THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DALE JACKSON,	)	
Employee	)	OEA Matter No. 2401-0089-11R14
	)	
v.	)	
	)	Date of Issuance: December 19, 2017
D.C. DEPARTMENT OF HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON MOTION
FOR RECONSIDERATION

This matter has been previously before the Office of Employee ("OEA") Board. By way of background, Dale Jackson ("Employee") worked as a Motor Vehicle Operator with the D.C. Department of Health ("Agency"). On August 20, 2010, Agency conducted a Reduction-in-Force ("RIF"). Employee was terminated from Agency effective September 24, 2010. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 14, 2010.[1]

Before the AJ issued his Initial Decision, both parties filed briefs regarding the RIF action. Agency asserted that the RIF action was proper because it afforded Employee with one

[1] Although Employee's Petition for Appeal is date stamped March 23, 2011, the Administrative Judge ("AJ") determined that the petition was actually filed on October 14, 2010, and accordingly, addressed the merits of Employee's appeal. *Initial Decision,* p. 1 (February 21, 2013).

round of lateral competition and thirty days' notice. Agency argued that the RIF regulations required that employees who have the same job title, series, and grade are to be placed within the same competitive level. Because Employee was the only Motor Vehicle Operator within his competitive level, it explained that the requirement for one round of lateral competition was inapplicable.[2]

Employee provided the AJ with an excerpt of a deposition from the United States District Court for the District of Columbia. He believed that the deposition offered proof of Agency's admission that it did not consider Employee's tenure, length of service, Veteran's or residency preferences, or work performance when conducting his RIF. Employee also claimed that Agency retained his co-worker, Mr. Flores, and RIFed him, which he believed was a violation of the RIF regulations.[3]

On February 21, 2013, the AJ issued his Initial Decision in this matter. He found that under D.C. Official Code § 1-624.08, he could only determine if Employee received one round of lateral competition and thirty days' notice. The AJ ruled that because Employee was within a single-person competitive level, Agency was not required to provide him with one round of lateral competition. Additionally, he found that Employee's placement within the competitive level was proper, and he was provided thirty days' notice of the RIF action. Further, the AJ held that in accordance with *Anjuwan v. D.C. Department of Public Works,* 729 A.2d 883 (D.C. 1998), OEA did not have jurisdiction to consider Employee's claims regarding how Agency elected to use its budget for personnel services. He found that Agency's decision to reorganize its structure was a management decision within its discretion. Therefore, Agency's RIF action

[2] *Agency's Brief,* p. 2-4 (November 13, 2012).
[3] *Memorandum of Employee* (November 15, 2012).

was upheld.[4]

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on March 27, 2013. He argued that the Initial Decision was not based on substantial evidence because it failed to consider that Agency retained Mr. Flores, who held the same position and was in the same competitive area as Employee. Employee contended that because he and Mr. Flores performed the same job, they should have been classified within the same competitive level. Therefore, he requested that he be afforded one round of lateral competition with Mr. Flores within his competitive level.[5]

On June 11, 2013, Agency filed its response to Employee's Petition for Review. It reiterated the arguments raised on appeal and reasoned that because Employee was in a single-person competitive level, it was not required to provide him with one round of lateral competition. Agency also submitted that Employee's arguments regarding Mr. Flores being in his competitive level, was conjecture and unsupported by the Standard Form 50 and Retention Register. Therefore, it requested that the OEA Board deny Employee's Petition for Review.[6]

On July 24, 2014, the OEA Board issued its Opinion and Order on Petition for Review. It found that Employee was in the competitive level of Motor Vehicle Operator and provided that Agency offered no proof that Mr. Flores was a Grade 5, other than its curt assertion. Moreover, the Board stated that the AJ failed to address this issue on appeal and that there was not enough evidence in the record to determine that the AJ's decision was based on substantial evidence. Thus, it remanded the matter to the AJ to determine if Employee was properly placed in a single-

[4] *Initial Decision,* p. 4-8 (February 21, 2013).
[5] *Employee's Petition for Review of Initial Decision* (March 27, 2013).
[6] *Agency's Answer to Employee's Petition for Review* (June 11, 2013).

person competitive level.[7]

The AJ held a Status Conference and determined that an evidentiary hearing was unwarranted. On November 7, 2014, the AJ ordered the parties to submit written briefs. Agency argued that only positions within the same competitive area and grade are included in the same competitive level and that Employee was properly placed in a single-person competitive level.[8] Employee explained that Mr. Flores shared the same occupational level and performed the exact same job. Employee provided that a competitive level consisted of all positions within the same grade or occupational level.[9]

On July 10, 2015, the AJ issued an Initial Decision on Remand. He found that DPR § 2410.4 provided Agency with a choice to group employees pursuant to their grade or their occupational level when planning for and implementing a Retention Register as part of a RIF action. In this instance, Agency opted to group its competitive level using an employee's grade and not their occupational level. He held that Mr. Flores should not have been included in the same competitive level as Employee and that no other Agency employee occupied the same competitive level. The AJ reasoned that Employee was properly included in a single-person competitive level; therefore, one round of lateral competition was inapplicable. Accordingly, he upheld Agency's RIF action.[10]

Employee disagreed with the AJ's decision and filed a Petition for Review on Remand on July 22, 2015. He contended that the AJ ignored DPM § 2410.4 which provides that a competitive level consists of all positions with the same grade or occupational level. Employee

[7] *Dale Jackson v. Department of Health*, OEA Matter No. 2401-0089-11, p. 4-9, *Opinion and Order on Petition for Review* (July 24, 2014).
[8] *Agency's Brief*, p.1-3 (December 11, 2014).
[9] *Memorandum of Employee, p.1-3* (January 13, 2015).
[10] *Initial Decision on Remand*, p. 2-8 (July 10, 2015).

asserted that he and Mr. Flores shared the same occupational level and performed the same job.[11]

On August 25, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provided that the Administrative Order contained in the record defines the position selected for abolishment in the instant RIF as the Grade 6, Series 5703 level. Agency explains that Mr. Flores should not have been included in the same competitive level as Employee because he occupied a Grade 5, Motor Vehicle Operator Position. It agreed with the AJ that Employee was appropriately placed in a single-person competitive level in this matter. Accordingly, Agency requested that the Board uphold the AJ's Initial Decision on Remand.[12]

The OEA Board issued its Opinion and Order on Remand on January 24, 2017. It held that Employee and Mr. Flores did not share the same classification series for one round of lateral competition, as required by DPM § 2410.4. The Board found that Employee held a classification of a "continuing" employee; while Mr. Flores was designated a "term" employee. Further, it reasoned that because Employee was in a single-person competitive level, one round of lateral competition was inapplicable in this matter. Accordingly, it ruled that Agency properly removed Employee pursuant to the RIF action and denied Employee's Petition for Review.[13]

On February 28, 2017, Employee filed what is essentially a Motion for Reconsideration. He argues that he and Mr. Flores were in the same classification series 5703. Consequently, Employee contends that he was entitled to one round of lateral competition. It is Employee's position that if he was afforded the opportunity to compete against Mr. Flores, he would have

[11] *Petition for Review of Initial Decision on Remand*, p. 1-2 (July 22, 2015).
[12] *Answer to Petition for Review*, p. 1-6 (August 25, 2015).
[13] *Dale Jackson v. Department of Health*, OEA Matter No. 2401-0089-11R14, *Opinion and Order on Remand,* p.7-8 (January 24, 2017).

been retained based on his tenure. Accordingly, Employee requests that the Board reconsider its decision and find that his termination under the RIF was improper.[14]

On March 10, 2017, Employee also filed an appeal in the Superior Court of the District of Columbia of OEA's Opinion and Order on Remand, issued January 24, 2017. Employee stated that the Board's Opinion should be overturned because it is based on an erroneous interpretation of DPM § 2410.4 and is not based on substantial evidence. Thus, Employee requested that he be reinstated; receive back and front pay; have the termination expunged from his record; and be awarded compensatory damages, costs, and attorney's fees.[15]

Agency filed its response to Employee's Petition for Review on April 4, 2017. It asserts that Employee's petition should be denied because it is improper; it was untimely filed; and OEA no longer has jurisdiction over this matter because an appeal was filed in the Superior Court. Agency argues that OEA Rule 633.3 does not contain any provision authorizing a Petition for Review from the OEA Board's Opinion and Order on Remand. Additionally, it explains that the OEA rules do not contain any provision for a Motion for Reconsideration of a Board decision. It explains that *assuming arguendo* that the OEA rules allowed for a Motion for Reconsideration, pursuant to the Superior Court Civil Rules, Employee's Petition for Review would be untimely, as Superior Court Rule 59(e) requires that such a motion be filed within ten days after entry of the Opinion and Order. Thus, Agency contends that Employee's Motion for Reconsideration should have been filed no later than February 7, 2017. Thus, it was untimely filed on February 28, 2017. Finally, Agency argues that OEA Rule 633.12 provides that an appeal of a final decision may be made in Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978. As a result, it requests that

[14] *Employee's Petition for Review of Review of Opinion and Order on Remand,* p. 1-5 (February 28, 2017).
[15] *Dale Jackson v. District of Columbia Office of Employee Appeals,* 2017 CA 001384 P (MPA) (D.C. Super. Ct. March 10, 2017).

Employee's petition be denied.[16]

As Agency provides, the OEA rules provide guidance on the issue presented in Employee's Motion for Reconsideration. OEA Rule 632 provides the following:

> 632.1 The initial decision shall become final thirty-five (35) calendar days after issuance.
>
> 632.2 The initial decision shall not become final if any party files a petition for review or if the Board reopens the case on its own motion within thirty-five (35) calendar days after issuance of the initial decision.
>
> 632.3 If the Board denies all petitions for review, the initial decision shall become final upon issuance of the last denial.
>
> 632.4 If the Board grants a petition for review or reopens a case, the subsequent decision of the Board shall be the final decision.
>
> 632.5 Administrative remedies shall be considered exhausted when a decision becomes final in accordance with this section.

After the Board's initial remand of the matter to the Administrative Judge, Employee filed a Petition for Review on Remand on July 22, 2015. Therefore, in accordance with OEA Rule 632.2, the Initial Decision did not become final because of the pending Petition on Remand. However, in accordance with OEA Rules 632.3 and 632.5, once the OEA Board issued its Opinion and Order on Remand on January 24, 2017, Employee's administrative remedies were exhausted after the Board denied his Petition for Review on Remand. As Agency accurately provided, there are no provisions within any rules, regulations, or statutes pertaining to OEA that allows it to address the merits of a Motion for Reconsideration. Once a final decision has been made on a petition before the Board, the only procedural option available to parties is to appeal the Board's decision to the Superior Court of the District of Columbia.[17] D.C. Official Code § 1-

[16] *Agency's Opposition to Employee's Petition for Review of Opinion and Order on Remand,* p.1-4 (April 4, 2017).
[17] OEA Rule 633.12 provides that "[a]n employee or agency may appeal a final decision to the District of Columbia

606.01(c) provides the following:

> A final decision of the full Office, relating to an appeal brought to it from a hearing examiner, *shall* be appealable to the Superior Court of the District of Columbia (emphasis added). Upon reviewing the final decision of the Office, the Court shall determine if it is supported by substantial evidence.

Accordingly, we must dismiss Employee's Motion for Reconsideration for lack of jurisdiction.[18]

Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, et seq. (2006 Repl. & 2011 Supp.))."

[18] *Assuming arguendo* that this Board could consider Employee's motion, it would be denied. In *Sarnita Beale and Judy Cofield v. Office of Contracting and Procurement and Office of Employee Appeals*, 2016 CA 006119 P(MPA)(D.C. Super. Ct. September 28, 2017), the District of Columbia Superior Court reasoned that a Motion for Reconsideration should not be granted "unless the moving party shows new facts or clear errors of law which compel the court to change its prior position." Additionally, it held that a Motion for Reconsideration "is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier." Employee made the exact same arguments raised in previous petitions to the Board. He also misconstrued the Board's position regarding Employee and Mr. Flores' classifications of "continuing" and "term" employees. The code 5703 that Employee references is clearly listed as an occupational code on the SF-50 forms; the Board highlighted this in its Opinion and Order on Remand. There are no new facts or errors of law raised in Employee's Motion to Reconsider. Employee presents the same argument for a second time to the Board that was previously addressed on appeal.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Motion for Reconsideration is **DISMISSED**.

FOR THE BOARD:

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Sheree L. Price, Chair

_____
Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

_____
Jelani Freeman

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.