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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: [redacted] Employee	OEA Matter No.: 2401-0020-12R16-R19
v.	Date of Issuance: May 19, 2020
METROPOLITAN POLICE DEPARTMENT, Agency	

SECOND OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. By way of background, [redacted] ("Employee") worked as a Computer Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of her termination was October 14, 2011.

The AJ issued his first Initial Decision on December 11, 2014. He held that Employee's separation from service was based on inaccurate RIF documents.[1] Consequently, Agency's RIF action was reversed and Employee was ordered to be reinstated with back pay and benefits.[2]

[1] *Vaughn v. Metropolitan Police Department*, OEA Matter No. 2401-0020-12 (December 11, 2014).
[2] *Id.*

Agency filed a Petition for Review with OEA's Board on January 15, 2015. On May 10, 2016, the Board remanded the matter because Agency was not afforded an opportunity to provide a brief in response to Employee's allegations pertinent to the RIF. Agency was also not given a chance to provide an explanation regarding the discrepancies in Employee's RIF documents. Therefore, the matter was remanded to the AJ for the purpose of addressing the aforementioned issues.[3]

The AJ issued an Initial Decision on Remand on September 9, 2016. He held that Employee was placed in the correct competitive level as a DS-0334-12-07-N Computer Specialist. Additionally, the AJ concluded that the inconsistencies in the RIF documents constituted a harmless error because they did not significantly affect Agency's final decision to separate Employee from service. As a result, the AJ reversed his previous ruling and upheld Agency's RIF action.[4]

On October 18, 2016, Employee filed a Request for Extension of Time to File a Brief with OEA. In her request, Employee stated that she made several attempts to contact her attorney, Leslie Deak, to determine whether a brief was filed on her behalf concerning the outstanding issues on remand. To avoid a dismissal of her appeal, Employee requested an additional week in which to file her brief.[5] On October 27, 2016, Employee filed a second letter titled "Abandonment by Attorney: Request for Leave to Obtain Attorney & Further [Extend Time] to File Brief-Memorandum on Pending Issues on Remand." Employee explained that she was unsuccessful in eliciting an update from her attorney regarding the status of her pending

[3] *Opinion and Order on Petition for Review* (May 10, 2016).
[4] *Initial Decision on Remand* (September 9, 2016).
[5] *Motion for Extension of Time to File Brief* (October 18, 2016).

appeal on remand. Thus, she requested leave to obtain new counsel to prosecute her appeal before OEA.[6]

On December 19, 2016, Employee's newly-retained attorney, Stephen Leckar, filed a Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision, wherein he asserted that Employee submitted a timely, *pro se* letter to OEA after being abandoned by her previous attorney. Counsel for Employee requested leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included a fellow Computer Specialist who had significantly less seniority.[7]

The Board issued its Opinion and Order on Remand on July 11, 2017, concluding that Employee's letter to the AJ was not intended as a Petition for Review of the Initial Decision on Remand. In the alternative, the Board stated that even if it were to construe Employee's letter as a Petition for Review, the filing was still untimely because under OEA Rule 633.1, a Petition for Review must be filed with the Board within thirty-five calendar days of the issuance of the Initial Decision. Since Employee's letter was filed beyond the jurisdictional time limit, the Board denied her filing.[8]

On February 8, 2018, Employee filed an appeal with the Superior Court for the District of Columbia. In its November 27, 2018 ruling, the Court held that although Employee's letter to OEA was filed beyond the thirty-five-day period, the Board erred in failing to equitably toll the deadline for submitting her Petition for Review. Further, the Court believed that Employee took several steps to comply with the filing requirements and to preserve her rights before OEA. As a

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[6] *Letter Requesting Leave to Obtain New Counsel* (October 27, 2016).
[7] *Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (December 19, 2016).
[8] *Opinion and Order on Remand* (July 7, 2017).

result, the matter was remanded to OEA for briefing on Employee's Petition for Review.[9] On May 28, 2019, the Board issued an Order Requesting Briefs. Both parties submitted responses to the order.[10]

In her brief, Employee argues that the AJ erred by failing to address her argument that another computer-related specialist, ("K.A."), should have been included in her competitive level when the RIF was conducted. Employee asserts that Agency's "2210" series nomenclature was merely a re-numbering of the former "334" occupational series for Computer Specialists. She opines that K.A.'s duties and responsibilities as a "2210" series Information Technology Specialist were sufficiently akin to her duties as a "334" series Computer Specialist such that they should have competed in the same competitive level. It is Employee's contention that if Agency had correctly construed the competitive level to include K.A., she would not have been separated as a result of the RIF because K.A. had significantly less seniority than Employee. Additionally, she asserts that she was placed in the incorrect competitive level because her proper position description was DS-0334-12-10-N, not DS-0334-07-N. According to Employee, Agency's failure to place her in the proper competitive level constitutes a harmful, reversible error. As a result, she requests that this Board grant her Petition for Review and reverse the AJ's Initial Decision on Remand.[11]

In its brief, Agency contends that the Initial Decision on Remand was based on substantial evidence. It disagrees with Employee's argument that K.A. should have been included in her competitive level at the time of the RIF. Agency states that under Chapter 6B, Section 2410.4 of the D.C. Municipal Regulations ("DCMR"), positions with different classification series cannot compete in the same competitive level. According to Agency, the

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[9] *Vaughn v. Metropolitan Police Department*, Case No. 2017 CA 005525 P (MPA) (Super. Ct. November 27, 2018).
[10] *OEA Board Order Requesting Briefs* (May 28, 2019).
[11] *Brief on Employee's Petition for Review* (July 8, 2019).

classification series for the position occupied by Employee was "334;" whereas, K.A. occupied a position designated as "2210." Additionally, it posits that it was unnecessary for the AJ to consider the issue of whether the position encumbered by K.A. should have been included in Employee's competitive level because doing so would be a clear violation of DCMR § 2410.4.[12]

Agency also opines that Employee's argument that her correct competitive level should have been DS-0334-12-7-N, and not DS-0334-12-10-N, is without merit. It explains that Employee's assertion represents a misunderstanding of the term "competitive level" as defined in 6B DCMR § 2410.4 and "Competitive Level Code" ("CLC"), which consists of five identifiers: the first three elements representing an employee's competitive level. Agency states that in the instant matter, Employee's competitive level at the time of the RIF was DS-334-12. However, it provides that Employee's correct CLC was DS-334-12-7-N. Additionally, Agency posits that its error in identifying Employee as a DS-0334-12-10-N Computer Specialist on its RIF notice constitutes a harmless error. Consequently, it asks this Board to deny Employee's Petition for Review.[13]

Substantial Evidence

On Petition for Review, this Board is tasked with determining whether the AJ's findings of fact and conclusions of law are based on substantial evidence in the record. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a

[12] *Agency's Opposition to Employee's Petition for Review* (August 23, 2019).
[13] *Id.*

contrary finding. For the reasons discussed below, this Board finds that the AJ's conclusions are supported by substantial evidence in the record.

Re-classification of Position Series

On August 24, 2011, Agency's Chief of Police submitted a memorandum requesting authorization to conduct a RIF to abolish fourteen positions. Attached to the memorandum was Administrative Order ("AO") FA-2011-01, dated August 24, 2011. The AO stated that reason for the RIF was shortage of work and realignment. The notice further provided that the competitive area for the RIF was the Metropolitan Police Department, Office of the Chief Information Officer. Under DCMR § 2409.2, it was acceptable for Agency to establish a competitive area smaller than the entire agency. The AO identified two Computer Specialist positions in the "0334-12" series to be abolished. Employee encumbered one of these positions.

Regarding the competitive levels within a competitive area, D.C. Official Code § 1-624.02 provides the following with respect to the rights of employees who have been subject to a RIF:

> (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.

DCMR § 2410 goes on to state the following in regarding the establishment of competitive levels:

> 2410.1 Each personnel authority shall determine the positions which comprise the competitive level in which employees shall compete with each other for retention.

> 2410.2 Assignment to a competitive level shall be based upon the employee's position of record.
>
> 2410.4 A competitive level shall consist of all positions in the competitive area identified pursuant to section 2409 of this chapter 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. (emphasis added).

Thus, a competitive level as defined under 6B DCMR § 2410.4 is limited to positions that have the same grade (or occupational series) and classification series. Accordingly, an employee who is deemed to be in a different classification series may not be permitted to compete within the same competitive level as another employee who encumbers a position in a different classification series. It is Employee's contention that the AJ failed to address her argument that K.A. should have been included in Employee's competitive level because K.A. held a computer-related position which had duties interchangeable with those of her position as a Computer Specialist. In response, Agency asserts that Employee's argument fails because Employee and K.A. encumbered positions with separate classification series in violation of DCMR § 2410.4.

The parties conducted discovery during the course of this appeal. Included with Employee's discovery requests were several interrogatories. Of relevance to this matter is Employee's query regarding the reclassification of certain computer-related positions:

> *Employee Interrogatory*: Explain why some employees in the IT Department had 2210 series positions and Employee's position was classified under the 334 series, including why the Agency did not convert all employees to the new 2210 series.[14]
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> *Agency Response*: In 1979, when the District of Columbia Government received independent personnel authority, the District adopted the federal Classification and Compensation system as its

[14] *Agency Opposition to Employee's Petition for Review* (August 23, 2019).

> own. As such, the District government follows the personnel classification policies administered by the Office of Personnel Management ("OPM").
>
> The 334 Computer Specialist series was the established occupational series for individuals working on a variety of computer [-] related issues. In 2001, OPM cancelled the 334 series and replaced it with the 2210 occupational series. At MPD, employees with 334 job classifications continued in those job classifications. However, as the Agency took affirmative actions on behalf of employees such as promotions, desk audits, change of positions in the IT area, the employee's occupational series was reclassified to reflect the new 2210 series. However, if the employee took no action, then no action was taken to reclassify the 334 series position to the existing 2210 series.[15]

Employee does not dispute that she was not reclassified to the "2210" occupational series prior to Agency's RIF action.[16] According to Agency's Notification of Personnel Action form ("SF-50"), Employee's position of record at the time of the RIF was DS-0334, Grade 12.[17] While it is true that the "334" classification series was cancelled by OPM in 2001, some, *but not all*, employees were re-classified to the new "2210" series. (emphasis added). Thus, only new positions that were created after the cancellation of the "334" series were required to be classified as "2210" positions. Employee's argument that Agency simply re-numbered all of the Computer Specialist positions is further undermined by Agency's FA-2011-10 Administrative Order, which identified both "334" and "2210" positions for abolishment under instant RIF.

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[15] *Id.*

[16] Agency prepared a Reemployment Priority program/Displaced Employee Program Registration Sheet for Employee. The document identified Employee's pay plan as "DS 0334-12." Employee provided her signature on the Registration Sheet on October 7, 2011. Employee did not contest that she should have been classified as a "2200" series position at that time. *See Agency's Brief in Support of Reduction-in-Force*, Attachment 9 (November 3, 2014).

[17] The issue of what constitutes an employee's competitive level has been determined by the D.C. Court of Appeals to be his or her official position of record. *See District of Columbia v. King*, 766 A.2d 38 (D.C. 2001). It should be noted that in the matters of *Boone v. Metropolitan Department*, OEA Matter No. 241-0019-12 (September 15, 2015) and *Gamble v. Metropolitan Police Department*, OEA Matter No. 2401-0018-12, *Opinion and Order on Petition for Review* (March 7, 2017), this Office addressed the instant RIF, acknowledging that Agency's "334" occupational series remained a legitimate and active classification series at the time of the 2011 RIF although "2210" series positions also existed at that time.

With respect to Employee's contention that K.A. should have been included in her competitive level, this Board agrees with Agency and finds that this action would constitute a violation of DCMR § 2410.4. According to the documents submitted by Agency, K.A. was hired as an Information Technology Specialist, CS-2210-12, in 2006.[18] Because K.A. was hired after OPM eliminated the "334" series, he could not be placed in the same competitive level as Employee because his position description designation was "2210," which constitutes a different classification series. Accordingly, even if this Board were to find that the duties of Employee's position at the time she was separated from service were interchangeable with those of K.A.'s position as an Information Technology Specialist, placing the two employee's in the same competitive level would nonetheless violate the plain language of DCMR § 2410.4 because Employee and K.A. encumbered positions in separate classification series.[19] Consequently, this Board finds that the AJ correctly concluded that the DS-0334-12 competitive level was comprised of only two Computer Specialist positions: Employee and another specialist, Zack Gamble.[20]

This Office has consistently held that when a separated employee is the only member of his or her competitive level or when an entire competitive level is abolished pursuant to a RIF, "the statutory provision affording [him/her] one round of lateral competition [is] inapplicable."[21] Since there were only two positions in Employee's competitive level, and both DS-0334-12

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[18] *Agency's Answer to Employee's First Discovery Request*, Exhibit 5.
[19] *See Dale Jackson v. Department of Health*, OEA Matter No. 2401-0089-11R14, *Opinion and Order on Motion for Reconsideration*, (December 19, 2017) (holding that that two employees who held separate classification series could not be placed in the same competitive level for purposes of a RIF.
[20] *See Gamble v. Metropolitan Police Department*, OEA Matter No. 2401-0018-12, *Opinion and Order on Petition for Review* (March 7, 2017). In *Gamble*, OEA's Board concluded that the employee's competitive level only consisted of two employees in the DS-0334-12-07-N series. K.A. was not deemed to be a part of this competitive level.
[21] *See Fink v. D.C. Public Schools*, OEA Matter No. 2401- 0142-04 (June 5, 2006); *Sivolella v. D.C. Public Schools*, OEA Matter No. 2401-0193-04 (December 23, 2005); *Mills v. D.C. Public Schools*, OEA Matter No. 2401-0109-02 (March 30, 2003); and *Cabaniss v. Department of Consumer & Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003).

Computer Specialist positions were identified for abolishment under the RIF, Employee was not entitled to one round of lateral competition. This Board finds that the AJ adequately addressed Employee's concerns regarding the construction of her competitive level, as only two employees were required to be included on the retention register. Moreover, K.A. did not encumber a position that was permitted to be included for lateral competition within Employee's competitive level. Consequently, we find no credible reason to disturb the AJ's finding on remand regarding such.[22]

Competitive Level Designation

Next, Employee asserts that Agency erroneously placed her in the incorrect competitive level. According to Employee, Agency's own documents reflect that her correct competitive level was DS-0334-12-10-N, not DS-0334-12-07-N, as evidenced by an October 18, 2001 Personnel Form 1 and Employee's DC Standard Form 52 (Request for Personnel Action). Additionally, Employee claims that prior to Agency's RIF action, her position number was 0034840 and the certification code number of her position was 130000003185. Thus, Employee believes that her position should not have been included for abolishment under the RIF because her position was not identified in the Administrative Order. Employee posits that Agency's misfeasance constitutes a reversable error.

As it relates to a RIF action, the competitive level of a position under DCMR § 2410.4 is grouping of positions based on an employee's position of record, grade or occupational level, and classification series. However, a CLC is a five-part numerical designator which is used to distinguish an employee's duties and responsibilities from the significantly different duties and responsibilities of other employees within the same competitive level.

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[22] Additionally, in *Gamble supra*, OEA's Board concluded that Employee's competitive level only consisted of two employees, in the DS-0334-12-07-N series. K.A. was not deemed to be a part of this competitive level.

Lewis Norman, a Supervisory Human Resources Specialist with the Administration of Recruitment and Classification within the D.C. Department of Human Resources, gave the following explanation regarding Employee's CLC in a January 15, 2015 affidavit to OEA:

> "DS," which is the pay plan; "0334," which is the classification series of the Computer Specialist position; "12," which is the grade level of the Computer Specialist position; "7," which is a numerical designator for the position description of the Computer Specialist 0334-12 position encumbered by Employee that was established to differentiate her duties and responsibilities from the significantly different duties and responsibilities of other Computer Specialist 0334-12 positions; and "N," which is an alphabetical designator for the Computer Specialist 0334-12 position that identifies whether the position is nonsupervisory, managerial, or a leader position.[23]

It is undisputed that the first three elements of Employee's CLC are DS-0334-12. This Board acknowledges that the RIF documents prepared by Agency contained an error. Employee's CLC on the retention register was DS-0334-12-07-N, while Agency's September 14, 2011 RIF notice to Employee stated that her CLC was DS-0334-12-10-N. The discrepancy in these documents is between the fourth element in Employee's CLC – 07 – and the fourth element in Employee's competitive level on the notice of separation – 10.

In his affidavit, Norman conceded that Agency committed an administrative error by identifying Employee's CLC on her notice of separation as being DS-0334-12-10-N and that Employee's correct CLC was in fact DS-0334-12-07-N.[24] Agency; however, maintains that this inconsistency does not constitute a reversible error.[25] This Board agrees. DCMR § 2405.7 provides that "[t]he 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

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[23] *Agency's Remand Brief in Support of Reduction-in-Force*, Exhibit 2. *Affidavit of Lewis C. Norman* (January 15, 2015).
[24] *Id.*
[25] *Id,*

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."

In this case, Employee was placed in the correct competitive level: DS-0334-12. Employee's position was also non-supervisory. There is no credible evidence in the record to support a finding that Agency's error in identifying the fourth element of Employee's CLC constituted a harmful error. Employee has not shown that but for Agency's mistake, she would not have been separated from service as a result of the RIF. Additionally, the fourth numerical designator in a CLC relates to the differentiation in the unique duties and responsibilities of other Computer Specialists within the *same* competitive level. (emphasis added). Agency's error in designating "10" instead of "7" would not have altered the ultimate result of the RIF because both of the Computer Specialist positions in the DS-0334-12 competitive level were abolished.[26] Therefore, we conclude that Agency's error did not constitute a harmful error.

In addition, Employee maintains that her position number, 0034840, was not included on the Administrative Order which authorized the RIF; thus, her position was not approved to be abolished. In support thereof, Employee cites to a 2001 D.C. Standard Form 52 (Request for Personnel Action). Box numbers sixteen and twenty-two of the form reflect a hand-written number of "34840" as the position number and the typed number "36058" is crossed out.[27] Agency counters Employee's argument by explaining that prior to 2004, the District utilized a payroll system called the Unified Personnel Payroll System ("UPPS"). Under the former system, positions were assigned a unique payroll number. According to Acting Chief Information Officer for the D.C. Department of Human Resources, Tremayne Perkins, in 2004, the District replaced

[26] Norman also noted in his affidavit that "there is absolutely no relationship at all between the numerical designator "7" in the CLC that appears on the retention register...and the step 8 that appears on [Employee's] SF-50.
[27] *Employee's Brief in Response to the Remand Order Opposing the RIF*, Exhibit 1.

the UPPS with the PeopleSoft payroll system, which is the current system used by the District government.[28] Agency explains that the position numbers utilized in UPPS were not compatible with the PeopleSoft system. Hence, the old UPPS position numbers were replaced with compatible numbers under the new system.[29]

Agency admits that Employee's position under UPSS was 0034840 but, for system compatibility purposes, her position number under the PeopleSoft system was changed to 00013015. Contrary to Employee's claim, Agency correctly identified the position number 00013015 in the August 24, 2011 Administrative Order for abolishment under the RIF.[30] The same position number is also listed on Employee's final Notification of Personnel Action form SF-50.[31] Therefore, this Board finds that Agency properly identified Employee's position for abolishment under the RIF.

Conclusion

In light of the foregoing, this Board finds that the AJ's findings on remand are supported by substantial evidence. Employee was separated from service pursuant to the RIF in accordance with all applicable laws, rules, and regulations. She was placed in the correct competitive level of Computer Specialist, DS-0334-12, in accordance with DCMR § 2410.4. Information Technology Specialist, K.A., was not eligible to compete in Employee's competitive level because his position constituted a separate classification series. Agency's error in incorrectly listing the fourth element in Employee's CLC on its RIF notice constitutes a harmless error. Lastly, Agency correctly identified Employee's position number for abolishment in its FA-2011-01 Administrative Order. Accordingly, this Board must deny Employee's Petition for Review.

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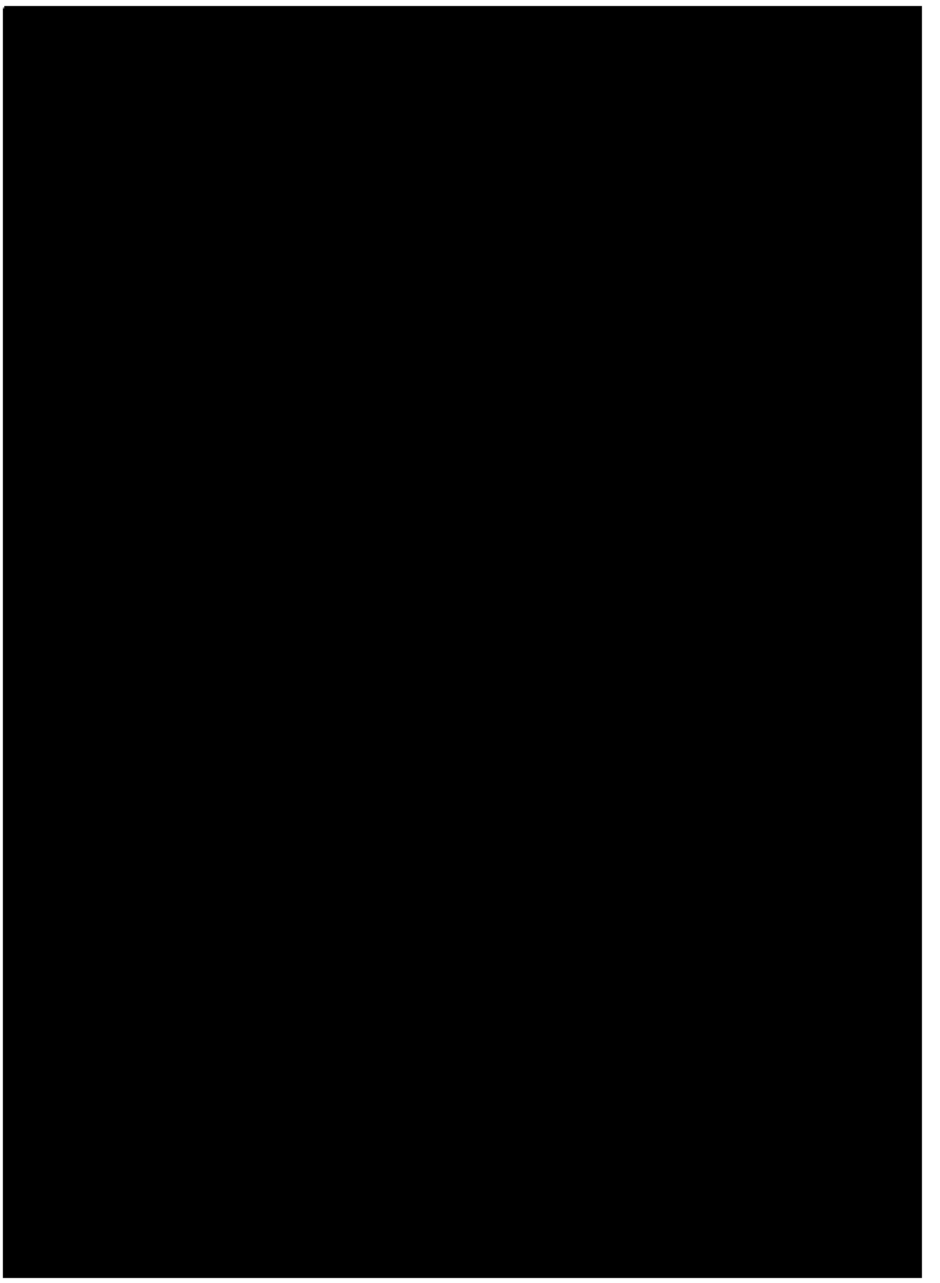
[28] *Agency's Reply to Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF*, Affidavit of Tremayne Perkins, Attachment 7.
[29] *Id* at pg. 6.
[30] *See* Administrative Order FA-2011-01.
[31] *Agency's Reply to Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF*, Attachment 7.

ORDER

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

FOR THE BOARD:



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.