Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GREGORY HUNTER	)	
Employee	)	
	)	OEA Matter No.: 2401-0002-05
v.	)	
	)	Date of Issuance: February 25, 2009
DISTRICT OF COLUMBIA WATER	)	
AND SEWER AUTHORITY	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Gregory Hunter ("Employee") began working for the District of Columbia Water and Sewer Authority ("Agency") in 1981. In 1993 Employee became a Warehouse Foreman and in 1998 Agency appointed him to the position of Materials Handler Foreman.

On August 2, 2004 Agency notified Employee that the position he encumbered would be abolished pursuant to a reduction-in-force ("RIF"). The RIF took effect on September 3, 2004.

Employee timely filed a Petition for Appeal with the Office of Employee Appeals. The issue before the Administrative Judge was whether Agency erred when it placed Employee in a single-person competitive level. Admittedly at the time of the RIF, Employee was the only person working as a Materials Handler Foreman. However, there were two people occupying the positions of Warehouse Foreman. Even though Employee's position of record at the time of the RIF was that of Materials Handler Foreman, Employee believes he should have been placed in the same competitive level as the Warehouse Foreman employees. Had Employee been placed in the competitive level with the Warehouse Foreman employees, it is unlikely that he would have been RIF'd.[1]

According to Agency's regulations concerning RIFs, an employee is assigned to a competitive level based on his position of record. Competitive levels are comprised of employees whose positions are in the same pay system, grade or class, and series and whose positions are sufficiently alike in qualification requirements, duties and responsibilities such that an employee in one position could perform the duties of any of the other positions that have been included within the competitive level. During the trial of this appeal Agency's expert witness testified that the Warehouse Foreman position required "the person occupying it to have additional duties, responsibilities, and different skill levels . . ." than were required of an employee in the Materials Handler Foreman position.[2] Furthermore, she stated that the duties of the two positions were not interchangeable.[3] She concluded by stating that "to the extent that a Materials Handler Foreman performed some of the duties [of the Warehouse Foreman], they were done to a

[1] Employee's earlier service computation date would most likely have protected him from the RIF.
[2] *Initial Decision* at 3.
[3] *Id.*

much lesser degree . . . ."[4] Employee did not present any evidence to refute this testimony.

The Administrative Judge found the testimony of Agency's expert witness to be credible and persuasive. Based on this testimony, the Administrative Judge went on to find "that the position of Warehouse Foreman is different and distinct from the position of Materials Handler Foreman and that the Agency acted properly when, during the RIF process, it evaluated the incumbents of the Warehouse Foreman separately from the Employee (the sole incumbent of the Materials Handler Foreman position)."[5] Thus in an Initial Decision issued June 8, 2006 the Administrative Judge held that Agency had acted properly when it placed Employee in a single-person competitive level when it RIF'd him. Therefore, Agency's RIF action was upheld.

Thereafter, Employee timely filed a Petition for Review. In his Petition Employee argues that the Initial Decision is based upon an erroneous application of the law and regulations and is not based upon substantial evidence.

Substantial evidence is "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Mills v. D.C. Dep't of Employment Servs.*, 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. D.C. Dep't of Employment Servs.*, 801 A.2d 983, 985 (D.C. 2002)). Evidence is substantial if it is "more than a mere scintilla." *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463 (D.C. 2008) (quoting *Office of People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d 719, 725-26 (D.C. 2002)). An action can be set aside as clearly erroneous as a matter of law if "the interpretation is unreasonable in light of the prevailing law or inconsistent with the statute" or if it "reflects a

[4] *Id.*
[5] *Id.* at 8-9.

misconception of the relevant law or a faulty application of the law." *Doctors Council v. D.C. Pub. Employee Relations Bd.,* 914 A.2d 682, 695 (D.C. 2007) (quoting *Teamsters Union 1714 v. Pub. Employee Relations Bd.*, 579 A.2d 706, 709 (D.C. 1990)).

Essentially what Employee is arguing in his Petition is that there is competing evidence that would have supported a finding in his favor. According to Employee, Agency's expert witness also testified that except for the requirement that the Warehouse Foreman possess a commercial driver's license, the minimum qualification requirements for both positions were the same.[6] Furthermore, according to Employee, Agency's expert testified that both positions were in the same pay system, grade and class.[7] The issue, however, is not whether there is competing evidence that would have supported a finding favorable to Employee. Rather, the issue is whether there is substantial evidence in the record to support the Administrative Judge's finding.

Based on the foregoing legal standard, we believe there is substantial evidence in the record to uphold the Initial Decision. The expert's testimony is such that a reasonable mind can accept as adequate to support the Administrative Judge's decision. Moreover, we also believe that the Administrative Judge correctly applied the law and regulations to the facts of this case. Therefore, we uphold the Initial Decision and deny Employee's Petition for Review.

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[6] *Petition for Review* at 7.
[7] *Id.*

ORDER

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

FOR THE BOARD:

_____
Sherri Beatty-Arthur, Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.