THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GEORGE DUNMORE, JR., Employee	
v.	OEA Matter No.: 2401-0141-10
DEPARTMENT OF GENERAL SERVICES, Agency	Date of Issuance: July 11, 2017

OPINION AND ORDER
ON
PETITION FOR REVIEW

George Dunmore, Jr. ("Employee") worked as a Supervisory Mail Assistant with the Department of General Services ("Agency").[1] On October 5, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was November 6, 2009.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 5, 2009. In his appeal, Employee stated that his separation from service was unfair and unprofessional. As a result, he requested that he be reinstated with another agency.[2] Agency's answer was due within thirty calendar days of service of the Petition for Appeal.

[1] The Department of General Services was formally referred to as the Department of Real Estate Services ("DRES").
[2] *Petition for Appeal* (November 5, 2009).

However, Agency did not submit a response. On July 21, 2010, Employee submitted a motion to vacate the RIF action because Agency failed to submit an answer to the Petition for Appeal. He further stated that there was no evidence to show that the RIF resulted in a cost savings to Agency.[3]

An OEA Administrative Judge ("AJ") was assigned to the matter in February of 2012. On February 15, 2012, the AJ issued an Order for Statement of Good Cause to Agency which required it to submit written justification for its failure to file an Answer to Employee's Petition for Appeal.[4] Agency submitted its response to the order on February 29, 2012, stating that it was unaware that Employee filed a Petition for Appeal with OEA. Agency further opined that Employee suffered no substantive consequences as a result of its failure to file a timely answer to his appeal.[5]

The AJ held a Status Conference on March 21, 2012 to assess the parties' substantive arguments. Employee and Agency were subsequently ordered to submit briefs addressing whether the RIF action should be upheld. In its brief, Agency argued that it conducted the RIF in accordance with all applicable laws, rules, and regulations. It contended that Employee was not entitled to one round of lateral competition because he was the only Supervisory Mail Assistant in his competitive level. Agency further stated that it provided Employee with thirty days' written notice prior to the effective date of the RIF action. As a result, it requested that the AJ deny Employee's Petition for Appeal.[6]

Employee filed his response to Agency's brief on April 20, 2012. He argued that he was separated from service as a result of an unpleasant working relationship with his staff, not for

[3] *Motion to Vacate* (July 21, 2010).
[4] *See* November 9, 2009 *Letter from OEA Executive Director Requesting Agency's Response to Petition for Appeal*.
[5] *Agency's Response to Order for Statement of Good Cause* (February 29, 2012).
[6] *Agency's Answer* (April 5, 2012).

budgetary purposes. Employee further posited that the RIF was conducted as a pretext to fire him for disciplining his subordinates. In addition, Employee stated that his separation from service was in retaliation for being a "whistleblower." Therefore, Employee requested that OEA issue a decision in his favor.[7]

An Initial Decision was issued on May 12, 2012. The AJ first held that D.C. Official Code § 1-624.02, and not the Abolishment Act, was the appropriate statute to utilize in evaluating the instant RIF because it was not conducted for budgetary purposes. Next, the AJ stated that Employee was the sole occupant of the Supervisory Mail Assistant position in his competitive level. She further explained that when an entire competitive level is abolished pursuant to a RIF, or when a separated employee is the only member in their competitive level, the statutory provision affording him or her one round of lateral competition is inapplicable. She further determined that Agency provided Employee with at least thirty days' written notice prior to the effective date of the RIF.[8]

With respect to Employee's request for an evidentiary hearing, the AJ stated that Employee provided no basis to support a finding that a hearing was warranted or that there were material issues of fact in dispute. Moreover, the AJ, citing the holding in *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883 (December 11, 1998), noted that "…OEA has indicated that it does not have the authority to determine whether an agency's RIF was bona fide.…Agency, and not [OEA], is responsible for deciding whether to retain or abolish particular positions during a [RIF]." Thus, she concluded that OEA lack jurisdiction to adjudicate Employee's claim that the RIF was not conducted for budgetary purposes.[9]

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[7] *Employee's Response to Agency's Brief* (April 20, 2012).
[8] *Initial Decision* (May 12, 2012).
[9] *Id.*

Next, the AJ indicated that there was nothing in the record to show that Employee was prejudiced by Agency's failure to provide a timely answer to the Petition for Appeal. She noted that Agency submitted a prompt response to the Order for Statement of Good cause and provided a reasonable explanation for its failure to submit a timely response to Employee's appeal.[10]

Finally, the AJ was unpersuaded by Employee's claims that the RIF action was pre-textual in nature. According to the AJ, Employee provided no credible basis to show that Agency terminated him in retaliation for any whistleblowing activities. In addition, she found Employee's claim that the work he performed was not discontinued after the RIF to be a grievance which was outside the purview of OEA's jurisdiction. Accordingly, the AJ upheld Agency's RIF action.[11]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 16, 2016. He disagrees with the AJ's finding that Agency's failure to submit a timely answer to the Petition for Appeal was a harmless error. Employee also contends that Agency's RIF action was wrongful, fraudulent, and in disregard of all laws, rules, and regulations. He further reiterates that Agency did not actually abolish his position because his duties continued to be performed after the effective date of the RIF. According to Employee, the AJ also erred in finding that OEA lacks jurisdiction over grievances. Therefore, he requests that this Board grant his Petition for Review and reverse the Initial Decision.[12]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

[10] *Id.*
[11] *Id.*
[12] *Petition for Review* (December 16, 2016). Agency did not file a response to Employee's petition.

(a) New and material evidence is available that, despite due diligence, was not available when the record closed;

(b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Employee's Petition for Review raises many of the same arguments that were presented to the AJ on Petition for Appeal. There is no new evidence presented that was not available or previously considered by the AJ. The arguments made by Employee seem to merely be disagreements with the AJ's ruling in this matter. That is not a valid basis for appeal. Accordingly, this Board finds that Employee's arguments do not fall within one of the four objections provided in OEA Rule 633.3.

It should further be noted that under OEA Rule 633.1, a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. Employee's Petition for Review was filed over four years after the issuance of the Initial Decision. This Board finds that Employee's late filing serves as an alternate basis for denying his petition. Based on the foregoing, his Petition for Review must be denied.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams.

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.