

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
DONNA GREEN,	)	
Employee	)	
	)	OEA Matter No.: 2401-0097-15
v.	)	
	)	Date of Issuance: April 18, 2017
DEPARTMENT OF	)	
GENERAL SERVICES,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Donna Green (“Employee”) worked as a Statistician with the Department of General Services (“Agency”). On June 1, 2015, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force (“RIF”). The effective date of the RIF was July 2, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on July 7, 2015. In her appeal, Employee argued that Agency’s RIF notice did not include a written justification stating why her position was being abolished. She also contended that Agency violated District Personnel Manual (“DPM”) § 2401 because there was not a lack of work or a budget shortfall to support conducting a RIF. In addition, Employee claimed that her separation

from service was retaliatory because she previously attempted to correct a wage deficiency in her salary. She further posited that Agency coerced her into accepting a new position as a Program Analyst, CS-343-13-01. According to Employee, by accepting the new position, Agency demoted her because her salary decreased as a result. Employee, therefore, requested that her position be changed to a Program Analyst, CS-343-13-10.<sup>1</sup>

On August 7, 2015, Agency filed an Answer to Employee's Petition for Appeal and a Motion to Dismiss for Lack of Jurisdiction. It requested that the appeal be dismissed because prior to the effective date of the RIF, Employee elected to accept a new position as a Program Analyst II in lieu of being terminated. According to Agency, Employee's decision to accept the new position also resulted in a pay increase. Thus, it reasoned that Employee was not technically separated pursuant to the RIF. Agency further stated that Employee's claims regarding discrimination and retaliation were outside the scope of this Office's jurisdiction.<sup>2</sup> Accordingly, it asked that Employee's appeal be dismissed for lack of jurisdiction.

An OEA Administrative Judge ("AJ") was assigned to the matter on August 12, 2015. On August 17, 2015, the AJ issued an order directing Employee to submit a written brief addressing whether her appeal should be dismissed for lack of jurisdiction because Agency rescinded the RIF prior to its effective date. On September 4, 2015, counsel for Employee sent an email to the AJ, confirming his entry of appearance and requested an enlargement of time to respond to the jurisdictional order. Agency responded to Employee's email on September 14, 2015, stating that it did not object to Employee's request. The AJ granted the motion, via email, and required that Employee file a brief on or before August 31, 2015. On September 11, 2015, counsel for

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<sup>1</sup> *Petition for Appeal* (July 7, 2015).

<sup>2</sup> *Agency Answer to Petition for Appeal* (August 7, 2015).

Employee emailed the AJ an Amended Answer to the Petition for Appeal and Brief in Support of Jurisdiction.<sup>3</sup>

An Initial Decision was issued on September 29, 2015. First, the AJ noted that Employee failed to submit a brief addressing the jurisdictional issue as of the date of the Initial Decision. Next, he held that D.C. Official Code § 1-606.03 provided that OEA's jurisdiction is expressly limited to performance ratings that result in removal; reductions in force; final agency decisions that result in removal; reductions in grade; suspensions, and enforced leave for ten days or more. The AJ found that OEA does not retain jurisdiction over RIFs that do not result in an employee being separated from service. According to the AJ, the record was clear that Employee accepted a new position with Agency, which prevented her from being separated as a result of the RIF. He further explained that there was no credible evidence in the record to support a finding that Employee suffered a break in service or a reduction in salary as a result of the RIF. Lastly, the AJ determined that Employee's additional arguments presented in her appeal constituted grievances over which this Office no longer has jurisdiction. As a result, Employee's Petition for Appeal was dismissed for lack of jurisdiction.<sup>4</sup>

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 30, 2015. In the petition, counsel for Employee states that the AJ failed to address all material issues of law and fact that were raised in his September 11, 2015 Amended Answer and Brief in Support of Jurisdiction. According to counsel, the AJ did not acknowledge receiving his entry of appearance or his request for leave to file a response to the jurisdictional order. Thus, counsel submits that the AJ erred in failing to consider the aforementioned

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<sup>3</sup> Counsel for Employee did not file a physical copy of the Amended Answer and Jurisdictional Brief with OEA until October 15, 2015.

<sup>4</sup> *Initial Decision* (September 29, 2015).

submissions prior to issuing his Initial Decision. Consequently, counsel requests that this Board remand the matter to the AJ for further consideration.<sup>5</sup>

Agency filed its Answer to Employee's Petition for Review on January 4, 2016. It maintains that Employee's Petition for Appeal was properly dismissed for lack of jurisdiction because she voluntarily accepted a new, higher paying position through a competitive process. Agency further argues that the RIF was eventually cancelled; thus, Employee was not terminated and was not subject to an adverse employment action. In the alternative, Agency posits that even if OEA has jurisdiction over this matter, the RIF was conducted in accordance with all applicable laws, rules, and regulations.<sup>6</sup>

#### Jurisdiction

OEA's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, et seq. (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. According to Section 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.17, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

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<sup>5</sup> *Petition for Review* (October 30, 2015).

<sup>6</sup> *Answer to Petition for Review* (January 4, 2015).

Moreover, OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction....” The burden of proof is defined under a preponderance of the evidence standard. Preponderance of the evidence means “[t]hat 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.”<sup>7</sup>

Here, the record is clear that Employee has failed to meet her burden of proof in establishing jurisdiction before this Office. Agency initially informed Employee that her position was being eliminated as a result of a RIF by letter dated June 1, 2015.<sup>8</sup> However, she voluntarily applied for, and accepted a new position as a Program Analyst, CS-0343-13, effective June 28, 2015. On July 1, 2015, Jonathan Kayne, Agency’s Interim Director, provided Employee with written notice that the RIF action was cancelled. The document stated the following in pertinent part:

“Dear Ms. Donna Green. Please refer to my letter of June 1, 2015, notifying you that you would be separated by reduction in force effective July 2, 2015. Because of your recent appointment to the position of Program Analyst, CS-0343-13, effective June 28, 2015, and pursuant to your re-employment rights in our Agency’s Re-employment Priority Program and provisions of Chapter 24 of D.C. Personnel Regulations, the above-referenced letter is hereby cancelled. I am pleased to notify you that your services will continue in the Department of General Services.”<sup>9</sup>

Employee accepted the new position as a Program Analyst prior to the effective date of the RIF; thus, she suffered no adverse employment action and the RIF was cancelled. Accordingly, OEA lacks jurisdiction over this appeal and cannot address the merits, if any, of Employee’s substantive or ancillary arguments. This Board notes that the AJ erred by failing to consider Employee’s Amended Petition for Appeal and Brief on Jurisdiction prior to dismissing

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<sup>7</sup> OEA Rule 628.1

<sup>8</sup> *Agency Answer to Petition for Appeal*, Tab 3 (August 7, 2015).

<sup>9</sup> *Id.* at Tab 7.

the matter for lack of jurisdiction.<sup>10</sup> Both of these documents were submitted to the AJ in a timely manner.<sup>11</sup> However, a remand in this instance would be fruitless, as the record clearly establishes a lack of jurisdiction because there was no RIF from which Employee could appeal. For this reason, Employee's Petition for Review must be denied.

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<sup>10</sup> On August 17, 2015, the AJ ordered Employee to submit a brief addressing the jurisdictional issue on or before August 31, 2015. Thereafter, Employee emailed the AJ and requested an extension of time in which to file the brief. The AJ granted Employee's request in an August 31, 2015 email. However, Employee subsequently retained legal counsel. On September 4, 2015, counsel for Employee emailed the AJ to confirm his entry of appearance and requested a second enlargement of time to file a brief. Employee's Amended Answer to the Petition for Appeal and Brief in Support of Jurisdiction were emailed to the AJ on September 11, 2015. The AJ did not acknowledge receipt of Employee's submissions and nevertheless issued his Initial Decision on September 29, 2015.

<sup>11</sup> In her Amended Petition for Appeal, Employee argued that OEA has jurisdiction over her appeal "based upon her challenge of the realignment underlying the RIF, the ensuing RIF, and abolishment of her position." In addition, she alleged that this Office may hear her claim because the action at issue involve the "government's inability to have a competitive level of review of an [e]mployee who enjoys an inherently illegal job classification."

**ORDER**

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

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Patricia Hobson Wilson

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P. Victoria Williams

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