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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
VERONICA BUTLER,)	
Employee)	OEA Matter No. 1601-0132-14C19
)	
v.)	Date of Issuance: November 25, 2019
)	
D.C. DEPARTMENT ON AGING ¹ ,)	MONICA DOHNJI, ESQ.
Agency)	Senior Administrative Judge
)	
)	
Joseph Mallon, Esq., Employee's Representative		
Rahsaan Dickerson, Esq., Agency Representative		

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

On September 25, 2014, Veronica Butler (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Office on Aging’s (“DCOA” or “Agency”) decision to terminate her from her position as a Special Assistant (“SA”) to the Executive Director, effective September 3, 2014. Employee was charged with violating the following: (1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, specifically: Absent without official leave;² and (2) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation, specifically: Unauthorized absence.³

On October 27, 2015, I issued an Initial Decision (“ID”) reversing Agency’s decision to terminate Employee. Agency appealed the ID to the OEA Board. On April 17, 2017, the OEA Board remanded this matter to the undersigned. Subsequently, an Evidentiary Hearing was held on March 1, 2018. Both parties were present for the Evidentiary Hearing. Thereafter, on July 3, 2018, I issued an Initial Decision on Remand (“IDR”) again reversing Agency’s decision to terminate Employee.

¹ This Agency is currently referred to as The District of Columbia Department of Aging and Community Living.
² District Personnel Manual (“DPM”) §§ 1603.3(f)(2), 1619.6(b).
³ DPM §§ 1603.3(f)(2), 1619.6 (a). It should be noted that this cause of action – Unauthorized Absence is listed under DPM 1603.3(f)(1) and not DPM 1603.3(f)(2) as stated in the Notice of Final Decision on Proposed Removal. The cause of action is correctly found under DPM § 1619(6)(a) of the Table of Appropriate Penalties.

In September of 2018, Employee filed a Motion for Attorneys' Fees and Expenses. Thereafter, Agency's representative notified the undersigned via email that a Petition for Review was filed by Agency with the District of Columbia Superior Court on September 5, 2018. Because there was a Petition for Review pending with the District of Columbia Superior Court at the time of Employee's Motion for Attorneys' Fees and Expenses, the undersigned issued an Addendum Decision on Attorney Fees on September 18, 2018, dismissing Employee's motion as premature. Thereafter, Agency withdrew its Petition for Review that was pending at the District of Columbia Superior Court. Accordingly, the IDR became the final decision in this matter. The July 3, 2018, IDR ordered Agency to reinstate Employee to her last position of record; or a comparable position.

In July of 2019, the undersigned was notified by Employee that Agency had offered to place Employee at a different Agency. However, Employee argued that the position in the new Agency is not comparable to her last position of record. After several teleconferences between the undersigned and the parties, the parties were subsequently required to submit briefs addressing the position comparability issue raised by Employee. Both parties have submitted their respective briefs. The record is now closed.

JURISDICTION

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

ISSUE

Whether the offered SA position at D.C. Department of Health Care Finance is substantially similar/comparable to Employee's former SA position at Agency.

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.

ANALYSIS AND CONCLUSIONS OF LAW

Employee argues that the current position offered by Agency is not her previous position of record and it is not comparable to her previous position of record. Agency on the other hand maintains that Employee's previous position of record no longer exists within Agency. Agency further argues that the current position offered – Special Assistant with the District of Columbia Office of Healthcare Finance (“DHCF”) is comparable to Employee's previous position of record.

Position Comparability

The July 3, 2018, IDR reversed Agency's decision and Ordered Agency to reinstate Employee to her last position of record; or a comparable position. Agency asserts that Employee's previous position of record no longer exists within Agency and as such, it has placed Employee in a comparable position at another Agency. Employee argues that the new position is not comparable to her previous position.

Citing to *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984), Employee argues that Agency is required to reinstate Employee as nearly as possible to the *status quo ante*. Employee further notes that Agency has not met the standards for reinstatement as set forth in *Kerr*. Specifically, Employee argues that Agency has acted in bad faith with regards to her reinstatement. Employee explains that: (1) Agency wrongfully terminated Employee; (2) Agency filed an appeal with the D.C. Superior Court after the IDR was issued for the sole purpose of delaying reinstatement; (3) Agency provided contradictory information with regards to the availability of the Special Assistant position;⁴ (4) the IDR was issued in July of 2018, and over a period of one year, the Agency accomplished nothing to get Employee reinstated; (5) there were significant credibility issues with regards to Agency's Comparability Brief and Accompanying papers;⁵ and (6) Agency denied Employee and her representative the opportunity to meet with Human Resources (“HR”) representative to try and find a suitable position for reinstatement. Employee concludes that if Agency acted in good faith, it would have allowed Employee's efforts to help find a comparable position. Employee states that Agency has not shown that its effort to place Employee in the SA position at DHCF is in good faith, as required for reinstatement.⁶

In addition, Employee argues that the proposed SA position at Department of Health Care Finance is not comparable to her former SA position at DCOA. Employee states that her skill set does not correspond to the proffered DHCF position. Employee highlights that she is trained as a Clinical Community Counselor with focus on seniors, whereas, the DHCF SA Position Description responsibilities involve strategic planning of business or finance, areas where Employee has no experience. Employee notes that, if DHCF were hiring for the position in a

⁴ Employee states that she was notified on April 16, 2019 that there was someone occupying the SA position, but Agency is now asserting that the SA position was abolished.

⁵ Employee argues that Dr. Thompson's affidavit is demonstrably false because Dr. Thompson was not Employee's supervisor and that he was untruthful with regards to the number of special projects performed by Employee.

⁶ Employee avers that Agency is attempting to place her in a position that she is not qualified for, which is in contrast with D.C. law.

competitive hiring process, Employee would never be hired for the position. Employee further argues that there are substantial differences between the mission of DCOA and DHCF.⁷

Agency on the other hand contends that, while the Courts have held that in order to place an illegally terminated employee at *status quo ante*, an agency may be required to displace the current incumbent, citing to *Gorny v. Department of the Interior*, 115 M.S.P.R. 520, 4 (2011), Agency explains that if the terminated employee's position no longer exists, the agency is not expected to return the employee to a non-existing position. Agency explains that it recently underwent a reorganization and Employee's SA position was abolished.⁸ Agency notes that its current vacancies require specialized knowledge and/or skills that Employee lacks, therefore, it has a legitimate, compelling reason for failing to reinstate Employee to her former SA position. Agency concedes that, since it has a justifiable reason for its failure to reinstate Employee to her former position, it must offer Employee a position that is substantially similar to Employee's former position.

Agency proclaims that, because it did not have a position that was comparable to Employee's previous position, it made due diligent efforts to find a substantially similar position at its partner Agency – DHCF. Agency maintains that the position offered to Employee at DHCF is in fact comparable to Employee's prior position with Agency. Citing to *Gorny*, Agency avers that the position offered at DHCF is substantially similar to Employee's prior position at Agency in terms of title, grade, position description, scope of actual duties and responsibilities of the new position with those of the former position. Agency explains that the position descriptions both have a heavy emphasis on policy review and development, and general problem-solving skills.

Agency declares that, with regards to the scope of Employee's duty with DHCF, Mr. Kenneth Evans who would be Employee's direct supervisor at DHCF, explained in his affidavit the scope, duties and expectations of the incumbent occupying the SA position with DHCF. Mr. Evans' affidavit also explains the synergy between DHCF and Agency, that creates a degree of overlap between the two agencies. In addition, Agency notes that, according to Mr. Evans' affidavit, Employee would be allowed to serve the entirety of the residents of the District of Columbia, District Government employees, and more specifically, senior citizens residents of the District of Columbia, in her capacity with DHCF. Serving in this capacity would be similar to the manner in which she served senior citizens in her capacity as SA with Agency. Agency also provided an affidavit from Employee's former supervisor, Dr. Thompson, highlighting the fact that Employee's prior SA position with Agency is substantially similar to the offered SA position at DHCF. Agency provides that, there are tasks in the DHCF SA position description which Mr. Evans has stated in his affidavit that Employee will not be expected to learn or perform, because those duties are not conducive to Employee's skillset. Agency concludes that there is little doubt that the SA position previously held by Employee with Agency, and the offered SA position with DHCF are substantially similar.⁹

⁷ Employee's Response to Agency's Comparability Brief (September 20, 2019).

⁸ Agency explains that it recently went through a reorganization that included Agency subsuming the Adult Protective Services Division from the D.C. Department of Human Services.

⁹ Agency's Comparability Brief (September 6, 2019); See also, Agency's Motion for Leave to File A Sur-Reply to Employee's Brief on Comparability (October 3, 2019).

Analysis

The U.S. Court of Appeals for the Federal Circuit in *Kerr v. National Endowment for the Arts, Respondent*, supra, noted that, “[a]s the Supreme Court stated in one NLRB case, the basic purpose of a reinstatement or back pay order is “restoration of the situation, as nearly as possible, to that which would have been obtained but for the illegal discrimination”.”¹⁰ The Court in *Kerr* explained that “[t]he NLRB has held that reinstatement offers (1) must be made in good faith¹¹, ... (2) must be unequivocal,¹² ... and (3) must encompass employment which is substantially the same as that previously held before discharge.¹³”

Here, Employee argues that Agency did not act in good faith in its attempt to reinstate her. Base on a review of the record, I disagree with Employee’s assertions. The simple fact that Agency’s decision was reversed does not indicate that Agency acted in bad faith when it instituted the current adverse action against Employee. Also, Agency’s decision to appeal the IDR to the D.C. Superior Court and later withdrawing the appeal in an attempt to resolve the matter out of court does not indicate bad faith. With regards to the information regarding the availability of a SA position at Agency, Agency’s current General Counsel, Mr. Adam Mingal, noted in his affidavit submitted to this Office on October 3, 2019, that he emailed Employee’s representative on April 16, 2019, while away from the office on work travel and based on his good faith belief that a SA position at Agency was currently being filled by someone else. Unbeknownst to him at the time, the position had actually been eliminated in January of 2019, when the person serving in the SA position was converted to a different position. He further explained that the personnel action was not communicated across Agency nor was it common knowledge amongst Agency employees.¹⁴ Moreover, Agency’s current Director, Ms. Laura Newland, confirmed that she eliminated the SA position effective January 6, 2019, without regards to the current case which was currently pending in the D.C. Superior Court at that time.¹⁵

In addition, the IDR was issued in July of 2018. Agency made a decision to appeal the IDR in September of 2018, thus, at this point the IDR had not become final since it was pending before the D.C. Superior Court. Agency withdrew its pending appeal from the D.C. Superior Court in February of 2019. Thereafter, Agency’s General Counsel was in contact with Employee, wherein, Employee was informed of Agency’s decision to resolving the matter amicably. The parties were engaged in settlement negotiation through July of 2019. Thus, I find that Employee’s assertion that Agency accomplished nothing to get Employee reinstated for over one (1) year is without merit. While Employee attempts to argue that Dr. Thompson was not Employee’s direct supervisor, the record contradicts this assertion. Employee was promoted to the title of SA to the Executive Director, whom at that time was Dr. Thompson. Throughout the course of this appeal, Employee did not dispute that she was the SA to the Executive Director.

¹⁰ *Citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

¹¹ *Citing Earl I. Sifers*, 92 NLRB 1280 (1951).

¹² *Citing Leeding Sales Co.*, 155 NLRB 753 (1965).

¹³ *Citing Thomas J. Aycock, Jr.*, 154 NLRB 1716 (1965), enforced as modified 377 F.2d 81 (5th Cir. 1967).

¹⁴ See Agency’s Motion for Leave to File A Sur-Reply to Employee’s Brief on Comparability, supra, at Affidavit of Adam Mingal, ¶12.

¹⁵ See Agency’s Motion for Leave to File A Sur-Reply to Employee’s Brief on Comparability, supra, at Affidavit of Laura Newland, ¶10.

Further, I find that Agency's refusal to allow Employee to meet with an HR representative to try and find a suitable position for reinstatement does not constitute bad faith. Nowhere in the District of Columbia rules and regulation does it provide that an agency is required to get input from an employee with regards to reinstatement. Also, Employee has not provided this Office with any authority mandating such practice. Moreover, Mr. Mingal stated in his affidavit that on July 15, 2019, he requested that Employee send him more duties that she expected to perform, consistent with her last position description while at Agency, so he could share with the people finalizing the proposed position description at DHCF, to see if they could work it into the new position description. Employee's representative ignored the request and instead insisted on a sit-down with an HR representative.¹⁶ Based on the following, I find that Agency did not act in bad faith in its attempt to reinstate Employee to a comparable position.

Although decisions from the Merit Systems Protection Board ("MSPB"), this Office's federal counterpart are not binding on OEA, this Office has historically relied on its decisions for guidance.¹⁷ In *Gorny v. Department of the Interior*, 115 M.S.P.R. 520, the MSPB Board noted that when "a personnel action [is] unwarranted, the aim is to place the appellant, as nearly as possible, in the situation she would have been in had the wrongful personnel action not occurred."¹⁸ While also citing to *Kerr*, the MSPB Board further noted that, this is called *status quo ante* relief.¹⁹ The MSPB Board in *Gorny* explained that "the displacement of other individuals is sometimes necessary to afford an appellant, as nearly as possible, *status quo ante* relief." Accordingly, in the instant matter, Agency was required to reinstate Employee to her previous position of record – SA to the Executive Director of Agency, even if it had to displace the person currently holding that position at Agency. Agency's current Director, Ms. Newland, stated in her affidavit that she eliminated the SA position effective January 6, 2019.²⁰

Nevertheless, the MSPB Board in *Gorny*, citing to *Miller v. Department of the Army*, 109 M.S.P.R. 41, (2008)), noted that "if the agency does not return the employee to her former position, *it must show first that it has a strong overriding interest or compelling reason requiring reassignment to a different position, and second that it has reassigned the employee to a position that is substantially similar to the former position* (emphasis added)." In the current matter, Agency contends that Employee's previous position of record – SA to the Executive Director no longer exists because it recently underwent a reorganization and the SA position was abolished.²¹ Because Employee's previous position no longer exists at Agency, and in line with the reasoning in *Gorny*, I find that Agency has a strong overriding interest or compelling reason requiring reassignment to a different position, even if this means with a different district agency.

¹⁶ *Id.* at ¶19 and ¶20.

¹⁷ See *Sholanda Miller v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0325-10R15, Opinion and Order on Remand, at 8 (June 6, 2017).

¹⁸ *Citing Tubesing v. Department of Health and Human Services*, 112 M.S.P.R. 393, ¶ 5 (2009) (citing *House v. Department of the Army*, 98 M.S.P.R. 530, ¶ 9 (2005)).

¹⁹ See also, *Kerr*, *supra*.

²⁰ Ms. Newland explained that, following the separation of Agency's Resource Allocation Officer ("RAO") from Agency, her then SA was transitioned to an Interim RAO, as well as Deputy Chief of Staff ("DCOS") in January 2019. Because the policy and finance responsibilities, which were the primary duties of the SA had been subsumed by the Interim RAO/DCOS position, the SA position was no longer necessary to Agency. Consequently, on January 6, 2019, Ms. Newland decided to eliminate the SA position.

²¹ See Agency's Motion for Leave to File A Sur-Reply to Employee's Brief on Comparability, *supra*. at Affidavit of Laura Newland.

The court in *Gorny* also noted that, upon a showing that it has a strong overriding interest or compelling reason requiring reassignment to a different position, the employee must be reassigned in a position that is substantially similar to the former position. Here, Agency has shown that Employee's former position has been abolished. Thus, Agency must reassign Employee to a position that is substantially similar to the former position. This appears to be the crux of this matter. While Employee argues that the new SA position at DHCF is not substantially similar to her former position of record, Agency on the other hand argues that both positions are substantially similar. The Court in *Kerr*, *supra*, explained that, "in our view, appropriate steps to enforce compliance must include more than the formal determination that an individual was reinstated to a position bearing the same title, grade and pay--no matter what the actual content of that position may be at the time of reinstatement. Rather, the Board should, where appropriate, also make a substantive assessment of whether the actual duties and responsibilities to which the employee was returned are either the same as or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge." The MSPB Board in *Gorny* further echoed this point by noting that, "in analyzing whether an agency has reassigned an employee to a position that is substantially similar to her former position, the Board looks beyond the title and grade of the positions involved, and compares the scope of actual duties and responsibilities of the new position with those of the former position."²²

Following the MSPB Board's reasoning in *Gorny*, it would be improper for the undersigned to rely solely on the position descriptions, while excluding any rebuttal evidence such as sworn statements explaining the duties actually being assigned. Here, Employee submitted a sworn statement stating that the proposed position does not match her skillset.²³ Agency has offered evidence to rebut Employee's assertion. Agency submitted the position descriptions of Employee's former SA position, as well as the position description for the proposed SA position at DHCF. Additionally, Agency submitted affidavits from Ms. Laura Newland, Agency's current Director, Kenneth Evans, the Chief Operation Officer of DHCF, and John Thompson, Agency's former Executive Director, in support of its assertion that both positions are substantially similar.

New position is substantially similar to the former position

Employee argues that the new position offered at DHCF is not comparable to her former SA position at Agency. She posits that she is trained as a Clinical Community Counselor with focus on seniors, whereas, the DHCF SA Position Description responsibilities involve strategic planning of business or finance, areas where Employee has no experience. Employee notes that, if DHCF were hiring for the position in a competitive hiring process, Employee would never be hired for the position. I find Employee's argument to be mere speculation. While it is plausible that if DHCF were hiring for the position in a competitive hiring process, Employee would probably not be hired for the position, I further find that this is not a competitive hiring. Moreover, DHCF's COO, Mr. Evans, who would be Employee's direct supervisor at the new position stated in his affidavit that as the DHCF COO, he has never had a SA. He further

²² Citing *Miller*, 109 M.S.P.R. 41, ¶ 11, *Tubesing*, 112 M.S.P.R. 393, ¶ 7.

²³ Employee's Brief, *supra*, at Exhibit G.

explained that the SA position is being created specifically to return Employee to D.C. Government employment.²⁴

Employee asserts that the DHCF SA Position Description responsibilities involve strategic planning of business or finance, areas where Employee has no experience. Employee further maintains that she lacks experience regarding a comprehensive understanding of business, insurance, and finance and this precludes her understanding of the technological development. Addressing this concern, Mr. Evans explained in his affidavit that:

Likewise, when working the Special Assistant position, *Veronica Butler will not be performing technical job duties or job functions including but not limited to not performing the following functions: IT duties, IT support-related duties, accounting, or Medicaid Finance* (emphasis added). To the extent that the Position Description refers to interpreting data (or the like), it is not referring to interpreting technical data, but rather to the interpretation of non-technical, standard business data.²⁵

Consequently, I conclude that, based on the foregoing, Employee would not be required to perform these technical aspects of the job.

Mr. Evans also explained as follows:

There is significant overlap (shared or related responsibilities) between the operations of DHCF and Agency. He enlightened that, DHCF is the state Medicaid agency for the District of Columbia. DHCF operates Medicaid grant, funded by the U.S. Department of Health & Human Services (“HHS”).²⁶

Currently, and in the past, DHCF has multiple memorandums of understanding and/or memorandums of agreement (collectively, MOUs) with DCOA. For example, in one of those MOUs, DCOA does the front end work, dealing with elderly residents, in collaboration with work also performed by DHCF. Such work could comprise approximately 10%-15% of Veronica Butler’s duties in the Special Assistant position.²⁷

Veronica Butler’s primary role in the DHCF Special Assistant position would be to assist the COO with special projects, so that the COO can perform other duties including managing the overall direction of DHCF- in effect, the position could be called, ‘special project officer.’²⁸

In the Special Assistant position, one area that Veronica Butler would work is dealing with the annual renewal process for the multiple MOUs between DHCF

²⁴ Agency’s Comparability Brief, *supra*, at Affidavit of Kenneth Evans, ¶7.

²⁵ *Id.* at Affidavit of Kenneth Evans, ¶6.

²⁶ *Id.* at Affidavit of Kenneth Evans, ¶9.

²⁷ *Id.* Affidavit of Kenneth Evans, ¶10.

²⁸ *Id.* Affidavit of Kenneth Evans, ¶11.

and DCOA (and/or other D.C. agencies). This would call for Ms. Butler to interact with the relevant persons at DCOA and other D.C. agencies, tracking relevant documents, and ensuring that such documents are signed by all parties and the storage of same. I would expect this area of Veronica Butler's work duties to take up no more than 15% of her time working her Special Assistance position, with the remaining (approximately) 85% of her time involved with other duties addressed herein.²⁹

Another area that Veronica Butler would perform work in as Special Assistant involves the D.C. Access System ("DCAS"), which is an integrated eligibility system, attempting to integrate multiple benefits into a single system. The DHCF COO expects the Special Assistant position to be a liaison, to receive and synthesize, and then report back to the COO the status of progress as to such DCAS matters, on a weekly or periodic basis.³⁰

Another area that Veronica Butler would perform work in as Special Assistant involves developing a so-called 'Workplace Wellness' program. This involves DHCF outreach to employees, in an effort to improve employee quality of life, including areas such as (illustrative): physical fitness, financial fitness, and mental fitness. In the role of Special Assistant, Ms. Butler's duties are expected to include scheduling (for putting the program together), the Workplace Wellness committee, reaching out to vendors (e.g., vendors providing cooking exercises; something such as, 'Work-out Wednesdays').³¹

Regarding travel, or field work, in the Special Assistant position, Ms. Butler would not engage in travel or field work on a significant basis (I would characterize it as minimal), although there may be occasional travel within D.C., in reaching out to other D.C. agencies. Currently, DHCF has two offices, so periodic travel between the two DHCF offices is expected.³²

Page 2 of 3 of the Position Description begins with the heading, "**Knowledge Required by the Position**"; the first and second paragraphs under that heading (paragraphs beginning, "Comprehensive knowledge of"; and "Extensive Knowledge and", respectively) are area of knowledge that if Veronica Butler does not have already, I would expect her to learn within two (2) months of working the Special Assistant position; I would be responsible for conveying to Ms. Butler any information that she does not know, for these two categories.³³

Page 2 of 3 of the Position Description begins with the heading, "**Knowledge Required by the Position**"; the third paragraph under that heading (beginning, "Expert knowledge of") is an area of knowledge that I would expect Veronica

²⁹ *Id.* Affidavit of Kenneth Evans, ¶12.

³⁰ *Id.* Affidavit of Kenneth Evans, ¶13.

³¹ *Id.* Affidavit of Kenneth Evans, ¶14

³² *Id.* Affidavit of Kenneth Evans, ¶15.

³³ *Id.* Affidavit of Kenneth Evans, ¶16.

Butler to have, already upon beginning work in the Special Assistant position; I would expect Ms. Butler to have this knowledge already both because of her prior work as a DCOA special assistant and because the area of knowledge called for are not technical knowledge or expertise, but areas of general business knowledge, such as: project problem solving skillset; the ability to review a process and find deficiencies, recommend improvements, and/or foresee where problems might arise in the future; the ability to conduct risk analysis on projects; the ability to conduct “SWOT” and/or the ability to conduct risk mitigation planning.³⁴

Page 2 of 3 of the Position Description begins with the heading, “**Knowledge Required by the Position**”; the fourth paragraph under the heading (beginning, “Comprehensive knowledge of”) involves areas of knowledge that I would expect Veronica Butler as Special Assistant to have to the extent it relates to a broad knowledge of how D.C. government works; however, I would not expect Veronica Butler as Special Assistant to have D.C. government agency-specific or technical knowledge (except as identified herein). If Ms. Butler, as Special Assistant, has any questions as to this category of knowledge, she is welcome to question me, as reference; if I cannot provide the responsive information, I will refer her to someone within DHCF with greater knowledge in the area.³⁵

Likewise, Employee’s previous supervisor, former Executive Director at DCOA, Dr. John Thompson, declared in his affidavit to this Office that based on his knowledge of Employee’s actual job duties as her supervisor throughout her time as Special Assistant with DCOA and his review of the two position descriptions, the two position are comparable.³⁶ Dr. Thompson stated the following: In her role as Special Assistant, VB’s duties included the following:³⁷

- a. Serving as the liaison between myself as agency head, agency employees, and the Executive Office of the Mayor;
- b. Responding to and addressing constituent concerns;
- c. Assisting DCOA with increasing its presence in the community;
- d. Assisting DCOA with establishing an intergenerational program; and
- e. Developing partnership with D.C. Public Schools and the senior community.

Dr. Thompson also asserted that he has reviewed the position description for both the previous SA position at Agency and the SA position at DHCF and found the following similarities between the positions:³⁸

- a. Day-to-day assessment of management, administrative issues, and problems;
- b. Preparing and reviewing all correspondence written for the superior;

³⁴ *Id.* Affidavit of Kenneth Evans, ¶17.

³⁵ *Id.* Affidavit of Kenneth Evans, ¶18.

³⁶ *Id.* Affidavit of John Thompson, ¶6.

³⁷ *Id.* Affidavit of John Thompson, ¶4.

³⁸ *Id.* Affidavit of John Thompson, ¶5.

- c. Initiating tactful inquiries regarding sensitive and confidential matters;
- d. Developing, recommending and participating in specific activities to resolve problems; and\Advising the superior of existing problems and recommending solutions and alternatives.

Employee contends that the new position description itself reflects duties and responsibilities that are not substantially similar to those of her former position as they do not align with her skillset. In her affidavit to this Office, Employee provides the following:

In my previous, D.C. Office of Aging (“DCOA”), a/k/a Department of Aging and Community Living (“DACL”) Special Assistant (“SA”) position I was not responsible for providing day-to-day assessment of management and administrative issues. On only approximately two instances was I tasked to even address management and administrative problems that arose within DCOA.³⁹

At no point in the DCOA SA position was I involved in coordinating administrative projects, development, analysis, and modification of internal administrative procedures and the management process of DCOA. Except for immediate attention needed to lessen agency neglect in addressing the needs of seniors regarding the fire at the senior facility, I was never involved in any administrative projects. To the best of my knowledge, those matters were taken care of by the Chief of Staff, Ms. Camile Williams, or people to whom she assigned them.⁴⁰

Working my DCOA SA position, at no time was I tasked with monitoring and tracking reports and studies. At no time was I tasked with searches for and assembling information from files and documents for the Director and his senior staff. The special projects assigned to me as DCOA SA included:⁴¹

- a. Acting as liaison and troubleshooting DCOA issues for the Mayor and/or City Council members;
- b. Recruiting/vetting constituents for positions as DCOA Commissioners;
- c. Organizing outreach ‘meet-and-greet,’ with as many D.C. senior citizen groups as reasonably achievable for the Director, and sometimes the Mayor;
- d. Coordinating DCOA and Office of Returning Citizens Affair services for released senior re-joining the community;
- e. Re-development of the failing Intergenerational Program between DCOA and D.C. Public Schools;
- f. Researching, planning and the development of Focus Groups to address the needs of D.C. seniors to improve their quality of life.

³⁹ Employee’s Response to Agency’s Comparability Brief, *supra*, at Exhibit G, Affidavit of Employee Veronica Butler, ¶2.

⁴⁰ *Id.* at ¶3.

⁴¹ *Id.* at ¶4.

Working the DCOA SA position, I was not tasked with the disposition, conduct, or resolution of sensitive program matters requiring any level of confidentiality. Except for the IG program and the senior housing dwelling fire, and the Tineo residential fire, I do not recall being tasked with any other special assignments involving activities of more than one office.⁴²

At no time was I tasked with reviewing programs and projects with the director and/or senior staff determining the scope and/or description of their goals and objectives. I was never asked to advise the director of existing problems thereby being able to recommend solutions and/or alternatives.⁴³

Regarding the proffered D.C. Department of Health Care Finance (“DHCF”) SA position, I have no comprehensive knowledge of the mission, policies, procedures, goals, objectives and programs of DHCF. I have, absolutely, no extensive knowledge and understanding of the substantive nature of DHCF operating programs and the interrelationships among such program activities.⁴⁴

I have no expert knowledge of analytical and evaluative principles, procedures, and processes, as required to complete DHCF tasks such as the research, compilation, and analysis of information; problem identification and resolution; and the assessment of programs and administrative operations required to recommend improved processes.⁴⁵

I have only an abbreviated, hit-or-miss knowledge of administrative laws, policies, regulations and precedents to D.C. and the federal government.⁴⁶ I am not qualified to concisely organize and present any information towards policy for DHCF.⁴⁷

I am not qualified to independently (or otherwise) organize or determine any approach and/or methodology with would sufficiently keep the DHCF COO Evans apprised of potential problems affecting his decision-making process regarding the scope of DHCF project assignments. Nor am I qualified to review said completed reports on effectiveness towards achieving DHCF intended objectives.⁴⁸

I am not familiar with existing DHCF operation policies, standards, agency (or industry) guidelines, or established departmental procedures. Thus, I am not able to exercise judgement regarding guidelines for researching regulations or for determining DHCF organization efficiency and program effectiveness.⁴⁹

⁴² *Id.* at ¶5.

⁴³ *Id.* at ¶6.

⁴⁴ *Id.* at ¶7.

⁴⁵ *Id.* at ¶8.

⁴⁶ *Id.* at ¶9.

⁴⁷ *Id.* at ¶10.

⁴⁸ *Id.* at ¶11.

⁴⁹ *Id.* at ¶12.

My academic training and my experience have provided me, generally speaking, with a broader range of planning, developing, initiating and coordinating function that are related to a variety of aspects. ... However, my lack of experience regarding a comprehensive understanding of business, insurance, and finance precludes my having an understanding of the technological development needed to make intelligent, accurate decision necessary for the interpretation of considerable DHCF data.⁵⁰

Paragraph 2 of the Affidavit of Kenneth Evans (“Evans Affidavit”) states: I am responsible for all DHCF administrative operations and assume the lead role in recommending and formulating related policies and strategies.” Giving my professional training and experience, I do not have an understanding of the identified area.⁵¹ Paragraph 6 of the Evans Affidavit states that the job duties of the proposed DHCF Special Assistant involve “the interpretation of non-technical, standard business data.” Given my professional training and experience, I do not have an understanding of the identified area.⁵²

As stated in the position Description, the job duties making up the DHCF Special Assistant proposed reinstatement position do not match my skillset. I am a Clinical Community Counselor with a focus on seniors by training. I have no knowledge and experience in the strategic planning of business or finance. As a clinician by training, my objective since 2012 has been to directly help and improve the quality of life for seniors. The DHCF Special Assistant proposed reinstatement position (according to the Position Description) does not primarily or particularly involve direct interaction with seniors through program(s) that I am familiar with.⁵³

I do not have significant experience involving the subject areas for which DHCF is responsible. The only MOU that DHCF and DACL (then, DCOA) collaborated on, that I was sufficiently involved in, was the Money Follows The person demonstration project in 2012, as a DCOA Case Manager.⁵⁴

As underlined in *Gorny*, the underlying issue is not whether Employee’s new position is identical to her prior position, but rather, whether it is substantially similar. Weighing the evidence presented by both parties, I find that both jobs are substantially similar. *Citing to Marion v. U.S. Postal Service*, 79 M.S.P.R. 443, 444 (1998), the MSPB Board in *Gorny* underscored that, “Since the appellant’s former position has been abolished, [the appellant]’s placement in a different position necessarily involves the performance of different duties.” Based on this reasoning, in the instant matter, Employee should expect to perform some duties at the offered SA position that are different from what her duties were at her former SA position at Agency.

⁵⁰ *Id.* at ¶13.

⁵¹ *Id.* at ¶14.

⁵² *Id.* at ¶15.

⁵³ *Id.* at ¶16.

⁵⁴ *Id.* at ¶17.

Employee also argues that as a clinician by training, her objective since 2012 has been to directly help and improve the quality of life for seniors and the proposed SA position at DHCF does not primarily or particularly involve direct interaction with seniors through programs she is familiar with. I do not find that the issue of directly helping and improving the lives of seniors was an essential aspect of Employee's prior position.⁵⁵ Employee's Position Description for her former SA position noted that Employee will serve as SA and advisor to the Executive Director, with *substantial responsibilities for policy and program issues, assisting with the day-to-day assessment of comprehensive programs and service issues that surface* (emphasis added). The former position description dictated no permanent focus on working with seniors. Similarly, Mr. Evans noted in his affidavit that Employee's primary duty as a SA at DHCF would be to assist the COO with special projects. Moreover, Mr. Evans asserted in his affidavit that there is significant overlap between the operations of DHCF and Agency. He asserted that, DHCF is the state Medicaid agency for the District of Columbia and it operates Medicaid grant, funded by the HHS. Mr. Evans stated that DHCF has multiple MOUs with DCOA, dealing with elderly/senior residents and Employee would work on such projects.⁵⁶

Employee acknowledges that she was a liaison between Agency and other D.C. government agencies. She also states that she troubleshot DCOA issues for the Mayor and/or City Council members. Likewise, Mr. Evans notes that in her new position, Employee would work as a liaison between DHCF and other agencies. Employee asserts that at her previous position, she organized outreach 'meet-and-greet,' with as many D.C. senior citizen groups as reasonably achievable for the Director, and sometimes the Mayor. She further notes that she re-developed, researched, and planned programs addressing the needs of D.C. seniors to improve their quality of life. Mr. Evans equally stated in his affidavit that at the new position, Employee would do development, outreach and liaison work, with employees from within and outside of DHCF, which are all skills that Employee utilized in her previous SA position at Agency. Mr. Evans specified that Employee would develop a 'Workplace Wellness' program, which would involve DHCF outreach to employees, in an effort to improve employee quality of life. He also explained that he would expect Employee to be a liaison, to receive and synthesize, and then report back to the COO.

I further find that Employee's attempt to discredit Dr. Thompson's explanation of the similarities between the positions unconvincing. For instance, Employee argues that she was not responsible for providing day-to-day assessment of management and administrative issues in her previous position as SA at Agency. However, she contradicts herself by stating that she has been tasked approximately twice to address management and administrative problems that arose within DCOA.

Based on the above evidence, I conclude that the new SA position at DHCF, which was specifically created to return Employee to the employ of the District of Columbia government, though not identical, is substantially similar to Employee's former SA position. Relying on the MSPB Board's reasoning in *Gorny I* I further conclude that, while the new position may involve

⁵⁵ See *Gorny, supra*.

⁵⁶ While working with seniors was not an essential function of her previous position at Agency, based on Mr. Evans' affidavit, Employee would still be afforded the opportunity to work with seniors in the SA position at DHCF.

the performance of different duties, a majority of the skillset needed to complete these tasks are substantially similar, thereby, making both positions comparable.

ORDER

Based on the aforementioned, since Agency has offered Employee a position that is substantially similar to Employee's former SA position at Agency, I find that Agency has complied with this Office's IDR.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge