THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WANDERLINE BENJAMIN-BANKS, Employee	
v.	OEA Matter No.: 2401-0027-12R16
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: November 7, 2017

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Wanderline Benjamin-Banks ("Employee") worked as a Computer Program Analyst with the Metropolitan Police Department ("Agency" or "MPD"). On September 14, 2011, Agency notified Employee that was she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF action was October 14, 2011.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 10, 2011. In her appeal, she argued that Agency erred in conducting the RIF because it was not initiated for the purpose of a budget shortfall, realignment, or reorganization, as

required under the D.C. Municipal Regulations ("DCMR").[1] She further contended that Agency failed to provide the affected employees with an opportunity to apply for other positions with MPD.[2]

Agency filed its answer on December 13, 2011. It denied each of the allegations presented in Employee's Petition for Appeal.[3] An OEA Administrative Judge ("AJ") was assigned the case on August 9, 2013. On November 18, 2013, the AJ held a Status Conference for the purpose of assessing the parties' arguments. The parties were subsequently ordered to submit briefs addressing whether Agency separated Employee from service in accordance with all applicable rules, laws, and regulations.[4]

The AJ issued an Initial Decision on October 28, 2014. He held that Agency provided Employee with thirty days' written notice prior to the effective date of the RIF. The AJ noted that D.C. Official Code § 1-624.02(a)(2) was inapplicable in this case because Employee was the only Computer Programmer Analysis in her competitive level and was not entitled to one round of lateral competition.[5] In addition, the AJ determined that Employee's separation from service was unlawful because Agency failed to procure the City Administrator's signature on the Realignment Approval Form ("RAF") prior to implementing the RIF, in violation of D.C. Personnel Regulation ("DPR") § 2406.4 and District Personnel Manual ("DPM") Instruction No.

[1] *Petition for Appeal*, Attachment A (November 10, 2011).
[2] *Id*.
[3] *Agency Answer to Petition for Appeal*, p. 1 (December 13, 2011).
[4] *Briefing Order* (May 20, 2014).
[5] OEA has consistently held that one round of lateral competition does not apply to employees in single-person competitive levels. *See Lyles v. D.C. Dept. of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabaness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Fagelson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (August 28, 2003); and *Dyson v. Department of Mental Health*, OEA Matter No. 2401-0040-03, *Opinion and Order on Petition for Review* (April 14, 2008).

24-1.[6] Therefore, the AJ reversed the RIF action and ordered Agency to reinstate Employee with back pay and benefits.[7]

Agency filed a Petition for Review with OEA's Board on December 2, 2014. In its petition, Agency argued that the Initial Decision should be reversed because new and material evidence became available that, despite due diligence, was not available when the record was closed by the AJ.[8] It contended that it exercised diligence, albeit unsuccessfully, in an effort to produce the RAF with the City Administrator's signature prior to the issuance of the Initial Decision. In support thereof, Agency submitted the affidavit of Lewis Norman ("Norman"), who worked as a Human Resource Specialist for the Department of Human Resources ("DCHR") at the time of the 2011 RIF. Norman corroborated Agency's contention that it attempted to retrieve a copy of the RAF prior to the issuance of the AJ's decision. As such, Agency requested that the Board grant its Petition for Review and reverse the Initial Decision.

In response, Employee requested that Agency's Petition for Review be denied because it failed to satisfactorily authenticate the RAF.[9] She also argued that Agency failed to establish that sufficient due diligence was sufficiently exercised in an effort to locate the RAF. Therefore, Employee opined that the AJ's decision was supported by the evidence.[10]

The Board issued its Opinion and Order on Petition for Review on May 10, 2016. It agreed with Employee's argument that Agency failed to satisfactorily establish that the RAF was signed by the City Administrator given the peculiar circumstances under which the document was produced and submitted to OEA. However, the Board could not determine whether the RIF was properly authorized in light of the new and material evidence. Consequently, the matter was

---

[6] *Initial Decision*, p. 8 (October 28, 2014).
[7] *Id*.
[8] *Petition for Review* at 6 (December 2, 2014).
[9] *Employee's Answer to Agency's Petition for Appeal*, p 4 (January 6, 2015).
[10] *Id*.

remanded to the AJ for the purpose of determining whether the newly-produced document could be sufficiently authenticated as to warrant a different outcome in the disposition of the matter.[11]

The AJ subsequently held a Status Conference on June 29, 2016 to address the issues directed by the Board. On September 7, 2016, the AJ held an evidentiary hearing regarding the newly-produced RAF. An Initial Decision was issued on January 9, 2017. The AJ first highlighted the holding in *Banks v. United States*, 359 A.2d 8 (D.C. 1976), wherein the D.C. Court of Court of Appeals stated that because documentary evidence generally does not possess self-authenticating powers, its reliability is not automatically assumed. Next, the AJ considered the testimony of Human Resource Specialist, Lewis Norman, who testified that despite numerous attempts, neither he, nor his staff at DCHR, was able to locate the RAF containing the City Administrator's signature in hard copy or from MPD's electronic storage drive prior to the issuance of the Initial Decision. Norman stated that he was finally able to locate the document after searching DCHR's internal "J" drive, electronic emails, and other subject matter files. He further stated that the signed RAF was mis-filed among other classification documents not related to realignments or RIFs.

However, the AJ was unpersuaded by Agency's explanation that DCHR was the only department capable of locating a copy of the fully executed RAF because copies of the document were required to be simultaneously forwarded to DCHR and MPD after the City Administrator approved the RIF. In addition, the AJ noted that it was unreasonable for Agency to argue that it could not produce a copy of the RAF with all of the necessary signatures prior to the issuance of the Initial Decision. Based on the documentary and testimonial evidence provided during the hearing, the AJ determined that Agency failed to meet its burden of proof in establishing that the

[11] *Opinion and Order on Petition for Review* (May 10, 2016). The Board denied Employee's Limited Petition for Review.

RIF was properly authorized. Thus, he concluded that Agency's inability to satisfactorily authenticate the RAF did not warrant a different outcome in the disposition of this matter and Agency's RIF action remained reversed.[12]

Agency disagreed and filed a Petition for Review of Initial Decision on Remand with this Board on February 10, 2017. It argues that the Initial Decision on Remand is not supported by substantial evidence because the AJ's findings exceeded the purpose for which the matter was remanded. Agency further states that its witnesses provided ample testimony during the evidentiary hearing to show that the RAF was signed by former City Administrator, Allen Lew ("Lew"), on September 13, 2011. Thus, Agency posits that Lew's testimony that he signed the RAF was "evidence of his authorship and satisfied that purpose for which the matter was remanded…." Moreover, Agency asserts that its inability to locate the signed RAF until after the Initial Decision was issued has no bearing on whether the signature of the City Administrator was authentic. Consequently, it believes that the Initial Decision on Remand is not based on substantial evidence.[13]

Employee filed an Answer to Agency's Petition for Review on March 16, 2017. She argues that Agency's Petition for Review should be denied because it failed to articulate any cognizable grounds to overturn the Initial Decision. According to Employee, Agency's protestations are merely disagreements with the AJ's findings and do not serve as a valid basis for appeal. Employee, therefore, asks this Board to deny Agency's Petition for Review and uphold the Initial Decision on Remand.[14]

---

[12] *Initial Decision on Remand* (January 9, 2017).
[13] *Petition for Review of Initial Decision on Remand* (February 10, 2017).
[14] *Employee's Answer to Agency's Petition for Review of Administrative Judge's Decision* (March 16, 2017).

RIF Approval

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[15] In this case, we do not believe that the AJ's findings are based on substantial evidence.

With respect to the process for approving a RIF, Chapter 24 of the D.C. Personnel Regulations ("DCPR") states the following in pertinent part:

> 2406.1 If a determination is made that a reduction in personnel is to be conducted pursuant to the provisions of sections 2400 through 2431 of this chapter, the agency shall submit a request to the appropriate personnel authority to conduct a reduction in force (RIF).
>
> 2406.2 Upon approval of the request as provided in subsection 2406.1 of this section, the agency conducting the reduction in force shall prepare a RIF Administrative Order, or an equivalent document, identifying the competitive area of the RIF; the positions to be abolished, by position number, title, series, grade, and organizational location; and the reason for the RIF.
>
> 2406.3 Any changes following the submission and approval of the request to conduct a reduction in force shall be made by issuance of an amendment to the administrative order by the agency.
>
> 2406.4 The approval by the appropriate personnel authority of the RIF…shall constitute the authority for the agency to conduct a reduction in force

In addition, E-DPM Instruction No. 21-4 provides the measures agencies must take in order to request authority to conduct a RIF.[16] Section IV(1) of the Instruction states that "[i]f an agency head determines that it is in the best interest of the agency to conduct the RIF, the agency

[15] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[16] E-DPM Instruction No. 24-1 (October 27, 2011).

head shall submit a request to conduct the RIF through the Director [of] DCHR to the City Administrator." Section V of Instruction No. 21-4 provides that "[c]oncurrence by the Director, DCHR, and the City Administrator, along with the approval of the agency's personnel authority, shall constitute authority for the agency to conduct a RIF."[17]

At issue is whether Agency satisfactorily complied with DCPR § 2406.4. This matter was remanded to the AJ because Agency did not submit a copy of the fully executed Realignment Approval Form to OEA until after the Initial Decision was issued. The document that Agency previously submitted was not signed by the City Administrator. Agency was aware that the signed document was required as proof that the realignment and subsequent RIF were properly authorized. The peculiar circumstances surrounding the newly-produced RAF called into question both the veracity and authenticity of the document.

It bears noting that a RIF and realignment are two separate processes. A realignment is an organizational change within a department whereby positions and employees may be affected by moving from one structure to another.[18] A RAF is a document that focuses on the actual realignment and addresses Agency's programs that are affected by the action. In addition, the RAF indicates who initiated the action and contains the signatures of the officials that must approve the realignment before it is implemented[19] A RIF, however, occurs when an agency elects to abolish positions because of reasons such as lack of work or budget constraints. In this case, the RAF was required to have all of the necessary signatures in order for Agency to proceed with the changes that that were requested in the realignment, including the elimination of positions via a RIF.[20]

---

[17] *Id.*
[18] *Evidentiary Hearing Transcript* p. 34.
[19] *Id*. at 35.
[20] *Id*. at 44, 64 and 70.

During the evidentiary hearing, Lew testified that the signature for the City Administrator on the RAF belonged to him. Lew also stated that the date appearing next to his name was September 13, 2011. While he did not specifically recall signing the RAF in 2011, Lew presented uncontroverted evidence of authorship.[21] Moreover, Norman, who worked as a Human Resource Specialist at the time of the RIF, testified that he knew that the fully executed RAF existed in 2011 because he hand-delivered the document to the Office of the City Administrator and retrieved it once it was signed by Lew.[22]

It appears, understandably so, that the AJ is suspicious of the timing in which Agency produced the RAF. He also casts doubt on Agency's explanation regarding why Norman was the only person who could locate the RAF containing the City Administrator's signature because copies of the document should have been forwarded to DCHR and MPD. However, this has no bearing on Lew's ability to authenticate his own signature or whether the RAF contained all of the necessary signatures prior to the implementation of the RIF. There is no credible evidence in the record to indicate that the signatures were backdated, forged, or prepared in anticipation of litigation before OEA. While the AJ was unpersuaded by Agency's explanation regarding why the signed RAF could not be located and submitted to the AJ before he issued an Initial Decision, there is now substantial evidence in the record to support a finding that the newly submitted RAF was signed by the City Administrator. The RAF also contains the signatures of the Chief of Police, the Chief Financial Officer, and the Director of DCHR. The written notices to affected employees were issued on September 14, 2011; thus, Agency received the appropriate

[21] *See* Fed. R. Evid. 901. In general, to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. This may be accomplished through the testimony of a witness with knowledge of the document.
[22] Evidentiary Hearing Transcript at 40.

authorization prior to implementing the realignment and subsequent RIF. Therefore, the AJ's findings are not supported by the record because Agency complied with DCPR § 2406.4.[23]

Harmful Error

Assuming *arguendo* this Board finds that Agency erred in failing to procure the City Administrator's signature prior to conducting the realignment and RIF, we must determine if retroactive reinstatement is appropriate under the circumstances. Chapter 24, Section 2405 of the DCPR states the following in pertinent part:

> 2405.7 The retroactive reinstatement of a person who was separated by a reduction in force under this chapter may only be made on the basis of a finding of a harmful error as determined by the personnel authority or the Office of Employee Appeals. To be harmful, an error shall be of such a magnitude that in its absence the employee would not have been released from his or her competitive level.

This Board finds that Agency's failure to produce the fully executed RAF prior to the issuance of the Initial Decision was not a harmful error. There is no evidence in the record to show that Agency's alleged failure to precisely comply with DCPR § 2406.4 adversely affected Employee's substantive rights. Employee has not asserted that she was prejudiced by Agency's error. Moreover, there is no indication that Agency's failure to produce a fully executed RAF in a timely manner significantly affected its final decision to conduct the instant RIF. As a result, reinstatement is not appropriate under the circumstances.

D.C. Official Code § 1-624.02

In *Anjuwan v. District of Columbia Department of Public Works*, 729 A.2d 883 (D.C. 1998), the D.C. Court of Appeals held that OEA‟s authority regarding RIF matters is narrowly

[23]It should be noted that this Board upheld the same RIF in *Toyer v. Metropolitan Police Department*, OEA Matter No. 2401-0022-12, *Opinion and Order on Petition for Review* (March 7, 2017). In *Toyer*, the AJ found that the signatures on the RAF at issue in this case were both timely and authentic. The matter is currently pending in D.C. Superior Court. *See* 2017 CA 002470 P(MPA).

prescribed. OEA was given statutory authority to address RIF cases in D.C. Official Code §1-606.03(a). This statute provides that:

> An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days effective date of the appealed agency action.

Moreover, a RIF conducted pursuant to D.C. Official Code § 1-624.02(a) 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 employee's competitive level;
> (3) Priority reemployment consideration for employees separated;
> (4) Consideration of job sharing and reduced hours; and
> (5) Employee appeal rights.

This Board finds that the AJ correctly held that Agency followed the applicable RIF procedures as enumerated in § 1-624.02. Employee was the only Computer Program Analyst in her competitive level and was not entitled to one round of lateral competition.[24] Agency also provided Employee with at least thirty days' written notice prior to the effective date of the RIF. In addition, Employee was placed on Agency's priority reemployment list after submitting a Registration Sheet on October 6, 2011. As the AJ properly stated, Agency had the discretion, but

[24] *See Lyles v. Department of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabaness v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Fagelson v. Department. of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (August 28, 2003); and *Dyson v. Department of Mental Health*, OEA Matter No. 2401-0040-03, *Opinion and Order on Petition for Review* (April 14, 2008).

was not required, to consider job sharing or reduced working hours prior to conducting the RIF.[25] Lastly, Employee was given the correct appeals rights. Consequently, this Board finds that Agency complied with D.C. Official Code § 1-624.02(a).

Conclusion

Based on the foregoing, this Board concludes that Agency has met its burden of proof in establishing that the RIF action was taken in accordance with all applicable laws, rules, and regulations. The RIF was properly authorized and Agency complied with D.C. Official Code § 1-624.02.[26] Accordingly, we must reverse the AJ's Initial Decision on Remand and uphold Agency's RIF action.

[25] *See* DPM § 2403.2.
[26] *See also Anjuan* at 885, holding that employees subject to a RIF action may file an appeal with the OEA if the "agency has incorrectly applied the provisions of this subchapter or the rules and regulations issued pursuant thereto." The Court further stated that OEA does not have the authority to determine broadly whether the RIF violates any law. Therefore, this Board lacks the authority to determine if Agency's RIF action was bona fide, as Employee has alleged that the RIF was a "sham" and a reclassification.

ORDER

Accordingly, it is hereby ordered that the Initial Decision is **REVERSED**. Agency's RIF action is upheld.

FOR THE BOARD**:**

_____
Sheree L. Price, Chair

_____
Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

_____
Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.