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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
EMPLOYEE,) OEA Matter No. 2401-0020-12R16R23
)
) Date of Issuance: September 28, 2023
v.)
) Joseph E. Lim, Esq.
METROPOLITAN POLICE DEPARTMENT,) Senior Administrative Judge
Agency)
Jeremy Greenberg, Esq., Agency Representative
David Branch, Esq., Employee Representative

SECOND INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On November 10, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Metropolitan Police Department’s (“Agency”) final decision to separate her from government service pursuant to a Reduction-in-Force (“RIF”). This matter was assigned to the undersigned Senior Administrative Judge (“SAJ” on August 2, 2013. In an Initial Decision (“ID”) issued December 11, 2014, I reversed Agency’s action.¹ Following Agency’s appeal to the OEA Board, the OEA Board remanded the matter back to the undersigned with instructions to conduct further proceedings to properly determine whether Employee was placed in the correct competitive level and whether the inconsistencies in the RIF document constitute reversible error.²

On September 9, 2016, I issued an Initial Decision on Remand (“IDR”) upholding the RIF after finding that Employee was placed in the proper competitive level in the retention register and that the other inconsistencies in the RIF documents constituted “harmless error” because the inconsistencies did not significantly affect the Agency’s final decision to separate Employee from employment.³ On or about October 18, 2016, Employee filed a request to the OEA Board to extend the deadline for filing an appeal of the IDR, explaining that her attorney had abandoned her appeal. On July 11, 2017, the OEA Board issued an Opinion and Order on

1 *Vaughn v. MPD*, OEA Matter No. 2401-0020-12 (December 11, 2014).
2 *Vaughn v. MPD*, OEA Matter No. 2401-0020-12, *Opinion and Order on Petition for Review*, (May 10, 2016).
3 *Vaughn v. MPD*, OEA Matter No. 2401-0020-12R16 (September 9, 2016).

Remand, rejecting Petitioner's arguments after concluding that the October 13, 2016, Letter was not a Petition for Review ("PFR") or a request for an extension of time to file a PFR; but rather an attempt by Employee to determine whether her attorney had filed a brief on remand in a timely manner. The OEA Board held that it had no authority to extend the 35-day time limit for appealing the ID.⁴

Employee obtained new counsel and filed an appeal to the Superior Court for the District of Columbia ("SC") on August 9, 2017. On November 27, 2018, the SC granted Employee's Petition for Review and remanded this matter to OEA.⁵ On May 19, 2020, the OEA Board denied Employee's Petition for Review after finding that the ID was based on substantial evidence.⁶ Employee appealed the matter again to the SC, and on April 11, 2023, the SC remanded the matter to the undersigned to address the limited issue of determining whether the job description of 2210 and 334 series positions are sufficiently alike for the purposes of § 1-624.02(a)(2).⁷

After a requested postponement of time, a Status Conference was convened on April 27, 2022, wherein the parties agreed to complete discovery regarding the 2210 and 334 series positions mentioned by the SC's remand order. Following another conference held on June 22, 2023, I ordered the parties to submit briefs on the issues identified by the SC. The parties have complied. Since this case could be decided based upon the documents of record, no additional proceedings were conducted. The record is closed.

JURISDICTION

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

ISSUE

Whether the job descriptions for the 2210 and 334 series positions mentioned by the DCSC's remand order are sufficiently alike based on the criteria set out by § 1-611.01(a)(1) and DCMR § 2410.4 for purposes of section 1-624.02(a)(2).

FINDINGS OF FACT⁸

The following facts are undisputed:

⁴ *Vaughn v. MPD*, OEA Matter No. 2401-0020-12R16, *Opinion and Order on Remand* (July 11, 2017).

⁵ *Vaughn v. MPD*, Case No. 2017 CA 005525 P (D.C. Super. Ct. November 27, 2018).

⁶ *Vaughn v. MPD*, OEA Matter No. 2401-0020-12R16R19, *2nd Opinion and Order on Petition for Review*, (May 19, 2020).

⁷ *Vaughn v. MPD*, Case No. 2022 CA 002856 P (D.C. Super. Ct. April 11, 2023).

⁸ This case was most recently before the Superior Court under Case No. 2022-CA-002856- P(MPA) (D.C. Super. Ct. April 11, 2023). On August 9, 2022, OEA filed the then-existing Administrative Record in that Superior Court proceeding. For the ease of reference, this Second IDR will cite to that same Administrative Record where appropriate rather than reintroduce evidence that has already been submitted in this proceeding. The Administrative Record will be cited herein as "R. at ____".

In July 1994, Employee was appointed to the position of Computer Specialist, DS-334-09, with the Metropolitan Police Department (Agency). Over time, Employee was promoted to Computer Specialist, CS-334-12. The District government follows the personnel classification policies administered by the Office of Personnel Management (“OPM”). The Computer Specialist 334 classification series created by OPM was the established occupational series for individuals working on a variety of computer related issues.⁹ In 1994, Employee was appointed to a Grade 9 Computer Specialist position, classification series 334, with MPD.¹⁰

On or around September 8, 1999, Employee was promoted to a Grade 12 Computer Specialist position within the same 334 classification series.¹¹ Due to an administrative error, Employee’s position description includes a competitive level code of DS-0334-12-10-N rather than the correct code of DS-0334-12-07-N.¹² The number 07 following “0334” (classification series) and “12” (pay grade) on the position description is a numerical designator that was established to differentiate Employee’s significant duties and responsibilities from other Computer Specialist 0334 positions.¹³

In 2001, OPM cancelled the 334 series and replaced it with the 2210 occupational series.¹⁴ At MPD, employees with 334 series job classifications continued in those job classifications.¹⁵ However, as MPD took affirmative actions on behalf of some employees such as promotions, desk audits, and change of positions in the IT area, those employees’ occupational series was reclassified to reflect the new 2210 series.¹⁶ If “employees took no action, then no action was taken to reclassify their 334 series positions to the existing 2210 series.”¹⁷ On or around September 12, 2005, A¹⁸ was hired as a Grade 12 IT Specialist, classification series 2210.¹⁹

On or about August 24, 2011, the Chief of Police submitted a memorandum (“Memo”) “requesting authorization to realign programs and functions within the Office of the Chief Information Officer (“OCIO”), Executive Office of the Chief of Police [to] conduct a Reduction in Force (RIF) to abolish 14 positions in the OCIO.”²⁰ Attached to the Memo was Administrative Order (“AO”) FA-2011-01, which cited the reasons for the RIF and identified both positions recommended for abolishment by the RIF and the competitive area in which the RIF would be

9 R. at 411.

10 R. 145.

11 R. Exhibit B.

12 R. at 326.

13 *Id.*

14 R. at 411.

15 R. at 411.

16 *Id.*

17 *Id.*

18 To protect this employee’s identity and privacy, his initial A is used.

19 R. Exhibit C.

20 R. 28.

conducted.²¹ In that regard, the reasons for the RIF were cited as shortage of work and realignment, and the competitive area for the RIF was identified as the Executive Office of the Chief of Police, Office of the Chief Information Officer.²² One of the fourteen (14) positions recommended for abolishment in the AO was Computer Specialist, 334-12, the position encumbered by Employee.²³

On September 8, 2011, MPD's request to conduct a realignment was approved by Shawn Stokes, the Director of the District of Columbia Department of Human Resources, and on September 13, 2011, the City Administrator concurred "in the Realignment action."²⁴ On September 14, 2011, MPD's request to conduct the RIF was approved.²⁵

Pursuant to the approval to conduct the RIF, and in accordance with applicable RIF regulations, competitive levels were identified, and retention registers were developed. A competitive level encompasses only those positions that are of the same grade and classification series.²⁶ A retention register is a document that lists employees in the same competitive level who are ranked on the retention register according to seniority, with the most senior person ranked first and the least senior person ranked last.²⁷

Pursuant to the approval to conduct the RIF, a retention register was developed for competitive level 334-12, which listed Employee and co-worker Zach Gamble.²⁸ In its RIF notice, the competitive level for the Computer Specialist position encumbered by Employee was identified as DS-0334-12-10-N.²⁹ The retention register that was developed for that competitive level (DS-0334-12-07-N) listed Employee and another individual.³⁰ The "07" designation in the Competitive Level DS-0334-12-07-N does not refer to a step in the pay scale grade but the actual position description. In a letter to Employee dated September 14, 2011, Employee was advised that pursuant to a RIF, she would be "separated from District government effective October 14, 2011."³¹ In accordance with the September 14, 2011, letter, Employee was separated effective October 14, 2011.³²

Prior to the reorganization and implementation of the RIF, MPD only had one (1) Grade 12 IT Specialist classification series 2210 position.³³ This position was encumbered by A.³⁴ The

21 R. 29.

22 *Id.*

23 *Id.*

24 R. 213.

25 R. 27, 215.

26 D.C. Mun. Reg. Tit. 6 § 2410.4.

27 D.C. Mun. Reg. Tit. 6 § 2499.

28 R. 26.

29 Agency Reply to Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF, Attachment 6, September 14, 2011, RIF Notice to Employee.

30 Retention Register for Computer Specialist, DS-0334-12-07-N, dated September 14, 2011.

31 R. 7-8.

32 *Id.*

33 R. at 35.

Grade 12 IT Specialist 2210 classification series position was not selected for the RIF.³⁵

Employee Cannot Compete In A Series In Which She Was Not Employed

The applicable RIF statute provides that an employee whose position is subject to a reduction in force is entitled to “[o]ne round of lateral competition limited to positions *within the employee’s competitive level.*” D.C. Code § 1-624.02(a)(2) (emphasis added). The relevant regulations further expound that “[a] competitive level *shall* consist of all positions in the competitive area identified... in the same grade (or occupational level), *and* classification series *and* which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions.” 6B DCMR § 2410.4 (emphasis added). Thus, the law dictates that a reduced employee is only entitled to a right to compete for a lateral position in their same grade and competitive level (i.e., a position with the same classification series). Accordingly, I find that Employee cannot be entitled to compete for a position in a series *in which she was not employed.*

All 334 job classification series positions which remained until 2011 were abolished pursuant to the 2011 RIF, including the only other Grade 12 position. Accordingly, and as the OEA Board held in a previous posture of this case, “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 [of D.C. Code § 1-624.02] affording [him/her] one round of lateral competition [is] inapplicable.’”³⁶

Even if an employee performs duties outside of her job description, like when on a detail, the D.C. Court of Appeals has affirmed that a “competitive level must be based on [an] official position of record.” *D.C. v. King*, 766 A.2d 38, 45 (D.C. 2001). In this case, notwithstanding Employee’s attempt to insert herself into a 2210 classification series position, her official position of record was a 334 classification series position. Thus, 2210 classification series positions cannot be considered in her competitive level because Employee’s official position of record was not in the 2210 classification series. Therefore, I find that Employee’s competitive level is thus limited by her official position description in a 334 classification position.

After the RIF, MPD created (2) new vacancies for Grade 12 IT Specialist classification series 2210 positions under its Organizational Realignment Plan.³⁷ In or around November 2011, Employee applied for one of these newly created Grade 12 IT Specialist 2210 classification series positions.³⁸ Solely based on Employee’s application, Employee “appear[ed] to minimally

34 R. at *See* Exhibit C.

35 R. at 27, 29, 31.

36 R. at 769 (citing *Fink v. D.C. Pub. Schs.*, OEA Matter No. 2401-0142-04 (June 5, 2006); *Sivolella v. D.C. Pub. Schs.*, OEA Matter No. 2401-0193-04 (Dec. 23, 2005); *Mills v. D.C. Pub. Schs.*, OEA Matter No. 2401-0109-02 (March 30, 2003); *Cabaniss v. Dep’t of Consumer & Regul. Affairs*, OEA Matter No. 2401-0156-99 (Jan. 30, 2003)) (first set of brackets added, second and third sets in original); *see also*, *Phillippa Mezile v. D.C. Dep’t on Disability Servs.*, OEA Matter No. 2401-0158-09R12, Initial Decision on Remand, (October 10, 2012); *May v. DCDMH*, OEA Matter No. 2401-0129-09, Opinion and Order on Petition for Review (May 23, 2011).

37 R. at 35-36.

38 R. Exhibit D.

meet selective placement factors.”³⁹ Employee was interviewed for the position on or around January 27, 2012, by three panelists.⁴⁰ The interview panel determined that Employee was “likely to *consistently* demonstrate a *substandard* level of the competencies as the IT Specialist (AppSW). The applicant will require *extensive* supervision despite training.”⁴¹

Duties of a Grade 12 Computer Specialist

The major duty listed in Employee’s position description is to “[p]erform team support help desk functions and programming within the [Technology Development] Unit.”⁴² Employee’s position description goes on to give examples of the kind of help functions she would provide, such as receiving user support requests and resolving their problems, tracking such requests, and managing printed documents of the Technology Development Unit.⁴³ Employee’s position description also indicates that the incumbent would evaluate aspects of certain projects and develop recommendations for plans of action.⁴⁴ The position required generalized knowledge of programming standards and comprehensive knowledge of the applications ArcView, Microsoft Access, and Oracle Relational Database Management System (“RDBMS”) components.⁴⁵

Duties of a Grade 12 IT Specialist

The introduction of Mr. A’s Grade 12 IT Specialist 2210 classification position summarizes the duties of the job: “This position is responsible for testing software and for the development and creation of testing plans and scripts; execution of test scripts; generation of test data and metrics as well as analysis of the results and recording/documentation of test defects on Web based applications.”⁴⁶ Mr. A’s position description then provides specific examples of the major duties involved with testing software and creating testing plans and scripts, such as analyzing functional requirements and designs; testing new releases and maintenance releases for tailored commercial off the shelf (“COTS”) packages and in-house developed software; coordinating with programmers and functional users; creating test cases for use in manual and automated end user testing; perform peer reviews of case cases developed by others; evaluate testing processes; document and track testing results; and make recommendations related to complex issues affecting testing.⁴⁷ The position required knowledge of Java and XML programming languages; writing test scenarios; testing applications Rationale or Mercury’s Winrunner and TestDirector; and knowledge of the data report application Crystal Reports.⁴⁸

39 *Id.*

40 R. Exhibit E.

41 *Id.* (emphasis in original).

42 R. Exhibit B.

43 *Id.*

44 *Id.*

45 *Id.*

46 R. Exhibit C.

47 *Id.*

48 *Id.*

Judicial Notice Established in the Gamble Case

In the similar case of *Gamble v. Metropolitan. Police Department*, OEA Matter No. 2401-0018-12R19, which the undersigned presided over, involved the same RIF and an employee who occupied the same Grade 12 IT Specialist 334 classification series position as Employee.⁴⁹ Following a remand from the OEA Board, I found that “uncontroverted evidence [] shows that the personnel subjected to the RIF did not have the technical skillset or certifications for the new positions created. The evidence also shows that there were no old positions left that used their skillsets.”⁵⁰ In that decision, the undersigned highlighted testimony of Chief Information Officer Barry Gersten during that case’s July 7, 2015, evidentiary hearing:

Gersten: I think for many of the people impacted by the RIF, they actually did have to go through the training, but that they didn’t retain or have the skills to do the work, though... They went through some training in some of the areas we were pursuing, but they did not use those skills or absorb or retain them. So the training was not effective for them to contribute to the footwork that we were trying to get done.

Q: You testified that the employees---or some of the employees were RIF’d because they lacked the skill set to perform Microsoft ... How did you know they lacked the skill set to perform Microsoft?

Gersten: From interactions with them, requesting them to perform certain tasks and them being unable to do so.

Id. at 8.

The undersigned also noted testimony by MPD’s Director of Human Resources, Diana Haynes-Walton:

Q: But there was nothing requiring the positions occupied by individuals to be abolished; correct? The 334 positions that were occupied by individuals, nothing required you to abolish them in 2011? Nothing changed, correct?

Walton: Well, what changed was Mr. Gersten did an assessment of his staff and determined he needed IT (Information Technology) specialists. And IT, if you look at the job series for Computer Specialists and the job series for IT Specialists, they’re different jobs. *Id.* at 9.

49 R. at 26; *Gamble v. Metro. Police Dep’t*, OEA Matter No. 2401-0018-12R19, Initial Decision on Remand (May 6, 2020).

50 *Gamble*, OEA Matter No. 2401-0018-12R1, at 6.

Accordingly, the undersigned upheld the RIF.⁵¹

ANALYSIS AND CONCLUSIONS OF LAW

Whether the job descriptions for the 2210 and 334 series positions mentioned by the DCSC’s remand order are sufficiently alike based on the criteria set out by § 1–611.01(a)(1) and DCMR § 2410.4 for purposes of Section 1-624.02(a)(2).

The DCSC has instructed the undersigned to determine whether Employee’s 334 classification series position and Mr. A’s 2210 classification series position were “sufficiently akin” for the purposes of D.C. Code § 1-624.02(a)(2). In her brief, Employee recites parts of the position description that corresponds to both job series. She omits the significant parts that do not correspond and rationalizes them to “evolution and changes in technology and new programs which is to be expected in this field over a period of six to seven years.”⁵²

There Is No Evidence That the 334 Classification Series and 2210 Classification Series Are Sufficiently Alike

Employee has not presented any evidence to establish that her 334 classification series position and Mr. A’s 2210 classification series position were “sufficiently alike in qualification requirements, duties, responsibilities, and working conditions.”⁵³

Moreover, additional evidence presented following the Superior Court’s remand further demonstrates how the two positions are not akin. First, the duties of the two positions were not “interchangeable.” As can be clearly seen in the position descriptions, Employee’s former position primarily concerned fulfilling helpdesk functions, i.e., receiving requests for assistance from users and solving their problems, as well as improving the helpdesk process.⁵⁴ Additionally, Employee’s duties included developing and utilizing a paper filing system.⁵⁵ The required knowledge of the position was basic programming and comprehensive knowledge of specific applications.⁵⁶ In contrast, Mr. A’s position involved testing software for MPD. His position’s duties required the incumbent to analyze off the shelf and customized software, coordinate with both programmers and users, develop automated and manual testing schema, perform peer review of other testers’ work, and make recommendations related to complex testing related issued.⁵⁷ Further, the IT Specialist position required specialized knowledge of particular programming languages, identified applications, and skills.⁵⁸ This required knowledge

51 *Id.* Following various appeals within OEA and D.C. Superior Court, on May 31, 2023, Judge Neal Kravitz issued an opinion affirming the SAJ’s decision and upholding the RIF. *D.C. Metro. Police Dep’t v. D.C. Off. of Employee Appeals*, Case No. 2022-CA-001198-P(MPA) (May 31, 2023).

52 Employee’s Legal Br. at 1.

53 DC Personnel Regulations Ch. 24 Reductions in Force § 2410.4.

54 R. Exhibit B.

55 *Id.*

56 *Id.*

57 R. Exhibit C.

58 *Id.*

was different than Employee's required knowledge as a Computer Specialist. Accordingly, the plain text of Employee's and Mr. A's position descriptions prove that the two (2) jobs were not sufficiently akin as required by statute and regulation to entitle Employee to a round of lateral competition.

Additionally, Employee could not perform the duties of a Grade 12 IT Specialist 2210 classification series position "without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee."⁵⁹ After Employee's termination, she applied for and was interviewed for a Grade 12 IT Specialist 2210 classification series position. The interviewing panel provided Employee an interview rating of "poor," meaning that Employee "is likely to *consistently* demonstrate a *substandard* level of the competencies as the IT Specialist (AppSW). The applicant will require *extensive* supervision despite training." Exhibit E (emphasis in original). Thus, Employee was not qualified for a Grade 12 IT Specialist 2210 classification series position.

Finally, the undersigned has already determined that employees within the 334 classification series that were a part of Employee's RIF did not have the qualifications of 2210 series IT Specialists in *Gamble v. Metropolitan Police Department*.⁶⁰ Specifically, I held that "uncontroverted evidence [] shows that the personnel subjected to the RIF did not have the technical skillset or certifications for the new positions created. The evidence also shows that there were no old positions left that used their skillsets."⁶¹ The uncontroverted evidence I relied on included testimony of MPD's Chief Information Officer Barry Gersten and Director of Human Resources, Diana Haynes-Walton describing how the RIF'd employee did not have the skills required of the IT Specialist positions.⁶² The undersigned may take judicial notice of these adjudicative facts because they have already been settled in related proceedings and in records before the same tribunal.⁶³ Accordingly, the undersigned may rely on his prior adjudicative fact finding in holding that Employee's position was not sufficiently akin to Mr. A's 2210 classification series position.

Conclusion

An IT helpdesk employee is clearly not akin to a software tester. Accordingly, I find that Employee's claim that her Grade 12 Computer Specialist 334 classification series position is sufficiently akin to Mr. A's Grade 12 IT Specialist 2210 classification series position is entirely without merit. The duties and required knowledge of the two positions are entirely different.

59 6B DCMR § 2410.4.

60 OEA Matter No. 2401-0018-12R19 (May 6, 2020).

61 *Id.* at 6.

62 *Id.* at 8; 9.

63 *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43, 54 (D.D.C. 2009) (citing *See Estate of Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229, 263 (D.D.C. 2006)); *see also, Renard v. D.C. Dep't of Emp. Servs.*, 673 A.2d 1274, 1276 (D.C. 1996) (reversing hearing examiner's decision for not taking judicial notice of its own tribunal's records); FRE 201; D.C. Code § 2-509(b) (authorizing judicial notice of facts not otherwise in the record where opposing party may respond).

Moreover, when Employee later interviewed for a different Grade 12 IT Specialist 2210 classification series position, she was deemed to “*consistently demonstrate a substandard level of the competencies*” for the position.⁶⁴ These facts, the lack of any other facts proffered by Employee, and the SAJ’s prior adjudicative findings in the *Gamble* case, prove that the 2210 and 334 series positions are not sufficiently alike for the purposes of D.C. Code § 1- 624.02(a)(2). Therefore, Employee’s RIF is affirmed, and her appeal dismissed.

As enumerated in the Findings of Fact above, the evidence plainly demonstrates that the 334 classification series position and 2210 classification series position are not equivalent. Not only are the positions within different classification series, Employee and Mr. A’s position descriptions clearly show how the jobs involved different duties. Employee worked at MPD’s help desk to assist those with computer issues, when she was not organizing MPD’s paper files. In contrast, Mr. A’s duties involved testing software for MPD, engaging with programmers and end users, and developing related plans of action. The two positions are readily not comparable. Moreover, after the RIF, Employee was determined to consistently demonstrate a substandard level of the competencies for a Grade 12 IT Specialist 2210 classification series position to which she later applied. Finally, the undersigned has already determined in another case that all the 334 classification series employees who were a part of Employee’s RIF were not qualified for IT Specialist positions. These adjudicative facts, plus those established in this proceeding, prove that Employee’s position was not sufficiently akin to Mr. A’s. Therefore, I find that the RIF should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency’s action of abolishing Employee’s position through a Reduction-In-Force is **UPHELD**.

FOR THE OFFICE:

/s/ Joseph Lim

Joseph E. Lim, Esq.

Senior Administrative Judge