THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ZACK GAMBLE,	)	
Employee	)	
	)	OEA Matter No.: 2401-0018-12
v.	)	
	)	Date of Issuance: March 7, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Zack Gamble ("Employee") worked as Computer Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of his termination was October 14, 2011.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 10, 2011. In his appeal, Employee argued that his separation from service was improper because Agency failed to engage in good faith practices when it initiated the RIF. He also stated that the RIF was not conducted for the purpose of a budget shortfall, realignment, or a reorganization, as required by Title 6, § 2401 of the D.C. Municipal Regulations ("DCMR"). In

addition, he contended that Agency did not provide employees affected by the RIF with opportunities to compete for other positions or training for reclassified positions. According to Employee, the competitive levels, retention standing, and retention registers were not properly defined by Agency when it implemented the RIF. Lastly, he contended that the RIF notices provided to affected employees failed to comply with DCMR Sections 2422 and 2423.[1]

Agency filed its Answer to the Petition for Appeal on December 13, 2011. It denied the allegations presented in Employee's appeal and requested that an evidentiary hearing be held.[2] An OEA Administrative Judge ("AJ") was assigned to the case in July of 2013. On October 3, 2013, the AJ held a Prehearing Conference to assess the parties' arguments. The AJ subsequently ordered the parties to submit briefs addressing whether the RIF action was done in accordance with all applicable rules, laws, and regulations. After reviewing the parties' submissions, the AJ determined that there were material issues of fact that required an evidentiary hearing. Therefore, a hearing was held on July 7, 2015, wherein the parties presented oral testimony in support of their positions.[3]

An Initial Decision was issued on August 31, 2015. The AJ first 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 it was not conducted for budgetary purposes. With respect to approving the RIF, the AJ determined that Administrative Order ("AO") FA-2011-01 properly stated Agency's justification for conducting the RIF and listed the positions that were identified for abolishment. He further provided that Agency obtained the required signatures for approving the RIF and concluded that the signatures were authentic, timely, and properly procured.

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[1] *Petition for Appeal* (November 10, 2011).
[2] *Agency Answer to Petition for Appeal* (December 13, 2011).
[3] *Briefing Order* (February 2, 2015).

Next, the AJ provided that at the time of the RIF, Employee held the position of Computer Specialist DS-0334-12-07-N, as evidenced by his Standard Personnel Form 50 ("SF-50"). The AJ found that Employee's pay grade/step was listed inconsistently on some of Agency's documents; however, he noted that the competitive level was determined according to the title, series, and grade of the position, not the pay grade step. The AJ, therefore, concluded that Employee was placed in the correct competitive level.

Regarding the lateral competition requirement, the AJ provided that the Administrative Order identified two Computer Specialist positions for abolishment under the RIF. Employee encumbered one of the two positions within his competitive level that were identified for abolishment. Although Employee was entitled to compete for retention, the AJ stated that both positions were abolished; thus, there was no one remaining with whom Employee could compete. In his analysis, the AJ noted that OEA has consistently held that when an entire competitive level is abolished pursuant to a RIF, or when a separated employee is the only member of his or her competitive level, then the statutory provision affording the employee one round of lateral competition is inapplicable. After reviewing the documentary and testimonial evidence presented by the parties, the AJ concluded that Employee was separated from service under the RIF in accordance with all applicable rules, laws, and regulations. He also held that Agency provided Employee with at least thirty days' written notice prior to the effective date of the RIF. Consequently, Agency's RIF action was upheld.[4]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 5, 2015. He argues that the AJ failed to address all of the issues raised in his

[4] *Initial Decision* (August 31, 2015).

April 3, 2015 legal brief and during the subsequent evidentiary hearing.[5] Specifically, Employee asserts that the Initial Decision did not address his claim that Agency utilized inaccurate and incomplete documents in the realignment plan which formed the basis for the RIF. He further states that the AJ did not address his arguments pertinent to the issues of job sharing rights, and reduced hours. In addition, Employee believes that Agency failed to timely place him on the priority re-employment list as required by D.C. Official Code § 1-624.02(a)(3). Finally, he argues that the Initial Decision was based on an erroneous interpretation of statute and that the AJ's findings were not based on substantial evidence in the record. Therefore, he asks this Board to reverse the Initial Decision, or remand the case to the AJ for the purpose of addressing the aforementioned issues.[6]

Agency filed an Answer to the Petition for Review on November 9, 2015. It maintains that the AJ considered all of the claims that were raised during the course of this appeal, including issues regarding obtaining the requisite RIF signatures and the realignment documents.[7] It further argues that the AJ correctly held that Employee's competitive level for purposes of the RIF was a Computer Specialist, DS-0334-12-07.[8] Agency, therefore, submits that the Initial Decision was based on substantial evidence in the record. Consequently, it requests that Employee's Petition for Review be denied.[9]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

[5] *Petition for Review* (October 5, 2015).
[6] *Id*. at 12.
[7] *Answer to Petition for Review* (November 9, 2015).
[8] *Id.* at 7.
[9] *Id.* at 9.

(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.

RIF Approval and Concurrence

Employee first argues that the AJ did not address his claims that Agency failed to receive the necessary approvals or concurrence to conduct the instant RIF, and that it utilized inaccurate and incomplete documents in the realignment plan that formed the basis of the RIF. This Board disagrees with Employee's position and finds that the AJ adequately addressed these issues in his Initial Decision. With respect to the RIF documents, the AJ made the following findings of fact:

1. On or about June 29, 2011, the Chief of Police submitted a memorandum…"requesting authorization to realign programs and functions within the Office of Chief Information Officer (OCIO), Executive Office of the Chief of Police [to] conduct a Reduction-in-Force…to abolish 14 positions in the OCIO."[10]

2. On June 29, 2011, Police Chief Cathy Lanier signed her assent to the RIF, and on June 30, 2011, Chief Financial Officer Jackson signed her approval. On September 8, 2011, Agency's request to conduct a realignment was approved by Shawn Stokes…and on September 13, 2011, the City Administrator concurred "in the realignment action."[11]

3. The required signatures on the RIF documents are authentic, timely, and properly procured in accordance with RIF regulations.[12]

Contrary to Employee's assertions, the AJ addressed his arguments concerning the approval of the RIF and concluded that the documents were authentic and accurate. The AJ

[10] *Initial Decision* at 5.
[11] *Id*. at 6.
[12] *Id*.

adduced testimony from witnesses during the July 7, 2015 evidentiary hearing regarding the documents that were required to approve the RIF. Allen Lew, who served as the City Administrator in 2011, testified regarding the process for obtaining the RIF Approval Forms and for procuring signatures for its concurrence.[13] In addition, the AJ considered the testimony of Human Resource Specialist, Lewis Clark Norman. Norman also provided testimony relative to the documents that were required to conduct the RIF, the realignment process, and the procedure for reviewing each document for accuracy. After analyzing the evidence, the AJ held that Agency met is burden of proof in establishing that it followed the proper procedures for conducting the RIF. Although he disagrees with the AJ's findings, Employee's claims regarding the concurrence and approval of the RIF were satisfactorily addressed.

Job Sharing and Reduced Hours

In his Petition for Review, Employee maintains that the AJ erred in failing to address his argument that Agency did not consider job sharing or reduced hours when it conducted the RIF. He claims that "the purported rationale for the RIF, lack of work, would fall within the types of scenarios in which job sharing or reduced hours would be appropriate to apply in order to allow employees to share in the shortage of work without losing their jobs."[14] Under D.C. Official Code § 1-624.02(a)(4) and District Personnel Manual ("DPM") § 2404, when a RIF is conducted, an agency may consider job sharing and reduced hours for employees separated pursuant to the RIF. DPM § 2403.2 states that "[a]n agency may, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency."

[13] *Evidentiary Hearing Transcript, pgs*. 11-16 (July 7, 2015).
[14] *Petition for Review*, p. 9.

Here, the AJ acknowledged Employee's allegation that his position was not abolished because of lack of work. However, the AJ, citing the holding in *Anjuwan v. D.C. Department of Public Works*, 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]."[15] He further stated that "when [a]gency has been shown to have invoked a Reduction-in-Force…for reasons stated in [the] regulation[s]…this Office has no authority to review management considerations that underlay Agency's exercise of its discretion."[16] While Employee maintains that Agency should have considered the options of job sharing and/or reduced hours, he failed to present any evidence to support a finding that Agency did not consider these actions prior to conducting the RIF. In addition, it should be noted that use of the word "may" under DPM § 2404.1 indicates that it is within Agency's discretion to consider job sharing or reduced hours. Based on a review of the record, this Board finds that the Initial Decision addressed Employee's arguments pertinent to Agency's pre-RIF actions, and we can find no credible reason to disturb the AJ's findings.

Priority Re-employment

Employee submits that the AJ failed to address his claim that Agency failed to timely and correctly place him on its Priority Re-employment list and enroll him in the Displaced Employee Program. Under D.C. Official Code § 1-624.02(a)(3), employees that are separated pursuant to a RIF shall be given consideration for priority reemployment. DPM § 2426.3 states that "[a]n employee…who has reinstatement eligibility to the Career Service and who is separated from his or her competitive level shall be eligible for priority consideration, under the agency reemployment priority program and the displaced employee program, for positions for which [he

[15] 729 A.2d 883 (December 11, 1998); *Initial Decision* at 12.
[16] *Id.*

or she is] qualified, at grades no higher than the grade last held under a Career Appointment…or at any lower grade acceptable to the employee." In addition, DPM § 2429.1 states that "[e]ach personnel authority shall establish and maintain a displaced employee program list for priority placement referral of its displaced employees to all agencies or any other identifiable organizational components within the personnel authority under its administrative control."[17]

In this case, Agency's September 14, 2011 RIF notice to employee provided that "[e]mployees in tenure group I and II who have received a notice of separation by reduction in force have a right to priority placement consideration through the Agency Reemployment Priority Program."[18] On October 6, 2011, Employee submitted a registration sheet for Agency's Reemployment Priority Program ("ARPP")/Displaced Employee Program ("DEP"). The document identified Employee's education, locale availability, skill sets, in addition to the lowest grade that he would accept for re-employment as a result of the RIF.[19] Human Resource Specialist, Theoza W. Miller, processed the registration form on October 6, 2011. This evidence was introduced and admitted during the July 7, 2015 evidentiary hearing. However, Employee did not present any documentary or testimonial evidence to support a finding that Agency violated the requirement that he be placed on the priority re-employment list. It is clear from the record that Employee was enrolled in both programs. Accordingly, this Board finds his argument that Agency violated the procedural provisions of the ARPP and the DEP to be without merit.

Competitive Level

Employee next argues that the Initial Decision was based on an erroneous interpretation of statute because he was incorrectly placed in the competitive level of Computer Specialist, DS-

[17] Under DPM §2429.3, a group I employee's name shall remain on the displaced employee program list for two (2) years, and a group II employee's for one (1) year, from the date he or she was separated from his or her competitive level.
[18] *Agency Brief in Support of Reduction-in-Force*, Exhibit 6 (March 20, 2015).
[19] *Id*.

0334-12-07-N, when he should have competed in the DS-0334-12-09-N level. Chapter 24 of the DPM specifically addresses the requirements for the establishment of competitive levels. It provides that employees are entitled to one round of lateral competition, which shall be limited to positions in the employee's competitive level. DPM Section 2410 states the following in pertinent part:

> 2410.4 A competitive level shall consist of all positions in the competitive area identified pursuant to section 2409 of this chapter in the same grade (or occupational level), and classification series and which are sufficiently alike in qualification requirements, duties, responsibilities, and working conditions so that the incumbent of one (1) position could successfully perform the duties and responsibilities of any of the other positions, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.
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> 2410.5 The composition of a competitive level shall be determined on similarity of the qualification requirements, including selective factors, to perform the major duties of the position successfully, the title and series of the positions, and other factors prescribed in this section and section 2411 of this chapter.

In this case, the retention register created by Agency included five factors/identifiers that represented Employee's competitive level, also known as a Competitive Level Code ("CLC"). Human Resource Specialist, Lewis Clark Norman, gave the following explanation regarding Employee's CLC in a March 18, 2015 affidavit to OEA:

> "The retention resister for the position occupied by Mr. Zack Gamble…includes…a CLC…that consists of the following five elements: (1) DS, which is the pay plan, (2) 0334, which is the classification series of the Computer Specialist position, (3) 12, which is the grade level of the Computer Specialist position encumbered by Mr. Gamble, (4) 07, which is a numerical designator for the position description of the Computer Specialist 0334-12 position…and (5) N, which is an alphabetical designator…that identifies whether the position is non-supervisory, supervisory, managerial, or a leader position…."[20]

[20] *Agency's Brief in Support of Reduction-in-Force*, Attachment 8 (March 20, 2015).

Norman further clarified that the fourth identifier in Employee's CLC ("07") "was established to differentiate his duties and responsibilities from the significantly different duties and responsibilities of other Computer Specialist 0334-12 positions."[21] During the evidentiary hearing, Norman provided testimony regarding Employee's CLC that corroborated his previous affidavit. The AJ, noting that there were some inconsistencies in Employee's RIF documents, agreed with Norman's assessment, and concluded that Employee was placed in the correct competitive level of Computer Specialist, DS-0334-12-07-N. This Board agrees with the AJ and finds that the fourth CDC identifier on the retention register constituted a numerical designator for Employee's position, not his pay grade step.

Next, Employee argues that the holding in *Vaughn v. Metropolitan Police Department*, OEA Matter No. 2401-0020-12 (December 11, 2014), is in direct conflict with the AJ's findings in this case. In *Vaughn*, the same AJ as in this matter, examined the instant RIF and held that the fourth CLC identifier represented the employee's pay grade step. The AJ held that Agency committed a reversible error when it listed Vaughn's pay grade step on the retention register incorrectly. He, therefore, overturned Agency's RIF action and ordered that the employee in *Vaughn* be reinstated with back pay and benefits.[22]

However, this Board remanded the matter to the AJ in a May 11, 2016 Opinion and Order on Petition for Review.[23] On September 9, 2016, the AJ issued an Initial Decision on Remand upholding Agency's RIF action and held that the fourth CLC identifier, in fact, represented a numerical designator for the employee's position description, and not her pay grade step.[24] While

[21] *Id.*
[22] *Vaughn*, p. 8.
[23] *Vaughn v. Metropolitan Police Department*, OEA Matter No. 2401-0020-12, *Opinion and Order on Petition for Review* (May 11, 2016).
[24] *Initial Decision on Remand* (September 9, 2016).

this Board notes that the Initial Decision on Remand in *Vaughn* was issued after Employee filed a Petition for Review in this case, it is clear from the record that the AJ's decisions in both cases were, ultimately, consistent. Based on the foregoing, we find that Employee was placed in the correct competitive level.

Finally, Employee's petition raises many of the same arguments that were presented to the AJ on Petition for Appeal. There is no new evidence presented that was not available or previously considered by the AJ. The arguments made by Employee on Petition for Review seem to merely be disagreements with the AJ's ruling in this matter. That is not a valid basis for appeal.

Based on a review of the record, this Board finds that there was no clear error in judgment by Agency. There is substantial evidence in the record to support a finding that Employee was separated from service pursuant to the RIF in accordance with all applicable laws, rules, and regulations.[25] Furthermore, the Initial Decision addressed all issues raised by Employee on Petition for Appeal. Consequently, we must deny his Petition for Review.

[25] According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.

ORDER

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

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams.

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.