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:	
GINA VAUGHN, Employee	
v.	OEA Matter No.: 2401-0020-12R16
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: July 11, 2017

OPINION AND ORDER
ON REMAND

This case was previously before the Office of Employee Appeals' ("OEA") Board. Gina Vaughn ("Employee") worked as a Computer Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, 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 October 14, 2011.

Employee filed a Petition for Appeal with the OEA on November 10, 2011. In her appeal, Employee argued that Agency improperly conducted the RIF because it was not initiated for the purpose of the budget, realignment, or reorganization as required under Title 6, § 2401 of the D.C. Municipal Regulations (D.C.M.R.).[1] She also stated that Agency failed to take steps to

[1] *Petition for Appeal* (November 10, 2011).

minimize the adverse impacts that the RIF would have on affected employees.[2] 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.[3]

The AJ issued an Initial Decision ("ID") on December 11, 2014. He held that Employee's separation from service was based on inaccurate documents. Specifically, the AJ provided that at the time of the RIF, Employee's official position of record was a Computer Specialist, CS-334-12, Step 8. However, Agency's September 14, 2011 RIF notification listed her competitive level as DS-0034-12-10-N. Therefore, the AJ concluded that Employee was improperly separated from service from a position that she did not officially occupy. Consequently, Agency's RIF action was reversed, and Employee was ordered to be reinstated with back pay and benefits.[4]

Agency filed a Petition for Review with OEA's Board on January 15, 2015. It argued that the AJ should have afforded it an opportunity to provide a response regarding the discrepancies in Employee's RIF documents. According to Agency, Employee did not submit a brief or response brief as was directed in the AJ's October 22, 2014 order. Thus, it was unable to respond to any of Employee's arguments that were referenced by the AJ in his Initial Decision. Agency posited that if it had been given an opportunity to respond, it could have presented evidence to prove that any differences between the retention register and Employee's SF-50 constituted a harmless error. It further contended that the AJ's failure to allow a response to the "discrepancy issue" should result in the Initial Decision being reversed. In the alternative, Agency requested that the matter be remanded for further proceedings.[5]

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[2] *Id*.
[3] *Agency Answer to Petition for Appeal*, p. 1 (December 13, 2011).
[4] *Initial Decision* (December 11, 2014). Employee's position of record on the SF-50 is listed as a DS-334-12, Step 8. The AJ incorrectly listed the position as a CS-0334-12.
[5] *Petition for Review* (January 15, 2015).

In response, Employee contended that the AJ correctly held that Agency committed a reversible error when it included her in the incorrect competitive level. According to Employee, Agency should have allowed her to compete in the DS-0334-12-10-N level, and not the DS-0334-12-07 level. Employee also posited that her termination was improper because the Administrative Order that authorized the RIF did not identify her position number as one that would be eliminated. Accordingly, she requested that the OEA Board uphold the Initial Decision. In the alternative, she asked that the matter be remanded to the AJ for the purpose of correcting the mistake of fact and to rule on the additional facts and evidence presented.[6]

The OEA Board issued its Opinion and Order on Petition for Review on May 10, 2016. It first provided that the AJ erred by not affording Agency an opportunity to address any of Employee's material allegations pertinent to the RIF. Of note, Agency was not given a chance to provide an explanation regarding the discrepancies and inaccuracies that the AJ used as a basis for reversing the RIF action. In addition, the Board determined that the AJ made a mistake of fact in finding that the "07" designation in Employee's Competitive Level DS-0334-12-07-N designation referred to a step in the pay scale grade instead of the actual position description. As a result, the matter was remanded to the AJ for further proceedings to determine whether Employee was placed in the correct competitive level and whether the inconsistencies in the RIF documents constituted a reversible error.[7]

On remand, the AJ ordered the parties to submit briefs addressing the issues enumerated in the Opinion and Order on Petition for Review.[8] Agency filed a Remand Brief in Support of Reduction-in-Force on July 29, 2016. It reiterated that Employee was placed in the correct

[6] *Opposition to Agency's Petition for Review* (February 19, 2015).
[7] *Opinion and Order on Petition for Review* (May 10, 2016).
[8] *Order Requesting Briefs* (May 27, 2016). The parties subsequently requested an extension of time in which to file briefs. The request was granted by the AJ and the deadline to submit briefs and optional response briefs was extended until August 23, 2016.

competitive level, Computer Specialist, DS-0334-12-07-N. Agency further clarified that the retention register it created included five factors/identifiers that represented Employee's competitive level, also known as a Competitive Level Code ("CLC"). Specifically, Agency provided that the CLC consisted of the pay plan; classification series of the position included on the retention register; grade level of the position; numerical designator for the position; and whether the position was supervisory or non-supervisory. Agency conceded that the documents of record reflected a slight discrepancy in Employee's CLC.[9] However, it opined that the differences did not constitute a reversible error. Thus, Agency argued that its RIF action should be upheld because Employee was separated from service in accordance with all applicable statutes and regulations.[10]

On August 1, 2016, Employee's former attorney, Leslie Deak, filed a Brief in Response to the Remand Order Opposing the RIF. She submitted that Employee's correct position at the time of the RIF was Computer Specialist, DS-0334-12-10-N, not DS-0334-12-07-N. Attorney Deak further stated that Agency's mistake constituted a reversible error because Employee was working under a position description that was designated for a competitive level different than the one in which she was placed. In addition, she contended that the Administrative Order did not include her position number as one to be eliminated under the RIF. Accordingly, attorney Deak reasoned that but for Agency's errors, Employee would not have been separated from service under the RIF. As a result, she asked that Agency's RIF action be reversed.[11]

Agency filed a Reply to Employee's Brief in Response to the Remand Order Opposing the RIF on August 19, 2016. It emphasized that the inconsistencies in the RIF documents

[9] The CLC on Agency's retention register stated that Employee's position was Computer Specialist, DS-0334-12-07-N. Whereas, Employee's RIF notice reflected a position of DS-0334-12-10-N.
[10] *Agency's Remand Brief in Support of Reduction-in-Force* (July 29, 2016).
[11] *Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF* (August 1, 2016).

constituted a harmless error. Agency further stated that the position number on Employee's RIF documents was correctly listed as 00013015.[12]

The AJ issued his Initial Decision on Remand on September 9, 2016. He highlighted Chapter 6B, Section 2410.4 of the D.C. Municipal Regulations ("DCMR"), which provides that a competitive level shall encompass only those positions that are of the same grade and classification series and which are sufficiently alike in qualification requirements, duties, and responsibilities. According to the AJ, a competitive level is the grouping of positions with the same classification series and grade; whereas, the CLC is used to identify the positions that are in the group. Based on the evidence submitted by the parties, the AJ determined that Employee was placed in the correct competitive level. He further concluded that Employee's CLC at the time of the RIF was Computer Specialist, DS-0334-12-07-N, as the fourth identifier was a numerical designator for the position description that was established to differentiate her duties and responsibilities from the significantly different duties of other Computer Specialist (0334-12) positions. In addition, the AJ provided that the inconsistencies in the RIF documents constituted a harmless error because they did not significantly affect Agency's final decision to separate Employee from service. Therefore, the AJ reversed his previous ruling and upheld Agency's RIF action on remand.[13]

On October 18, 2016, Employee filed a Request for Extension of Time to File a Brief with OEA. In her request, Employee stated that she made several attempts to contact her attorney of record, Leslie Deak, to determine whether a brief was filed on her behalf concerning the

[12] *Agency's Reply to Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF* (August 19, 2016). Employee's attorney filed a Remand Reply Brief Opposing the RIF on August 23, 2013, wherein she reiterated her previous arguments concerning Agency's alleged harmful and reversible errors. Agency filed Errata on August 30, 2016 to correct a mistake on page 3 of its July 29, 2016, Remand Brief in Support of Reduction-in-Force.
[13] *Initial Decision on Remand* (September 9, 2016).

outstanding issues on remand. To avoid a dismissal of her appeal, Employee requested an additional week in which to file her brief.[14] On October 27, 2016, Employee filed a second letter titled "Abandonment by Attorney: Request for Leave to Obtain Attorney & Further [Extend Time] to File Brief-Memorandum on Pending Issues on Remand." Employee stated that she was unsuccessful in eliciting an update regarding the status of her pending appeal on remand from her attorney. Thus, she requested leave to find new counsel to represent her before OEA.[15]

On December 19, 2016, Employee's newly-retained attorney, Stephen Leckar, filed a Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision, wherein he asserts that Employee submitted a timely *pro se* letter to OEA after being abandoned by her previous attorney. According to attorney Leckar, the letter should be considered as a "nascent" Petition for Review. Additionally, he seeks leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included a fellow DS-12 Computer Specialist in her office who had significantly less seniority. Therefore, Employee's attorney requests leave to supplement the previously submitted letters and to explain why the AJ failed to address a dispositive matter of law that was timely raised before the AJ.[16]

In response, Agency argues that Employee's letter requesting an extension of time to file a brief on remand does not constitute a Petition for Review. It further states that the issue raised in Employee's Motion for Leave regarding the inclusion of another Computer Specialist in her competitive level was previously decided in the AJ's December 11, 2014 Initial Decision. As a result, Agency asks this Board to dismiss Employee's motion. Alternatively, it opines that if the

[14] *Motion for Extension of Time to File Brief* (October 18, 2016).
[15] *Letter Requesting Leave to Obtain New Counsel* (October 27, 2016).
[16] *Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (December 19, 2016).

Board considers Employee's filing as a Petition for Review, her argument regarding the establishment of her competitive level should not be considered because the issue was already adjudicated by the AJ.[17]

The threshold issue to be decided by this Board is whether Employee's October 18, 2016 letter to OEA can be reasonably interpreted as a timely Petition for Review. OEA Rule 633.1 provides that a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. Under OEA Rule 607.4, filing of a petition for appeal and a petition for review must be made by personal delivery at the Office during normal business hours, Monday through Friday, or by mail addressed to the Office. 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:
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> (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.

In this case, Employee's letter, titled "Request for Extension of Time to File Brief," stated the following in pertinent part:

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[17] *Agency's Opposition to Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (January 26, 2017). Employee filed a *Reply to Agency's Opposition to Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* on February 2, 2017, wherein she claims that she could have filed an appropriate petition with this Board if she had been made aware of the filing requirements by the AJ or OEA's Executive Director. Employee filed a Notice of Supplemental Authority on February 15, 2017.

> "Dear Ms. Barfield and Judge Lim. A month ago, the Office of Employee Appeals (OEA) Board remanded my appeal to Judge Lim for additional findings. Briefs on Remand were due to be filed with Judge Lim no later than today....
>
> I have made several attempts to contact my Attorney of Record, Ms. Leslie Deak, to determine whether her brief was filed today, the due date. I have been unsuccessful in reaching her today. As of this morning, checking with your Office Manager, there is no confirmation that she was filed with Judge Lim, any of the documents referenced in the order.
>
> *Thus, to avoid dismissal of my appeal…I am requesting that Judge Lim and the OEA grant a week's extension of the deadline to comply with the Order to brief the remaining issues in my case…."* (emphasis added).

This Board does not believe that Employee's letter was intended as a Petition for Review of the Initial Decision on Remand. Rather, Employee was attempting to determine whether her attorney filed a Brief on Remand in a timely manner. The language of Employee's letter was clear: to request an extension of time to file a brief to avoid dismissal of her appeal. Contrary to Employee's argument, there is no indication that this submission was meant to serve as a *pro se* Petition for Review, as the letter made no reference to the Initial Decision on Remand and provided no basis for granting a petition as provided in OEA Rule 633.3. Moreover, Employee provides no credible basis to support a finding that the AJ and/or OEA's Executive Director were required to inform her of the need to file a Petition for Review after being apprised of Employee's "plight."[18] Accordingly, we are unpersuaded by Employee's argument that her letter to OEA constituted a Petition for Review.

[18] It should be noted that Employee's previous attorney, Leslie Deak, submitted a Brief in Response to the Remand Order Opposing the RIF on August 1, 2016 and a Remand Reply Brief Opposing the RIF on August 23, 2016. While it is unfortunate that she failed to communicate with Employee regarding the status of the remand and the filing deadlines, the record shows that attorney Deak adequately adhered to the AJ's briefing schedule. Accordingly, Employee was in compliance with the AJ's Order on Remand.

Even if we were to unreasonably construe Employee's letter as a Petition for Review, it was nonetheless filed in an untimely manner. Under OEA Rule 633.1, Employee was required to file a Petition for Review within thirty-five calendar days of the issuance date of the Initial Decision on Remand. The petition could not be submitted via email or facsimile.[19] Thus, when OEA received Employee's letter via U.S. Mail on October 18, 2016, the thirty-five day period had passed. Furthermore, D.C. Official Code § 1-606.03(c) provides that "…the initial decision…shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." The D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991), that "the time limits for filing appeals with administrative agencies, as with courts, are mandatory and jurisdictional matters." Therefore, OEA has consistently held that the Petition for Review filing requirement is mandatory in nature.[20]

Lastly, Employee's current attorney has filed a Motion for Leave to Submit a Memorandum in Support of Petition for Review of Initial Decision. He requests leave to supplement Employee's letter and explain why the AJ failed to address a dispositive matter that was raised on Petition for Appeal. However, in *Shalonda Smith v. D.C. Fire and Emergency Medical Services Department,* OEA Matter No. 1601-0195-11, *Opinion and Order on Petition for Review* (March 3, 2015), this Board held that it lacks the authority to grant any requests for

[19] *See* OEA Rule 607.4 *supra*.
[20] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Dametrius McKenny v. D.C. Public Schools*, OEA Matter No. 1601-0207-12, *Opinion and Order on Petition for Review* (February 16, 2016); and *Carolyn Reynolds v. D.C. Public Schools*, OEA Matter No. 1601-0133-11, *Opinion and Order on Petition for Review* (May 10, 2016).

extensions for filing Petitions for Review. While Employee's attorney attempts to distinguish the facts in *Smith* from those in the instant matter, the premise the same. There are no rules or regulations which bestow on this Board the ability to rule on motions for extensions. Furthermore, Employee fails to provide a credible legal basis to support her position that this Board has the authority to grant a motion for an extension of time in which to file a Petition for Review. As a result, her motion must be denied.[21]

Based on the foregoing, this Board does not interpret Employee's October 18, 2016 letter to be a Petition for Review. In addition, we lack the authority to grant a request for an extension of time in which to file a Petition for Review. Consequently, Employee's Motion for Leave to Submit a Memorandum in Support of Petition for Review of Initial Decision must be denied.

[21] Employee's attorney seeks leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included another DS-12 Computer Specialist who had significantly less seniority. However, the AJ addressed this issue in his December 11, 2014 Initial Decision. Employee argued that Agency violated District Personnel Manual Section 2423.1(b) when it included only Computer Specialist, Zach Gamble, and not Karim Alaoul, and the vacant Grade 12 Information Technology Specialist positions, in her competitive level. Specifically, Employee alleged that she should have been allowed to compete for the Grade 12 Information Technology Specialist position held by Karimi Alaoul, as well as four vacant positions. The AJ held that Employee failed to provide any evidence regarding Karimi Alaoul's position of record to prove that he should have been included in her competitive level. In addition, the AJ provided that Employee failed to cite to any statute, regulation, or rule to bolster her contention that even vacant positions should be included in the establishment of a competitive level. Thus, pursuant to OEA Rule 632.1, the AJ's previous ruling regarding whether Employee's competitive level was correctly established became final thirty-five days after the issuance of the Initial Decision.

ORDER

Accordingly, it is hereby ordered that Employee's filing 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

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.