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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 2401-0317-10
TYRONE DAVIS,	)	
Employee	)	
	)	Date of Issuance: January 31, 2013
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF PUBLIC LIBRARY,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
Tyrone Davis, Employee, <i>Pro Se</i>		
Grace Perry-Gaiter, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On June 7, 2010, Tyrone Davis ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Library's ("Agency") decision to separate him from service as a result of a Reduction-in-Force ("RIF"). Employee's position of record prior to being terminated was a Special Police Officer in Career Service. Employee's termination was effective on July 6, 2010.

I was assigned this matter in July of 2012. On August 23, 2012 I held a Status Conference ("SC") for the purpose of assessing the parties' arguments with respect to this instant RIF. I subsequently ordered the parties to submit written briefs addressing whether Agency complied with applicable District laws, statutes and regulations when it conducted the RIF. Both parties submitted timely responses to the order. After reviewing the documents of record, I determined that an evidentiary hearing was 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.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,<sup>1</sup> which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, section § 1-624.08 states in pertinent part the following:

(a) ***Notwithstanding** any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).*

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) ***Notwithstanding** any rights or procedures established by any other provision of this subchapter, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).*

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<sup>1</sup> See *Agency Brief*, Tab 13 (September 20, 2012). D.C. Code § 1-624.02 states the following:

- (a) Reduction-in-force procedures shall apply to the Career and Educational Services... and 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.

(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 one 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.

(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.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that “the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency.”<sup>2</sup> The Court also found that both laws were current and that the government triggers the use of the applicable statute by using “specific language and procedures.”<sup>3</sup>

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”<sup>4</sup> The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act (“the Act”) instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”<sup>5</sup> The Court stated that the “ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF.”<sup>6</sup>

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.<sup>7</sup> The Act provides that, “notwithstanding any rights or procedures established by any other provision of this subchapter,” which indicates that it supersedes any other RIF regulations. The use of the term ‘notwithstanding’ carries special significance in statutes and is used to “override conflicting provisions of any other section.”<sup>8</sup> Further, “it is well established that the use of such a ‘notwithstanding clause’ clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other sections.”<sup>9</sup>

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.<sup>10</sup> Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory

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<sup>2</sup> *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

<sup>3</sup> *Id.* at p. 5.

<sup>4</sup> *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1125.

<sup>8</sup> *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

provision to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

1. That he or she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or
2. That he or she was not afforded one round of lateral competition within their competitive level.

### ***Employee's Position***

Employee offers the following arguments in support of his position that his termination under the RIF should be overturned:

1. Employee received a "Highly Effective" performance rating on previous performance evaluations, in addition to attending training courses and being awarded a letter of commendation for his service.
2. Agency's act of terminating Employee under the RIF was an act of retaliation based on him filing verbal complaints with the Department of Human Resources ("DHR").
3. Agency should have eliminated other part-time positions prior to terminating Employee under the RIF.<sup>11</sup>
4. Employee was hired on the same day as two other library police employees who he believes were not subject to the RIF.
5. A coworker informed Employee that Agency planned on citing to budget deficiencies as justification for terminating him.
6. Agency violated the District Personnel Manual ("DPM") when it hired another part-time employee to fill a full-time position. Employee believes that he was not notified of an opening for temporary employment under Agency's Priority Reemployment Program.

### ***Agency's Position***

Agency argues that it properly followed all District statutes, regulations and laws in conducting the RIF. Agency submits that it provided Employee with one round of lateral

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<sup>11</sup> It should be noted that there is no evidence in the record to show that Agency did not comply with Chapter 24, Section 2411 of the DPM, which requires positions filled on a part-time basis to be established under a separate Retention Register.

competition in addition to affording him at least thirty (30) days written notice prior to the effective date of Employee's termination.

### *Discussion*

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

All positions in the competitive area ... in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) 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.

In this case, the DC Public Library was the competitive area in which Employee was placed and DS-0083-06-06-N Special Police Officer constituted Employee’s competitive level. The Administrative Order which authorized the RIF identified one (1) Special Police Officer position to be abolished.<sup>12</sup>

According to the Retention Register produced by Agency, Employee was one of thirteen (13) Special Police Officers within his competitive level. Employee has a Service Computation Date (“SCD”) of January 7, 2008, and did not receive additional service credit for D.C. residency, veterans preference or for an outstanding performance evaluation. As such, Employee’s RIF SCD remained at a date of January 7, 2008. The Retention Register further reflects that one other Special Police Officer (“SPO 2”) has an identical RIF SCD of January 7, 2008.

However, Agency notes that inaccurate information was listed on the Retention Register because SPO 2’s actual SCD should have been listed as January 4, 2004. In support thereof, Agency provides SPO 2’s Form 50, which verifies his SCD. Because Employee had the least amount of service at the time the RIF was implemented, his position was selected to be abolished. Although other Special Police Officers within Employee’s competitive level may have been hired on the same day, any previous employment with other D.C. agencies will affect their SCD as well as their relative placement on the Retention Register. Accordingly, I find that Employee was properly identified as the Special Police Officer with the least amount of service on the Retention Register.<sup>13</sup>

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<sup>12</sup> Agency Response to Petition for Appeal, Tab 6 (August 20, 2010). *See also* Administrative Order No. 401-01-10 (June 1, 2010).

<sup>13</sup> While Employee did receive a “Highly Effective” rating on his performance evaluation (*See* Petition for Appeal), additional points were only awarded for employees who received an “Outstanding” rating. The ‘ratings add’ would have been reflected on the Retention Register.

The notice of termination letter was dated June 1, 2010. The effective date of the RIF was July 6, 2010. I find that Employee received thirty (30) days written notice prior to the effective date of his termination as required by D.C. Official Code § 1-624.08.

Employee argues that Agency violated the DPM when it hired another part-time employee to fill a full-time position for which he should have been considered after the effective date of the RIF. Employee believes that he was not notified of an opening for temporary employment under Agency's Priority Reemployment Program.<sup>14</sup> In this case, Agency notified Employee in his Notice of Termination that he would be placed on its Priority Reemployment Program and that he was entitled to assistance through the Department of Employment Services Dislocated Worker Program.<sup>15</sup> An employee's placement on Agency's Priority Reemployment list; however, does not guarantee that such individual will be rehired by Agency. I find no evidence in the record to support Employee's contention that he was not properly considered for any positions that he applied for after the effective date of the RIF or that Agency was required to place him in a new position.

According to Employee, Agency's act of terminating Employee under the RIF was an act of retaliation based on him filing verbal complaints with the Department of Human Resources ("DHR"). D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.<sup>16</sup> Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights.

Moreover, the Court of Appeals in *Anjuwan v. D.C. Department of Public Works* held that OEA's authority over RIF matters is narrowly prescribed.<sup>17</sup> The Court explained that OEA lacks the authority to determine broadly whether the RIF violated any law except whether "the Agency has incorrectly applied...the rules and regulations issued pursuant thereto." The Court further stated that OEA's jurisdiction cannot exceed statutory authority and thereby, OEA's authority in RIF cases is to "determine whether the RIF complied with the applicable District Personnel Statutes and Regulations dealing with RIFs."<sup>18</sup> However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*<sup>19</sup> stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation...."<sup>20</sup>

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<sup>14</sup> Petition for Appeal (June 7, 2010).

<sup>15</sup> Final Notice of Termination (January 28, 2011).

<sup>16</sup> D.C. Code §§ 1-2501 *et seq.*

<sup>17</sup> 729 A.2d 883 (December 11, 1998).

<sup>18</sup> *Gilmore v. Board of Trustees of the University of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997).

<sup>19</sup> 730 A.2d 164 (May 27, 1999).

<sup>20</sup> *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

Here, Employee's claims as described in his submissions to this Office, do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear that the RIF was retaliatory in nature. In addition, Employee stated that he only made verbal complaints with DHR; allegations which are not supported by documentary evidence in the record.

Employee contends that a coworker informed him that Agency planned on citing to budget deficiencies as justification for terminating him. It should be noted that the Court in *Anjuwan* held that OEA lacked the authority to determine whether an Agency's RIF was bona fide. The stated that as long as a RIF is justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF.<sup>21</sup> The Court in *Anjuwan* also noted that OEA does not have the "authority to second-guess the mayor's decision about the shortage of funds...about which positions should be abolished in implementing the RIF."

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds for personnel services. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.<sup>22</sup> I find that Employee has also failed to provide any compelling evidence to support this claim.

Based on the record, I find the Agency complied with D.C. Official Code § 1-624.08. Agency properly implemented the RIF which resulted in Employee's termination. Accordingly, this matter should be dismissed.

### ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-in-Force is UPHeld.

FOR THE OFFICE:

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Sommer J. Murphy, Esq.  
Administrative Judge

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<sup>21</sup> See *Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).

<sup>22</sup> *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).