THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ZACH GAMBLE Employee	OEA Matter No. 2401-0018-12R19
v.	Date of Issuance: May 6, 2020
METROPOLITAN POLICE DEPARTMENT Agency	JOSEPH E. LIM, ESQ. Senior Administrative Judge

Frank McDougald, Esq., Agency Representative
Lateefah Williams, Esq., Employee Representative

INITIAL DECISION ON REMAND[1]

PROCEDURAL HISTORY

On November 10, 2011, Zach Gamble ("Employee") filed a Petition for Appeal from the Metropolitan Police Department's ("MPD" or "Agency") final decision to separate him from government service pursuant to a Reduction-in-Force ("RIF"). This matter was assigned to the undersigned administrative judge ("AJ") on July 26, 2013. After several continuances requested by the parties, I conducted a Prehearing Conference on October 3, 2013, and held an evidentiary hearing on July 7, 2015. On August 31, 2015, I issued an Initial Decision ("ID") upholding the validity of the RIF.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 5, 2015. He argued that the AJ failed to address all the issues raised in his April 3, 2015 legal brief and the evidentiary hearing. Based on a review of the record, the Board found no clear error in judgment by Agency. It held that there was substantial evidence in the record to support a finding that Employee was separated from service pursuant to the RIF in accordance with all applicable laws, rules, and regulations. Furthermore, the Initial Decision addressed all issues raised by Employee on Petition for Appeal, and consequently, the Board denied Employee's Petition for Review.[2]

On April 7, 2017, Employee filed an appeal to the Superior Court for the District of

1 This decision was issued during the District of Columbia's Covid-19 State of Emergency.
2 *Gamble v. MPD*, OEA Matter No. 2401-0018-12, *Opinion and Order on Petition for Review*, (March 7, 2017).

Columbia, asserting that the ID and the Board's decisions were not supported by substantial evidence, and that new and material evidence had come to light which contradicts the ID. On April 30, 2018, the Superior Court denied Employee's appeal and affirmed the ID.[3] Employee appealed the matter to the D.C. Court of Appeals. On March 19, 2019, the Court of Appeals issued its Order pursuant to a request by the MPD to remand the matter to the Superior Court with instructions to vacate its decision and remand the matter to OEA for additional findings.[4]

I held a telephone conference on January 21, 2020, and ordered the parties to submit a joint stipulation of facts and briefs on the issue identified by the parties. The parties have complied. Since this case could be decided based upon the documents of record, no additional proceedings were conducted. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Agency met its burden of proof that it properly implemented the D.C. RIF statute, D.C. Official Code §1-624.02(a)(4).

2. If not, whether Agency's action separating Employee pursuant to a RIF should be upheld.

Position of The Parties

Based on my finding that the appropriate D.C. RIF statutes that apply in this appeal are D.C. Official Code §1-624.02 and §1-624.04, Employee alleges that Agency failed to conduct the RIF in accordance with applicable laws, rules and regulations. Specifically, Employee alleges that Agency failed to consider job sharing or reduced hours before conducting the RIF as required by D.C. Official Code § 1-624.02 (a)(4). Employee further alleges that this failure amounts to reversible error and thus, Employee should be reinstated to his prior position.

Agency posits that it met its burden of proof regarding whether it considered job sharing and reduced hours through the testimonies of Barry Gersten, Diana Haines-Walton, and Lewis Norman. Secondly, Agency asserts that even if it failed to prove that it considered reduced hours and job sharing, such failure does not constitute harmful error.

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3 *Gamble v. D.C. Office of Employee Appeals, et.al.* 2017 CA 002472 (D.C. Super. Ct. April 30, 2018).
4 *Gamble v. D.C. Office of Employee Appeals, et.al.* CAP 2472-17 (D.C. Court of Appeals March 19, 2019).

ADDITIONAL FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[5]

1. Whether Agency met its burden of proof regarding job sharing and reduced hours in carrying out its RIF action as required by the D.C. RIF statute, D.C. Official Code §1-624.02(a)(4).

The RIF statute clearly provides that Agency should consider job sharing and reduced hours for employees that have been subjected to a RIF. Of specific relevance to this case is D.C. Official Code § 1-624.02, which tracks the Omnibus Personnel Reform Amendment Act (OPRAA) of 1998 § 101(x). This section reads in pertinent part as follows:

> D.C. Official Code § 1-624.02. Procedures
>
> (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. *See* D.C. Official Code § 1-624.04. [emphasis applied.]

Looking at the evidence presented at the July 7, 2015, evidentiary hearing, the only testimonial evidence presented by Agency on its efforts regarding the consideration of job sharing and reduced hours is as follows:

1. Barry Gersten (Transcript p. 30-67)

Barry Gersten ("Gersten") was the Chief Information Officer of the MPD's Office of Information Technology. After he was hired in September 2010, Gersten performed an assessment of the staffing and functions performed by his information technology organization and concluded that Agency needed to modernize and streamline its technologies and skillsets in order to cut costs and improve operational performance. He wanted to eliminate redundancies and upgrade personnel with higher technical capabilities. For instance, he outsourced the support of mobile computers in the police squad cars to the Office of Unified Communications, pared down the number of technologies Agency employed to one that they could master, and recommended a staffing realignment to then Police Chief Cathy Lanier. This involved the elimination of unneeded personnel and the hiring of people with the right technical skill set, work experience, and computer certifications.

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5 These additional findings of fact are in addition to the findings of fact listed in the *Gamble v. MPD*, OEA Matter No. 2401-0018-12 (August 31, 2015) ID and are incorporated herein.

When asked about the skill sets of his then staff in the Office of The Chief Information Officer ("OCIO"), Gersten testified that based upon his observations, interactions, and performance of the staff, they lacked the skills associated with the new set of Microsoft tools Agency was pursuing even after completing training. After Chief Lanier assented to his plan, Gersten met with Ms. Diana Haynes-Walton of Human Resources to discuss the steps needed to conduct a RIF. In the information technology ("IT") field, changes in technology are constant, and he said that employees who did not or could not obtain the necessary technical certifications and training were subject to the RIF.

Q: So you know if they were retained by MPD or outsourced to other organizations?

Gersten: It varies by position. Some were outsourced. Some were retained.

Q: So some of the employees could have been transferred to another area?

Gersten: I'm not sure how to answer that. I can't answer that.

2. Diana Haynes Walton (Transcript p. 94-95)

Diana Haynes Walton ("Walton") is Agency's Director of Human Resources. She testified that Gersten discussed his plan to realign his IT staff and she provided the advice and resources to properly implement the RIF in accordance with D.C. rules and regulations. Walton testified that Lewis Norman gave them guidance on the steps towards implementing the RIF. Walton stated that the rationale for the RIF was realignment and shortage of work.

Q: Are you aware of whether Mr. Gersten considered job sharing or reduced hours prior to conducting – or compressing the Realignment?
…..
Walton: I don't – I am not aware.

Agency claims that it met its burden of proof that it considered job sharing or reduced hours when Walton testified that she consulted with Lewis Norman on the appropriate way to implement the RIF and when Lewis Norman testified that Agency met the personnel guidelines in implementing the RIF.[6] In other words, Agency wants us to believe that since it sought guidance in implementing its RIF, we should just assume that it followed every directive of the relevant statutes and regulations. However, when Agency's witnesses were directly asked regarding whether he or she considered job sharing or reduced hours, they replied they did not know. Thus, the evidence contradicts Agency's assertion. Therefore, I find that Agency failed to meet its burden of proof that it considered job sharing or reduced hours when it implemented its RIF.

6 Agency's Brief in Response to Order dated May 30, 2019, and repeated in Agency's Brief in Response to Order dated January 31, 2020.

2. If not, whether Agency's failure to consider job sharing and reduced hours in the RIF of Employee constitute sufficient harmful procedural error to warrant a reversal of the RIF.

Employee alleges that Agency failed to conduct the RIF in accordance with applicable law, rules or regulation. Employee argues that Agency failed to prove that it fully complied with D.C. Official Code § 1-624.02 (4), because it did not consider job sharing and reduced hours before implementing the RIF. Employee argues that this failure amounts to reversible error and thus, Employee should be reinstated to his prior position.

With respect to a RIF, 6-B DCMR § 2405.7 provides the following:

> 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 a magnitude that in its absence the employee would not have been released from his or her competitive level.

Thus, for the error to be considered harmless, the evidence must show that even if Agency had considered job sharing and reduced hours, the affected employees would still have been subjected to a RIF. Based on the testimonial evidence presented at the July 7, 2015, hearing, I find that it is undisputed that Agency's entire Office of Information Technology was revamped and realigned to better cope with its data information technology needs. All of the positions in that Office were abolished. Since all the positions were abolished, job sharing or reduced hours were not possible. Some of the staff were sent to other organizations while the rest were RIFed. Only after the RIF was implemented, were new positions created that would better serve Agency's needs as evidenced from the following:

Diana Haynes-Walton (Transcript p. 75-76)

> Q: Okay. Now, I think you mentioned the reason for RIFs. What were the reasons for the RIFs in this particular situation?
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> Walton: In this case it was shortage of work, and I don't recall the other, but basically it was a shortage of work.
>
> Q: Okay. Let me see if I can refresh your recollection. I am going to have this marked as [Exhibit] 2…okay. And so what were the reasons for the --
>
> Walton: The realignment itself, and shortage of work.

Diana Haynes-Walton (Transcript p. 87)

> Walton: There were – the new positions – at the time that the RIF took place, there

> weren't any new positions. There were – what Mr. Gersten did – he had proposed some new positions, but the new positions didn't come to fruition until sometime after the RIF. So he made the proposal, we got permission to conduct the RIF, the RIF was conducted. Once the RIF was conducted and the positions became vacant, then they had the funding to do – to create new positions. So the new positions that Mr. Gersten created probably didn't come to fruition until December of 2011 or so.

Diana Haynes-Walton (Transcript p. 106)

> Walton: …But if you're abolishing the entire job series and everyone in the series, then it's not going to have an impact.

Diana Haynes-Walton (Transcript p. 110-111, 113)

> Walton: …they were abolishing all the positions and they made a decision that none of those positions were going to be part of the reorganization and realignment…
>
> Walton: …the purpose of the realignment was to abolish the positions that were – to abolish certain positions so that you could use the funding from those positions to hire higher level Information Technology Specialists.

The following uncontroverted evidence also shows that the personnel subjected to the RIF did not have the technical skillset or certifications for the new positions created. The evidence also shows that there were no old positions left that used their skillsets. The most relevant testimonies relating to this was given by Employee and Gersten.

Employee (Transcript p. 194-199)

Employee testified that he worked for Agency for 22 years, first as a police officer, and the last 11 years as a Computer Specialist. His job was to provide mobile support, help desk, and develop databases. He testified that he was never given an opportunity to fill any of the new jobs created by Agency despite his experience and knowledge.

> Q: Okay. What did you do as a Computer Specialist?
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> Employee: Sort of like a Swiss Army Knife. From mobile support to sometimes assisting the help desk when they wouldn't be able to handle at their tier in reference to the different Microsoft applications. I developed databases. Pretty much at MPD, whatever they assign you to do, you pretty much do.
>
> Q: Okay. You mentioned Microsoft. Were you familiar with Microsoft?
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> Employee: Yes.

Q: Did Mr. Gersten ever discuss Microsoft with you or your knowledge of it?

Employee: As the CIO, Mr. Gersten is one of the first ones that didn't come in and fully outline what he had envisioned for the Agency employees under his command. So, no, we never had that level of conversation of what was the path he was going to take with the unit.

Q: Were you ever told you needed to learn more Microsoft?

Employee: Well, to me, within IT, we already were doing that, but he never defined the path. When you say Microsoft, in any software packages there are multiple avenues that you can explore, so you have to define; do you want somebody to be an administrator, a developer, or what. So to just say get a certification is just way too generic. You have – then you have to determine, are they going to allow you to utilize the training that you've taken.

Q: And were you ever told what training you needed?

Employee: No. But like I said, as an IT professional, I just take classes on my own so that I can stay employed.

… And I was a 12 over at MPD as a Computer Specialist.

Q: Okay. Were you given an opportunity to fill one of the newly created 2210-grade 12 IT positions at MPD?

Employee: No, sir.

Q: Did you – in order to get the job you have now, did you have any additional licenses that you had to get?

Employee: No, it was based on experience and knowledge.

Barry Gersten (Transcript p. 50-60)

Q: Now, you previously testified that the help desk function that was performed by Ms. Toyer and the mobile support function performed by Ms. Thomas, those functions were transferred out to different organizations?[7]

Gerten: Correct.

Q: Now, with respect to Mr. Gamble, did he have the certifications that you

7 Ms. Toyer and Ms. Thomas were fellow employees subjected to the RIF.

believed were required to do the work of Microsoft?

Gersten: He did not.

Q: Okay. And likewise with Mr. Boone, [8] did he have the certifications that you felt were necessary to perform the work of Microsoft?

Gersten: I would say that neither of the certifications or the years of experience and background required to do the work. [sic].

Q: Okay. They worked on mainframe. "They" being Mr. Gamble and Mr. Boone.

Gersten: Mr. Boone worked on mainframe.

Q: He worked on mainframe. Okay. And, I guess, the mainframe had been outdated or eliminated?

Gersten: It had been retired. So it had been replaced with other new technologies… Mr. Gamble was working on some systems that we had, but they were more as in – his skills were tied more toward building utilities as opposed to bigger systems that linked together and shared information between them.
…
Administrative Judge: And did the agency think about giving them the training so they could get the certifications?

Gersten: I think for many of the people impacted by the RIF, they actually did have to go through the training, but that they didn't retain or have the skills to do the work, though… They went through some training in some of the areas we were pursuing, but they did not use those skills or absorb or retain them. So the training was not effective for them to contribute to the footwork that we were trying to get done.

Q: You testified that the employees—or some of the employees were RIF'd because they lacked the skill set to perform Microsoft…How did you know they lacked the skill set to perform Microsoft?

Gersten: From interactions with them, requesting them to perform certain tasks and them being unable to do so.

…So the tests are at the initiative of the employee. They are not a directive. There could be a requirement for them in some positions, but it's not a directive from me that they need to take the test.

8 Boone is an employee who was also subject to the RIF.

> Q: Did any of the contractors perform work that had been performed by employees who were RIF'd?
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> Gersten: No.

Diana Haynes-Walton (Transcript p. 112-113)

> Q: But there was nothing requiring the positions occupied by individuals to be abolished; correct? The 334 positions that were occupied by individuals, nothing required you to abolish them in 2011? Nothing changed, correct?
>
> Walton: Well, what changed was Mr. Gersten did an assessment of his staff and determined he needed IT (Information Technology) specialists. And IT, if you look at the job series for Computer Specialists and the job series for IT Specialists, they're different jobs.

Thus, based on the evidence adduced at the hearing, I make the following additional findings of fact: The separated Employee was a member of a competitive level, Computer Specialist DS-0334-12, where all its positions were abolished; and his technical skills and/or certifications did not meet the new job requirements. I also find that Employee failed to exhibit the required technical proficiency or obtain the certification required for positions created after the realignment. I also find that because Agency's computer related positions were to be abolished, there were no positions for Employee to job share nor were reduced hours an option.

To summarize, based on the preponderance of the evidence,[9] I find that even if Agency had considered job sharing and reduced hours for Employee, the RIF would still have occurred. Chapter 6-B DCMR § 631.3 defines "Harmless error" as "an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Thus, I conclude that, based on these particular set of facts, Agency's failure to either consider job sharing and/or reduced hours, or more specifically, its failure to meet its burden of proof that it considered such, is harmless error. Thus, in accordance with 6-B DCMR § 2405.7, the RIF is upheld.

It should also be noted that in another matter involving Employee's fellow co-worker, Darryl Boone, [10] involving the same facts and testimony, the District of Columbia Superior Court affirmed the finding and conclusion that failure to consider job sharing and reduced hours was

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9 OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. 59 DCR 2129 (March 16, 2012). "Preponderance of the evidence" shall mean: "That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."

10 *Darryl Boone v. D.C. Office of Employee Appeals, et.al.* 2018 CA 006783 P(MPA) (D.C. Super. Ct. Order June 13, 2019). The Court's Order was not appealed to the District of Columbia Court of Appeals.

harmless error where the elimination of all the jobs in the OCIO precluded the options of "job sharing" or "reduced hours."

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

s/s/ Joseph Lim

FOR THE OFFICE: Joseph E. Lim, Esq.
Senior Administrative Judge