**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| Samson Abeboye, | ) | OEA Matter No. 2401-0024-12R18 |
| Darryl Boone, | ) | OEA Matter No. 2401-0019-12R18 |
| Employees | ) | |
| | ) | Date of Issuance: August 21, 2018 |
| v. | ) | |
| | ) | Joseph E. Lim, Esq. |
| Metropolitan Police Department | ) | Senior Administrative Judge |
| Agency | ) | |
| | ) | |

Frank McDougald, Esq., Agency Representative
Robert Shore, Esq., Employee Representative

**INITIAL DECISION ON REMAND**

INTRODUCTION

On November 10, 2011, Samson Abeboye and Darryl Boone ("Employees") filed separate Petitions for Appeal from the Metropolitan Police Department's ("MPD" or "Agency") final decision to separate them from government service pursuant to a Reduction-in-Force ("RIF"). This matter was assigned to me on July 26, 2013. After several continuances requested by the parties, I conducted a hearing on July 7, 2015. On August 25, 2015, and September 15, 2015, I issued Initial Decisions ("ID") upholding the RIF.[1]

Employees appealed, and on March 7, 2017, the OEA Board upheld the IDs.[2] The decisions then were appealed to the D.C. Superior Court. On February 13, 2018, the D.C. Superior Court held that, while there was substantial evidence to support the grounds for upholding the validity of the RIF, the burden of proof on whether Agency considered job sharing and reduced hours rested with Agency, not Employees. Thus the D.C. Superior Court remanded the matter to the undersigned with instructions for further proceedings consistent with its opinion.[3] Specifically, the Court seeks a determination of whether Agency proved that it considered job sharing and reduced hours in carrying out its RIF action.

1 *Abedoye v. MPD*, OEA Matter No. 2401-0024-12 (August 25, 2015) and *Boone v. MPD*, OEA Matter No. 2401-0019-12 (September 15, 2015). In the interest of judicial efficiency and at the request of the parties, these two matters were consolidated for the remand.
2 *Abedoye v. MPD*, OEA Matter No. 2401-0024-12, *Opinion and Order on Petition for Review* (March 7, 2017) and *Boone v. MPD*, OEA Matter No. 2401-0019-12, *Opinion and Order on Petition for Review* (March 7, 2017).
3 *Abedoye v. MPD*, Case No. 2017 CA 2469 (D.C. Super. Ct. February 13, 2018) and *Boone v. MPD*, Case No. 2017 CA 2471 (March 13, 2018).

I held a status conference on March 16, 2018, and ordered the submission of information and briefs by close of business July 13, 2018. The record is closed.

## JURISDICTION

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

## ISSUES

1. Whether Agency met its burden of proof that it implemented D.C. RIF statute, D.C. Official Code §1-624.02(a)(4).

2. If not, then whether Agency's action separating Employees pursuant to a RIF should be upheld.

*Position of The Parties*

Agency argues that it has proven by a preponderance of the evidence that it considered job sharing and reduced hours before it implemented its RIF. Agency also argues that, even if it failed to do so, such was harmless error. Employees argue that this omission by Agency is fatal to the RIF and that they should be returned to work.

## ADDITIONAL FINDINGS OF FACT, ANALYSIS AND CONCLUSION[4]

Whether Agency met its burden of proof regarding job sharing and reduced hours in carrying out its RIF action.

The RIF statute clearly provides that Agency should consider job sharing and reduced hours for employees that have been subjected to a RIF. Of specific relevance to this case are D.C. Official Code § 1-624.02, which tracks the Omnibus Personnel Reform Amendment Act (OPRAA) of 1998 § 101(x). This section reads in pertinent part as follows:

> D.C. Official Code § 1-624.02. Procedures
>
> (a) Reduction-in-force procedures shall apply to the Career and Educational Services . . . and *shall* include:
> (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;

4 These findings of fact are in addition to the findings of fact listed in the August 25, 2015, Abedoye ID and September 15, 2015, Boone ID and are incorporated herein.

(2) One round of lateral competition limited to positions within the employee's competitive level;
(3) Priority reemployment consideration for employees separated;
(4) *Consideration of job sharing and reduced hours*; and
(5) Employee appeal rights. *See* D.C. Official Code § 1-624.04. [emphasis applied.]

Agency argues, however, that Chapter 24 of the District of Columbia Personnel Manual ("DPM" or "DCMR"), which sets forth the District of Columbia Personnel Regulations regarding RIFs, made the consideration of job sharing and reduced hours optional. S*ee* 6B DCMR § 2400 *et seq*. Specifically, 6B DCMR § 2403.2 states: "An 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. Examples of such actions are the following: (a) Job sharing and reduced working hours under section 2404 of this chapter[.]" [emphasis applied.]

I find that Agency is wrong in this regard, as the plain meaning of the statutory language is not ambiguous and the intent of the legislature is clear. Where there is a contradiction between a statute and a regulation that implements that statute, then the plain meaning of D.C. Official Code § 1-624.02 supersedes the contradicting language of 6B DCMR § 2403.2.[5]

Looking at the evidence presented at the hearing, the only testimonial evidence presented by Agency on its efforts regarding the consideration of job sharing and reduced hours is as follows:

Barry Gersten (Transcript p. 63)

Barry Gersten was the Chief Information Officer of the MPD's Office of Information Technology who sought to improve operational performance by replacing staff for personnel with higher technical capabilities.

Q: So you know if they were retained by MPD or outsourced to other organizations?

Gersten: It varies by position. Some were outsourced. Some were retained.

Q: So some of the employees could have been transferred to another area?

Gersten: I'm not sure how to answer that. I can't answer that.

Diana Haynes Walton (Transcript p. 94-95)

Diana Haynes Walton is Agency's Director of Human Resources. She testified that Gersten discussed his plan to realign his IT staff and she then provided the advice and resources to properly

5 See *Expedia, Inc. v. District of Columbia*, 120 A.3d 623 (2015).

implement the RIF in accordance with D.C. rules and regulations.

> Q: Are you aware of whether Mr. Gersten considered job sharing or reduced hours prior to conducting – or compressing the Realignment?
> …..
> Walton: I don't – I am not aware.

Agency claims that it met its burden of proof that it considered job sharing or reduced hours when Walton testified that she consulted with Lewis Norman on the appropriate way to implement the RIF and when Lewis Norman testified that Agency met the personnel guidelines in implementing the RIF.[6]

In other words, Agency wants us to believe that since it sought guidance in implementing its RIF, we should just assume that it followed every directive of the relevant statutes and regulations. However, when Agency's witnesses were directly asked regarding whether he or she considered job sharing or reduced hours, they replied they did not know. Thus, the evidence contradicts Agency's assertion.

I therefore, find that Agency failed to meet its burden of proof that it considered job sharing or reduced hours when it implemented its RIF.

Whether Agency's action separating Employees pursuant to a RIF should be upheld.

With respect to a RIF, 6-B DCMR § 2405.7 provides the following:

> The retroactive reinstatement of a person who was separated by a reduction in force under this chapter may only be made on the basis of a finding of a harmful error as determined by the personnel authority or the Office of Employee Appeals. To be harmful, an error shall be of such a magnitude that in its absence the employee would not have been released from his or her competitive level.

Thus, for the error to be considered harmless, the evidence must show that even if Agency had considered job sharing and reduced hours, the affected employees would still have been subjected to a RIF.

Based on the testimonial evidence presented at the hearing, I find that it is undisputed that Agency's entire Office of the Chief Information Officer was revamped and realigned to better cope with its data information technology needs. All of the positions in that Office were abolished. Some of the staff were sent to other organizations while the rest were RIFed. Only

6 Agency's Brief in Response to Order dated April 30, 2018, p. 5-7.

after the RIF was implemented, were new positions created that would better serve Agency's needs as evidenced from the following:

Diana Haynes Walton (Transcript p. 75-76)

> Q: Okay. Now, I think you mentioned the reason for RIFs. What were the reasons for the RIFs in this particular situation?
>
> Walton: In this case it was shortage of work, and I don't recall the other, but basically it was a shortage of work.
>
> Q: Okay. Let me see if I can refresh your recollection. I am going to have this marked as [Exhibit] 2…okay. And so what were the reasons for the --
>
> Walton: The realignment itself, and shortage of work.

Diana Haynes Walton (Transcript p. 87)

> Walton: There were – the new positions – at the time that the RIF took place, there weren't any new positions. There were – what Mr. Gersten did – he had proposed some new positions, but the new positions didn't come to fruition until sometime after the RIF. So he made the proposal, we got permission to conduct the RIF, the RIF was conducted. Once the RIF was conducted and the positions became vacant, then they had the funding to do – to create new positions. So the new positions that Mr. Gersten created probably didn't come to fruition until December of 2011 or so.

Diana Haynes Walton (Transcript p. 106)

> Walton: …But if you're abolishing the entire job series and everyone in the series, then it's not going to have an impact.

Diana Haynes Walton (Transcript p. 110-111, 113)

> Walton: …they were abolishing all the positions and they made a decision that none of those positions were going to be part of the reorganization and realignment…
>
> Walton: …the purpose of the realignment was to abolish the positions that were – to abolish certain positions so that you could use the funding from those positions to hire higher level Information Technology Specialists.

The following uncontroverted evidence also shows that the people subjected to the RIF did not have the technical skillset or certifications for either the new positions created nor were there any of the old positions left that used their skillsets.

Barry Gersten (Transcript p. 44)

> Q: And Mr. Abedoye?
>
> Gersten: He was in the admin group…He did some basic tracking of the budgets, he handled invoicing for outside agency use of some of our technologies. We had a charge back program. And he handled some procurements.

Samson Abedoye, Employee (Transcript p. 187)

> Q: Okay. Now, when you were working for MPD, what was your position? What did you do?
>
> Abedoye: I worked on the IT budget…I am in charge of preparing the annual non-personnel services budget. The non-personnel services budget means it doesn't include employees' name or employees' salaries and – or their leave or anything. It just means bank, goods, and services, contracts.

Barry Gersten (Transcript p. 50-51)

> Q: Okay. Now, with respect to Mr. Gamble,[7] did he have the certifications that you believed were required to do the work of Microsoft?
>
> Gersten: He did not.
>
> Q: Okay. And likewise with Mr. Boone, did he have the certifications that you felt were necessary to perform the work of Microsoft?
>
> Gersten: I would say that neither of the certifications or the years of experience and background required to do the work. [sic].
>
> Q: Okay. They worked on mainframe. "They" being Mr. Gamble and Mr. Boone.
>
> Gersten: Mr. Boone worked on mainframe.
>
> Q: He worked on mainframe. Okay. And, I guess, the mainframe had been outdated or eliminated?

7 Gamble is an employee who was also RIFed.

> Gersten: It had been retired. So it had been replaced with other new technologies.
> …
>
> Q: Okay. So at the time you arrived, what was Mr. Boone doing?
>
> Gersten: He was providing support for some documentation on the old systems, kind of doing some housecleaning as we retire those and put them away.

Employees argue that Agency should have given the RIFed employees new training so that they could transition to the new positions created. However, the parties did not cite any law or regulation that obligates Agency to incur this additional cost. In addition, the following evidence reveals that even after some of these employees did undergo additional training, they still lacked the technical proficiency and required certifications for the new positions.

Barry Gersten (Transcript p. 52-53)

> Administrative Judge: And did the Agency think about giving them the training so they could get the certifications?
>
> 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. [sic].
>
> Administrative Judge: They went through the training, but they didn't pass the test.
>
> Gersten: They didn't take the test. They went through some training in some of the areas that 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.

Barry Gersten (Transcript p. 59-60)

> 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.
>
> …So the tests are at the initiative of the employee. They are not a directive. There could be a requirement for them in some positions, but it's not a directive from me that they need to take the test.

> Q: Did any of the contractors perform work that had been performed by employees who were RIF'd?
>
> Gersten: No.

Diana Haynes Walton (Transcript p. 112-113)

> 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.

Thus, based on the evidence adduced at the hearing, I make the following additional findings of fact: The separated Employees were the only members of his or her competitive level; their former positions were abolished; and their technical skills and/or certifications did not meet the new job requirements. I also find that despite whatever additional training that Employees underwent, they still failed to exhibit the required technical proficiency or pass the certification required for positions created after the realignment. I also find that because Agency's computer related positions were to be abolished, there were no positions for Employees to job share nor were reduced hours an option.

Therefore, I find that even if Agency had considered job sharing and reduced hours for Employees, the RIF would still have occurred. Accordingly, I conclude that, based on these particular set of facts, Agency's failure to either consider job sharing and reduced hours, or more specifically, its failure to meet its burden of proof that it considered such, is harmless error. Thus, in accordance with 6-B DCMR § 2405.7, the RIF is upheld.

## ORDER

It is hereby ORDERED that Agency's action of abolishing Employees's positions through a Reduction-In-Force is UPHELD.

FOR THE OFFICE: Joseph E. Lim, Esq.
Senior Administrative Judge