No. 23-CV-557

DISTRICT OF COLUMBIA COURT OF APPEALS

ZACK GAMBLE,

Appellant,

v.

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, et al.,

Appellees.

On Appeal from the
Superior Court of the District of Columbia –
Civil Division

APPELLANT ZACK GAMBLE'S BRIEF

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DISTRICT OF COLUMBIA COURT OF APPEALS

ZACK GAMBLE,	)	**No. 23-CV-557**
Appellant,	)	**Case No.: 2022 CA 001198 P(MPA)**
v.	)	
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, et al.,	)	**December 22, 2023**
Appellees,	)	

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3. *Gamble v. MPD, OEA 2401-0018-12R19R21, January 11, 2021*. (DC OEA Administrative Judge Joseph Lim's 2nd Initial Decision on Remand)

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1. OEA Administrative Record—developed during the OEA evidentiary hearing and filed as part of the initial Petition for Review with the DC Superior Court
2. District Personnel Manual, Part II, Chapter 1, Sections 1.6 and 1.7
3. 2008 District of Columbia Reorganization and Realignment General Information Guide, published by the District of Columbia Department of Human Resources ("DCHR")

Assertion of Appeal is from Final Order or Judgment

Appellant asserts that this appeal is from a final order or judgment. Specifically, DC Superior Court Judge Neil Kravitz issued a final Order on May 31, 2023, that disposed of all claims.

Statement of Issues Presented for Review

The Appellant is presenting the following issues to this Court for review:

1. Whether the DC Superior Court erred when it ruled that the harmful/harmless error standard always applies, even when a DC government Agency violates a substantive statutory right, which the Employee is entitled to prior to the Agency separating an employee via a RIF, pursuant to DC Code §1-624.02(a), and what should be an employee's remedy in this instance, and;
2. Whether the distinction between substantive and procedural rights enables and, potentially, mandates the Court to impose different standards when a violation of a substantive right occurs versus a violation of a procedural right, placing particular emphasis on the "entitlement" language used which differentiates a substantive right from a procedural right, and;
3. Whether a presiding judge in a RIF appeal or Petition for Review has the authority to rescind a District Agency's RIF if that Agency violated an Employee's substantive rights the Agency was statutorily required to

perform prior issuing a RIF to an Employee, and;

4. Whether the Law of the Case Doctrine requires the judge, court, or fact-finder receiving a case on a Petition for Review or an appeal to adhere to its own decisions in an earlier phase of the case, except when an extreme miscarriage of justice would occur. (The Law of the Case Doctrine applies in this case because the DC Superior Court was acting in the capacity of a court of appeals for OEA). The standard of review on these issues is de novo.

I. Statement indicating Nature of the Case, Course of Proceedings, and Disposition

Appellant Zack Gamble ("Appellant"), by and through counsel, Lateefah S. Williams, National Association of Government Employees, respectfully submits this Brief in appeal of the Superior Court of the District of Columbia's ("DC Superior Court" or "DCSC") Decision on May 31, 2023, in "Metropolitan Police Dept. v. Office of Employee Appeals and Zack Gamble," 2022 CA 001198 P(MPA), which granted the District of Columbia Metropolitan Police Department's ("MPD," "Agency," or "Appellee") Petition for Review ("PFR") of the District of Columbia Office of Employee Appeals' ("OEA") Second Initial Decision on Remand ("2nd IDR").

Prior to MPD's PFR, on January 11, 2022, DC OEA Administrative Judge Joseph Lim issued a 2nd IDR, in accordance with DC Superior Court Judge Heidi Pasichow's July 14, 2021, Order granting Appellant Gamble's Second Petition for

Review ("2nd PFR") of DC OEA's Decision, vacating OEA's August 31, 2015 Initial Decision, and remanding the case back to OEA Judge Lim for "further proceedings consistent with the Order."

On August 6, 2021, Appellee MPD appealed the DCSC's Decision to the Court of Appeals ("DCCA"). On September 1, 2021, the DCCA Ordered MPD to "show cause why this appeal should not be dismissed for having been taken from a non-final order." On September 30, 2021, the DCCA issued an Amended Order dismissing MPD's appeal "as having been taken from a non-final and non-appealable order." See DCAA No. 21-CV-554. DC OEA issued its Decision after the DCCA dismissed MPD's Appeal and the DC Superior Court remanded it back to OEA.

By granting the PFR, the DCSC reversed OEA's 2nd IDR, affirmed OEA's Initial Decision on Remand ("IDR"), and upheld Appellant Gamble's termination from MPD in its Reduction-in-Force ("RIF"), which it asserted was done in accordance with DC Superior Court Review of Agency Orders, Pursuant to DC Code 1981, Title 1, Chapter 6. Appeal of Final Agency Decision, Rule 1 (SCR Civ. Agency Review Rule 1 Appeal of Final Agency Decision).

On May 6, 2020, District of Columbia Office of Employee Appeals (OEA) Senior Administrative Judge Joseph Lim issued an Initial Decision ("ID") in this matter, which became final on June 10, 2020. After the ID became Final, Appellant

filed a Petition for Review with the DCSC. In seeking the Petition for Review, the Appellant asserted that the OEA Administrative Judge's Initial Decision on Remand/Final Decision was not supported by substantial evidence, was erroneous as a matter of law, and was not in accordance with the Superior Court's Remand Order.

In support of the District of Columbia Office of Employee Appeals' ("OEA") January 11, 2022, Second Initial Decision on Remand ("2nd IDR"). The 2nd IDR, issued by OEA Senior Administrative Judge Joseph E. Lim, reversed Judge Lim's IDR and rescinded MPD's improper RIF of Appellant Gamble on October 14, 2011, after DCSC Judge Heidi M. Pasichow's July 14, 2021, Order granting the Appellant's Second Petition for Review ("2nd PFR") and remanding the case back to OEA to apply the law in the appropriate manner. Appellee appealed the 2nd IDR to the DCSC, which reversed OEA's 2nd IDR, reinstating the Agency's RIF.

A. PROCEDURAL ADMINISTRATIVE APPEALS BACKGROUND

On September 14, 2011, Appellant Zack Gamble was informed via letter that he was going to be separated from employment due to a Reduction in Force

("RIF") and that the RIF was effective October 14, 2011. *Administrative Record*[1] ("Record") at 75. On November 10, 2011, Appellant filed a Petition for Appeal with OEA. *Record* at 1. On December 13, 2011, the Agency filed its Answer to the Petition for Appeal. *Record* at 1. An OEA Administrative Judge was not assigned to the case until August 2, 2013, an unnecessary delay which compounded the District of Columbia government's unwarranted personnel action against Appellee. *Record* at 661. On February 27, 2014, OEA Administrative Judge Joseph Lim issued a Decision and Order finding that the general RIF regulations in D.C. Code §1-624.02 and §1-624.04 govern this RIF. *Record* at 335. On February 2, 2015, Judge Lim ordered the Parties to submit legal briefs in this case. *Record* at 420.

After the briefs were submitted, the Judge determined a hearing was still necessary. On July 7, 2015, a hearing was held. *Record* at 526. On September 16, 2015, Judge Lim issued an Initial Decision upholding the RIF. *Record* at 621. Although Judge Lim stated in his Initial Decision that there were two issues to be determined in that Appeal, he had already determined in his February 27, 2014, Decision and Order that the Abolishment Act did not apply to this RIF. *Record* at 335, 627-28. Nonetheless, he addressed the issue of which RIF statute applied and,

[1] Administrative Record refers to the record that was developed in the hearing before OEA and filed as part of the initial Petition for Review with the DC Superior Court.

again, found that the broader RIF statute in D.C. Code §1-624.02 and §1-624.04 applied. *Record* at 627-28. After Judge Lim's reference to the Abolishment Act in 2014, the Agency never raised the Abolishment Act to the DCSC until its October 11, 2022, Brief, despite this case first being brought before the DCSC on April 7, 2017, when Appellant filed a Petition for Review.

On October 20, 2015, Appellant filed a Petition for Review of the Initial Decision with the OEA. *Record* at 636. Appellant requested review regarding the administrative judge's decision based on the second issue, which was articulated as, "Whether Agency's action separating Employee pursuant to a RIF was conducted in accordance with applicable law, rule or regulation." *Id.* Appellant argued that since the Judge determined that the broader RIF statute applied to the instant RIF, the judge was obligated to address all issues and arguments raised that alleged that MPD incorrectly or improperly applied the rules or regulations regarding a RIF in the District. *Id.* On March 7, 2017, the OEA issued its Opinion and Order on the Petition for Review, upholding the administrative judge's Decision and finding that the judge adequately addressed Appellant's claims. *Record* at 660.

On April 7, 2017, Appellant filed a Petition for Review of the OEA's Opinion and Order with the DC Superior Court, alleging that the OEA and the judge's findings that the RIF was conducted in accordance with all applicable laws,

rules and regulations, were not based upon substantial evidence. In addition to Appellant's argument that the Board's decision was not supported by substantial evidence, amongst several arguments, the Appellant also argued that the Agency failed to consider job sharing or reduced hours as required by D.C. Code §1-624.02(a)(4), and that the OEA improperly placed the burden on the Appellant (Employee) to prove that such job sharing, or reduced hours did not occur. On April 30, 2018, DCSC Judge Robert R. Rigsby issued an Order, denying the Petition for Review and upholding OEA's decision. Since OEA Judge Lim did not address Appellant's argument that MPD did not consider job sharing and reduced hours as an alternative to the RIF in his Initial Decision, among other criteria enumerated in the DC RIF statute, Appellant then filed a Petition for Review with the D.C. Court of Appeals.

On March 19, 2019, the D.C. Court of Appeals, again, determined there were additional determinations that OEA still needed to make, and, consequently, issued an Order remanding this matter back to OEA to determine:

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

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

On January 21, 2020, OEA Judge Lim held a teleconference and ordered the parties to submit a stipulation of facts and briefs by a certain date, in which the

parties complied. On May 6, 2020, Judge Lim issued his Initial Decision on Remand, in which he upheld MPD's action abolishing Appellant 's position through a RIF. While Judge Lim found that the Agency had not met its burden to prove that it considered job sharing or reduced hours, he went on to uphold the RIF anyway, finding that the failure to adhere to the requirements of D.C. Code §1-624.02(a)(4) was *not a harmful error* (emphasis added). Appellant then filed a Second Petition for Review with the DCSC, herein referenced as ("2nd PFR") for clarity purposes, alleging that the OEA and Judge Lim's findings were "not supported by substantial evidence in the record as a whole," which would have enabled them to conduct a proper analysis as to whether MPD's failure to meet its burden constituted a "harmful error." Appellant filed a Brief for the 2nd PRF on January 15, 2021. After MPD filed its response, Appellant filed a Reply Brief to the 2nd PFR on April 23, 2021. In Appellant's April 23, 2021, Reply Brief, to his 2nd PFR, he analyzed his arguments in a different way than he had previously done. Appellant relied on the legislative language of the statute and on case law interpreting the statute to illustrate the distinction between substantive and procedural language, its role in determining whether the consideration of job sharing and reduced hours prior to a RIF was mandatory or permissive, and, if it was mandatory, whether the failure to consider it constituted a harmful error. While it is important to distinguish that Appellant put forth a different analysis in his Reply to MPD's Response to his 2nd PFR, the

underlying reason that Appellant set forth that the 2nd PFR should be granted remained consistent. Further, even if Appellant had brought forth a new argument, the Agency has had several opportunities to make any claims that the Appellant is relying on a new argument. Thus, since MPD failed to raise the claim at any point after the DCSC granted Appellant's 2nd PFR, including when it appealed to the DCCA, filed its own PFR with the DCSC, and filed a Brief and Supplemental Brief with the DCSC, it is deemed to have waived any claims that the Appellant relied on a new claim or a new analysis in its April 23, 2021 Reply Brief or any point thereafter.

On July 14, 2021, DCSC Judge Heidi M. Pasichow issued an Order granting Appellant's 2nd PFR of Agency Decision, finding "a clearly erroneous finding of law." Judge Pasichow found that "OEA erred when it considered the 'harmful error' standard. The factors set forth in §1-624.02 are substantive rights that every Employee must be afforded when subject to a RIF." Judge Pasichow reasoned that since "OEA previously found that the MPD failed to properly consider job sharing and reduced hours as an alternative to RIF, as required by §1-624.02(a)(4)," OEA's "decision not to overturn the MPD's dismissal was clearly erroneous when measured against statutory requirements." Accordingly, Judge Pasichow vacated the August 31, 2015, and May 22, 2020, OEA Decisions and remanded the matter back to OEA for further proceedings consistent with the Order.

On August 6, 2021, MPD appealed the DCSC Decision to the DCCA by filing a Notice of Appeal and a DCCA Mediation Screening Statement (MSS). MPD wrote in its MSS that the principal issue on appeal was "[w]hether the Superior Court erred when it decided that a harmful standard error does not apply to DC Code §1-624.02(a)(4)." On September 1, 2021, the DCCA ordered MPD to show cause why MPD's appeal "should not be dismissed for having been taken from a non-final order." On September 30, 2021, the DCCA dismissed the appeal for "having been taken from a non-final and non-appealable order because damages (benefits, back pay, and attorney's fees) have yet to be calculated." On October 22, 2021, the DCCA sent the Clerk of the DCSC a certified copy of the Decision. The case was then remanded back to Judge Lim at OEA.

On November 17, 2021, the parties held a status conference with Judge Lim and agreed that pursuant to Judge Pasichow's order and DCCA's dismissal of MPD's appeal, Judge Lim had no choice but to order that Appellant be returned to his position with MPD, with restoration of all lost benefits, including, but not limited to, back pay and reasonable attorney fees. The parties agreed to jointly submit the case procedural and substantive history to Judge Lim by December 6, 2021. Judge Lim issued an Order to that effect after the status conference. On January 11, 2022, Judge Lim issued the Second Initial Decision on Remand ("2nd

IDR"), reversing Appellant's RIF and entitling him to back pay, lost benefits, and attorney fees.

On October 18, 2022, MPD filed a Petition for Review with the DC Superior Court, followed a Brief explaining why it believed its PFR should be granted. On March 6, 2023, Appellant filed an updated response brief with the DCSC. The Agency filed a reply brief. On April 5, 2023, Judge Neil E. Kravitz issued an Order requiring the parties to each file a supplemental brief addressing "the extent to which, if at all, the law-of-the-case doctrine constrains the court's authority to decide whether the failure of the Metropolitan Police Department (MPD) to consider job-sharing and reduced hours as required by D.C. Code §1-624.02(a) was subject to harmless-error analysis." The parties submitted their supplemental briefs on May 15, 2023. Judge Kravitz held a status conference and oral arguments soon thereafter. On May 31, 2023, Judge Kravitz granted MPD's PFR and reinstated OEA's Initial Decision on Remand. The Superior Court clarified that there was no need to remand the case back to OEA and the next step would be to appeal to the DC Court of Appeals. After the DCSC ruling, the Appellant appealed this matter to this Court. On August 6, 2021, Appellant filed a Notice of Appeal with this Court.

II. Statement of Facts Relevant to the Issues Submitted for Review

A. FACTUAL BACKGROUND

Appellant Zack Gamble is a former Computer Specialist, DS-0334-12-9, in the Office of the Chief Information Officer ("OCIO") at MPD. *See Administrative Record,* ("Record") p. 146. Appellant began his career with the District of Columbia Government on September 15, 1986, and worked there until he was removed on October 14, 2011, based on a RIF. *Id.* As noted above, on September 14, 2011, Appellant was informed via letter that he was going to be separated from employment due to a RIF that became effective October 14, 2011. *Record* at 75.

Based on the letter, the RIF was the result of an Agency realignment and shortage of work. *Record* at 364. Appellant was one of fourteen (14) Appellant s who were separated due to the RIF. *Id.* Prior to the RIF, the Agency did not consider job sharing or reduced hours for the Appellant. In the IDR, Judge Lim found that the "Agency failed to meet its burden of proof that it considered job sharing or reduced hours when it implemented its RIF." *See IDR*, p. 3. The Agency never approached Appellant to inquire about or determine whether he had the skill set for one of the new Information Technology positions that were created when Appellant's Computer Specialist position was abolished. Had the Agency approached him, it would have determined that Appellant has a solid information technology background and was just as capable of performing the tasks for one of

the positions as some of the individuals they hired to fill those positions, as several of those job duties encompassed duties that the Appellant was previously performing. Further, Appellant asserts that when the new Agency director came aboard prior to the RIF, the new director began giving some of his work to a new contract employee, who would consult Appellant on how to do the work assignments. Appellant further asserts that after the RIF, his work was transferred to that same contract employee, who was hired into one of the new full-time positions. Approximately one (1) year after Appellant's improper RIF from MPD, he obtained an information technology position with another DC government Agency, despite MPD's assertion and the Judge's finding in the IDR that the Appellant only had the skills for his current computer specialist position, but not for an information technology position. Appellant asserts that he is still employed as a full-time information technology specialist with the DC government Agency that he joined in 2012.

B. REALIGNMENTS AND REDUCTIONS IN FORCE

MPD is governed by the District Personnel Manual and is a subordinate Agency of the Executive Office of the Mayor. *See District Personnel Manual, Part II, Chapter 1, Sections 1.6 and 1.7, Record* at 51. When an agency of the District of Columbia Government conducts a realignment and RIF, there are numerous steps and procedures the agency must follow prior to conducting the realignment

and RIF. Those steps are laid out in the RIF regulations, which are found in D.C. Code §1-624.02 and §1-624.04. They are also laid out in the 2008 District of Columbia Reorganization and Realignment General Information Guide, published by the District of Columbia Department of Human Resources ("DCHR"). *Record* at 55-71. It is well-settled law that if there is any inconsistency between the statutory law and District government regulations that statutory law trumps the regulations.

When conducting a RIF based on a realignment in the District, an agency must comply with D.C. Code §1-624.02(a), which states:

> **(a)** Reduction-in-force procedures shall apply to the Career and Educational Services, except those persons separated pursuant to §1-608.01a(b)(2), and to persons appointed to the Excepted and Legal Services as attorneys 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;
> **(2)** One round of lateral competition limited to positions within the Appellant 's competitive level;
> **(3)** Priority reemployment consideration for Appellant s separated;
> **(4)** Consideration of job sharing and reduced hours; and
> **(5)** Appellant appeal rights.

D.C. Code §1-624.02(a). As stated therein, an agency is required to consider job sharing and reduced hours prior to conducting a RIF.

Summary of Argument

The Metropolitan Police Department did not consider Job Sharing or Reduced Hours prior to issuing a RIF to Appellant Gamble, in violation of the RIF procedures outlined in DC Code §1-624.02(a)(4). In OEA's Initial Decision on RIF Appellant's appeal on July 7, 2015, OEA found that MPD failed to consider job sharing and reduced hours. On July 14, 2021, DC Superior Court Judge Heidi Pasichow granted Appellant's Second Petition for Review, holding that "OEA erred when it *considered* the 'harmful error' standard" because "[t]he factors set forth in §1-624.02 are substantive rights that every employee must be afforded when subject to a RIF." *Gamble v. OEA, 2020 CA 003074 P(MPA).* While the statute does not specify the Employee's remedy if the Agency violates §1-624.02 prior to a RIF, the statute would be rendered ineffective if the RIF is allowed to go through despite the Agency's misconduct. This would set an untenable precedent that District government agencies would not have to be concerned about protecting the rights of rank-and-file employees.

Further, under the Law of the Case Doctrine, a Judge or fact-finder is required to adhere to a previous ruling by the same court, except when an extreme miscarriage of justice would occur. Denying vulnerable District government employees mandatory substantive rights that DC legislators put into the DC Code to protect them rises to that level, so Judge Pasichow was justified in issuing her

decision, once she realized the gravity of the mistake concerning the harmful error standard.

However, Judge Kravitz' decision which reversed Judge Pasichow's Decision did not adhere to the Law of the Case Doctrine because Judge Pasichow was not presented with a grave error or miscarriage of justice. Rather, his Decision largely relied on previous decisions concerning the same RIF, in which the none of the judges were presented with the arguments that caused Judge Pasichow to grant Appellant's PFR and remand the case back to OEA, which led to OEA Judge Joseph Lim rescinding Appellant's RIF in his Second Decision on Remand.

Finally, the Agency has waived any claims that Appellant did not focus on substantive vs. procedural rights until its 2nd PFR because the Agency had numerous opportunities to raise that argument in its own Petition for Review before the DC Superior Court and failed to do so.

III. ARGUMENT

The DC Superior Court erred when it overturned Judge Heidi Pasichow's July 14, 2021, Order Granting Appellant Gamble's PFR of OEA's Decision. Judge Pasichow relied on the appropriate legal standard and adequately discussed her analysis and rationale for the Decision she reached during the Discussion portion or her Order. See *Pasichow Order, p. 3-5*.

In Judge Pasichow's Decision, she found that "OEA erred when it considered the 'harmful error' standard" because the Reduction-in-Force ("RIF") procedures enumerated in DC Code §1-624.02 are **substantive rights** (emphasis added) and, as a result, the Agency and the District government are **required** (emphasis added) to follow the steps listed in that statute. The arguments that Judge Pasichow relied on when granting Appellant's 2nd PFR had not previously been made by Appellant or the other employees who were subject to the same RIF. OEA had already previously found that MPD did not consider job sharing or reduced hours, as required by the statute. Thus, when Judge Pasichow found that "OEA's decision not to overturn the MPD's dismissal was clearly erroneous when measured against statutory requirements," she had the benefit of relying on the analysis that Appellant outlined in his 2nd Petition for Review, particularly his reply brief. This is where Appellant went into detail about substantive vs. procedural rights and explained how this Court previously held that substantive rights are mandatory while procedural rights were permissive. *District of Columbia v. King, 766 A.2d 38, 47 (D.C. 2001).* Appellant then used the statutory language in DC Code §1-624.02(a)(4), when analyzing the difference between mandatory language, such as "shall," and permissive language, such as "may," and supporting this analysis by citing to well-regarded cannons of legislative interpretation, along with case law, such as *DC v. King*.

Thus, Judge Neil Kravitz erred when he reversed Judge Pasichow's Decision, while largely relying on cases from the same RIF action in which the rationale that Judge Pasichow relied on was never presented in those cases. *Kravitz Order, p. 8, May 31, 2023*. Judge Pasichow was the first judge that Appellant or any of the RIFed employees presented with the argument that the statutory language was mandatory and not permissive, and that was the determining factor in whether the Agency committed "harmful error."

A. It was Improper for the AJ to Apply the Harmful Error Standard

Appellee MPD argued that D.C. Code §l-624.02(a)(4) "provides only that the RIF procedures should include 'consideration of job sharing and reduced hours,' but does not include language making it an entitlement. This is not a meritorious argument as the key language in D.C. Code §l-624.02(a)(4) is mandatory not permissive. In using the *King* case to illustrate its point, the Agency insists that "*King* is distinguishable from the instant matter because the language of the two statutes is different, one providing an entitlement and the other not. *Agency's Opposition Brief; D.C. v. King, 766 A.2d 38, 44 (D.C. 2001).* In that instance, D.C. Code §1-624.05(d) clearly provides that "an employee ... shall be *entitled*. ..." (emphasis added). However, D.C. Code §l-624.02(a)(4) includes no such language."

This reasoning is flawed, however, because the Agency improperly focuses on the word “entitled” instead of the word “shall,” which is used in both statutes. It is general knowledge that “shall” has long been a mandatory term in legislative drafting throughout this nation. "In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. *People v. O'Rourke, 124 Cal. App. 752, 759 (Cal. App. 1932).*

“When used in statutes, contracts, or the like, the word "shall" is generally imperative or mandatory.” *Independent School Dist. v. Independent School Dist., 170 N.W.2d 433, 440 (Minn. 1969).* When lawmakers want to use permissive language, they generally use the permissive term “may.” When lawmakers want to use mandatory language, they use the term “shall.” The language of both aforementioned DC Code statutes is mandatory, not permissive. Thus, even though the RIF statute refers to D.C. Code §l-624.02(a)(4), the argument that the Appellant outlines in his Brief stands and OEA AJ Lim was correct in determining that job sharing, and reduced hours are required under DC statute.

B. The AJ’s Decision that the Agency’s Failure to Consider Job Sharing and Reduced was Harmless was Erroneous and Not Based on Substantial Evidence

OEA Administrative Judge Lim's ruling that MPD's failure to consider job sharing and reduced hours was harmless does not comport to the facts of this case. MPD has contended that OEA "considered testimony," but the testimony that OEA considered was obtained before the current questions concerning "job sharing" and "reduced hours" were before Judge Lim or the OEA Board. Thus, for the Agency to validly assert that the AJ "considered testimony," the AJ would have had to have considered testimony after the current questions related to "job sharing" and "reduced hours" were before him, which did not happen. The Appellant would have presented additional evidence during the hearing phase in 2017-2018 had he been put on notice that he could prevail by showing that job sharing and/or reduced hours were pertinent issues in deciding this matter.

Appellee contends that Judge Lim properly applied the Harmless Error Standard when he analyzed MPD's failure to consider job sharing and reduced hours. In MPD's recent PFR before the DCSC, it presented a new argument, ten (10) years after the RIF, that the RIF was done pursuant to the Abolishment Act. *Appellant DCSC Response Brief at 21*. Appellant Gamble has illustrated that the standard surrounding job sharing and reduced hours was appropriately applied in OEA's 2nd IDR. MPD did not issue the RIF pursuant to the Abolishment Act and, even if it did, it waived that argument by not presenting it prior to its Oct 18, 2022, brief, ten (10) years after the RIF occurred. This should not be confused with

Appellant's recent analysis of mandatory vs. permissive rights because MPD has a statutory duty to perform certain functions, while the Appellant does not.

C. The Reduced Hours Required By DC Municipal Regulation §2405.8 and DC Code §1-624.02(A)(4) was a Harmful Error

In Judge Pasichow's July 14, 2021, Decision and Order, she ruled in favor of Appellant's argument that the OEA mistakenly applied the "harmful error" standard. In granting the Appellant's Petition for Review ("PFR") Judge Pasichow wrote, "When an Employee is separated from employment pursuant to an RIF, steps set forth in DC Code §1-624.02(a) must be followed. If they are not followed, then the RIF dismissal may subject to reversal." The Agency does not dispute that it did not follow the aforementioned DC Code provision. Rather, it argues that it did not have to because "the Appellant 's entire competitive level was eliminated." *See MPD Brief* at 12. While the Decision in the PFR focused on whether the provisions in DC Code §1-624.02(a) are "procedural" or "substantive" rights, the Agency chose to focus on the competitive level of the Appellant's position at MPD, without adequately addressing whether the Appellant's right to a consideration of job sharing and reduced hours was "substantive" and, thus, a right to which the Appellant was "entitled, versus as "procedural" right, in which a party is not entitled to the right.

In its PFR Decision, this Court agreed with Appellant's contention that this case is similar to *District of Columbia v. King*, 766 A.2d 38, "in which the court considered if the 'harmful error' standard should be applied to instances involving substantive, as opposed to procedural rights." While the King case dealt with DC Code §1-624.08(d) regarding competition level, the key takeaway from King is establishing the difference between a substantive right and a procedural right. MPD continuously asserts that specific facts of this case render the Appellant's substantive rights under King moot because "neither job sharing nor reduced hours were viable alternatives to [the] RIF." *MPD Brief* at 16. It is not possible for the Agency to know whether they were viable alternatives since they were never considered. This Court focused on the mandatory language in the DC RIF statute when it found, in the Appellant's preceding PFR, that the "statute clearly reads, 'reduction in force procedures *shall* apply to the Career and Educational Services … and *shall* include….' §1-624.02(a). Should and shall are not the same. To the contrary, by the Court's measure "shall" and "entitled" are much closer than "shall" and "should." So, the steps within §1-624.02(a) are substantive as opposed to procedural," and must be afforded to every Employee. MPD's arguments do not address this issue. Therefore, the Decision that OEA erred when it considered the "harmful error" standard was correct and OEA properly reversed the RIF when it applied the correct legal stand on the 2nd IDR.

While District of Columbia Municipal Regulation ("DCMR") §2405.8 states that, "[t]he 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," that requirement, established in the DCMR, does not supersede an Agency's obligations established by the D.C. Code. It has been established that the Agency was obligated under D.C. Code §1-624.04(a) to consider job sharing and reduced hours prior to RIFing the Appellant. However, the Appellant meets both the criteria outlined in the DC Code and the criteria outlined in the DCMR, so either one will suffice.

Appellant reasserts that the Agency's failure to conduct the RIF in accordance with D.C. Code §1-624.02(a)(4) constitutes harmful error. D.C. Code §1-624.02 governs the conducting of a RIF in the District of Columbia. Its provision on the process and procedures of a RIF are mandatory and a failure to comply with such procedures must be considered harmful error. In his Initial Decision on Remand, Judge Lim found that the Agency failed to consider job sharing and reduced hours in accordance with D.C. Code §1-624.02(a)(4). Yet, he found that the Agency's failure to consider job sharing and reduced hours was not "harmful" because the separated Appellant s were the only members of their "competitive level," their former "positions were abolished," and their "technical skills and/or certifications did not meet the new job requirements." *Record, Initial*

Decision on Remand, p. 9. While the Agency continues to rely on this argument, it is contrary to both the applicable case and statutory law.

D. The Boone and Gamble Cases are not Analogous

The Agency's analysis of relying on the DCSC's analysis in the *Boone v. MPD* ("Boone 2"), 2018 CA 006783 P(MPA), is flawed because this instance case prevailed due to the DC RIF statute on job sharing and reduced hours being codified as a substantive right. While the facts are similar, although not identical, Boone did not argue that the statutory language contained mandatory language, specific the word "shall," making the provisions of the RIF statute mandatory and not permissive. The Agency incorrectly contends that "Mr. Boone's counsel made the very same arguments in *Boone* 2 that were asserted in *Gamble* 2." *MPD Brief* at 15. This is not true, as Mr. Boone's counsel never addressed the issue of whether the statutory language was mandatory or permissive. Thus, the Agency's argument that "the OEA Administrative Judge's determination that consideration of job sharing or reduced hours did not impact MPD's decision to effectuate a RIF" is flawed because counsel in *Gamble* 2 prevailed on an argument that was not made in *Boone* 2.

The Agency errs by relying on OEA's analysis in the first IDR by considering the outcome for another employee who was subjected to the same RIF as Appellant. OEA Judge Lim states, "[i]t should also be noted that in another

matter involving Appellant ’s fellow co-worker, Darryl Boone, involving the same facts and testimony, the District of Columbia Superior Court affirmed the finding and conclusion that failure to consider job sharing and reduced hours was harmless error where the elimination of all the jobs in the OCIO [Office of Chief Information Officer] precluded the options of “job sharing” or “reduced hours.” *See Initial Decision on Remand*. Comparing these two Appellant s was an error because they are not similarly situated and counsel in the cases raised different issues in the PFR’s.

The Agency also repeatedly writes that the Appellant was not qualified for the new IT positions, which is not accurate. Even though both Appellant Zack Gamble and his former colleague Darryl Boone were two (2) of the fourteen Appellant s RIFed by MPD, all of the Appellant s did not hold the same positions or perform the same job functions. They merely worked in the same division. Many of the Appellant s who were RIFed did not hold computer specialist or information technology related positions. While both Appellant and Darryl Boone held computer specialist positions at MPD, even the Agency’s Chief Information Officer (“CIO”), Barry Gersten, acknowledged in his testimony that Appellant’s duties were broader than Boone’s. Gersten said that “Boone worked on mainframe,” which “had been replaced with other new technologies… but Mr. Gamble [Appellant] was working on some systems that we [currently] had.” *See*

Initial Decision on Remand, p. 8. Additionally, Appellant held a grade 12 computer specialist position that was abolished for a grade 12 information technology position. The Agency then asserts without basis that Appellant was not able to do Microsoft duties, based on his lack of a certification, despite Appellant's previous experience doing that type of work.

In reaching his *Initial Decision on Remand,* Judge Lim relied, in large part, on the following testimony of Diana Haynes-Walton[2]:

Question: But there was nothing requiring the positions occupied by individuals to be abolished; correct? The 14 positions that were occupied by individuals, nothing required you to abolish them in 2011? Nothing changed, correct?

Walton: Well, what changed was Mr. Gersten[3] 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. *See Administrative Record,* p. 112-113, *Initial Decision on Remand,* p. 9.

Based on Ms. Walton's testimony, Mr. Gersten's decision was based on the title of the positions, which were the same grade, but not on an assessment of whether Appellee had the requisite skill set to perform the job duties listed in the IT Specialist job description. Rather, CIO Gersten improperly assumed that if Appellant did not currently have the IT Specialist title or an Information

[2] Diana Haynes-Walton was MPD's Director of Human Resources when the hearing in this matter took place before OEA Judge Joseph E. Lim.
[3] Barry Gersten was hired as the Chief Information Officer of MPD's Office of Information Technology in September 2010 and was in the position when the hearing in this matter took place before OEA Judge Lim.

Technology certification that was not a requirement, then he must not be able to perform the IT Specialist position duties and did not have the ability to learn any additional skills through training. This was a false assumption.

However, OEA Judge Lim relied on this false assumption, as well. Judge Lim stated that, "based on the evidence adduced at the hearing, I make the following additional findings of fact: The separated employee was a member of a competitive level, Computer Specialist DS-0334-12, where all its positions were abolished; and his technical skills and/or certifications did not meet the new job requirements. I also find that Employee failed to exhibit the required technical proficiency or obtain the certification required for positions created after the realignment." This finding of fact is not based on substantial evidence, as Appellant's current position as an IT Specialist with a District government agency, which he obtained approximately one (1) year after the MPD RIF and has held for the past nine (9) years illustrates that Appellant is able to perform IT Specialist duties. The Judge would have had this information if he conducted an additional fact finding after the case was remanded back to him, as the hearing in which his facts were based was held prior to the case being remanded to address the issues of "job sharing" or "reduced hours," which neither the Judge nor the parties focused on during the hearing. Fortunately, this Court reached the correct Decision in the Appellant's 2nd PFR, as did OEA in the 2nd IDR. Since the Court found that job

sharing and reduced hours were substantive rights, it did not have to decide whether Appellant was qualified for the new position. However, Appellant includes these arguments in response to Appellee's arguments to the contrary in case the Court addresses this aspect of the argument.

E. Substantial Evidence Standard

Further, as noted earlier, "findings of fact are only to be affirmed if those findings are supported by substantial evidence in the record which can be relied upon." *See Murchison v. D.C. Dept. of Pub. Works*, 813 A.2d 203, 205 (D.C. 2002). The Judge's findings of fact in the IDR, which the Agency relies on throughout its brief, were not supported by substantial evidence. In addition, had the Judge held a fact-finding hearing *after* the DC Court of Appeals remanded the case back to him, Appellant would have been able to present evidence that he performed, at least, some, if not many, of the duties that were transferred to one or more individuals in the new IT Specialist positions (emphasis added). The Agency's decision to transfer some of Appellee's duties to the new employee is evidence that the Agency was aware that the Appellant was able to perform, at a minimum, some of the job duties of the new IT Specialist positions. Thus, if the Agency had considered "job sharing" or "reduced hours," a reasonable person can conclude that the Appellant would have qualified to work in one of those capacities. Moreover, Appellant's ability to obtain a full-time IT Specialist position

with another DC government agency approximately one (1) year after the RIF, and continuously hold that position through the present time, is further evidence that had MPD considered job sharing or reduced hours, it would have reached a different conclusion.

The error of failing to consider job sharing or reduced hours was clearly harmful, as Appellant lost his job and his livelihood. To determine that such a failure is not harmful ignores the clear evidence and facts that Appellant lost his job due to the Agency's failure to comply with the RIF requirements in the D.C. Code. No evidence was ever put forth by the Agency that job sharing, or reduced hours would not have prevented the RIF of at least some of the employees.

Furthermore, the Judge seems to assume, without pointing to any supporting findings, guidance or law, that the job sharing or reduced hours contemplated in the D.C. Code §1-624.02(a) was limited to the Appellant's specific job, positions or competitive levels. No place in the statute does it specify how job sharing or reduced hours is to be applied. The Agency had the discretion to apply that aspect of the Statute as it saw fit, whether it be considering job sharing and reduced hours in the specific competitive level, or throughout the Agency as a whole. Here, since the Agency never considered job sharing or reduced hours, it is impossible to know if such actions would have prevented Appellee's RIF.

CONCLUSION

Thus, the DC Superior Court erred when it granted the Metropolitan Police Department's Petition for Review and reinstated OEA's May 6, 2020 Initial Decision on Reprimand. In OEA's August 31, 2015 Initial Decision, it found that MPD failed to consider job sharing and reduced hours, prior to issuing a RIF to Appellant Gamble, so that issue is not in dispute. It is also not in dispute that the RIF procedures outlined in DC Code §1-624.02(a)(4) requiring the Agency to consider job sharing and reduced hours prior to issuing a RIF are mandatory and not permissive. DC Superior Court Judge Heidi Pasichow gave a detailed analysis on substantive (mandatory) versus procedural (permissive) rights in her July 14, 2021 Decision, which granted Appellant's Second Petition for Review and rescinded his RIF.

In DC Superior Court Judge Neil Kravitz' May 31, 2023 Decision, reinstating Appellant's RIF, he does not dispute that the RIF procedures outlined in DC Code §1-624.02(a)(4) are substantive rights that the Agency is required to follow prior to a RIF. Rather, his disagreement is with "the proposition that a violation of a 'substantive right' in the RIF statute requires automatic reversal of a termination decision." However, even if Judge Pasichow was not *required* to automatically reverse Appellant's termination, she is not prohibited from doing so. As Judge Kravitz noted in his Decision on p. 7, the case law on this issue is "very

thin." Judge Pasichow supports her Decision that substantive rights are not subject to a harmless error review in her Order's analysis of both applicable case law and statutory authority. Contrarily, Judge Kravitz opines that "a person ought to be no less entitled to receive the benefits of procedural rights guaranteed by an applicable statute than to profit from substantive rights protected by the same law" on p. 8 of his Decision. This statement is an opinion that is not supported by case law or statutory authority. Moreover, Judge Kravitz' statement seems to be an argument about fairness and if this Court is going to take fairness into account, it is much more reasonable to opine that the DC legislature was concerned with fairness and protecting the due process rights of rank and file DC government employees against powerful government officials and agencies when it enacted the RIF requirements in DC Code §1-624.02(a)(4). Based on Judge Pasichow's findings, she was within her rights to overturn the Agency's RIF.

While her Decision is solidly supported by the facts, case law, the applicable statutes and the cannons of legislative interpretation, even if her Decision was not as solid, the Law of the Case Doctrine would apply, which requires a judge or fact-finder to adhere to a previous ruling by the same court, except when an extreme miscarriage of justice would occur. If applied correctly, this doctrine should have significantly constrained Judge Kravitz's authority to *redecide* whether MPD's failure to consider job-sharing and reduced hours was subject to harmless-error

analysis, as his colleague on the same Court, Judge Pasichow, had already decided that issue.

Based on the high burden required to meet an exception for the Court to override the law-of-the-case doctrine, that burden was not met in this case. There was not an extreme miscarriage of justice that justified Judge Kravitz failing to adhere to his colleague's previous ruling. Therefore, Judge Kravitz erred when he *redecided* the issue of whether MPD's failure to consider job-sharing and reduced hours was subject to the harmless-error analysis, as the law-of-the-case doctrine prohibited him from doing so.

Further, while DC Code §1-624.02 does not specify the Employee's remedy if an Agency violates the statute prior to a RIF, the statute would be rendered ineffective if the RIF is allowed to go through despite the Agency's misconduct. This would set an untenable precedent, as there would be no accountability if District government agencies refuse to protect the legally mandated rights of rank-and-file District government employees. As noted earlier, none of the judges who denied Petitions for Review from other employees subjected to the same RIF were presented with the substantive vs. procedural rights arguments that Judge Pasichow was presented with and how that determination impacts the ability or necessity to consider the harmful error analysis.

WHEREFORE, Appellant respectfully submits that this Court should reverse the DC Superior Court's May 31, 2023 Decision granting MPD's Petition for Review, affirm the DC Superior Court's July 14, 2021 Decision, and reinstate the DC Office of Employee Appeals' Second Decision on Remand, which rescinded Appellant's RIF, awarded him back pay and lost benefits, and gave him the option to request the agency to pay his attorney fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of December 2023, a copy of the foregoing "Appellant Zack Gamble's Brief" was served electronically on:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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No. 23-CV-557

Case Number(s)

12/20/2023

Date