**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| EMPLOYEE[1], | ) | OEA Matter No.: 2401-0014-22 |
| Employee | ) | |
| | ) | Date of Issuance: August 24, 2023 |
| v. | ) | |
| | ) | |
| D.C. DEPARTMENT OF FORENSIC SCIENCES, | ) | |
| Agency | ) | MICHELLE R. HARRIS, ESQ. |
| | ) | Senior Administrative Judge |
| | ) | |

Lateefah Williams, Esq., Employee Representative
Rachel Coll, Esq., Agency Representative
Hillary Hoffman, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL HISTORY

On November 29, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting District of Columbia Department of Forensic Sciences' ("Agency") decision to separate him from her position as a Forensic Scientist pursuant to a Reduction-in-Force ("RIF"). Employee was RIF'd effective October 22, 2021. On December 6, 2021, OEA issued a Request for Agency Answer to Petition for Appeal. On December 28, 2021, Agency submitted its Motion to Dismiss Employee's Petition for Appeal stating that Employee's Petition for Appeal was untimely. This matter was assigned to the undersigned on January 19, 2022. On January 21, 2022, Employee filed an Opposition to Agency's Motion to Dismiss. On January 27, 2022, the undersigned issued an Order on Jurisdiction and Convening a Prehearing Conference noting that OEA maintained jurisdiction over this matter. A Prehearing Conference was held in this matter on February 24, 2022, via WebEx. Subsequently, I issued an order requiring the parties to submit written briefs. Both parties have submitted their respective briefs.[2] After several conferences, an Evidentiary Hearing was held in this

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

[2] On May 3, and May 19, 2022, Agency filed a Motion to Consolidate this matter with another similar matter assigned to the undersigned. This Motion is hereby DENIED. The facts of the cases do not warrant consolidation. However, for the purposes of the record regarding the RIF, the AJs assigned to these matters before this Office elected to hold a joint Evidentiary Hearing to address issues identified regarding the administration of the RIF.

matter on March 21, 2023. The parties submitted their respective closing arguments on June 2, 2023. The record is now closed.

## JURISDICTION

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

## ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

## BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "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.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following findings of fact, analysis, and conclusions of law are based on the documentary and testimonial evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a RIF. On August 10, 2021, Administrative Order No. DFS-2021-01 authorizing a RIF pursuant to D.C. Code § 1-624.02; Chapter 24, Reduction-In-Force of Title 6 of the District of Columbia Municipal Regulations ("DCMR"); and Mayor's Order 2008-91, dated June 26, 2008, was issued. The RIF Authorization Memo stated that the RIF was conducted for "a lack of work due to the loss of accreditation as required pursuant to D.C. Official Code § 5-1501.06(d)(1)."[3] Following an investigation into an alleged misconduct in the Firearm Examination Unit ("FEU"), Agency's Forensic accreditation was suspended effective April 12, 2021. The entire Firearms Examination Unit was abolished because of the loss of accreditation. Employee was a Forensic Science Technician in the Firearms Examination Unit. She is a member of the National Association of Government Employees ("NAGE") which has a Collective Bargaining Agreement with Agency. Agency

[3] *See.* Employee's Prehearing Statement (February 16, 2022).

issued a written RIF Notice on September 15, 2021, to Employee, with an effective RIF date of October 22, 2021.

SUMMARY OF RELEVANT TESTIMONY

As part of the appeal process within this Office, an Evidentiary Hearing was conducted on March 21, 2023, with four (4) OEA Administrative Judges[4] on the issue of whether Agency's conducted the instant RIF in accordance with applicable law, rules, or regulations. With agreement by all parties involved, the Evidentiary Hearing was held jointly for ten (10) similarly situated RIFed DFS employees. All the DFS employees that were heard had the same legal counsel that consistently offered substantially similar legal and factual reasoning challenging DFS' RIF action. Moreover, DFS, through counsel, also offered substantially similar legal reasoning to bolster their RIF actions. It was determined that by the OEA Administrative Judges that the factual issues in question were best addressed collectively during the joint Evidentiary Hearing. This provided the most clear and efficient means for addressing the concerns of the parties in a way that provided consistent analysis and efficient use of government resources. During the Evidentiary Hearing, the Administrative Judges had the opportunity to observe the poise, demeanor, and credibility of the witnesses.

***Agency's Case-in-Chief***

Anthony Crispino ("Crispino") Tr. 34-108.

Crispino worked as the Interim Director of the Department of Forensic Sciences ("Agency") since May of 2021. Crispino explained that the Firearms Examination Unit ("FEU") within Agency was disbanded via a RIF in the summer of 2021. He provided that when he arrived at Agency, the unit was unaccredited and unable to perform work. Tr. 34-35. Crispino testified that if the FEU was restored, it would have been with reduced services. He explained that with training, Agency might have been able to bring back serial number restoration services. He noted that those services were provided through an arrangement with the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Crispino explained that prior to the RIF, Agency conducted firearms testing and provided National Integrated Ballistic Information Network ("NIBIN") entries so that the tested shell casings could be entered into the national searchable database. Tr. 36. He stated that he did not supervise ATF individuals and was unsure if ATF was accredited. Tr. 40.

Crispino testified that accreditation for Agency was an 'umbrella policy' and since the accreditation was pulled, Agency was precluded from forensic work. He indicated that accreditation requirements were instilled to ensure that results were accurate and standardized procedures were followed and held to certain measures, which gave confidence to prosecutors that Agency was functioning correctly. Tr. 38-39.

Crispino explained that to conduct a RIF in the District government, approval was needed from the D.C. Department of Human Resources ("DCHR"). Crispino recalled Agency's Exhibit 3, wherein he emailed former Director, Ventris Gibson ("Gibson") for authorization to conduct a RIF. Tr. 51. In response to the email, Gibson informed Crispino that Agency was required to exhaust all available

[4] The four Administrative Judges ("AJ") that collaborated in these matters were: AJ Monica Dohnji, AJ Michelle Harris, AJ Joseph Lim, and AJ Eric Robinson.

management flexibilities such, as reassignment to other vacant positions where an employee met the minimum qualifications, connecting with other agencies for placement and or local and state governments. Tr. 53.

According to Crispino, when Agency's loss of accreditation occurred in 2021, it still had to meet its obligations to stakeholders, specifically the United States Attorney's Office ("USAO"), the Metropolitan Police Department ("MPD"), and the Office of the Attorney General ("OAG"). He testified that in order to ship items to and from external laboratories, specific employees were retained after the RIF in order to have evidence processed for outsourcing and to accept receipt of the firearms results. Tr. 43. Crispino provided that some units within Agency were retained because those employees did not work in areas that were critical to criminal prosecution. To provide an example, Crispino explained that the Public Health Laboratory conducted operations such as syringe surveillance, but this function was not related to criminal prosecution because it aided with public health initiatives. Tr. 42. Additionally, Crispino explained that the Biology unit was retained because it used DNA and fingerprints and the Chemistry unit was retained because it did not conduct analytical work. He further noted that the Chemistry unit conducted analysis for the Public Health Laboratory, which fell under a different accreditation, and the tests conducted were permitted under that scope of accreditation. Tr. 44.

Crispino reiterated that Agency's loss of accreditation precluded the unit from conducting work internally and that was the reason ATF was utilized. He indicated that the loss of accreditation occurred in May 2021 and the RIF was initiated in July 2021. Tr. 68-69. Additionally, Crispino affirmed that the difference between the FEU and the Latent Fingerprint Unit ("LFU") versus ATF was that ATF is onsite; whereas the other two units required that evidence be sent to external vendors. Additionally, he provided that the laboratories are located across the United States, including Mississippi, North Carolina, and other jurisdictions. Tr. 72-73.

Crispino claimed that FEU employees were not given an opportunity to train due to the Inspector General's report which identified significant systemic issues with the FEU that would take an excess of two (2) years to rehabilitate. Because Agency needed to be back online as soon as possible, it prioritized which units would come back first under the scope of accreditation. Crispino testified that after conducting an audit and considering information from the USAO and the OAG, Agency determined that the reaccreditation process should focus first on the Biology and Chemistry Units since they contained the least amount of issues, which allowed the units to be back online and reduced the need for outsourcing. Tr. 82.

Crispino also testified that under the Anti-deficiency Act, if funding was not available for positions, he was unable to fill the position because it violated the act. He explained that it was represented to him by her Human Resources ("HR") manager that there were no positions available for the eleven (11) impacted employees under the RIF. Crispino stated that unfortunately, he was unable to relocate employees to other positions. He explained that Agency's outsourcing costs were exponential, and the costs had to be accounted for in Agency's operating budget. Tr. 88.

Crispino was unable to speak to the relationship between understaffing and vacancies. He clarified that just because a unit was understaffed did not necessarily mean that there were vacancies in the unit, as it depended on Agency finances. Crispino further explained that the budget was adjusted as Agency crossed between different fiscal years. Tr. 97. Crispino attested that a 'Schedule A' is a

document utilized by the HR Unit and the financial or fiscal officer to ensure that the finances meet the needs of Agency and tracks vacancies against personnel costs. Crispino testified that the RIF process did not automatically create a budget or new vacancies. He explained that while personnel costs may be reduced, because Agency was not accredited, it could not conduct an internal analysis; thus, all the work was outsourced, and costs increased exponentially. Tr. 98-99. Crispino reiterated that Agency lost its accreditation due to systematic issues identified within the FEU. He also testified that there was an alleged managerial cover-up involving the FEU. Tr. 100.

Crispino also noted that when considering vacancies or potential vacancies prior to a RIF, the period of time that is considered is "real time" and what is present at the time of the RIF. He explained that there could be attrition at any time, but that in this instant matter, this consideration was done in the summer of 2021 when the RIF was conducted. Tr. 101. He further cited that the new fiscal year begins on October 1st and that the budget changes for vacancies within a fiscal year. Tr. 102.

Crispino testified that it was the responsibility of DCHR to reach out to agencies for placement and that Director Gibson signed an August 10, 2021, memorandum which noted that these actions had been completed. Tr. 103. When questioned about how he ensured that the RIF procedures and policies and other mechanisms were followed, given that Michael Hodge's ("Hodge") departure took place prior to the RIF, Crispino noted that the mechanisms to accomplish the RIF had already been completed before Hodge's departure. Crispino noted that he had already asked for approval and that Director Gibson signed off on the authorization memorandum on August 10, 2021. Tr. 104.

Dominique Odesola ("Odesola") Tr. 114-156.

Odesola worked as a HR manager for DCHR for approximately three (3) years. He testified that DCHR serves as the personnel authority for many District government agencies. In this capacity, DCHR provides guidance and support to the majority of the agencies under the mayor's purview. Odesola stated that he provided guidance to the division that covered staffing and recruitment, as well as processing various personnel actions including new hires, rehires, reassignments, terminations, and RIFs. He explained that a RIF occurs when an agency lacked work, funding, or experienced restructuring or realignment. Odesola also testified that he was not involved with the instant RIF action. Tr. 114-116. Odesola noted that he had been involved with only two (2) prior RIFs in his career.

Odesola testified that job sharing is an element that was considered when a RIF was conducted. He claimed that employees could be impacted by a potential risk if they were interested in sharing specific, full-time jobs, in a part-time role. For instance, he indicated that two employees could work part-time to fill one full-time vacancy, or several employees could work part-time to fill a full-time vacancy. He also explained that an existing full-time employee would not be asked to share their position with an employee who was subject to a RIF, because the agency did not want to impact an employee outside of their competitive area. Odesola stated that to determine how to fill a vacancy position, an agency would first assess the skill set and qualifications of the employees and subsequently determine if there were any similarities with other potential vacancies within the agency. Odesola asserted that a vacant position was required to exist prior to conducting a RIF. Tr. 117-121. Odesola testified that job sharing does not mean that an existing full time employee's position would be changed to two part-time positions to create a position for an employee that has been subject to a RIF. Tr. 121.

Odesola also provided that one of the requirements when conducting a RIF is that an agency should determine if job sharing, temporary opportunities, or reducing hours were available. He explained that DCHR did not evaluate the existence of vacancies on an agency level; however, DCHR could provide support if requested. Additionally, Odesola noted that if an agency had a unit that was understaffed, it did not necessarily mean that there were existing vacancies. He testified that agencies had various budgets, and depending on the budget, an agency may not have a vacant position within that specific division. Odesola further explained that if an employee within a specific unit was on Family and Medical Leave Act ("FMLA") or administrative leave, that did not create a vacancy. Tr. 122.

Odesola attested that the Agency Re-Employment Placement Priority Program ("ARPP") is used when there is a RIF. He explained that an agency first has to create a list of all impacted employees and then provide them priority placement if there are positions that became available throughout the agency. Odesola clarified that ARPP differed from the Displaced Employee Program ("DEP"), which was managed by DCHR and that both ARPP and DEP only become effective once a RIF occurs. Tr. 124. Odesola explained the DEP is a program that looks at the District as a whole to identify when positions become vacant and whether someone impacted by a RIF might have "first dibs" at the opportunity for those positions. Tr. 125. He reiterated that both the ARPP and DEP are effective on the effective date of the RIF. Odesola also explained that sometimes the agencies internal evaluation of vacancies can go hand in hand with the ARPP when identifying vacancies after the effective date of the RIF. Tr. 125.

Odesola also explained the process for employees being matched with vacancies in the agency after the RIF has occurred. He cited that the agency would have someone in HR handle the list and as vacancies occurred, they would view the list and see if any employees had skills to match those positions. He noted that the agency has the prerogative to move forward if they see a good fit, but that there is no obligation to place employees in that vacancy. Tr. 126. He also explained that job sharing considerations are supposed to take place prior to the planning of the RIF. He also cited that a vacancy had to be available for the placement of an employee in a temporary position. Tr. 127. Odesola testified that "freezing vacancies" in a RIF process is when an agency would "not hire against specific vacancies" such that those positions would not be posted. He noted that this practice might protect employees from being impacted by a RIF or may have budgetary benefits, such that this might be considered as an alternative to a RIF. Tr. 127-128.

Odesola reiterated that he had no direct involvement or knowledge of the instant RIF. Tr. 129. Odesola explained that there are different personnel actions that could create a vacancy, including reassignment, termination or a resignation. Tr. 129-130. Regarding 'detailed assignments,' Odesola noted that vacancies do not occur with details. Tr.131. Odesola also testified that RIFs might include a lot or a little paperwork depending on the RIF situation. He cited that there was no threshold about the adequate amount of paperwork required for a RIF. Tr. 131. Odesola also explained that a RIF is justified through the required administrative order. So, if an administrative order has been signed by the mayor or the mayor's designee, then that serves as the required paperwork. Tr. 132. Odesola also noted that there might be documentation about job sharing or reduced hours, but if there's not any it doesn't mean that those actions did not occur, just that they may not have been documented. Tr. 132. He reiterated that employees were eligible for ARPP after the effective RIF date. He explained that an agency was responsible for completing the ARPP form and it would not be considered abnormal if a form was not appropriately completed a year and a half after a RIF. Tr. 146.

On examination by Administrative Judge ("AJ") Robinson, Odesola confirmed that he did not have in depth conversations with DCHR regarding the instant RIF. He further explained that he was called to testify because he was knowledgeable on RIF procedures but was not provided with any specifics related to the instant RIF. Tr. 149.

On examination by AJ Dohnji, Odesola stated that he worked the ARPP and DEP programs with the agencies and was familiar with the pre-RIF requirements of the program. Odesola also explained that prior to the effective date, all employees that may be affected by the RIF must be identified. He stated that an employees' specific position and tenure were reviewed to understand which tenured group they fell into, so that once he or she was placed on the respective ARPP or DEP priority list, the employee could be placed into a vacancy position that was a good match. Tr. 150-151. Odesola affirmed that he had personal experience with a RIF in 2013. Tr. 154.

On examination by AJ Harris, Odesola testified that he had experience with two RIFs, one directly and one indirectly. Tr. 152. On examination from AJ Lim, Odesola cited that he had been in his current role for three (3) years, and that he had been previously employed with another D.C. government agency for five (5) years in HR management. Odesola cited that his previous involvement with a RIF took place in 2013, approximately 10 years prior. On recross examination, Odesola reiterated that he was directly involved in one RIF action. Additionally, he was involved with the ARPP process. However, he could not recall what he did or the specifics of the process since it occurred many years ago. Tr. 156.

***Employee's Case-in-Chief***

Latoya McDowney ("McDowney") Tr. 159-196

McDowney worked as an Essential Evidence Specialist for Agency since 2015. She also served as the Union President for Agency employees since 2016. As President, McDowney represented bargaining unit employees and oversaw the entire local at Agency. Additionally, she was the union representative for all the employees subject to the RIF. Tr. 159-160.

McDowney stated that Agency employees were called to meet individually with HR regarding the RIF. She explained that HR specialists, Carla Butler ("Butler"), and Krysty Hopkins ("Hopkins") served the employees their RIF notices. Additionally, she provided that two (2) members of Agency's legal department were present at the time. McDowney testified that since it was her first RIF experience, she referred to the District Personnel Manual ("DPM") to ask questions and make sure the RIF was properly conducted. She asked Butler if Agency considered job sharing, reducing hours, and asked if Agency intended to detail the affected employees. However, Butler cited that she was unable to answer McDowney's queries and stated that she was only instructed to provide the employees with RIF notices and have them sign off on the notification. Tr. 162-163. McDowney also testified that she defined "vacancies" as those that were listed online and based on 'manpower in the office" and where other units were understaffed. Tr. 167.

McDowney also identified five units within Agency that were not accredited. She testified that the Public Health Lab ("PHL"), Digital Evidence Unit ("DEU"), Latent Fingerprint Unit ("LFU"), Central Evidence Unit ("CEU"), and the Firearms Examination Unit ("FEU") were not accredited

entries. McDowney pointed that Agency did not make an effort to place the RIF employees in other positions. Tr. 173. McDowney stated that units participated in the transferring of evidence; however, none of the units conducted testing. Tr. 174-178.

McDowney testified that based on her work with CEU, she is familiar with what work CEU and FEU did collectively. She reiterated that the CEU and Crime Scene Collection units were not accredited. Tr. 184. She testified that she was familiar with the collective work of the CEU and FEU. McDowney indicated that she was not sure what the FEU did with the firearm evidence, but knew they had a list of work that could be done although they did not have accreditation. She explained that part-time employees could work with fire machines to ensure standardization and that she believed that there was work to sustain full time and part time employment. McDowney further noted that employees could take different training courses to fill the needs of accreditation, similar to other units. She acknowledged that she partially contradicted herself in earlier testimony and stated that she did not know the work of the other units because she did not work in those divisions. However, McDowney stated that she was informed that employees went to trainings and worked on machines. Tr. 181-183.

Natasha Pettus ("Pettus") Tr.198-242

Pettus worked as a Supervisor in the CEU at Agency. Pettus had been employed with the District government for approximately 27 years. Prior to her tenure with Agency, she worked as a Crime Scene Evidence Technician with the Metropolitan Police Department (MPD). Pettus provided that her unit was transitioned under Agency. She explained that employees were needed in the CEU one year after Agency was opened, so she and another senior civilian technician worked in that division. Tr. 198-201. Pettus testified that she was involuntarily separated from service on January 9, 2023. She stated that she received a letter informing her that her position as a Management Supervisory Service ("MSS") 'at-will' employee was abolished. Tr. 201.

Pettus claimed that Agency lost accreditation due to an incident in the FEU regarding testing results; but she was not privy to the details of the case. Pettus did not know whether Agency offered to retrain employees in other units after it lost accreditation. Tr. 212-218. After accreditation was lost, Pettus stated that she was not notified of the pending RIF. She explained that she was informed of the RIF when firearms evidence could not be processed. Pettus testified that a meeting with the Evidence Control Branch, the Crime Scene Director, and herself was held to discuss how they could process weapons testing. She stated that at the end of the meeting, it was determined that a mobile bus would be utilized to process and test the firearms. Pettus further explained that the ATF conducted the test fires, and the Evidence Control Branch took the evidence until it was housed at Agency. Tr. 220-221.

Pettus testified that prior to her onboarding, Agency did not have a system in place for testing firearms. She opined that the timeline that was created for the testing was spontaneous and not ideal. Tr. 222. According to her, prior to the RIF, the CEU took the weapons to an ATF mobile command bus to test fires because of loss of accreditation. Tr. 227. Pettus stated that she was unsure if ATF was accredited under Agency. Tr. 234. Pettus testified that the Forensic Biology Unit ("FBU") tested DNA, FEU conducted test fire, examination for AFIS with casings, FCU, conducted drug testing for narcotics, the DEU tested cellphones, laptops, and computer electronics. and LFU examined prints that were recovered from crime scene scientists. She opined that all the units conducted substantive work. Tr. 238.

On cross-examination, Pettus cited that she was a supervisor in the CEU. She reiterated that she was terminated in January 2023 and was not provided with an explanation for her separation from Agency. She stated that after the units lost their accreditation, they continued to work. However, she did not know the exact date the units stopped working until Agency as a whole stopped working. Tr. 242. Pettus cited that the unaccredited tasks that the FBU did included transferring evidence to storage or assisting with sending evidence to outsourced labs.

**Summary of Agency's Position**

Agency asserts that Employee was a Forensic Science Technician in the Firearms Examination Unit ("FEU"). It maintains that the entire FEU was subject to a RIF due to a shortage of work, stemming from the loss of accreditation.[5] Citing to D.C. Code § 1-624.01, Agency noted that under D.C. law, the personnel authority within each agency shall be responsible for determining when a reduction in force is necessary. Agency avers that it has complied with the requirements of the D.C. Code and applicable rules and regulations impacting the Employee's RIF, and accordingly asks OEA to uphold its actions.[6]

Citing to *Johnson v. D.C. Department of Health*, 162 A. 3d 808 (2017), Agency notes that the Court found that the Office of Employee Appeals (OEA) lacked authority to review Department of Health's (DOH) determination that shortage of funds and agency-wide realignment justified reduction in force that resulted in employee's termination. Agency explains that the Court of Appeals made it clear in *Johnson*, that OEA cannot make a determination about the underlying reason, such as funding or shortage of work. That determination is left solely to the agency, and in the current matter, Agency made the determination that FEU lacked work. Applying the reasoning in *Johnson*, Agency argues that its determination of shortage of work, is not open to a challenge.[7]

Agency also contends that it went above and beyond in meeting the requirements of the rules and regulations to prioritize reemployment of the affected employees and continue to link them to job prospects across District government. Agency maintains that it was under no legal obligation to place the RIFed FEU employees in new positions and was simply required to consider them for vacant positions and prioritize their consideration based upon identified competitive areas.[8]

Agency contends that it was authorized to determine any lesser competitive areas within the larger competitive area of the agency itself; and here, the lesser competitive area was the FEU. Agency explains that although a review of all affected positions was done against existing Agency openings as a courtesy, this competitive area no longer exists, and it was under no obligation to give priority consideration to these employees under D.C. Code $ l-624.02(a)(3). Agency further asserts that it determined that no Agency openings were appropriate for the affected employees. Accordingly, it complied with all potential statutory and regulatory requirements to engage in lateral competition and gave Employee priority consideration but was ultimately unable to place Employee and the other affected FEU employees in appropriate positions.[9]

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[5] Agency's Brief in Support of Reduction in Force (May 6, 2022).
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.

Citing to *Johnson*, Agency argues that because it lost its accreditation in the firearms area, it could no longer perform any of the work done by Employee and her colleagues in the FEU who were affected by the instant RIF. Agency maintains that job sharing or other alternatives such as a reduction in hours were not available to Employee as there was no other position available within the agency that would appropriately be split with the Employee's unique position. Agency also noted that there were no firearms positions available to be split as the determination was made that there was no work, not simply lesser amounts of work.[10] Agency avers that the only position appropriate for firearms examiners to share would be the very positions that were completely eliminated due to the lack of work. Relying on the Court's ruling in *Johnson*, Agency states that job sharing is solely its discretion and OEA is discouraged from going behind agency judgment to independently evaluate this determination.[11]

Referencing Employee's argument that Agency violated Article 17 of the Collective Bargaining Agreement ("CBA"), Agency argues that it went above and beyond the requirements of CBA by giving priority consideration to these employees for several positions outside of the competitive level. Agency notes that it also referred the affected FEU employees for placement on a retention register, whereby they can be efficiently placed in appropriate vacancies should they become open in the future; thereby, complying with the standards articulated in the CBA.[12]

Agency also cited to the Court's ruling in *Johnson* which provides that "[t]he regulations governing establishment of a retention register, see 6-8 DCMR 5 2412 (2012), presuppose that positions for which employees may compete have been retained at the relevant competitive level and area. See, e.g.,6-8 DCMR § 2412.7 (a) ("The retention register shall include... [t]he name of each competing employee in the competitive level[.]" (emphasis added))." Agency highlights that when all positions in the competitive level are eliminated, and the relevant competitive level and area no longer exists within the agency, placement on the retention register is no longer required. Agency further notes that it followed the rules regarding the retention register, as each FEU employee subject to the RIF was placed on the register pursuant to the regulations. Agency explains that although it is the only agency that performs the kind of work done within FEU, the affected FEU employee would be considered accordingly if there were any vacancies that matched their experiences. Agency maintains that Employee, along with the other affected FEU employees have been linked to numerous positions across the District Government agencies, demonstrating that the retention register is serving its intended purpose. Agency concluded it met all the requirements within the rules and regulations, as such, the RIF should be upheld.[13]

**Summary of Employee's Position**

Employee argues that her position should not have been abolished because Agency did not follow the RIF procedure in accordance with D.C. Code § 1-624.02; Chapter 24 of the District Personnel Manual ("DPM"); or E-DPM Instruction No. 8-69, 9-36, and 36-11.[14] Specifically, Employee contends that Agency did not consider Priority Reemployment prior to termination as prescribed in D.C. Code § 1-624.02(a)(3). She also maintains that although she was placed on both the Agency Reemployment

[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] Petition for Appeal (November 29, 2021).

Priority Program ("ARPP") and the Displaced Employee Program ("DEP"); Agency did not seek to place the affected employees in other positions before the RIF determination was made.[15] Employee asserts that Agency did not comply with the Retention Registry procedure as prescribed by the DPM.[16]

Employee avers that Agency illegitimately invoked a RIF and then failed to comply with the applicable RIF procedures. She argues that Agency did not comply with the lateral competition, priority reemployment, job sharing and reduced hours RIF provisions. According to Employee, prior to the RIF, Agency had five (5) casework units and all five (5) units lost accreditation. Employees in all five (5) units performed tasks outside of each unit's primary function. However, the FEU was the only unit that was abolished. Employee reiterated that although employees in the FEU continued working after they lost their accreditation, Agency failed to consider job sharing before the RIF. Thus, she concludes that the RIF was a pretext.[17] Employee further asserts that contrary to Agency's assertion that Employee's position was abolished for lack of work, Agency has presented no evidence to support this assertion. Employee maintains that she continued working at Agency even after the loss of accreditation:

> "Employee maintained the Reference Collection Spreadsheet and inventoried each firearm in the Reference Collection. She continued her Health and Safety duties by checking eye wash stations, gathering the Biohazard Materials bag for transport. and scheduling walk throughs with DFS Health and Safety advisors to ensure [DFS was] in compliance. She assisted Alcohol, Tobacco and Firearms ("ATF") with data collection of firearms by documenting firearms information while MPD processed the weapon" then she submitted this information to the Central Evidence Unit.[Employee] also "handled barrel obstructions of weapons collected and submitted to the Agency." She further "supported the FEU's transfer of evidence processing to the Central Evidence Unit ("CEU"). She also gathered weapons and other supplemental evidence to be transferred back to the CEU once accreditation was lost and made phone calls to outside agencies to inform them [DFS] would not be able to test fire weapons. In addition, [Employee] arranged pickup of evidence for agencies [that] needed it returned" and attended virtual DCHR and related field trainings."[18]

Employee avers that the ARPP entitles displaced employees to priority consideration for reemployment in the agency from which they are separated pursuant to a RIF. Employee claims that Agency violated this provision by filling available career service positions within Agency with new appointments and individuals not on the ARPP list. Employee states that despite her "extensive forensic training" and educational background, she was not selected for an interview for the positions she applied for with the Central Evidence Unit (CEU) or as a Forensic Scientist (DNA) CS-9, and Forensic Scientist (Crime Scene Analyst CS-9 at DFS. Employee cited that Agency has not provided any justification as to why Employee was not placed in any of these positions.[19]

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[15] *Id*. See also, Employee's Prehearing Statement (February 15, 2022).
[16] *Id*.
[17] Employee's Brief (May 27, 2022).
[18] *Id*. at Pages 7-8.
[19] *Id*.

## ANALYSIS[20]

The RIF Authorization Memo (Administrative Order No. DFS-2021-01) dated August 10, 2021, stated that the RIF was conducted for "a lack of work due to the loss of accreditation as required pursuant to D.C. Official Code § 5-1501(d)(1)."[21] Consequently, I am guided primarily by D.C. Official Code § 1-624.02, which states in pertinent part that:

> (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.

### *One Round of Lateral Competition*

Agency asserted that it provided Employee with one round of lateral competition. Agency explained that it was authorized to determine any lesser competitive areas within the larger competitive area of the agency itself, as such, the lesser competitive area was the FEU. Employee on the other hand argued that the Administrative Order No. DFS2021-01, dated August 10, 2021, offered no evidence that Agency legitimately created this lesser competitive area according to the requirements of the regulations.

Pursuant to D.C. Official Code § 1-624.02(a)(2), Agency is required to provide employees affected by a RIF with one round of lateral competition. According to Chapter 24 of the District Personnel Manual ("DPM") § 2409, each Agency shall generally constitute a single competitive area, and Agency personnel are authorized to establish lesser competitive areas when conducting RIFs.[22]

Here, the instant RIF was approved on August 10, 2021. The Memorandum authorizing the RIF designated the Department of Forensic Science – Firearms Examination Unit as a lesser competitive area.[23] Pursuant to Chapter 24 of the District Personnel Manual ("DPM") § 2409, … Agency personnel

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[20] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[21] *See.* Employee's Prehearing Statement (February 16, 2022).
[22] *See. Leon Graves v. Department of Youth Rehabilitation Services*, OEA Matter No. 2401-0018-14 (July 3, 2014).
[23] Employee's Prehearing Statement (February 16, 2022).

are authorized to establish lesser competitive areas when conducting RIFs. Accordingly, I disagree with Employee's assertion that Agency has not provided any evidence that it legitimately created a lesser competitive area because the RIF Authorization Memorandum clearly provides that the FEU was a lesser competitive area Agency created.[24] Additionally, the retention register also lists the FEU as a lesser competitive area.[25] Moreover, the above-referenced regulation authorizes Agency to establish a lesser competitive area when conducting a RIF, without providing any specific procedure on how this should be accomplished. Consequently, I find that Employee's argument in this instance is without merit.

In addition, the competitive level on the RIF Authorization Memorandum, is CS-0401-13-N – Forensic Scientist (Firearm & Toolmark Analyst). Chapter 24 of the DPM, § 2410.4, 47 D.C. Reg. 2430 (2000), defines "competitive level" as:

> All positions in the competitive area … in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

Furthermore, pursuant to Chapter 24 of the DPM, § 2410.5, 47 D.C. Reg. 2430 (2000) "[t]he composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions, and other factors prescribed in this section and section 2411 of this chapter." Generally, an employee's position of record is shown through the issuance of an SF-50 Notification of Personnel Action.[26] In this matter, all the employees in this competitive level including Employee, were designated as Forensic Scientist (Firearm & Toolmark Analyst)." Employee does not dispute this assertion. Employee was one (1) of eleven (11) employees with the same job title, grade, classification series, and sufficiently alike in qualification in this competitive level. Consequently, I find that because Employee could successfully perform the duties of the other ten (10) individuals in her competitive level, Employee was placed within the correct competitive level. Because Employee was not the only Forensic Scientist within her competitive level, she was entitled to compete with the other ten (10) employees within her competitive level.

Employee asserts that Agency did not comply with the Retention Register procedure as prescribed by the DPM. Section 2412 of the RIF regulations, 47 D.C. Reg. at 2431, requires an agency to establish a "Retention Register" for each competitive level, and provides that the Retention Register "shall document the final action taken, and the effective date of that action, for each employee released from his or her competitive level." Generally, employees in a competitive level who are separated because of a RIF are separated in inverse order of their standing on the Retention Register. An employee's standing is determined by his/her RIF service computation date (RIF-SCD), which is generally the date on which the employee began D.C. Government service. Here, Employee was entitled

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[24] *Id*.
[25] Agency's Brief, *supra*, at Attachment 3.
[26] *See. Armeta Ross v. D.C. Office of Contracting & Procurement*, OEA Matter No. 2401-0133-09-R11 (April 8, 2013).

to compete with the other ten (10) employees in one round of lateral competition. According to the Retention Register, all positions in Employee's competitive level were eliminated in the RIF. Therefore, I conclude that the statutory provision of the D.C. Official Code § 1-624.08(d), affording Employee one round of lateral competition is inapplicable because all the positions were eliminated, and thus Agency is not required to go through the rating and ranking process described in that chapter relative to abolishing Employee's position.[27]

***Priority Reemployment***

Employee contends that Agency did not consider Priority Reemployment prior to the termination as prescribed in D.C. Code § 1-624.02(a)(3). She also maintained that although she was placed on both the ARPP and DEP, Agency did not seek to place him in other positions before the RIF determination was made. Employee explained that the ARPP entitled displaced employees to priority consideration for reemployment in the agency from which they are separated pursuant to a RIF. Employee argued that Agency violated this provision by filling available career service positions within Agency with new individuals not on the ARPP list. Employee averred that despite her "extensive forensic training" and educational background, she was not selected for an interview for the positions she applied for with the Central Evidence Unit (CEU) or as a Forensic Scientist (DNA) CS-9, and Forensic Scientist (Crime Scene Analyst CS-9 at DFS. Employee cited that Agency has not provided any justification as to why Employee was not placed in any of these positions.

D.C. Official Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section are to be afforded consideration for priority reemployment. In the RIF notice dated September 22, 2021, Agency indicated that employees in Tenure Groups I and II who received a separation notice pursuant to a RIF have a right to priority placement consideration through the ARPP. It further noted that placement assistance through the D.C. Department of Human Resources DEP for vacancies in other District Agencies would also be provided to employees in Tenure Groups I and II.[28]

Employee does not argue that she was not placed on the ARPP and the DEP. However, citing to Electronic District Personnel Manual ("E-DPM") Instruction No. 8-69, 9-36 & 36-l I (3)(a)[29], Employee asserted that she was not provided priority reemployment prior to the effective date of the separation. Based on the reading of E-DPM Instruction No. 8-69, 9-36 & 36-l I (3)(a), the Undersigned finds that Agency complied with this instruction as the RIF Separation Notice succinctly stated that employees in Tenure Groups I and II separated through a RIF had a right to priority placement through both the ARPP and DEP. Employee also cited to E-DPM Instruction No. 8-69, 9-36 &36-l I (8)(d)(l) which states that: "(l) Employees who are issued a RIF letter are to be given priority consideration for all agency vacancies that are open during the RIF notice period (before separation)." As previously noted, the RIF Separation Notice noted that Employee was entitled to priority reemployment through the ARPP and the DEP. This RIF Separation Notice was issued on September 22, 2021, and the effective date of the RIF

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[27] *See*. *Evelyn Lyles v. D.C. Dept of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Leona Cabiness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Robert T. Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 20, 2003); *Deborah J. Bryant v. D.C. Department of Corrections,* OEA Matter No. 2401-0086-01 (July 14, 2003); and *R. James Fagelson v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 2401-0137-99 (December 3, 2001).

[28] Petition for Appeal (November 29, 2021).

[29] "Career Service employees in Tenure Groups I and II shall be eligible for priority consideration under the ARPP and DEP upon separation from their competitive level due to RIF."

was October 22, 2021. Therefore, I conclude that by placing Employee on the ARPP and DEP prior to the effective date of the RIF, Agency afforded Employee priority reemployment consideration.

Employee also averred that Agency did not give priority consideration for any positions that she applied for after receiving the RIF notice, but before the effective date of the RIF. During his testimony, Dominique Odesola ("Odesola"), of DCHR, clarified that ARPP differed from the DEP, which was managed by DCHR and that both ARPP and DEP only become effective once a RIF occurs. He asserted that employees were eligible for ARPP once there is an effective RIF date. Odesola also explained that an agency creates a list of all employees affected by a RIF, and then provided them priority placement to available positions throughout the agency. Tr. 124, 146.[30] Accordingly, I find that being placed on the ARPP or DEP does not equate to automatic reemployment, it simply means the individual would receive some priority consideration for vacant positions they apply to.

The E-DPM instructions regarding the ARPP program seems to suggest that employees on the ARPP list were matched through open vacancy announcements. E-DPM (5) also provides in part that "… [d]isplaced employees are '*matched*' with open job requisitions (vacancies) based on occupational series and grade . . . (including [the] lowest grade acceptable to each displaced employee)." Additionally, E-DPM (10)(c) provides that DCHR "generate *Lists of Eligibles for priority consideration based on job requisitions 'Open to the General Public* (emphasis added)*."*" Read together, E-DPM (5) and (10)(c) seem to suggest that employees on the ARPP and DEP register can only be matched to positions that are open to the public. Thus, it is open to everyone, without regard to former or current District government employment. The use of the word "matched" does not imply that the employees on the ARPP or DEP lists do not compete with others. These employees on the ARPP lists such as Employee in this matter, still have to compete with other candidates, including other employees on the ARPP list, who also qualify for the position. Based on the reasoning above, it could be reasonably assumed that Employee was not selected for the position she applied for because another individual on the ARPP list or from the general applicant pool was more qualified for the position than Employee. Consequently, I find that Agency complied with the RIF requirement to consider Employee for priority reemployment.

***Consideration of Job Sharing***

Pursuant to D.C. Code § 1-624.02(a)(4), when a RIF is conducted, an Agency "*shall* consider job sharing and reduced hours for employees separated pursuant to the RIF." (Emphasis added). In the current matter, Employee argued that the RIF was a pretext because Agency failed to consider job sharing and reduced hours. Employee explained that employees in the FEU continued working after they lost their accreditation. She maintained that there was no lack of work, and that the RIF was a pretext to avoid affording Employee her rights related to termination based on misconduct. Agency on the other hand stated that it did not consider job sharing and reduced hours because the entire competitive area was abolished.

During the Evidentiary Hearing, LaTonya McDowney ("McDowney") testified that she asked Agency's HR Specialist, Carla Butler ("Butler"), if Agency considered job sharing, reducing hours, and asked if Agency intended to detail the affected employees. McDowney noted that Butler informed her

[30] Odesola testified that he worked on the ARPP and DEP programs with District agencies; therefore, he was familiar with the pre-RIF requirements of the program.

that she was unable to answer her inquiries and stated that she was only instructed to provide the employees with RIF notices and have them sign off on the notification. Tr. 162-163. Additionally, Employee cited to *Gamble v. MPD*[31], in support of her argument that Agency's failure to consider job sharing and reduced hours is a substantive right, whose violation is reversible error. In *Gamble*, the employee Zack Gamble ("Gamble") worked as a Computer Specialist with the Metropolitan Police Department ("MPD"). His position was abolished pursuant to a RIF. Gamble filed an appeal with OEA arguing that Agency did not consider job sharing and reduced hours. Agency argued that its failure to consider job sharing and reduced hours is harmless error because all the positions in Gamble's office were abolished. The D.C. Superior Court issued an Order on July 14, 2021, finding that "OEA erred when it considered the 'harmful error' standard. The Court also held that the factors set forth in D.C. Code §1-624.02 are substantive rights that every employee must be afforded when subject to a RIF."[32] The matter was remanded to OEA, wherein, on January 11, 2022, an OEA AJ reversed Agency's decision to RIF Gamble due to Agency's failure to consider job sharing and reduced hours. The AJ in *Gamble* opined that, accordingly to the D.C. Superior Court's reasoning that the steps set forth in D.C. Official Code § 1-624.02(a) are substantive, rather than procedural, rights, OEA's consideration of the "harmful error" standard is erroneous when measured against statutory requirements. Consequently, the OEA AJ in *Gamble* reversed Agency's RIF action against Gamble, based on the D.C. Superior Court's holding that Agency's failure to fully comply with D.C. Official Code § 1-624.02 (4) amounts to reversible error.

This case is similar to the instant matter in that all the positions within Employee's office/competitive level were abolished. Additionally, there is evidence in the record to suggest that Agency did not consider job sharing or reduced hours. However, the undersigned cannot rely on the ruling in the January 11, 2022, ID as precedence because this decision was appealed to the D.C. Superior Court and on May 31, 2023, the D.C. Superior Court ruled that "OEA's decision should be reversed and that the termination of Mr. Gamble's employment with MPD in the 2011 RIF should be upheld."[33] The Judge opined that "several other judges of this court have upheld the applicability of harmless error review to OEA cases with similar facts, including cases stemming from the same RIF challenged by Mr. Gamble."[34]

Agency cited to *Johnson v. D.C. Department of Health*, *supra*, in support of its job sharing and reduced hours argument. In *Johnson*, the employee appealed the Department of Health's ("DOH") decision to abolish her position due to a RIF. She subsequently filed an appeal with OEA, which was appealed to the D.C. Court of Appeals. One of the arguments presented in support of her position was that Agency did not consider job sharing or other alternatives to the RIF. In *Johnson*, the AJ upheld Agency's decision to RIF Employee. In that decision, the Administrative Judge explained that the RIF procedures, entitled Johnson to no relief because all positions within appellant's competitive area at her competitive level had been abolished. The D.C. Court of Appeals upheld the Initial Decision in *Johnson*.

Here, 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

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[31] OEA Matter No. 2401-0018-12R19R21 (January 11, 2022).
[32] *Gamble v. Metropolitan Police Department*, 2020 CA 003074 (D.C. Super. Ct. July 14, 2021).
[33] *Gamble v. Metropolitan Police Department*, 2022-CA-001198-P(MPA) (D.C. Super. Ct. May 31, 2023).
[34] *See. Boone v. D.C. Office of Employee Appeals*, Case No. 2018-CA-6783-P(MPA), Order (Jun. 13, 2019) (Pan, J.); *Adeboye v. D.C. Office of Employee Appeals*, Case No. 2018-CA-6767-P(MPA), Order (Sep. 30, 2021) (Saddler, J.); *Banks v. D.C. Office of Employee Appeals*, Case No. 2019-CA-841-P(MPA), Order (Dec. 23, 2019) (Higashi, J.).

sharing, or reduced hours were at the very least considered in this action. Furthermore, the D.C. Court of Appeals in *Johnson* reasoned that, the alternative measure of considering job sharing and reduced hours prior to imposing a RIF has "debatable merit." More specifically, the Court stated that:

> 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.[35]

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 Agency's need(s). Additionally, Odesola testified that an existing full-time employee would not be asked to share their position with an employee who was RIF'd because the agency would not want to impact an employee outside of their competitive area. Tr. 117-121.

Furthermore, 6-B DCMR § 2405.7, 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's entire competitive level was abolished, 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 his 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, even 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.[36]

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

[36] The D.C. Superior Court Judge in the second *Gamble* decision stated that, "[w]ith this background, the court respectfully declines to follow Judge Pasichow's determination that a violation of D.C. Code § 1-624.02(a) requires automatic reversal of a decision to terminate an employee through a RIF. First, Judge Pasichow appears to have overlooked a municipal regulation that expressly requires harmless error review in these circumstances. As ALJ Lim noted in the IDR, Chapter 6-B24 of the District of Columbia Municipal Regulations governs RIF procedures and provides: 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. 6B DCMR § 2405.7. Judge Pasichow made no mention of § 2405.7 in her ruling in *Gamble* 2. Second, the consideration of whether an error committed below was prejudicial is foundational to our system of judicial review. Save for a few circumstances in which "structural" errors require automatic reversal on appeal, see, e.g., *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018); *Miller v. United States*, 209 A.3d 75, 80 (D.C. 2019), our system of appellate review is premised on the understanding that decisions of a lower court or agency will be disturbed on appeal only where prejudicial error has been established, see *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (structural errors comprise a "highly exceptional" category that merits automatic reversal because they "affect the entire conduct of the proceeding from beginning to end" (internal citations

***Grievances***

Employee claimed that Agency filled available career service positions within Agency with new appointments and individuals not on the ARPP list. Employee noted that despite her "extensive forensic training" and educational background, she was not selected for an interview for the positions she applied for with the Central Evidence Unit (CEU) or as a Forensic Scientist (DNA) CS-9, and Forensic Scientist (Crime Scene Analyst CS-9 at DFS. Employee cited that Agency has not provided any justification as to why Employee was not placed in any of these positions.[37]

Complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. In addition, this Office has previously held that it lacks jurisdiction to entertain any post-RIF activity which may have occurred at an agency.[38] Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance-based appeals. As such, I find that Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Accordingly, and in consideration of the above, I conclude that Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

ORDER

It is hereby **ORDERED** that Agency's action of separating Employee pursuant to a RIF is **UPHELD**.

FOR THE OFFICE:

**/s/ Michelle R. Harris**
Michelle R. Harris, Esq.
Senior Administrative Judge

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omitted)); *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (survey of constitutional violations that have been subjected to harmless error analysis). The harmless error analysis required by 6B DCMR § 2405.7—limiting the retroactive reinstatement of persons terminated in a RIF to cases in which harmful error has been found—is thus fully consistent with the long and venerable tradition of harmless error review in our legal system." *Gamble v. Metropolitan Police Department*, 2022-CA-001198-P(MPA) (D.C. Super. Ct. May 31, 2023).

[37] Employee's Brief at Pages 14-17 and Exhibit A. (May 27, 2022).

[38] *Williamson v. DCPS*, OEA Matter No. 2401-0089-04 (January 5, 2005); *Cabaniss v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).