 2003. It was impossible to obtain this evidence prior to the hearing date because certified classifiers working in the DC Office of Personnel . . . feared retribution. . . ."[4]

We do not believe that Employee has established a basis for us to grant his Petition for Review. Two prehearing conferences were conducted in this matter and an evidentiary hearing was held on February 26, 2003. Employee has failed to adequately explain why this evidence has now become available to him but was not available prior to either of the conferences or the evidentiary hearing. Furthermore, if these witnesses feared retribution as Employee claims, Employee could have sought, and most likely obtained, a subpoena from the Administrative Judge to compel their testimony at the hearing. There are laws in place to protect government employees who are called as witnesses in another employee's appeal. As such potential witnesses, including these

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[3] *Id.*
[4] *Petition for Review* at 2.

certified classifiers, have no reason to fear retribution. For these reasons, we deny Employee's Petition for Review and uphold the Initial Decision.

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.