THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GREGORY SHORTER, Employee	OEA Matter No. 2401-0286-09
	Date of Issuance: February 6, 2013
DEPARTMENT OF TRANSPORTATION, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Gregory Shorter ("Employee") worked as a Masonry Worker with the Department of Transportation ("Agency"). On July 17, 2009, Employee received a reduction-in-force ("RIF") notice providing that he would be separated from service. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 21, 2009. He argued that the competitive level used by Agency to RIF him was too narrow, and the RIF was not authorized by the Mayor.[1]

Agency responded by filing its Answer to Employee's Petition for Appeal. It explained that the procedures were followed in accordance with Chapter 24 of the District Personnel Manual ("DPM"). Moreover, Agency provided the Administrative Order that was used to

[1] *Petition for Appeal,* p. 4-7 (September 21, 2009).

prepare the Retention Register in this matter.[2] Agency asserted that Employee received thirty days notice prior to the RIF, and he was allowed one round of lateral competition. Thus, it requested that the RIF action against Employee be sustained.[3]

Prior to issuing his Initial Decision in this matter, the OEA Administrative Judge ("AJ") requested that Agency address whether it adequately followed D.C. Official Code § 1-624.08 when conducting this RIF action.[4] Agency responded by making some of the same arguments presented in its Answer to Employee's Petition for Appeal. Additionally, it provided that there were eight out of the eleven masonry positions identified for abolishment. Agency argued that although Employee's position was not listed as one of the positions to be abolished, the employee with the third highest retention standing actually displaced Employee. Accordingly, it was Agency's position that the Retention Register was correct, and the RIF against Employee was proper.[5]

The AJ issued his Initial Decision on October 25, 2011. He found that the Retention Register used by Agency specifically indicated which positions were to be abolished by notating the word "abolish" next to each individual employee. However, the area next to Employee's name was blank and did not note abolish. It was Agency's determination that only three of the eleven positions could be retained. The AJ explained that by using the Retention Register created by Agency, it is obvious that it made an egregious error when it abolished Employee's position. He held that Agency's explanation for this discrepancy was unsatisfactory because it

[2] Agency contended that it identified all competing employees in their respective competitive levels and service areas to determine their retention standing. It noted that the retention standing for each employee was determined on the basis of their tenure of appointment, length of service, veteran's preference, residency preference, relative work performance, and other selection factors as provided in DPM § 2408.1. Together, these factors were used to determine an employee's retention standing. *Agency's Answer to Employee's Petition for Appeal,* p. 2 (November 20, 2009).
[3] *Id.,* 1-3.
[4] *Order Requesting Brief* (July 1, 2011).
[5] *Agency Response to Briefing Order on Employee's Petition for Appeal,* p. 2-4 (July 15, 2011).

controlled all of the documentation used for the RIF. In examining Agency's explanation, the AJ found that Agency contended that the Retention Register it submitted could not be trusted. However, he determined that the nature and purpose of a Retention Register is to have a precise and accurate reflection of the information contained in the documentation. Thus, the AJ rejected Agency's notion that the documentation does not need to be clear and accurate. Accordingly, he reversed Agency's action and ordered that Employee be reinstated with back pay and benefits.[6]

On November 29, 2011, Agency filed a Petition for Review of the Initial Decision. The Petition for Review simply provides that it sought review of the decision because it was based on an erroneous interpretation of statute, regulation, or policy. There are no specific regulations outlined and no additional arguments presented.[7]

It is the duty of this Board to determine if the Initial Decision was based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[8] Therefore, this Board must determine if the evidence supports Agency's abolishment and termination of Employee's position. We are guided by the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), which 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 contrary finding. This Board believes that there is substantial evidence to support the AJ's ruling in this matter

OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a

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[6] *Initial Decision*, p. 3-4 (October 25, 2011).
[7] *Petition for Review* (November 29, 2011).
[8] Black's Law Dictionary, Eighth Edition; Mills v. District of Columbia Department of Employment Services, 838 A.2d 325 (D.C. 2003); and Black v. District of Columbia Department of Employment Services, 801 A.2d 983 (D.C. 2002).

> performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

In an attempt to more clearly define OEA's authority, D.C. Official Code § 1-624.08(d), (e), and (f) establish the circumstances under which the OEA may hear RIFs on appeal.

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> > (1) An employee may file a complaint contesting a determination or separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.

As a result of above-referenced statutes, this Office is authorized to review RIF cases where an employee claims the agency did not provide one round of lateral competition or where an employee was not given a thirty-day written notice prior to their separation.

In its Response to Employee's Petition for Appeal, Agency noted that the retention standing for each employee was determined on the basis of their tenure of appointment, length of

service, veteran's preference, residency preference, relative work performance, and other selection factors as provided in DPM § 2408.1. Together these factors were used to determine an employee's retention within his competitive level.[9] In examining the Retention Register provided by Agency, there appears to be no mathematical logic to establish which positions were abolished and which were retained.

Of the eight positions represented on the Retention Register for abolishment, there are three positions where employees received a score of "three" for residency preference. The remaining five positions all received scores of "zero". Of the positions identified for retention, two of the employees had scores of zero (Employee is included in this group of employees) and one employee had a veteran's preference score of "four." Thus, in accordance with Agency's own explanation, other factors must have been considered other than an employee's length of service, veteran's preference, and residency preference. However, they offered no other evidence of these other factors. Thus, we are left with only the retention register as evidence of Agency's intent to abolish positions. Because Agency made the final decision to abolish eight of the positions by utilizing its own set of factors, we are left to examine its final decision as represented on the Retention Register. After reviewing the Register, it is obvious that Agency improperly removed Employee from his position because his position was not identified as one of the positions to be abolished.[10]

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[9] Agency's Answer to Employee's Petition for Appeal, p. 2 (November 20, 2009).

[10] This Board recognizes that D.C. Official Code § 1-624.08(e) limits OEA's authority as it relates to our review of specific positions to be abolished by an agency. We want to be clear that OEA is not attempting to expand its authority as outlined in D.C. Official Code § 1-624.08(e). However, D.C. Official Code § 1-624.08(d) provides that OEA is to determine if one round of lateral competition occurred pursuant to Chapter 24 of the DPM. This section of the Code infers that agencies should conduct one round of lateral competition in a manner that is meaningful and not arbitrary or capricious in nature. Furthermore, DPM § 2412.3 specifically 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." In accordance with the Retention Register provided by Agency, the final action, as it relates to Employee, was that his position would *not* be abolished (emphasis added).

It must also be noted that Agency offered no grounds for this Board to grant its Petition for Review. In accordance with OEA Rule 634.3, the OEA Board may only grant a Petition for Review when the Petition establishes that:

(a) New and material evidence is available that, despite due diligence, was not available when the record closed;
(b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
(c) The findings of the Administrative Judge are not based on substantial evidence; or
(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Agency raised Rule 634.4(b) as the basis of its appeal; however, no arguments were offered to support its contention that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy. Because no specific objections were offered, there is no merit to Agency's claim.

After review of the Retention Register, it is clear that Agency improperly abolished Employee's position. Additionally, it presented no basis for this Board to grant its Petition for Review. Consequently, Agency's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

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William Persina, Chair

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Vera M. Abbott

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Sheree L. Price

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