No. 23-CV-557

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ZACK W. GAMBLE,
APPELLANT,

v.

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT;
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT

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STATEMENT OF THE ISSUES

In 2011, the Metropolitan Police Department ("MPD") reorganized its information technology office and conducted a reduction in force ("RIF"). Zack Gamble's position was one of two in his competitive level, and both positions were identified for abolishment through the RIF. Before the Office of Employee Appeals ("OEA"), MPD argued that this RIF had been conducted under the Abolishment Act, which requires limited procedures, rather than the General RIF statute. But the OEA concluded that the General RIF statute applied, including its requirement to consider job sharing or reduced hours for the employees terminated in the RIF. MPD had not considered those measures. The Administrative Judge also found, however, that MPD's failure to consider those measures was harmless because Gamble's entire competitive level had been abolished and there were no positions in which Gamble could job-share or work reduced hours. The Superior Court ultimately affirmed, finding MPD's failure to consider job sharing and reduce hours to be harmless. The issues on appeal are:

1. Whether the OEA and Superior Court correctly applied the harmless-error standard, consistent with the RIF regulations and supported by the factual findings.

2. In the alternative, whether the RIF may be upheld under the Abolishment Act, which does not require consideration of job-sharing or reduced hours.

STATEMENT OF THE CASE

Gamble was separated from his position as a Computer Specialist at MPD on October 14, 2011. Supplemental Appendix ("SA") 13. On November 11, 2011, he timely appealed his termination to the OEA. SA 7. The Administrative Judge ("AJ") rejected MPD's argument that the Abolishment Act applied but upheld the RIF under the General RIF statute. Appellant's Appendix ("App.") 60-61 (AJ's Initial Decision, Aug. 31, 2015). Gamble sought review and both the OEA Board and the Superior Court upheld the RIF. App. 42 (Board's Opinion, Mar. 7, 2017), 34 (Superior Court's Order, Apr. 30, 2018). Gamble appealed to this Court, and on March 19, 2019, this Court remanded the case to the OEA, as requested by MPD with Gamble's consent, for additional findings. SA 76-77; App. 32 (Order).

On remand, the AJ again upheld the RIF, finding that MPD did not consider job sharing or reduced hours but that that error was harmless. App. 21 (Initial Decision on Remand, May 6, 2020). Gamble sought review, and on July 14, 2021, the Superior Court remanded to OEA, finding the harmless-error standard was inapplicable to a "substantive right." App. 15, 17-18. MPD appealed to this Court, and on September 30, 2021, the appeal was dismissed as taken from a nonfinal order. SA 80.

On remand and consistent with the Superior Court's order, the AJ ordered Gamble reinstated. App. 11 (Second Initial Decision on Remand, Jan. 11, 2022).

MPD sought review, and on May 31, 2023, the Superior Court reversed and vacated the Second Initial Decision on Remand and reinstated and affirmed the Initial Decision on Remand, which had applied the harmless-error standard. App. 1. Gamble timely appealed to this Court on June 30, 2023.

STATEMENT OF FACTS

1. Legal Framework.

The Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-601.01 *et seq.*, includes two processes for conducting a RIF. One process, under the General RIF statute, D.C. Code § 1-624.02, requires procedures that 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 employee's competitive level;
>
> (3) Priority reemployment consideration for employees separated;
>
> (4) *Consideration of job sharing and reduced hours*; and
>
> (5) Employee appeal rights.

Id. § 1-624.02(a) (emphasis added). An employee "identified for separation" through a RIF "may file an appeal with the Office of Employee Appeals" and challenge whether the "agency has incorrectly applied the [statutory] provisions . . . or the rules and regulations issued pursuant to [the CMPA]." *Id.* § 1-624.04.

The second RIF process is the Abolishment Act, *id.* § 1-624.08, which was added to the CMPA as permanent legislation in 2000.[1] The Abolishment Act provides for a more streamlined approach, in which the agency must provide "one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level." *Id.* § 1-624.08(d). Review of an Abolishment Act RIF is limited: "Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except" for complaints filed under the D.C. Human Rights Act. *Id.* § 1-624.08(f)(1) (citing *id.* § 2-1403.03). An appeal to the OEA may contest only whether "the separation procedures" of the one round of lateral competition and the 30 days' notice "were not properly applied." *Id.* § 1-624.08(f)(2) (citing subsections (d) and (e)). An agency may use the Abolishment Act only once per fiscal year, before February 1.

An agency can choose which RIF statute to use. It can select the Abolishment Act's streamlined approach with its limited review. Or it may use the additional

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[1] The Council of the District of Columbia originally enacted the Abolishment Act in response to a fiscal emergency as part of the Budget Support Act of 1995. It was re-enacted as temporary legislation several times until, in November 2000, it was enacted by Congress as part of an appropriations act and was amended to apply to fiscal year 2000 and subsequent fiscal years. *See Stevens v. D.C. Dep't of Health*, 150 A.3d 307, 312-15 (D.C. 2016) (detailing the history of the Abolishment Act).

procedures adopted under the General RIF statute. *See Stevens v. D.C. Dep't of Health*, 150 A.3d 307, 318 (D.C. 2016) (noting that the OEA may assume that the agency is using the "streamlined procedures" in the Abolishment Act "unless the agency asserts otherwise"). While the Abolishment Act was enacted originally in response to a fiscal emergency, its use is not limited to fiscal issues. *Id.* at 319 (rejecting "the OEA's interpretation that ties the Abolishment Act to all RIFs that respond to 'times of fiscal emergency' (or to budgetary 'constraints,' 'restrictions,' or 'issues')" as "legally erroneous").

The fact that both RIF statutes remain operable, that an agency may choose which to use, and that the Abolishment Act was not tied to fiscal issues was not fully established until this Court decided *Stevens* in 2016. Before *Stevens*, some agency adjudicators had mistakenly concluded that "a RIF undertaken in response to a fiscal emergency will always qualify as an Abolishment Act RIF." *Id.* at 319 (rejecting this view). So too was there a mistaken belief that "if the District wishes to conduct a RIF that is not for a fiscal emergency, then it must follow the applicable regulations in the [G]eneral RIF statute." *Id*. at 319 n.16 (rejecting this argument).

In an appeal of a RIF, the RIF regulations specify that "retroactive reinstatement of a person who was separated by a reduction in force . . . 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." 6-B DCMR § 2405.7. 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." *Id*. This is similar to the OEA's harmless-error rule, which limits its power to reverse an employing agency's action to circumstances where the agency cannot establish that the error was harmless:

> Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

6-B DCMR § 631.3 (2012).[2]

2. In 2011, MPD Conducts A Reduction-In-Force, Gamble's Position Is Abolished, And The Office Of Employee Appeals Holds An Evidentiary Hearing.

In 2011, after an assessment of staffing and functions, MPD's Office of the Chief Information Officer was restructured to modernize and streamline its technologies and increase the skillsets of its employees. App. 23. As part of that

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[2] In 2021, the OEA's rules were amended, but the harmless-error standard remains substantively the same. *See* 6-B DCMR § 634.6 ("Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was a harmless error."); *id.* § 699.1 (defining "harmless error" as "an error in the application of a District agency's procedures, which did not cause substantial harm or prejudice to the employee's rights, or significantly affect the agency's final decision to take the action.").

process, MPD conducted a RIF to reclassify and abolish positions no longer needed. SA 1. Gamble was a Computer Specialist in that office and was terminated by the RIF. SA 13-14. He was part of a competitive level with one other computer specialist; both positions were identified for abolishment. SA 3.

Gamble challenged his termination before the OEA. SA 7. In 2013, the parties submitted briefs on the question of which statute governed this RIF. SA 4 (Post Conference Order). MPD argued that the Abolishment Act applied, explaining that the act does not require a budgetary reason to conduct a RIF. SA 18-22. Gamble argued that the Abolishment Act did not apply because the RIF was conducted for non-budgetary reasons, and that the procedures in the General RIF statute governed this action. SA 27-30. In February 2014, the AJ agreed with Gamble, finding that the General RIF statute was the "more applicable statute to govern *this* RIF" because "budgetary issues were never the stated rationale for the RIF." SA 32 (emphasis in original) (citing *Stevens v. D.C. Dep't of Health*, No. 2010-CA-003345-P(MPA) (Super. Ct. Feb. 14, 2014)).

Discovery proceeded, and a consolidated evidentiary hearing, covering this case and several others involving the same RIF, was held in July 2015. SA 62 (Tr. 1). Several individuals testified, including MPD's Director of Human Resources, Diana Haynes-Walton, SA 69 (Tr. 68), and the Chief Information Officer, Barry Gersten, SA 63-64 (Tr. 29-30). Haynes-Walton testified that through

the restructuring, entire job series were abolished to allow for new positions at higher skill levels to be created. SA 70, 72 (Tr. 70-71, 113).

Testimony revealed that Gamble did not have the skills for those higher-level positions. SA 65 (Tr. 50-52). Gamble lacked certifications required to work with Microsoft applications. SA 65-66 (Tr. 50, 57) (referring to a Microsoft Certified Software Engineer). Gamble's skills did not match the needs of the office. SA 65 (Tr. 51-52) (describing his skills as building utilities rather than bigger systems that link and share information).

Neither Haynes-Walton nor Gersten were aware if, before the RIF, MPD considered job sharing or reduced hours for the affected employees. SA 68, 71 (Tr. 63, 94-95).[3]

3. The OEA Upholds The RIF; The Board And The Superior Court Deny Gamble's Petitions For Review; This Court Remands.

Gamble challenged MPD's compliance with several of the General RIF requirements, including that MPD did not consider job sharing or reduced hours. SA 55-56 (Gamble's brief); *see* D.C. Code § 1-624.02(a)(4). The AJ issued an initial decision in August 2015 upholding the RIF. The AJ found that the retention register accurately determined Gamble's retention standing; that Gamble was in a

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[3] Gamble's factual assertions in his brief, beginning on the bottom of page 16 through 17, are unsupported by the record, as reflected in the lack of record cites. *See* SA 74-75 (Tr. 194-99) (Gamble's testimony); D.C. App. R. 28(a)(8) (requiring a statement of facts to contain "appropriate references to the record").

competitive level with one other employee; and that both positions in that level were abolished in the RIF. App. 59. The AJ explained that when, as here, an entire competitive level is abolished, the lateral competition requirements in 6-B DCMR § 2408.1 are inapplicable. App. 64. The AJ rejected Gamble's various arguments that the RIF was invalid but did not address his argument about job sharing or reduced hours. App. 54-66.

Gamble sought review before the OEA Board, which denied his petition for review. App. 42-53. As relevant here, Gamble argued that the AJ did not address his argument on job sharing and reduced hours. App. 45. The Board rejected that argument, explaining that the requirement was discretionary rather than mandatory, relying on the regulation that uses the word "may" in describing the agency's obligation to order job sharing or reduced hours. App. 48 (citing 6-B DCMR § 2404.1).

Gamble petitioned for review before the Superior Court, arguing, among other things, that the RIF was "not executed in accordance with the law because MPD did not consider job sharing or reduced hours for the position as required under the RIF Statute, D.C. Code § 1-624.02(a)(4)." App. 36. The Superior Court (Judge Rigsby) rejected Gamble's arguments. App. 36-41. In relevant part, the court explained that the "RIF statute states that '[r]eduction-in-force procedures . . . *shall* include . . . consideration of job sharing and reduced hours . . .'" App. 39. But here, where "the

entire competitive level . . . was abolished by the RIF," it was "unnecessary to pry into the agency judgment to determine whether lesser measures such as job sharing or reduced hours were sufficiently considered." App. 40.

Gamble appealed to this Court. *See Gamble v. D.C. Off. of Emp. Appeals*, No. 18-CV-604. MPD moved, with Gamble's consent, to remand to the OEA for additional findings on job sharing and reduced hours. SA 76-77. In March 2019, this Court granted the motion and remanded the case. App. 32.

4. The AJ Issues Additional Findings And Upholds The RIF.

On remand, the AJ issued additional findings to address Gamble's argument that MPD did not consider job sharing and reduced hours. App. 21-30. Relying on testimony from Gersten and Haynes-Walton, the AJ found that MPD "failed to meet its burden of proof that it considered job sharing or reduced hours when it implemented its RIF." App. 24. But the AJ explained that reinstatement following a RIF is permitted only if the agency's error is harmful. App. 25 (quoting 6-B DCMR § 2405.7). "[F]or the error to be considered harmless, the evidence must show that even if [MPD] had considered job sharing and reduced hours, the affected employees would still have been subjected to a RIF." App. 25. The AJ made such a finding based on the testimony that Gamble's entire competitive level was abolished in the RIF. App. 25; *see* App. 29 ("[Gamble] was a member of a competitive level, Computer Specialist DS-0334-12, where all its positions were

abolished"). "Since all the positions were abolished, job sharing or reduced hours were not possible." App. 25.

The AJ further noted that there was "uncontroverted evidence" "that the personnel subjected to the RIF did not have the technical skillset or certifications for the new positions created." App. 26, 29 (finding Gamble did not have "the required technical proficiency or obtain the certification required for positions created after the realignment"). The AJ found "that even if [MPD] had considered job sharing and reduced hours for [Gamble], the RIF would still have occurred." App. 29 (citing OEA's harmless-error standard at 6-B DCMR § 631.3). "Thus . . . based on these particular set of facts, [MPD's] failure to either consider job sharing and/or reduced hours, or more specifically, its failure to meet its burden of proof that it considered such, is harmless error." App. 29. The AJ upheld the RIF. App. 29.

5. The Superior Court Remands, Finding The Harmless-Error Standard Inapplicable; This Court Dismisses MPD's Appeal As Premature; The OEA Orders Reinstatement On Remand.

Gamble sought review in the Superior Court, arguing, as relevant here, that the AJ "mistakenly applied the 'harmful error' standard." App. 17. In July 2021, the court (Judge Pasichow) issued an order agreeing with Gamble. App. 15-20. The court noted that Section 1-624.02(a) provides the required steps for a RIF, and explained that if those steps are "not followed, then the RIF dismissal may [be] subject to reversal." App. 18. In the court's view, the dispositive question was

whether the steps in Section 1-624.02(a) are "'procedural' or 'substantive' rights." App. 18. A right is "substantive," the court said, "if an individual is 'entitled' to it." App. 18. Based on its reading of *District of Columbia v. King*, 766 A.2d 38 (D.C. 2001), the court concluded that the harmful-error standard does not apply "to instances involving substantive" rights. App. 18. The court reasoned that because Section 1-624.02(a) uses the word "shall," which is similar to "entitled," "the steps within Section 1-624.02(a) are substantive as opposed to procedural." App. 18. The OEA therefore "erred when it considered the 'harmful error' standard" and should have "overturn[ed] MPD's dismissal" based on the failure to consider job sharing and reduced hours. App. 18-19. The court did not mention the harmful-error standard in the RIF regulations or the harmless-error standard from the OEA's regulations. *See* App. 18-19. The court remanded to the OEA for further proceedings consistent with its order. App. 19.[4]

MPD appealed the Superior Court's order, but this Court dismissed the appeal "as having been taken from a non-final and non-appealable order." SA 80.

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[4] The Superior Court's order includes a typographical error, ordering vacatur of the OEA decision "entered on August 31, 2015." App. 19. But the August 2015 order was already vacated after this Court remanded the matter in March 2019. *See* App. 32. The order that the Superior Court intended to vacate was the May 22, 2020 OEA order.

In January 2022, the OEA issued its second initial decision on remand. App. 11-14. Given the Superior Court's order, the OEA's only option was to issue an order reversing the RIF and reinstating Gamble. App. 14.

6. The Superior Court Reverses And Reinstates The AJ's Harmless-Error Findings.

MPD sought review by the Superior Court. MPD argued that the harmless-error standard applied and, in the alternative, MPD reiterated its original position that the Abolishment Act should have governed these proceedings, explaining that the Abolishment Act does not require consideration of job sharing and reduced hours. Gamble argued that the court was bound by the law-of-the-case doctrine to adhere to the earlier Superior Court decision (by Judge Pasichow) holding that D.C. Code § 1-624.02(a) is not subject to harmless-error review. App. 2.

In May 2023, the Superior Court (Judge Kravitz) reversed the OEA's Second Initial Decision on Remand and reinstated and affirmed the OEA's Initial Decision on Remand, which had found harmless MPD's failure to consider job sharing and reduced hours. App. 9-10. The court rejected Gamble's argument that it was "constrained by the law of the case doctrine to follow Judge Pasichow's ruling." App. 5. The court explained that the law-of-the-case doctrine is "designed to prevent relitigation of the same issue in the same case," but the doctrine "is discretionary . . . and does not require a judge to make a ruling that is clearly erroneous simply to maintain consistency with a previous ruling made by a different judge." App. 5.

The court listed three reasons to depart from Judge Pasichow's prior ruling. First, the earlier decision "overlooked a municipal regulation that expressly requires harmless error review in these circumstances." App. 6 (citing 6-B DCMR § 2405.7). Second, consideration of whether an error below was "prejudicial is foundational to our system of judicial review." App. 6. The "harmless error analysis required by 6[-]B DCMR § 2405.7—limiting the retroactive reinstatement of persons terminated in a RIF to cases in which harmful error has been found—is thus fully consistent with the long and venerable tradition of harmless error review in our legal system." App. 7. Third, Judge Pasichow's conclusion that harmless-error analysis is inapplicable was "inadequately supported by caselaw and ultimately unpersuasive." App. 7. The court explained that the distinction between substantive and procedural rights is not supported by this Court's case law but was based on dictum from *King*. App. 7. The court also noted that applying the harmless-error standard would allow for consistency among other cases in the Superior Court "stemming from the same RIF." App. 8 (citing cases).

The court next turned to the harmless-error standard. Relying on 6-B DCMR § 2405.7, the court explained that reversal of Gamble's separation was only available "upon a determination that the agency made an error 'of such a magnitude that in its absence the employee would not have been released from his or her competitive level.'" App. 8. The AJ did not make such a finding in his initial decision on

remand, when he first addressed the requirement of job sharing and reduced hours. App. 8. Instead, the AJ found that "the consideration of possible job-sharing and reduced hours . . . would have been futile" because "Gamble's entire competitive level had been abolished through the RIF." App. 8. That finding, the court explained, was "amply supported by substantial evidence in the record," and indeed Gamble "d[id] not challenge" it. App. 9.

As for next steps, the court explained that there was no need to remand the case to the OEA to conduct the harmless-error analysis already completed in the initial decision on remand. App. 9. Instead, "[i]n an effort to end what has to this point been a very inefficient bouncing back and forth among [the] OEA, this court, and the Court of Appeals," the court decided "that the best approach is to reverse [the] Second Initial Decision on Remand and to affirm [the] First Initial Decision on Remand upholding MPD's decision to terminate Mr. Gamble in the RIF." App. 9.

STANDARD OF REVIEW

"The scope of [the] OEA's review of an agency decision is limited to simply ensure that managerial discretion has been legitimately invoked and properly exercised." *D.C. Dep't of Pub. Works v. Colbert*, 874 A.2d 353, 358 (D.C. 2005) (internal quotation marks omitted). In resolving any relevant factual disputes, the OEA applies a preponderance of the evidence standard. 6-B DCMR § 631.1. This

Court "review[s] the OEA's decision, not the decision of the Superior Court." *Stevens*, 150 A.3d at 311-12. The Court "examine[s] the agency record to determine whether there is substantial evidence to support [the] OEA's findings of fact, or whether [the] OEA's action was arbitrary, capricious, or an abuse of discretion." *King*, 766 A.2d at 44 (quoting *Bufford v. D.C. Pub. Schs.*, 611 A.2d 519, 522 (D.C. 1992)). The Court will not overturn factual findings that are "supported by substantial evidence," even if it "may have reached a different result based on an independent review of the record." *Williamson v. D.C. Bd. of Dentistry*, 647 A.2d 389, 394 (D.C. 1994). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hutchinson v. D.C. Off. of Emp. Appeals*, 710 A.2d 227, 230 (D.C. 1998) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

1. This Court should affirm because any error by MPD in not considering job sharing or reduced hours was harmless—Gamble's position would still have been eliminated even if that error did not occur. That is precisely what the OEA found. Gamble's entire competitive level was abolished in the RIF, so there was no position that he could share or work reduced hours in. And he lacked the skills and certifications needed to fill any newly created position. Thus, even if MPD had considered the measures, Gamble would still have been terminated through the RIF.

Gamble's argument that he could have produced additional relevant facts comes too late. He introduced job sharing and reduced hours into this case in his opening brief to the OEA, and he had ample opportunity to produce evidence during the OEA hearing. But he did not. And even now his proffer is inadequate. He does not claim that he was qualified for the positions that remained in the division after the RIF—only that he had *some* of the required skills.

Gamble's next argument, that the harmless-error standard does not apply to "substantive rights," is simply unsupported. Gamble incorrectly equates a statutory requirement with a "substantive right" that defies harmless-error review. But only a limited class of fundamental constitutional errors are exempt from harmless-error standards. The failure to consider the RIF statute's job sharing and reduced hours is not such a fundamental constitutional error. Instead, Gamble relies on one case for his novel rule that "substantive rights" are exempt from harmless-error review—*King*. But *King's* holding fully supports MPD's position here. As Judge Kravitz correctly explained, the sole sentence from *King* that Gamble clings to is dicta.

Finally, this Court should reject Gamble's argument that the law-of-the-case doctrine prevented Judge Kravitz from applying the harmless-error standard. That doctrine is discretionary and does not limit the authority of a court to correct an erroneous ruling. Judge Kravitz detailed three errors from Judge Pasichow's ruling that warranted revisiting whether harmless error applied. In any event, even if the

law-of-the-case doctrine limited Judge Kravitz, it has no effect on this Court's review. This Court reviews the merits, not whether Judge Kravitz's order differed from Judge Pasichow's order.

2. In the alternative, this Court should affirm the RIF under the Abolishment Act. The Act allows for a streamlined process that an agency may use once per fiscal year. The OEA rejected MPD's invocation of the Abolishment Act, finding that to use the Abolishment Act, there must be a fiscal basis for the RIF. But that conclusion is now plainly wrong, as this Court rejected it in *Stevens*. Significantly, the Abolishment Act does not require that the agency consider job sharing or reduced hours. Thus, applying the Abolishment Act would fully resolve this appeal, since Gamble's entire argument for reinstatement rests on MPD's failure to consider those measures.

Gamble argues that MPD forfeited reliance on the Abolishment Act, explaining that while MPD raised it at first before the OEA, it did not re-raise it again until 2022 before the Superior Court. But this Court should excuse any forfeiture here. MPD did raise and litigate the applicability of the Abolishment Act before the OEA. The question of whether the Abolishment Act applies is a pure question of law requiring no further factual development or application of agency expertise. And the outcome is clear-cut under the Abolishment Act. There can be no dispute that the measures at issue in this appeal are not required.

ARGUMENT

I. MPD's Failure To Consider Job Sharing And Reduced Hours Was Harmless.

Gamble's sole argument is that he should be reinstated because MPD did not consider job sharing or reduced hours when it conducted the RIF. But under controlling law, reinstatement is only available if an error by the agency in conducting the RIF was harmful—in other words, that without the error Gamble would not have been terminated. But there was no such harm here. And contrary to Gamble's argument, the mandatory nature of the requirement to consider job sharing and reduced hours does not preclude harmless-error review. Nor does the law-of-the-case doctrine prevent this Court from affirming.

A. The OEA Correctly Applied The Harmful-Error Standard.

The RIF regulations expressly provide that reinstatements in RIFs require an agency's error to be "harmful"—that is, "of such a magnitude that in its absence [the employee] would not have been released from his . . . competitive level." 6-B DCMR § 2405.7. Similarly, the OEA's rules prohibit reversing an agency's actions based on harmless errors. 6-B DCMR § 631.3 (2012). The AJ correctly concluded that there was no harmful error here, finding that the consideration of job sharing or reduced hours would have been futile because Gamble's entire competitive level was abolished and Gamble was not qualified for the remaining jobs. In other words,

even if MPD had considered such measures, Gamble would still have been terminated through the RIF. This is quintessential harmless error.

This Court's decisions confirm the point. For example, in *Dupree v. D.C. Department of Corrections*, 132 A.3d 150 (D.C. 2016), the Court declined to reverse a RIF because correcting the error would have not stopped the employee's termination—the employee "still would occupy a position that was scheduled for abolishment." *Id*. at 161. Accordingly, the Court explained that the error was "harmless and cannot entitle [the employee] to relief." *Id*. (citing 6-B DCMR § 2405.7)). Similarly, in *Harding v. D.C. Office of Employee Appeals*, 887 A.2d 33 (D.C. 2005), this Court rejected an employee's argument that a RIF must be reversed because the agency failed to comply with a mandatory requirement, without regard to whether the error was harmful. The Court explained that the "adoption and application of a harmless error standard is rational, rather than arbitrary or capricious, for it is analogous to the harmless error standard which has been made applicable to judicial proceedings by statute, D.C. Code § 17-305 (2001), and by rule of court." *Id.* at 35 (citing Super. Ct. Civ. R. 61; Super. Ct. Crim. R. 52(a)).

Gamble does not argue that the error here was "of such a magnitude that in its absence [he] would not have been released from his . . . competitive level." 6-B DCMR § 2405.7. Nor could he. No one remained in Gamble's competitive level after the RIF because the entire level was abolished, a fact the AJ correctly found

dispositive in the harmful-error analysis. App. 25-26. The AJ also found that Gamble was not qualified for other positions. App. 26; *cf. Harding*, 887 A.2d at 34 (upholding harmless-error findings where "Harding does not contend, nor can he, that he would not have been separated from the [agency]"). The AJ's factual findings on these points are "binding at all subsequent levels of review." *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999).

Gamble's response regarding the factual record lacks merit. He asserts that he 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." Br. 24 (emphasis added). Relatedly, he asserts that the hearing occurred "before the current questions concerning 'job sharing' and 'reduced hours' were before [AJ] Lim." Br. 24; *see also* Br. 32 (complaining that the AJ did not reopen the record). But the record belies Gamble's assertion. Gamble did not need notice—it was *Gamble himself* who injected "the current questions" on job sharing and reduced hours into this case, raising these issues in 2015 in the initial briefing before the AJ. Br. 24; *see also* SA 55-56 (initial brief to AJ) ("Thus, the Agency's RIF violated D.C. Code § 1-624.02(a)(4) by not considering job sharing or reductions in hours and should be reversed."); SA 71 (Tr. 94) (Gamble's counsel asking about those measures at the hearing); App. 45 (OEA Board noting the issue raised by Gamble). Gamble cannot

claim he was not "on notice" of his own arguments. Nor, tellingly, can he point to anywhere in the record where he sought to reopen the record to introduce additional facts.

Instead, Gamble offers a years-late proffer in his opening briefing before this Court, asserting he "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." Br. 32 (emphasis added). But even if this Court were to consider this belated proffer, it is insufficient to overturn the AJ's finding that Gamble lacked the necessary skills for the remaining and new jobs. The AJ found that Gamble lacked "the required technical proficiency" and the certification "required for positions created after the realignment." App. 29. Gamble's late proffer says nothing about his certifications, if any, or technical proficiency to perform all of the skills necessary for a position that remained or was created after the RIF.

Gamble's final argument on the factual record is an unsupported assertion that the AJ relied "in large part" on the testimony of the director of Human Resources, Haynes-Walton, as well as the title of Gamble's position, to find that he lacked the necessary skills and certification. Br. 30. Not so. The AJ also relied on the testimony of Gersten, the Chief Information Officer, that Gamble lacked the necessary skills and certifications. *See* App. 29; SA 65-66 (Tr. 50-52, 57). But even

if the AJ relied on the testimony of the director of Human Resources, Gamble has not shown that such reliance was clearly erroneous or that the finding was not based on substantial evidence in the record.

B. Gamble's argument that the mandatory nature of the requirement forecloses harmful-error review is unsupported.

Unable to show the type of harm required to satisfy the harmful-error requirement, Gamble focuses almost exclusively on the mandatory language of D.C. Code § 1-624.02(a)(4). Br. 22-23, 27. To be sure, that provision says that RIF procedures "shall" include consideration of job sharing and reduced hours. However, the word "shall" does not definitively establish that a requirement is mandatory in all circumstances. Section 1-624.02(a)(2) provides: "Reduction-in-force procedures *shall* . . . include . . . (2) One round of lateral competition limited to positions within the employee's competitive level." (emphasis added). But when the entire competitive level is abolished, this Court has cited with approval the OEA's interpretation that one round of competition is not required. *See Stevens*, 150 A.3d at 323-24 ("We also defer to the OEA's interpretation that where an employee's entire competitive level is eliminated, there is no one against whom he or she could compete, and therefore that the one-round-of-lateral-competition requirement of § 1-624.08(d) is inapplicable.").

But even if the requirement to consider job sharing and reduced hours is mandatory, that establishes only that failing to consider these measures is an error—

not that the error is harmful in every case. It is the *effect* of an error, not the mandatory language of the statute, that determines whether there is harm. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 734 (1993) (explaining that a harmless-error inquiry "determine[s] whether the error was prejudicial"); *Perez v. United States*, 968 A.2d 39, 93 (D.C. 2009) (noting that determining whether there is "prejudicial effect on the outcome" is similar to asking if there is "'reasonable probability that, but for [the error claimed], the result of the proceeding would have been different'" (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 75 (2004)).[5]

Gamble is wrong that the mandatory language of the statute creates a "substantive right" that is impervious to harmless-error analysis. Br. 22-23. Countless mandatory provisions of law are subject to harmless-error review. The Sixth Amendment, for instance, provides that a criminal defendant "shall" have "the right" "to be confronted with the witnesses against him." U.S. Const. amend VI. Yet violations of the Confrontation Clause are subject to harmless-error review. *See, e.g.*, *Carrington v. District of Columbia*, 77 A.3d 999, 1007 (D.C. 2013). Indeed, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1,

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[5] In passing, Gamble implies that the harmful-error regulation conflicts with the mandatory obligations in D.C. Code § 1-624.02(a)(4). Br. 27 (noting that the regulation "does not supersede an Agency's obligations established by the D.C. Code."). But there is no conflict between the statute and regulation—the harmless-error standard is a longstanding principal of judicial review. *See Harding*, 887 A.2d at 35; App. 7 (Judge Kravitz's order).

8 (1999). Only "a limited class of fundamental constitutional errors" will "'defy analysis by harmless error standards.'" *Id*. at 7 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)); *cf., e.g.*, *Shiflett v. D.C. Bd. of Appeals & Rev.*, 431 A.2d 9, 11 (D.C. 1981) (holding that the failure to comply with a statutory "shall" requirement was harmless error). The consideration of job sharing and reduced hours when conducting a RIF is not a "fundamental constitutional error" precluding harmless-error analysis.

Gamble seeks support for his novel theory in *King*, 766 A.2d 38, but that decision, properly understood, does not aid him. In *King*, the AJ found as a factual matter, and this Court affirmed, that the employing agency wrongly put King in his own competitive level instead of in the same competitive level as other special assistants in his agency. *Id*. at 43. This improper construction of the competitive level "constituted 'harmful error' because Mr. King 'was not released from his position in proper retention order' since he was denied one round of competition," in which he would have been senior to some of the other special assistants. *Id.* at 42 (quoting the AJ's decision). In other words, the agency made an error absent which "the employee would not have been released from his or her competitive level." 6-B DCMR § 2405.7. *King*'s holding is thus perfectly consistent with MPD's position here.

Gamble latches onto a single sentence near the end of *King*: "Since 'an employee's entitlement under RIF regulations is a substantive right and not a procedural right subject to the harmful error standard,' he was improperly denied his right to one round of competition with respect to the positions in his competitive level." *Id*. (quoting *Johnson v. Dep't of Interior*, 21 M.S.P.R. 316, 318 (1984) (citation omitted)). This sentence must be read in the context of the specific facts and issues that *King* involved. *See Evans v. United States*, 122 A.3d 876, 893 (D.C. 2015) ("[B]road language in our opinions must be understood in context." (internal quotation marks omitted)). It cannot be read to mean that *every* mandatory requirement of the RIF regulations is immune to harmless-error analysis. Such a statement would clearly be dicta. *See Alfaro v. United States*, 859 A.2d 149, 154 n.8 (D.C. 2004) ("Language in an opinion" that is "entirely unnecessary for the decision of the case . . . has no effect as indicating the law of the District."). And it would be irreconcilable with 6-B DCMR § 2405.7.

Moreover, the unexplained language in *King* comes from a Merit Systems Protection Board ("MSPB") case, *Johnson*, 21 M.S.P.R. 316, where it was also dicta, as Judge Kravitz correctly noted, App. 7. In *Johnson*, the MSPB found that the agency did not make an error, but it "made out a prima facie case of proper establishment of the separate competitive levels" that the employee failed to rebut. *Johnson*, 21 M.S.P.R. at 319. Thus, there was no need for a harmful-error analysis.

And a review of MSPB cases shows that the harmful-error analysis does not depend on the mandatory nature of the requirement but instead—consistent with the broader jurisprudence of harmless error—requires a determination that the effect of the error was harmful. *See Schroeder v. Dep't of Transp.*, No. DE0351930096-I-1, 1994 WL 24198 at *6-7 (M.S.P.B. Jan. 25, 1994) (stating that "[t]he proper application of the RIF regulations is a substantive right, rather than a procedural requirement" but also explaining that the question is "whether the [employees]' substantive rights were affected by the agency's alleged error"); *see also Hill v. Dep't of Com.*, 25 M.S.P.R. 205, 207-08 (1984) ("[T]here is a difference between technical compliance with the rules governing RIF procedures and substantive entitlements of employees. An error in application of the procedures may affect the employee's rights but, in many cases, because of the presence of particular facts and circumstances, there may be no effect on substantive entitlements. Reversals in the latter cases would lead to illogical and inequitable results which would work an injustice on the federal workforce and mission.").

In short, Gamble's rule that mandatory requirements are exempt from harmless-error analysis is unsupported.

C. The law-of-the-case doctrine did not bar Judge Kravitz from revisiting and correcting an erroneous decision, nor does it bar this Court from affirming.

Gamble raises in his statement of issues whether the law-of-the-case doctrine precluded Judge Kravitz from holding that the harmful-error standard applied after Judge Pasichow had rejected it. Br. 6. This argument is doubly flawed. First, Judge Kravitz was free to depart from Judge Pasichow's ruling. Second, in any event, *this Court* is clearly not bound by that ruling.

The law-of-the-case doctrine "'is discretionary'; '[i]t merely expresses the practice of courts generally to refuse to reopen what has been decided, [but is not] a limit to their power.'" *Nunnally v. Graham*, 56 A.3d 130, 142-43 (D.C. 2012) (quoting *Crane v. Crane*, 614 A.2d 935, 939 n.12 (D.C. 1992)); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990) ("The 'law of the case' doctrine is a prudential rather than a jurisdictional restriction on a court's authority to reconsider an issue."). For the doctrine to apply, the issue "under consideration" must be "substantially similar to the one already raised before, and considered by, the first court," "the first court's ruling [must be] sufficiently final," and "the prior ruling [must not be] clearly erroneous in light of newly presented facts or a change in substantive law." *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 13 (D.C. 2011) (quoting *Tompkins v. Wash. Hosp. Ctr.*, 433 A.2d 1093, 1098 (D.C. 1981)).

Judge Pasichow's ruling that the harmless-error standard was inapplicable does not meet two of those three requirements: it was not sufficiently final and it was clearly erroneous. *See Nunnally*, 56 A.3d at 142-43 n.6 ("[A]n order denying a motion to dismiss . . . is an interlocutory and not a final order and . . . a final judgment is required to sustain the application of the law of the case rule." (quoting *Kumar*, 25 A.3d at 14)). First, this Court, in dismissing MPD's appeal taken from Judge Pasichow's order, ruled it was not final. SA 80. And second, Judge Kravitz detailed three errors in Judge Pasichow's order, including that she "overlooked" the regulations and that the distinction between substantive and procedural rights was inadequately supported by case law. App. 6-7.

But even if the doctrine applied in the Superior Court, it does not restrict this Court's authority. The doctrine applies to courts of "coordinate jurisdiction," *Kumar*, 25 A.3d at 13, not to higher courts. "In an appeal to this court where views of the law expressed by a judge at one stage of the proceedings differ from those of another at a different stage, the important question is not whether there was a difference but which view was right." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 593 (D.C. 2000) (internal quotation marks omitted). In short, even if law-of-the-case considerations were implicated in the trial court proceedings, "reversal is not warranted where . . . the appellate court agrees on the merits with the second

judge's analysis." *Id.* Thus, contrary to Gamble's argument, the law-of-the-case doctrine does not preclude affirmance.

II. Alternatively, The Abolishment Act Applies And Does Not Require Consideration of Job Sharing Or Reduced Hours.

Although this Court can and should affirm for the reasons explained in Part I, it can, alternatively, affirm for another reason: this was in fact an Abolishment Act RIF. The OEA's contrary conclusion (which it reached in 2014) rested on a premise this Court later rejected in *Stevens*. This purely legal point resolves this entire case, for the Abolishment Act does not require consideration of job sharing and reduced hours at all. If the Court considers this issue, it should forgive any forfeiture stemming from MPD's failure to re-raise it during interim stages of this litigation.

A. The Abolishment Act does not require a fiscal basis.

At the outset of the OEA proceedings, MPD explained that this RIF was conducted pursuant to the Abolishment Act. SA 15-22. The AJ rejected that view, concluding that the General RIF was the "more applicable statute to govern *this* RIF" because "budgetary issues were never the stated rationale for the RIF." SA 32. But that reasoning is now clearly wrong under this Court's decision in *Stevens*. *Stevens* rejected as "legally erroneous" "the OEA's interpretation that ties the Abolishment Act to all RIFs that respond to 'times of fiscal emergency' (or to budgetary 'constraints,' 'restrictions,' or 'issues')." 150 A.3d at 319; *see also id*. at 319 n.16 (rejecting the former employees' "argument that the Abolishment Act RIF 'covers

[only] shortage of funds in a fiscal emergency,' and their contention that 'if the District wishes to conduct a RIF that is not for a fiscal emergency, then it must follow the applicable regulations in the general RIF statute.'").

Instead, the only constraints on the Abolishment Act are that (1) an agency may use it once per fiscal year, before February, and (2) affected employees must receive written notice at least 30 days before the effective date of their separation. D.C. Code § 1-624.08(b), (e). Moreover, an agency need not label a RIF as an Abolishment Act RIF at the time it undertakes it. *See Stevens*, 150 A.3d at 321. If the agency complies with the Abolishment Act requirements, it is assumed the agency is using that statute, "unless the agency asserts otherwise." *Id.* at 318. Indeed, where the difference between the two RIF statutes matters, an aggrieved employee bears "the burden of proof . . . to show that the RIF was not an Abolishment Act RIF." *Id.* at 321-22.

Under these principles, the RIF here was an Abolishment Act RIF, just as MPD argued at the outset. The RIF was effective October 11, 2011, well before the February 1 deadline. SA 13-14. And written notice was provided 30 days in advance. SA 13-14.

The fact that this was an Abolishment Act RIF is dispositive. The Abolishment Act does not require the agency to consider job sharing or reduced hours. D.C. Code § 1-624.08. Thus, it was not error for MPD to not consider those

measures when it conducted this RIF. This conclusion, by itself, is a sufficient reason for the Court to affirm.

B. The Court should not apply forfeiture to this purely legal issue that fully resolves this appeal.

Gamble does not dispute that if the Abolishment Act governed this RIF then consideration of job sharing and reduced hours was not required. Instead, he argues that MPD has forfeited reliance on the Abolishment Act. Br. 24. MPD concedes that it did not re-raise this issue as promptly as it could have. After this Court decided *Stevens* in December 2016, MPD could have asked the OEA to reconsider its 2014 ruling that the General RIF statute applied. Instead, MPD did not re-raise the issue until its 2022 Superior Court brief. But even if MPD thereby failed to preserve this issue, "the usual rule that [this Court's] review is limited to issues that were properly preserved" is "one of discretion rather than jurisdiction." *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001).

Excusing any forfeiture here would be an appropriate exercise of discretion for five reasons. *First*, this is not a case of total forfeiture: MPD invoked the Abolishment Act at the very outset of the OEA proceedings and its applicability was litigated there.

Second, whether the Abolishment Act governs is a question of law. *See Fairman v. District of Columbia*, 934 A.2d 438, 446 (D.C. 2007) (recognizing an exception to waiver "if the issue is purely one of law"). The answer to that question

"does not require the development of a factual record, the application of agency expertise, or the exercise of administrative discretion." *D.C. Hous. Auth. v. D.C. Off. of Hum. Rts.*, 881 A.2d 600, 612 n.16 (D.C. 2005) (quoting *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1338-39 (D.C. Cir. 1983)). This Court, "in the interest of justice," will sometimes even allow a purely legal question to be "raised for the *first* time on appeal." *Pajic v. Foote Props., LLC*, 72 A.3d 140, 145-46 (D.C. 2013) (emphasis added).

Third, the answer to this legal question is now entirely clear. *Stevens* makes plain that the OEA's rationale was wrong and that this was an Abolishment Act RIF. *See Knight v. Georgetown Univ.*, 725 A.2d 472, 486 n.12 (D.C. 1999) (considering an issue that was not raised below because, among other things, "the outcome is clear-cut").

Fourth, there is no prejudice or unfair surprise to Gamble. *See Pajic*, 72 A.3d at 145-46. MPD re-raised the Abolishment Act's applicability in the Superior Court, which gave Gamble an opportunity to respond to this purely legal issue. He has addressed it in his opening brief before this Court, Br. 10, 24, and can respond further in his reply brief. Gamble identifies nothing more than the passage of time in response to MPD's reliance on the Abolishment Act, but time has not hindered his ability to respond.

Fifth, the question of the governing statute is an important legal question that should not be overlooked. "[I]t not only would set a bad legal precedent, but also would thwart the intent of the legislature, to rely on a statute that does not apply, simply because the parties failed to identify the correct one, inadvertently or not." *Lumen Eight Media Grp., LLC v. District of Columbia*, 279 A.3d 866, 874 (D.C. 2022). Those concerns apply all the more forcefully here, given that MPD *has* identified the correct statute, and did so as early as 2014.

There is no dispute that this RIF would be upheld under the Abolishment Act because that statute does not require an agency to consider job sharing or reduced hours. Indeed, MPD's lack of consideration of those measures makes sense because, as it maintained at the outset, it used the Abolishment Act when conducting the RIF. The artificial addition of these requirements after the RIF was conducted, over MPD's objection, has resulted in years of litigation. To hold that MPD must now rehire Gamble, with backpay, based on a failure to consider issues that never actually applied would be a manifest injustice. This Court can avoid that injustice by simply applying the correct law: the Abolishment Act.

CONCLUSION

The Court should affirm the Superior Court's judgment reinstating the OEA's May 6, 2020 decision.

Respectfully submitted,

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May 2024

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I certify that on May 8, 2024, this brief was served through this Court's electronic filing system to:

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