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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	OEA Matter No.: 2401-0029-12R16
LYNN BUTLER,	)	
Employee	)	
	)	Date of Issuance: January 9, 2017
v.	)	
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge
Robert J. Shore, Esq., Employee Representative		
Frank McDougald, Esq., Agency Representative		

**INITIAL DECISION ON REMAND**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On October 28, 2014, the undersigned Administrative Judge issued an Initial Decision reversing the Metropolitan Police Department's ("Agency" or "MPD") decision to remove Lynn Butler ("Employee") from her position pursuant to a Reduction-in-Force ("RIF"). The reversal was based on the fact that the Realignment Approval Form ("RAF") provided in the record was not signed for approval by the City Administrator at the time the RIF was implemented. On December 2, 2014, Agency filed a Petition for Review with the OEA Board arguing that new and material evidence was available, that despite due diligence, was not available when the record was closed prior to the issuance of the Initial Decision on October 28, 2014. Specifically, Agency asserted that the signed RAF, with the City Administrator's signature, had been located.

On May 10, 2016, the OEA Board issued an Opinion and Order on Petition for Review, remanding the matter back to the undersigned for further determinations regarding whether the newly-produced RAF can be sufficiently authenticated as to warrant a different outcome in the disposition of this matter.

A Status Conference was convened on June 29, 2016, to address the Board's Opinion and Order. This matter was subsequently scheduled for an evidentiary hearing to address the issue

on remand. As such, an evidentiary hearing was held on September 7, 2016.<sup>1</sup> The parties submitted their written closing arguments on December 2, 2016. The record is now closed.

### **JURISDICTION**

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

### **ISSUE**

Whether the newly-produced RAF can be sufficiently authenticated as to warrant a different outcome in the disposition of this matter.

### **SUMMARY OF TESTIMONY**

The following represents a summary of the relevant testimony given during the evidentiary hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding.

#### ***Allen Lew (“Mr. Lew”) Tr. 8-27***

Mr. Lew served as the City Administrator from 2011 to 2015, and served in various other high level capacities with the District Government for about twenty (20) years. During his tenure with the District government, Mr. Lew signed thousands of documents. Mr. Lew testified that he signed the RAF associated with the RIF in the instant matter on September 13, 2011.<sup>2</sup> He clarified that the date of his signature was September 13, 2011, and not September 15, as previously stated in a prior hearing regarding the same RIF.<sup>3</sup>

#### ***Lewis Norman (“Mr. Norman”) Tr. 28- 87***

Mr. Norman served the District Government for approximately thirty (30) years and retired in 2000. He returned to service for the District Government as an employee in 2008 and in 2011, was serving as a Supervisory Human Resource Specialist with the District of Columbia Human Resources (“DCHR”). In this capacity, Mr. Norman was responsible for position classification services as well as coordinating realignments and planning and implementing RIFs. Mr. Norman has testified as an expert in RIF cases. Mr. Norman was involved with the RIF that occurred with Agency in 2011, which is the subject of the instant matter.

Mr. Norman also testified that as part of the RIF conducted by Agency in 2011, its Information System Program underwent a realignment. He further testified that the RAF focuses on the realignment and addresses programs that are affected. The RAF also indicates who initiated the action as well as the officials that concurred with the action before the

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<sup>1</sup> This evidentiary hearing was consolidated with another matter that addressed the identical issue on remand from the OEA Board. See *Benjamin-Banks v. MPD*, OEA Matter No. 2401-0029-12R16.

<sup>2</sup> See Agency Exhibit 1.

<sup>3</sup> Tr. 22-24.

implementation. Mr. Norman testified that Mr. Lew was the City Administrator at the time of the instant RIF, and that as an employee of DCHR, he served at the direction of the City Administrator, although he did not work in the City Administrator's immediate office.

Mr. Norman testified to Agency's Exhibit 1, which shows the signed approval of all required officials for the realignment that Agency initiated in 2011. Mr. Norman testified that he had seen Mr. Lew's signature numerous times, mostly involving personnel matters that required his concurrence or approval.

Mr. Norman further testified regarding an affidavit he prepared in connection with the realignment that occurred with Agency pertaining to the RAF associated with the instant RIF.<sup>4</sup> Mr. Norman stated that the circumstances in which he prepared this affidavit was when Agency's attorney, Mr. Frank McDougald, requested a copy of the approved Realignment Approval Form by the City Administrator in connection with the instant realignment. After searching for several weeks, Mr. Norman notified Mr. McDougald that he and his staff were unable to locate the document with the City Administrator's signature. The affidavit provides that Mr. Norman and his staff continued to search for the RAF which contained the City Administrator's signature, and upon review of the files, "it was determined that the document had been mis-filed among other classification documents..."<sup>5</sup> Mr. Norman further testified that between the time of the realignment and the time the RAF was requested, that two or three years had passed and his division had moved locations and the RAF containing the City Administrator's signature was misfiled.<sup>6</sup> Mr. Norman stated that he knew the signed document existed because he personally hand-delivered it to the City Administrator's Office and picked it up once it was signed.

On cross-examination, Mr. Norman stated that Agency (MPD) did not have a copy of the RAF containing the City Administrator's signature. He also contacted the City Administrator's Office regarding whether they had the RAF form containing all of the necessary signatures. He did not contact the Chief Financial Officer's office to see if it had a copy of the signed RAF because "history has shown they never obtain a copy because they're never given a copy."<sup>7</sup> In conclusion, Mr. Norman stated that but-for his office moving, the RAF document would not have been misplaced.

### **FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW**

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.<sup>8</sup> "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

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<sup>4</sup> Agency Exhibit 3.

<sup>5</sup> *Id.*

<sup>6</sup> Tr. at 41.

<sup>7</sup> Tr. 66-67.

<sup>8</sup> 59 DCR 2129 (March 16, 2012).

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.<sup>9</sup>

Generally, because documentary evidence does not possess self-authenticating powers; its reliability is not automatically assumed.<sup>10</sup> Agency bears the burden of proof in establishing that the newly-produced RAF has been sufficiently authenticated as to warrant a different outcome in the disposition of this matter than the decision rendered in the Initial Decision issued on October 28, 2014. The newly-produced RAF containing all of the necessary signatures was sought by Employee prior to the issuance of the Initial Decision, including throughout the discovery process. Thus, the RAF produced after the Initial Decision is not self-authenticating. In order to properly assess the authenticity of the RAF document produced by Agency containing the City Administrator's signature, an evidentiary hearing was held.

While Mr. Lew, the City Administrator whose signature was missing from the previously submitted RAF, undoubtedly signed thousands of documents during his tenure with the District government, he understandably did not recall signing the specific RAF in this case. Mr. Lew has signed documents associated with roughly 100 RIFs throughout his tenure.<sup>11</sup> However, Mr. Lew did recognize the signature on the "City Administrator" line to be his own.

To further assess the veracity and authenticity of the RAF containing the City Administrator's signature, Mr. Noman's testimony was considered. Mr. Noman was the individual who purportedly located the RAF which contained the City Administrator's signature. Mr. Norman testified that when a realignment and RIF occur, the documents are generally stored in a specific RIF paper file, in an electronic storage drive (also known as the "J" drive), and copies are provided to the Agency (in this case, MPD) and a copy is retained by the City Administrator. However, when asked for a copy containing the City Administrator's signature by Agency's attorney, Mr. McDougald, on August 20, 2014, Mr. Noman was unable to locate the document that contained the City Administrator's signature in any of these locations. Interestingly, two days after the Initial Decision was issued in this matter on October 28, 2014, reversing Agency's action of removing Employee pursuant to the RIF, Mr. Norman himself was able to locate the document.<sup>12</sup> Mr. Norman stated that he and his staff continuously searched for the document when asked by Mr. McDougald.

I am skeptical that Mr. Norman was the only individual who could have located a copy of the RAF which included the four necessary signatures, including that of the City Administrator's.<sup>13</sup> Mr. Norman's testimony provided that once the City Administrator approves a realignment document (RAF), the document "will be forwarded simultaneously to DCHR and the Agency [MPD] that sought the action" by the City Administrator's office.<sup>14</sup> It is peculiar

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<sup>9</sup> OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

<sup>10</sup> See *Banks v. U.S.*, 359 A.2d 8 (D.C. 1976).

<sup>11</sup> Agency Exhibit 1. See Tr. 16-17.

<sup>12</sup> See Agency Exhibit 3.

<sup>13</sup> The RAF contained signature lines for four individuals: MPD's Agency Head, the Chief Financial Officer, Director of DCHR, and the City Administrator.<sup>13</sup>

<sup>14</sup> Tr. at 62.

that the only office that was able to locate a copy of the RAF with the City Administrator's signature was Mr. Norman's office. Given that MPD was the agency that implemented the realignment and subsequent RIF, it is incredible for it to argue that it did not have a copy of the RAF containing the necessary signature of the City Administrator prior to the issuance of the Initial Decision. Without a RAF containing all of the necessary signatures, Agency would not have been properly authorized to effectuate the RIF.

Given the totality of the circumstances, and upon consideration of the testimony produced by Mr. Lew and Mr. Norman, and the newly-produced RAF, I am unpersuaded that the Agency has met its burden of proof in establishing the authenticity of the newly-produced RAF. Therefore, I find that Agency's inability to sufficiently authenticate the RAF does not warrant a different outcome in the disposition of this matter. Accordingly, the Initial Decision issued on October 28, 2014, must stand.

### **ORDER**

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to her termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge