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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
BEVERLY MERCER) OEA Matter No. 2401-0132-09
Employee) Date of Issuance: March 25, 2010
v.) Sheryl Sears, Esq.
) Administrative Judge
DC OFFICE OF CONTRACTING)
AND PROCUREMENT)
Agency)

Ardra O’Neal, Esq., Employee Representative
Lionel Sims, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

Beverly L. Mercer (“Employee”) was a Program Compliance Specialist, District Service (DS) Grade 12, Step 2, in the Office of Procurement (Integrity Compliance) (“Agency”). By letter dated April 20, 2009, David P. Gragan, Chief Procurement Officer, notified Employee that she would be removed pursuant to the provisions of Chapter 24 of the D.C. Personnel Regulations effective on May 22, 2009. In effecting the removal, Agency designated Employee’s division as a competitive area and placed her on a retention register with one other employee. The competitive level was DS-1101-12-08-N. Two positions were abolished. Therefore, both employees were removed.

On June 18, 2009, Employee filed an appeal with the D.C. Office of Employee Appeals (“the Office”) challenging the Agency’s decision to separate her. On March 3, 2010, the parties convened for a pre-hearing conference. At the pre-hearing, Employee’s attorney entered an appearance and argued, on her behalf, that she did not receive a lawful round of lateral competition. Employee asserts that there was at least one other employee similarly situated who should have been on the retention register. Employee suggests, by this claim, that at least one employee was improperly excluded from the

register and, therefore, exempted from competing for retention during the RIF. Employee also contends that, as a result, she did not get a fair round of lateral competition. Employee stated, upon her belief, that one such employee was Samuel Leonard. At the pre-hearing conference, Employee moved for discovery of the names of any and all employees so situated.

This Judge granted Employee's motion and issued an order setting a deadline for agency to produce any documentary evidence that would support a finding that, on April 14, 2009 (the date on which the retention register was constituted), there were other employees of the Office of Contracting and Procurement in the division of the Office of Procurement (Integrity Compliance) in competitive level DS-1101-12-08-N. This was to include, but was not limited to, employee Samuel Leonard. Agency was ordered, in the alternative, to submit a written affidavit attesting to the search for said documentation.

The deadline for Agency's submission was March 19, 2010. Employee was allowed until April 2, 2010, to submit a brief based upon any documentary evidence produced stating any proposed findings of fact and conclusions of law that would support a determination that Agency failed to provide Employee a lawful round of lateral competition by failing to include all eligible employees on the retention register.

On March 19, 2010, Agency presented an affidavit from Glendora Meyers, Human Resource Manager for the Office of Contracting and Procurement, attesting to her diligent search for said documentation. She reported as follows:

An exhaustive search of the OCP employee personnel filed revealed that as of April 14, 2009, Samuel Leonard held the position of a Program Compliance Specialist- CS-1101-11. As a grade 11 employee, Mr. Leonard should not have been listed on the same Retention Register as Beverly Mercer, CS-1101-12.

An exhaustive search of the OCP employee personnel filed revealed that as of April 14, 2009, no other agency employee, except Beverly Mercer, Compliance Specialist- CS-1101-12 and Angela Ballard, Compliance Specialist – CS-1101-12, should have been listed on the DS-1101-12-08-N Retention Register.

Because no evidence was adduced that would support Employee's position, the deadline for her brief was rescinded. The record is now closed.

JURISDICTION

In accordance with D.C. Official Code § 1-606.03 (2001), this Office has jurisdiction over appeals from removals by reduction-in-force. However, as will be explained, this Office does not have jurisdiction over the claims of this appellant.

ISSUE

Whether this appeal should be dismissed for failure to state a claim pursuant to which this Office can grant relief.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean: That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

FINDING OF FACTS, ANALYSIS, AND
CONCLUSIONS

According to the D.C. Official Code § 1-624.08 (2001), an employee can challenge a RIF as follows:

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 as follows--

(1) an employee may file with the Office of Employee

Appeals an appeal contesting that separation procedures of subsections (d) and (f) were not properly applied.

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 1 *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 . . .

(f) 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. (Emphasis added).

In accordance with these provisions, the only facts and legal conclusions that are relevant to this appeal are those that go to establish whether the appellants received a “round of lateral competition” and “written notice of at least 30 days” before the effective dates of their separations. Employee has not claimed that she did not get the requisite 30 day notice in advance of her removal. She sought, but did not obtain, evidence that she was denied a round of lateral competition.

Chapter 24 of the DPM, § 2410.4, 47 D.C. Reg. 2430 (2000), defines “competitive level” as:

[A]ll positions in the competitive area . . . in the same pay system, grade or class, and series which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent in any one (1) position can perform successfully the duties and responsibilities of any other position, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

Employee has not identified any others with whom she could have lawfully competed for retention. Employee named one other person who also served as a Program Compliance Specialist (Samuel Leonard) but, according to the evidence, he served at a different grade level than she did. Therefore, he could not have been in her competitive level.

Moreover, Employee was one of only two on her retention register. Agency identified both positions for abolishment. Therefore, in fact, there was no competition to be had. Once both positions were targeted, it was inevitable and lawful that both occupants would be removed.

Employee has stated no claims pursuant to which this Office can afford her any relief. As there is no relief the Office can afford, no further consideration of this matter is warranted and it must be dismissed.

ORDER

It is hereby ORDERED that this appeal is dismissed for failure to state a claim pursuant to which relief can be granted.

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE