THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0004-17
ANGELA SIMMONS,	)	
Employee	)	
	)	Date of Issuance: February 1, 2018
v.	)	
	)	Arien P. Cannon, Esq.
D.C. DEPARTMENT OF HEALTH	)	Administrative Judge
Agency,	)	
	)	
	)	

Angela Simmons, Employee, *Pro se*
Nada A. Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Angela Simmons ("Employee") filed a Petition for Appeals with the Office of Employee Appeals ("OEA") on October 28, 2016, challenging the District of Columbia Department of Health's ("Agency" or "DOH") decision to separate her from service pursuant to a Reduction-in-Force ("RIF"). Employee's was a Staff Assistant when her position was abolished.[1] Employee's separation from service was effective September 30, 2016. Agency filed its Answer on December 1, 2016. I was assigned this matter on December 16, 2016.

A Prehearing Conference was convened on May 23, 2017. While Agency's representative was present at the Prehearing Conference, Employee did not appear. Accordingly, a Show Cause Order was issued on May 23, 2017. Based on Employee's response, the Prehearing Conference was rescheduled for July 13, 2017. Subsequently a Post Prehearing Conference Order was issued which required the parties to submit written briefs addressing the issues in this matter. Agency submitted its brief on August 14, 2017, and Employee submitted her brief on September 14, 2017. On September 27, 2017, Agency submitted a Consent Motion for Extension of Time to file its sur-reply brief. Accordingly, Agency submitted its sur-reply

[1] Agency's Brief, Exhibit 1 (August 14, 2017).

brief on October 5, 2017. Upon consideration of the briefs, it was determined that an evidentiary hearing is not warranted. The record is now closed.

JURISDICTION

This 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.

Agency's Position

In a memorandum, dated February 16, 2016, Agency sought approval from the Mayor to conduct a realignment and reduction-in-force.[2] The RIF was limited to the Community Health Administration's Bureau of Cancer and Chronic Disease, Office of the Senior Deputy Director, Perinatal and Infant Health Bureau, Nutrition and Physical Fitness Bureau, and the Child, Adolescent and School Health Bureau.[3]

Pursuant to Administrative Order DOH-2016-02-16, Agency identified forty-two (42) positions for purposes of conducting its realignment and RIF, including two Staff Assistant positions within the Office of the Senior Deputy Director of the Community Health Administration.[4] Agency notes that Employee's Official Personnel Action Forms, or Standard Form 50 ("SF-50"), indicates that she occupied one of the Staff Assistant positions.[5] On August 26, 2016, Agency issued a letter to Employee indicating that her position was being eliminated pursuant to a RIF under Chapter 24 of the District Personnel Regulations ("DPR").[6] Thus, Employee was separated from District government service, effective September 30, 2016.

Employee's Position

Employee asserts that although her position title may have been Staff Assistant, she performed the duties and functions of a Communications Liaison/Public Affairs Specialist for the Agency's Community Health Administration ("CHA"). In this capacity, Employee maintains that she functioned as a Contract Administrator for CHA's media and marketing contracts.[7]

Employee further argues that while she was performing in the role of a Communications Liaison/Public Affairs Specialist, Agency failed to make the appropriate changes to her personnel file to reflect this role. Employee points to Exhibit 1 in her brief, which is a RIF

[2] Agency Answer, Tabs 2 & 4 (December 1, 2016).
[3] *Id*., Tab 6.
[4] *See Id*.
[5] *See* Agency's Brief, Exhibits 1-4 (August 14, 2017).
[6] See Petition for Appeal, Attachment, October 28
[7] Employee's Brief, at 1 (September 14, 2017).

Service Computation Date Form used by the District of Columbia Department of Human Resources ("DCHR") in effectuating a RIF. The position title listed on this form states "Public Affairs Specialist." Thus, Employee contends that the justification for a realignment and lack of funds used in the RIF was subterfuge for removing her, and instead, used a contractor to carry out her duties. Employee further contends that she should have been placed into the vacant position of a Nutrition Program Specialist and afforded one round of lateral competition.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

Pursuant to D.C. Official Code § 1-624.02(a), a RIF shall include:

(1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
(2) One round of lateral competition limited to positions within the employee's competitive level;
(3) Priority reemployment consideration for employees separated;
(4) Consideration of job sharing and reduced hours; and
(5) Employee appeal rights. *See* D.C. Official Code § 1-624.02.

Prescribed order and one round of lateral competition

The prescribed order mentioned in subsection (a)(1) above is for the purpose of developing a Retention Register so that employees may be afforded one round of lateral competition when an agency intends to effectuate a RIF. The factors mentioned in subsection (a)(1) determine the retention standing of each competing employee for purposes of the one round of lateral competition in subsection (a)(2). Subsection (1) and (2) determine whether an employee is entitled to compete with other employees for employment retention and if so, with whom. The one round of lateral competition determines whether an employee is retained or released. According to the District Personnel Regulations ("DPR"), assignment to a competitive level shall be based upon an employee's position of record.[8] Additionally, the DPR specify that competitive levels shall include positions in the same grade (or occupational level) and classification series, and which are sufficiently alike in qualifications requirements, duties, responsibilities, and working conditions, so that the incumbent of one 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.[9]

Here, the Amended Administrative Order (No. DOH-2016-02-16), dated August 15, 2016, designates five lesser competitive areas within Agency, including the Office of Senior

[8] 6-B DCMR § 2410.2.
[9] 6-B DCMR § 2410.4.

Deputy Director, the division where Employee worked. Seven positions within the Office of Senior Deputy Director were included in the RIF, including two Staff Assistant positions.[10] One of the Staff Assistant position numbers is 00022692, Series CS-301, Grade 11, which is the same position number, Series, and Grade encumbered by Employee.[11] The Retention Register for Employee's competitive level lists two Staff Assistant positions, both of which were abolished.[12] Because all positions within Employee's competitive level were abolished, there was no one with whom Employee could compete.

Employee argues that she should have been placed into the vacant position of a Nutrition Program Specialist and afforded one round of lateral competition. Pursuant to 6B DCMR § 2410.2, assignment to a competitive level is based on the employee's position of record. Here, the evidence of record indicates that Employee's position of record was a "Staff Assistant."[13] Employee further argues that she performed the duties and responsibilities of a Communications Liason/Public Affairs Specialist, and not of a Staff Assistant. To support her position, she points to Exhibit 1 of her brief, which lists "Public Affairs Specialist" on the position title line on page 1.[14] However, Employee's position is listed as "Staff Assistant" on three other occasions throughout the form. It is apparent that the "Public Affairs Specialist" position listed on page 1 was in error. OEA has held that the official position of record, as evidenced by an Official Notification of Personnel Form, SF-50, is a determinative factor governing RIFs.[15] Because Employee's position of record was a "Staff Assistant," I find that for purposes of the RIF, she was placed in the proper competitive level.

Priority Reemployment Consideration

D.C. Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section shall be given consideration for priority reemployment. In the RIF Notice issued August 26, 2016, Agency states that, "Employees in tenure group I and II who have received a notice of separation by reduction in force, have a right to priority placement consideration through the Agency Reemployment Priority Program."[16] The RIF notice further states that "[p]lacement assistance through the D.C. Department of Human Resources Displaced Employee Program for vacancies in other District agencies will also be provided to employees in Tenure groups I and II."[17]

Here, subsequent to the RIF and Employee's appeal of her separation to OEA, she was rehired through Agency's Priority Reemployment Program. On February 22, 2017, Employee received a letter reinstating her to a Community Outreach Coordinator position with Agency.[18]

---

[10] *See* Agency Answer, Tab 6.
[11] Agency Brief, Exhibits 1-4 (August 14, 2017).
[12] *See* Agency Answer, Tab 5 (December 1, 2016).
[13] *See* Agency's Brief, Exhibits 1-4 (August 14, 2017).
[14] Employee's Brief, Exhibit 1 (September 14, 2017). This document is the RIF Service Computation Data Form generated by the District of Columbia Office of Human Resources.
[15] *Armeta Ross v. D.C. Office of Contracting & Procurement*, Initial Decision, OEA Matter No. 2401-0133-09R11 (April 8, 2013).
[16] See Agency Answer, Tab 7 (December 1, 2016).
[17] *Id*.
[18] Agency's Prehearing Statement, Attachment 1 (May 19, 2017).

Employee's effective reinstatement date to this position was March 6, 2017. As such, I find that Agency complied with the RIF procedure regarding priority reemployment for separated employees pursuant to D.C. Code § 1-624.02(a)(3).

Consideration of job sharing and reduced hours

Under D.C. Code § 1-624.02(a)(4) and 6B DCMR § 2404, when a RIF is effectuated, an Agency should consider job sharing and reduced hours for employees separated pursuant to the RIF. The District Personnel Regulations (DPR)[19] addresses Agency's responsibility for considering job sharing and reduced working hours. Specifically, 6B DCMR § 2404.1 provides:

> An employee *may* be assigned to job sharing or reduced working hours, provided the following conditions are met:
>
> (a) The employee is not serving under an appointment with specific time limitation; and
>
> (b) The employee has voluntarily requested such an assignment in response to agency's request for volunteers for the purpose of considering the provisions of subsection 2403.2(a) of this chapter in order to preclude conducting, or to minimize the adverse impact of, a reduction in force.

Furthermore, 6B DCMR § 2403.2 provides that, "[a]n Agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency." An example given for an action that could minimize the adverse impact on an employee is "job sharing and reduced working hours."[20] DPM section 2403.2 does not require (emphasis added) an Agency to make certain considerations prior to planning a RIF, rather it gives Agency the discretion to implement various actions that may mitigate the adverse impact on employees or the agency in anticipation of effectuating a RIF.

Here, as mentioned above, Employee argues that she should have been placed in the vacant position of a Nutrition Program Specialist. Other than a position description attached with her brief, Employee does not provide any authority that required Agency to place her in this position. While 6B DCMR § 2403.2 states that an agency may take action to minimize the adverse impact on employees, it does not mandate this transfer. Thus, I find that Agency did not violate the RIF procedures and regulation under D.C. Code § 1-624.02(a)(4) and 6B DCMR § 2403.2.

[19] The regulations are also referenced as the District Personnel Manual (DPM) and as the District of Columbia Municipal Regulations (DCMR), 6B DCMR § 2400, et *seq*.
[20] *See* DPM Section 2403.2(a).

Employee appeal rights

D.C. Code § 1-624.02(a)(5) states that Agency must provide employees separated pursuant to a RIF their appeal rights. Each employee separated pursuant to a RIF under D.C. Code § 1-624.02 shall be entitled to written notice of at least fifteen (15) days before the employee's separation from service.[21] Here, the RIF Notice issued to Employee on August 26, 2016, states that Employee may "appeal this action to the Office of Employee Appeals…" The RIF Notice also provides that an appeal "must be filed within 30 calendar days of the effective date of [the RIF]."[22] The effective date of the RIF was September 30, 2016. Employee signed the "Acknowledgement of Receipt" for the RIF Notice on August 29, 2016. Accordingly, I find that Employee was provided the appropriate appeal rights set forth in D.C. Code § 1-624.02(a)(5).

Pretext

Lastly, Employee argues that the RIF was a subterfuge and a pretext to separate her from service. This argument is based on Agency's continued use of a contractor to carry out the same duties and functions that Employee once covered. Employee maintains that the use of a contractor far exceed the costs of retaining her to perform these same functions. In *Anjuwan v. D.C. Department of Public Works,*[23] the D.C. Court of Appeals held that OEA lacks authority to determine whether an agency's RIF was bona fide. The Court also noted that OEA does not have the "authority to second guess…[an agency's] decisions about which position should be abolished in implementing the RIF."[24] Thus, examining the continued use of a contractor by Agency to carry out the duties and responsibilities Employee once performed are outside the scope of OEA's review.

ORDER

Accordingly, it is **ORDERED** that the RIF separating Employee from service effective September 30, 2016, is hereby **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

[21] D.C. Code § 1-624.02(d).
[22] Agency Answer, Tab 7 (December 1, 2016).
[23] 729 A.2d 883 (December 11, 1998).
[24] *Id.*