

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:	)	
	)	
GENNIFER CUNNINGHAM,	)	
Employee	)	OEA Matter No. 2401-0058-17
	)	
v.	)	Date of Issuance: December 18, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Gennifer Cunningham (“Employee”) worked as an Administrative Aide with the D.C. Public Schools (“Agency”). On May 22, 2017, Agency issued a notice to Employee informing her that she was being separated from her position pursuant to a Reduction-in-Force (“RIF”). The effective date of the RIF was August 4, 2017. Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on June 16, 2017.<sup>1</sup>

Agency filed its Answer to Employee’s Petition for Appeal on July 19, 2017. It asserted that the RIF was conducted pursuant D.C. Official Code § 1-624.02. Agency provided that due to budgetary issues, the school was forced to reduce its staff of Administrative Aides from six employees to four. According to Agency, Employee was afforded one round of lateral

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<sup>1</sup> *Petition for Appeal*, p. 1 and 5 (June16, 2017).

competition where she received the fifth lowest score in her competitive level. It also asserted that it provided Employee with more than the required thirty days' notice that her position was being eliminated. Therefore, it believed that its RIF action was proper.<sup>2</sup>

The OEA Administrative Judge ("AJ") ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF.<sup>3</sup> Agency asserted that it had the authority to determine if the RIF was necessary. It explained that Wilson Senior High School was the competitive area, and the Administrative Aides were the competitive level. Agency contended that Employee received the fifth lowest score after conducting one round of lateral competition among the six Administrative Aides. Therefore, she was removed. Additionally, Agency explained that Employee would receive some priority consideration; however, she was not guaranteed reemployment. Therefore, it contended that it properly conducted the RIF, and Employee's separation from service was appropriate.<sup>4</sup>

Employee argued in her brief that Agency failed to meet its burden to establish that the RIF was conducted in accordance with the governing regulations and statutes. Employee claimed that Agency failed to prove that it established the competitive level. It was Employee's position that Agency misstated the number of Administrative Aides, and it combined different job titles and positions into the competitive level. Employee contends that there were only four Administrative Aides at Wilson; thus, including six employees within the competitive level was improper. Moreover, she argued that her assessment scores were manipulated, and Agency failed to explain how the scores she received were in accordance with the RIF regulations.<sup>5</sup>

Prior to issuing the Initial Decision, the AJ ordered Agency to submit the Administrative

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<sup>2</sup> *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 1-2 (July 19, 2017).

<sup>3</sup> *Order to Submit Briefs* (August 28, 2017).

<sup>4</sup> *District of Columbia Public Schools' Brief*, p. 2-4 (September 18, 2017).

<sup>5</sup> *Employee's Brief*, p. 2-7 (November 13, 2017).

Order that authorized the RIF action. According to the AJ, Agency timely filed its response, but she found that the document submitted was not the Administrative Order or equivalent document. Therefore, on May 30, 2018, via email, the AJ requested again that the Administrative Order be provided by Agency. Agency responded to the email explaining that the “Notice to Employee is the authorization from the Chancellor regarding the RIF and that no other documents were issued as it relates to the RIF involving the Employee.”

On June 5, 2018, the AJ issued her Initial Decision. She determined that Agency did not properly comply with District Personnel Regulations (“DPR”) § 2406. The AJ held that because Agency failed to provide evidence of the Administrative Order from the Mayor, there was no proof that the RIF was approved. Additionally, she opined that although Agency may have correctly complied with the implementation of the RIF action, without prior approval from the Mayor to conduct the RIF, the RIF was invalid. As a result, she concluded that Agency did not meet its burden of proof in this matter. Consequently, she reversed Agency’s RIF action; ordered that Agency reinstate Employee to her last position or a comparable position; and ordered Agency to reimburse Employee with all back pay and benefits lost as a result of her separation.<sup>6</sup>

Agency filed a Petition for Review on June 11, 2018. It contends that it is not required to seek approval from the Mayor prior to conducting the RIF. Agency argues that pursuant to Mayor’s Order 2007-158, Mayor Fenty delegated his authority to the Chancellor to function as the personnel authority for Agency. Accordingly, it requests that Employee’s appeal be dismissed and that the Board affirm that Agency is not required to issue an Administrative Order before conducting the RIF.<sup>7</sup>

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<sup>6</sup> *Initial Decision*, p. 1-4 (June 5, 2018).

<sup>7</sup> *District of Columbia Public Schools’ Petition for Review*, p. 3-5 (June 11, 2018).

DPR Section 2406 provides in great detail the actions that must be taken after securing authority to implement a RIF. The relevant portions of the regulation provide the following:

- 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.
- 2406.4 The approval by the appropriate personnel authority of the RIF Administrative Order by the appropriate personnel authority shall constitute the authority for the agency to conduct a reduction in force.

In accordance with the regulations, Agency is first required to submit a request to the appropriate personnel authority to conduct a RIF. In its Petition for Review, Agency focused most of its argument on the Mayor's Order 2007-158. It accurately describes how the order delegated authority to the Chancellor for personnel determinations. Therefore, because Agency secured the Mayor's Order, it adequately addressed DPR § 2406.1. However, the order is just one part of the requirements for conducting a RIF.

DPR §§ 2406.2 and 2406.4 provide that once approval is secured, Agency shall prepare a RIF Administrative Order, or equivalent document, which identifies the competitive area; the positions to be abolished (by position number, title, series, grade, and organizational location); and the reason for the RIF. Based on a review of the record, Agency failed to adhere to this requirement. As the administrative judges in *Tyhasha Wright v. D.C. Public Schools*, OEA Matter Number 2401-0083-17 (August 27, 2018) and *Davette Butler v. D.C. Public Schools*,

OEA Matter Number 2401-0090-17 (August 27, 2018) held, D.C. Public Schools has consistently provided Administrative Orders or equivalent documentation in every RIF action appealed to OEA. Agency has routinely recognized and complied with this requirement. Thus, this Board is puzzled by why it decided to ignore the requirement in this particular case.

A review of the record yielded no notices, letters, or documents from the Chancellor or any other appropriate personnel authority regarding the RIF action. Agency argues that it relies on a notice to American Federation of State, County and Municipal Employees (“AFSCME”), as documentation of the RIF. However, it is unclear who drafted the notice because it is unsigned.<sup>8</sup> The notice provided that one hundred and twelve RIF notices would be delivered to AFSCME employees and included a table highlighting the job titles, number of reductions, and projected vacancies. However, the document falls significantly short of the requirements in DCMR § 2406.2. There is no identifiable competitive area provided. It does not provide the positions to be abolished by position number, title, series, grade, and organizational location, as required by the regulation.<sup>9</sup> Moreover, there is no reason for the RIF provided in the AFSCME notice. Finally, there was no approval by the appropriate personnel authority of the RIF Administrative Order as provided in DCMR § 2406.4. The notice simply provides AFSCME members with available vacancies for them to apply for other positions at various schools.

Agency failed to comply with the RIF requirements provided in DCMR §§ 2406.1, 2406.2, and 2406.4. The AJ’s decision to reverse the RIF action was based on substantial evidence.<sup>10</sup> Consequently, we must deny Agency’s Petition for Review and uphold the AJ’s

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<sup>8</sup> It appears that the notice was not drafted by the Chancellor because the notice references that “. . . the Chancellor has prioritized two initiatives in FY18.” This Board assumes that a letter written by the Chancellor would not refer to themselves in the third person. *District of Columbia Public School’s Brief*, Tab 2 (March 16, 2018).

<sup>9</sup> In its brief, Agency claimed that Administrative Aides, Administrative Assistants, and Secretaries were one competitive group. However, these details were not provided in the notice.

<sup>10</sup> The Court in *Baumgartner v. Police and Firemen’s Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is

ruling to reverse the RIF action; reinstate Employee to her last position of record (or a comparable position); and reimburse Employee with all back-pay and benefits lost as a result of the RIF.

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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. *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).

**ORDER**

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**.

**FOR THE BOARD:**

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Clarence Labor, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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.