**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | |
| | OEA Matter No.: 2401-0027-12R18 |
| WANDERLINE BENJAMIN-BANKS, Employee | |
| | Date of Issuance: December 26, 2018 |
| v. | |
| METROPOLITAN POLICE DEPARTMENT, Agency | |
| | Arien P. Cannon, Esq. Administrative Judge |

Robert J. Shore, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

## SECOND INITIAL DECISION ON REMAND

### INTRODUCTION AND PROCEDURAL BACKGROUND

On October 28, 2014, the undersigned Administrative Judge issued an Initial Decision reversing the Metropolitan Police Department's ("Agency" or "MPD") decision to remove Wanderline Benjamin-Banks ("Employee") from her position pursuant to a Reduction-in-Force ("RIF"). The reversal was based on the fact that the Realignment Approval Form ("RAF") provided in the record was not signed for approval by the City Administrator at the time the RIF was implemented. On December 2, 2014, Agency filed a Petition for Review with the OEA Board arguing that new and material evidence was available, that despite due diligence, was not available when the record was closed prior to the issuance of the Initial Decision on October 28, 2014. Specifically, Agency asserted that the signed RAF, with the City Administrator's signature, had been located.

On May 10, 2016, the OEA Board issued an Opinion and Order on Petition for Review, remanding the matter back to the undersigned for further determinations regarding whether the newly-produced RAF can be sufficiently authenticated as to warrant a different outcome in the disposition of this matter.

A Status Conference was convened on June 29, 2016, to address the Board's Opinion and Order. This matter was subsequently scheduled for an evidentiary hearing to address the issue on remand: whether the RAF could be sufficiently authenticated. As such, an evidentiary hearing was held on September 7, 2016, to address this issue.[1]

Following the evidentiary hearing, the undersigned issued an Initial Decision on Remand on January 9, 2017, again reversing MPD's removal of Employee, finding that the RAF had not been sufficiently authenticated. Thereafter, MPD filed a Petition for Review with the OEA Board. On November 7, 2017, the Board issued an Opinion and Order on Remand reversing the January 9, 2017, Initial Decision on Remand.

Pursuant to Superior Court Civil Procedure Rule 1, Employee filed a Petition for Review of the OEA Board's Opinion and Order on Remand. Employee asserted that the OEA Board's decision was not supported by substantial evidence and amongst several other arguments, argued that MPD failed to consider job sharing or reduced hours as required by D.C. Code § 1-624.02(a)(4) and that OEA improperly placed the burden on Employee to prove that such job sharing or reduced hours did not occur.

In a July 11, 2018 Order, the District of Columbia Superior Court granted Employee's Petition for Review in part, and remanded this case back to OEA to determine whether MPD met its burden of demonstrating that it considered job sharing and reduced hours pursuant to D.C. Code § 1-624.02(a)(4).

Pursuant to the Remand, the undersigned issued an Order establishing a briefing schedule directing the parties to submit arguments on "whether Agency considered job sharing and/or reduced hours prior to the effectuation of the Reduction-in-Force." Both parties have submitted their briefs accordingly.

## JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUE

Whether MPD properly considered job sharing and reduced hours as part of the RIF, pursuant to D.C. Code § 1-624.02(a)(4).

[1] This evidentiary hearing was consolidated with another matter that addressed the identical issue on remand from the OEA Board. *See Lynn Butler v. MPD*, OEA Matter No. 2401-0027-12R16. The *Butler* matter was dismissed in the District of Columbia Superior Court on March 12, 2018. See *Butler v. District of Columbia Office of Employee Appeals*, 2017 CA 008315 (D.C. Sup. Ct. March 12, 2018).

## FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

A RIF pursuant to D.C. Code § 1-624.02(a)(4), the applicable RIF provision at issue here, 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.C. Official Code § 1-624.02. (Emphasis added).

Agency asserts in its brief that the consideration of job sharing and reduced hours were not mandatory under D.C. Code § 1-624.02.[2] This assertion is in direct contradiction with the District of Columbia Superior Court's Order remanding the case to OEA. The Honorable Judge Epstein of the Superior Court specifically states in his order that "D.C. Code § 624.02(a)(4) mandates 'Consideration of job sharing and reduced hours' in any RIF."[3] Agency focuses its argument on what it believes is the "procedure" in carrying out the RIF as set forth in Chapter 24 of the District of Columbia Personnel Manuel ("DPM" or "DCMR"). Specifically, Agency cites 6-B DCMR § 2403.2, which states: "[a]n agency *may*…take appropriate action…to minimize the adverse impact on employees or agency."

As also determined in companion cases[4] related to this matter, I find that Agency is incorrect in its assertion that the consideration of job sharing and reduced hours are discretionary, rather than mandatory. Agency seems to ignore the plain language of the statutory language of D.C. Code § 1-624.02(a)(4) and the findings of the Superior Court's July 11, 2018 Order that the RIF procedures "*shall* include…consideration of job sharing and reduced hours…" Despite this finding, Agency argues that "D.C. Code § 1-624.02(a)(4) is not violated when an agency does not consider job sharing or reduced hours when planning a RIF."

Although Agency argues that consideration of job sharing and reduced hours was discretionary, Judge Epstein addresses this argument in the District of Columbia Superior Court's decision on remand. Judge Epstein held that "even if the Agency had discretion about whether to consider job sharing and reduced hours as alternatives to a RIF, the Agency abused its discretion by failing either to recognize that it had discretion or to explain why it exercised its

[2] Agency's Brief, at 4-5 (September 28, 2018).
[3] District of Columbia Superior Court Order, at 9 (July 11, 2018).
[4] The instant RIF has also been adjudicated in companion cases: *Abeboye v. MPD*, 2017 CA 002469 P(MPA) (D.C. Sup. Ct. Feb. 13, 2018); *Boone v. MPD*, 2017 CA 002471 P(MPA) (D.C. Sup. Ct. March 13, 2018); *Gamble v. MPD*, 2017 CA 002472 P(MPA) (D.C. Sup. Ct. April 30, 2018). While Senior Administrative Judge (SAJ) Lim found that the RAF was authentic in these cases, a finding upheld by the OEA Board and the District of Columbia Superior Court, it should be noted that the RAF was provided to SAJ Lim at a different stage in the litigation than when it was provided to the undersigned AJ. The RAF containing all necessary signatures in the instant case was provided only *after* a decision on the merits was made and the case was remanded from the OEA Board. The RAF containing all necessary signatures in SAJ Lim's cases was provided prior to his initial decision on the merits.

discretion not to consider these options."[5] As held by the District of Columbia Court of Appeals, and quoted by Judge Epstein, "Failure to exercise choice in a situation calling for choice is an abuse of discretion…"[6] Judge Epstein went on to state that MPD "may have a good explanation about why job sharing or reduced hours were not a lawful or practical alternative to the RIF that included [Employee], but it is not too much to ask the Agency to provide that explanation."[7]

The ruling in the Superior Court Order provides Agency the opportunity to explain itself about why job sharing or reduced hours were not a lawful or practical alternative to the instant RIF. In explaining itself on remand, Agency points to a Memorandum from the Director of its Human Resources Management Division, issued in preparation for implementing the RIF.[8] Agency highlights a section of the Memorandum, titled "Job Analysis of Positions Identified for Elimination." Agency argues that the discussion of this portion of the Memorandum shows that some employees who could not qualify for a new Information Technology Series either remained in an obsolete Computer Specialist Series or were placed in a Clerical Series. It acknowledges that the words "job sharing and reduced hours" are not specifically stated in the Memo, but asserts that a "reasonable inference can be made that within the alternatives to the RIF, job sharing and reduced hours were considered."

Additionally, Agency notes that Employee was in a single-person competitive level that was abolished. The Administrative Order relied upon in effectuating the instant RIF, dated August 24, 2011, supports Agency's position that there was only one Computer Program Analyst position that was identified for abolishment under the instant RIF.[9] This position was encumbered by Employee.[10] Thus, Agency asserts that it may be assumed that Agency believed that the alternative of job sharing and reduced hours would not have adequately addressed the need(s) in Agency's Office of the Chief Information Officer ("OCIO") for individuals to perform the work of that Office.[11]

Employee argues that consideration of job sharing and reduced hours should not be limited to an employee's competitive level. Both, Employee and Agency correctly note that "the regulations do not provide any guidance on how a manager would consider job sharing and reduced hours." Because there is a lack of clear guidance, Employee maintains that Agency has wide latitude in considering job sharing and reduced hours in an attempt to minimize the adverse impact of employees subject to the RIF.

Based on Agency's explanation that Employee's entire competitive level was abolished, and because there were no other positions available in Employee's competitive level, I find that job sharing or reduced hours were at the very least considered in this action. Furthermore, the D.C. Court of Appeals in *Johnson v. D.C. Dept. of Health*, 162 A.3d 808 (D.C. 2017) held that

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[5] District of Columbia Superior Court Order, at 9 (Epstein, J.) (July 11, 2018).
[6] District of Columbia Superior Court Order, at 9 (Epstein, J.) (July 11, 2018)(quoting *Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979).
[7] *Id.*
[8] Agency's Brief, Attachment 1 (September 28, 2018). Agency points to this document purportedly produced during discovery which show that in planning the RIF, Agency considered alternatives to separating individuals.
[9] Agency's Brief in Support of Reduction-in-Force, Attachment 3 (July 11, 2014).
[10] [10] *Id.*, Attachment 6.
[11] *See Johnson v. D.C. Dept. of Health*, 162 A.3d 808 (D.C. 2017).

the alternative measure of considering job sharing and reduced hours prior to imposing a RIF has "debatable merit." More specifically, the Court stated:

> In concluding that budgetary and related exigencies required a RIF of all employees across the competitive area at [Employee's] level, [an agency] arguably may be assumed to have found the lesser measures such a job sharing and reduced hours inadequate to address the need; and OEA's authority to look behind that agency judgment would be open to significant question.[12]

Thus, it may be assumed, based on Agency's explanation, and under the holding in *Johnson*, that the alternative of job sharing and reduced hours would not have adequately addressed the need(s) of OCIO for individuals to perform the work of that particular office.

Agency further argues that assuming, *arguendo* that it failed to meets its burden of proof regarding consideration of job sharing and reduced hours, such failure does not constitute harmful error. In making this argument, Agency relies upon 6-B DCMR § 2405.7, which provides that

> The retroactive reinstatement of a person who was separated by a reduction in force under this chapter may only be made on the basis of a finding of a harmful error as determined by the personnel authority or the Office of Employee Appeals. To be harmful, an error shall be of such magnitude that in its absence the employee would not have been released from his or her competitive level.

Because Employee was in a single-person competitive level, I find that even if Agency failed to meet its burden of considering job sharing and reduced hours as part of the RIF, Employee would still have been released from her position because there were no positions to job share, nor were reduced hours an option in Employee's competitive level. Thus, for argument's sake, if Agency failed to meet its burden of proof regarding job sharing or reduced hours, I find such error harmless pursuant to 6-B DCMR § 2405.7.

## ORDER

Accordingly, 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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Arien P. Cannon, Esq.
Administrative Judge

[12] *Johnson*, 162 A.3d 808, 812-13 (D.C. 2017).