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:	)	
	)	OEA Matter No.: 2401-0058-17
GENNIFER CUNNINGHAM,	)	
Employee	)	
	)	Date of Issuance: June 5, 2018
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	Monica Dohnji, Esq.
Agency	)	Senior Administrative Judge
	)	

F. Douglass Harnett, Esq., Employee's Representative
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On June 16, 2017, Gennifer Cunningham ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of abolishing her position through a Reduction-in-Force ("RIF"). Employee received her RIF notice on May 22, 2017. The effective date of the RIF was August 4, 2017. Employee was an Administrative Aide at Woodrow Wilson Senior High School at the time her position was abolished. On July 19, 2017, Agency filed its Answer to Employee's Petition for Appeal.

I was assigned this matter on August 21, 2017. On August 28, 2017, I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. While Agency complied with the August 28, 2017, Order, on October 6, 2017, Employee filed a Consent Motion to extend time. This Motion was granted in an Order dated October 11, 2017. A Status Conference was held on February 6, 2018. On February 21, 2018, the undersigned issued a Post Status Conference Order requiring the parties to address the issues raised during the February 6, 2018, Status Conference. Both parties submitted their respective briefs. Upon review of the record, the undersigned issued an Order dated May 15, 2018, requiring Agency to submit the Administrative Order that authorized the instant RIF. Agency had until May 29, 2018, to submit the required document. Agency timely filed its response to the May 15,

2018, Order. However, upon further review of the document submitted by Agency in response to the May 15, 2018, Order, the undersigned discovered that the document submitted by Agency was not the Administrative Order. As such, in an email dated May 30, 2018 to both parties, the undersigned again ordered Agency to submit the Administrative Order ("AO") that authorized the instant RIF. Agency responded to the undersigned's email stating 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." The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "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.

OEA Rule 628.2 *id.* states:

> 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.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On May 22, 2017, Employee was notified that her position was being abolished pursuant to a RIF, effective August 4, 2017. While Agency asserts that it properly followed District laws, rules and regulations in conducting the instant RIF, Agency has failed to provide this Office with the Administrative Order that authorized the RIF.

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)* (emphasis added).

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 (emphasis added).

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* (emphasis added).

In addition, E-DPM Instruction No. 21-4 provides the measures agencies must take in order to request authority to conduct a RIF.[1] 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 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."[2]

Additionally, pursuant to D.C. Official Code § 38-172:

(a) *The Mayor shall govern the public schools in the District of Columbia*. The *Mayor shall have authority over all* curricula, *operations*, functions, budget, *personnel*, labor negotiations and collective bargaining agreements, facilities, and other education-related matters, but shall endeavor to keep teachers in place after the start of the school year and transfer teachers, if necessary, during summer break (emphasis added).

(b) The *Mayor may delegate any of his authority to a designee* as he or she determines is warranted for efficient and sound administration and to further the purpose of DCPS to educate all students enrolled within its schools or learning centers consistent with District-wide standards of academic achievement (emphasis added).

At issue is whether Agency satisfactorily complied with DCPR § 2406. Upon determination that a reduction in personnel was needed, the agency head (Chancellor) was required to submit *a request to the appropriate personnel authority to conduct a* RIF.[3] Agency has failed to provide this Office with any documents evidencing this request. Also, there are no documents indicating the appropriate personnel's (Mayor or her designee) approval of Agency's RIF request. Furthermore, DCPR 2406.2 provides plain language which states that approval of the RIF request and the Administrative Order by the appropriate personnel authority *shall constitute the authority for the Agency to conduct a RIF (emphasis added).* The undersigned specifically required Agency to produce the signed Administrative Order in her May 15, 2018, Order, and May 30, 2018, email to Agency. Yet Agency insisted that the Notice to Employee was the only authorization it received to

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[1] E-DPM Instruction No. 24-1 (October 27, 2011).
[2] *Id.*
[3] According to D.C. Official Code § 38-172, DCPS is under the personnel authority of the Mayor. As such, Agency is required to seek the Mayor's approval (or that of her designee) prior to conducting a RIF.

conduct the RIF. In the email dated May 30, 2018, Agency explained 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." This document is not a request to conduct the instant RIF, an Administrative Order, nor is it signed by the appropriate personnel authority. Therefore, this document could not reasonably be viewed as an equivalent to an Administrative Order for the authorization of Agency's RIF action.

Because it cannot provide any evidence of an Administrative Order from the Mayor, there is no proof that the RIF was actually approved.[4] Therefore, 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 is invalid. Agency was provided with multiple opportunities to provide the Administrative Order or an equivalent document, but it failed to do so. Consequently, I conclude that Agency did not meet its burden of proof in this matter.

CONCLUSION

Because Agency has failed to establish that it had proper authority to conduct the RIF, I find that the RIF is invalid. As such, I will not address whether Agency properly followed the RIF procedure or any other issues raised by the parties during the course of this appeal.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of abolishing Employee's position through a RIF is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; 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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MONICA DOHNJI, ESQ.
SENIOR ADMINISTRATIVE JUDGE

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[4] *See Ernest Hunter v. District of Columbia Child and Family Services Agency*, OEA Matter No. 2401-0321-10 *Opinion and Order on Petition for Review* (March 4, 2014). It should be noted that the District of Columbia Superior Court reversed the OEA Board in this matter, finding that Agency in *Hunter* was an independent agency not under the personnel authority of the Mayor, and as such, did not require the Mayor's approval in conducting the RIF. *District of Columbia Child and Family Services Agency v. Ernest Hunter,* Civil Case No. 2014 CA 001857 P(MPA) (April 15, 2016). *Hunter* is distinguishable from the current case in that, DCPS is not an independent agency, and it is under the personnel authority of the Mayor. Therefore, it has to seek approval from the Mayor prior to conducting a RIF.