THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GEORGE DUNMORE, JR.,	)	
Employee	)	
	)	OEA Matter No.: 2401-0141-10
v.	)	
	)	Date of Issuance: September 4, 2018
DEPARTMENT OF	)	
GENERAL SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON MOTION
FOR RECONSIDERATION

George Dunmore, Jr. ("Employee") worked as a Supervisory Mail Assistant with the Department of General Services ("Agency").[1] On October 5, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was November 6, 2009.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 5, 2009. In his appeal, Employee stated that his separation from service was unfair and unprofessional. As a result, he requested that he be reinstated with another agency.[2]

[1] The Department of General Services was formally referred to as the Department of Real Estate Services ("DRES").
[2] *Petition for Appeal* (November 5, 2009).

Agency's answer was due within thirty calendar days of service of the Petition for Appeal. However, Agency did not submit a response. On July 21, 2010, Employee submitted a Motion to Vacate the RIF action because of Agency's failure to submit its answer. He further stated that there was no evidence to show that the RIF resulted in a cost savings to Agency.[3]

An OEA Administrative Judge ("AJ") was assigned to the matter in February of 2012. On February 15, 2012, the AJ issued an Order for Statement of Good Cause to Agency which required it to submit written justification for its failure to file an Answer to Employee's Petition for Appeal.[4] Agency submitted its response to the order on February 29, 2012, stating that it was unaware that Employee filed a Petition for Appeal with OEA. Agency further argued that Employee suffered no substantive consequences as a result of its failure to file a timely answer to his appeal.[5]

The AJ held a Status Conference on March 21, 2012 to assess the parties' substantive arguments. Employee and Agency were subsequently ordered to submit briefs addressing whether the RIF action should be upheld. In its brief, Agency argued that it conducted the RIF in accordance with all applicable laws, rules, and regulations. It contended that Employee was not entitled to one round of lateral competition because he was the only Supervisory Mail Assistant in his competitive level. Agency further stated that it provided Employee with thirty days' written notice prior to the effective date of the RIF action. As a result, it requested that the AJ deny Employee's Petition for Appeal.[6]

Employee filed his response to Agency's brief on April 20, 2012. He argued that he was separated from service as a result of an unpleasant working relationship with his staff, not for

[3] *Motion to Vacate* (July 21, 2010).
[4] *See* November 9, 2009 *Letter from OEA Executive Director Requesting Agency's Response to Petition for Appeal*.
[5] *Agency's Response to Order for Statement of Good Cause* (February 29, 2012).
[6] *Agency's Answer* (April 5, 2012).

budgetary purposes. Employee further posited that the RIF was conducted as a pretext to fire him for disciplining his subordinates. In addition, he stated that his separation from service was in retaliation for being a "whistleblower." Therefore, Employee requested that OEA issue a decision in his favor.[7]

An Initial Decision was issued on May 12, 2012. The AJ held that D.C. Official Code § 1-624.02, and not the Abolishment Act, was the appropriate statute to utilize in evaluating the instant RIF because the RIF was not conducted for budgetary purposes. Next, the AJ determined that Employee was the sole occupant of the Supervisory Mail Assistant position in his competitive level. She further explained that when an entire competitive level is abolished pursuant to a RIF, or when a separated employee is the only member in their competitive level, the statutory provision affording him or her one round of lateral competition is inapplicable. Additionally, the AJ held that Agency provided Employee with at least thirty days' written notice prior to the effective date of the RIF.[8]

With respect to Employee's request for an evidentiary hearing, the AJ reasoned that Employee provided no basis to support a finding that a hearing was warranted or that there were material issues of fact in dispute. Moreover, the AJ, citing the holding in *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883 (December 11, 1998), noted that "…OEA has indicated that it does not have the authority to determine whether an agency's RIF was bona fide. . . . Agency, and not [OEA], is responsible for deciding whether to retain or abolish particular positions during a [RIF]." Thus, she concluded that OEA lacked jurisdiction to adjudicate Employee's claim that the RIF was not conducted for budgetary purposes.[9]

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[7] *Employee's Response to Agency's Brief* (April 20, 2012).
[8] *Initial Decision* (May 12, 2012).
[9] *Id.*

The AJ also indicated that there was nothing in the record to show that Employee was prejudiced by Agency's failure to provide a timely answer to the Petition for Appeal. She noted that Agency submitted a prompt response to the Order for Statement of Good cause and provided a reasonable explanation for its failure to submit a timely response to Employee's appeal. Finally, the AJ was unpersuaded by Employee's claims that the RIF action was pre-textual in nature. According to the AJ, Employee provided no credible basis to show that Agency terminated him in retaliation for any whistleblowing activities. In addition, she found Employee's claim that the work he performed was not discontinued after the RIF to be a grievance which was outside the purview of OEA's jurisdiction. Accordingly, the AJ upheld Agency's RIF action.[10]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 16, 2016. He argued that the AJ's finding that Agency's failure to submit a timely answer to the Petition for Appeal was not harmless error. Employee contended that Agency's RIF action was wrongful, fraudulent, and disregarded all laws, rules, and regulations. He reiterated that Agency did not actually abolish his position because his duties continued to be performed after the effective date of the RIF. Accordingly, it was Employee's position that the AJ erred in finding that OEA lacked jurisdiction over grievances. Therefore, he requested that the Board grant his Petition for Review and reverse the Initial Decision.[11]

The OEA Board issued its Opinion and Order on July 11, 2017. It found that Employee's petition did not present any new arguments or material evidence in accordance with OEA Rule 633.3. The Board opined that the Employee's arguments were merely disagreements with the AJ's ruling and was not a valid basis for appeal. Furthermore, the Board held that under OEA

[10] *Id.*
[11] *Petition for Review* (December 16, 2016). Agency did not file a response to Employee's petition.

Rule 633.1, a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. Employee's Petition for Review was filed over four years after the issuance of the Initial Decision. Consequently, the Board denied Employee's Petition for Review.[12]

On August 22, 2017, Employee filed what is essentially a Motion for Reconsideration. He maintains many of the same arguments that were filed in his Petition for Review. Employee also claims that he was not afforded fair, unbiased, or impartial consideration in this matter. Additionally, he states that he has been denied his right of due process. Accordingly, Employee requests that the Board reconsider its decision and determine his full relief.[13]

OEA Rule 632 provides the following:

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

Employee filed a Petition for Review on October 16, 2016. Therefore, in accordance with OEA Rule 632.2, the Initial Decision did not become final because of the pending Opinion and Order on Petition for Review. However, in accordance with OEA Rules 632.3 and 632.5, once the

[12] *Opinion and Order on Petition for Review*, p. 4-5 (July 11, 2017).
[13] *Employee Petition for Administrative Review*, p. 1-2 (August 22, 2017).

OEA Board issued its Opinion and Order on July 11, 2017, Employee's administrative remedies were then exhausted after the Board denied his Petition for Review.

As this Board held in *Dale Jackson v. Department of Health*, OEA Matter No. 2401-0089-11R14, *Opinion and Order on Motion for Reconsideration* (December 19, 2017) and *Willie Porter v. Department of Mental Health, OEA Matter* No. 1601-0046-12R15, *Opinion and Order on Motion for Reconsideration* (January 30, 2018), there are no provisions within any rules, regulations, or statutes pertaining to OEA that allows it to address the merits of a Motion for Reconsideration. Once a final decision has been made on a petition before the Board, the only procedural option available to parties is to appeal the Board's decision to the Superior Court of the District of Columbia.[14] Moreover, D.C. Official Code § 1-606.01(c) provides the following:

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

Accordingly, we must deny Employee's Motion for Reconsideration for lack of jurisdiction.

[14] OEA Rule 633.12 provides that "[a]n employee or agency may appeal a final decision to the District of Columbia Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, et seq. (2006 Repl. & 2011 Supp.))."

ORDER

Accordingly, it is hereby ordered that Employee's Motion for Reconsideration is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

_____
Patricia Hobson Wilson

_____
Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.