

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:)	
)	
WANDERLINE BENJAMIN-BANKS,)	
Employee)	
)	OEA Matter No.: 2401-0027-12
v.)	
)	Date of Issuance: May 10, 2016
METROPOLITAN)	
POLICE DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

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 she was being separated from her position pursuant to a Reduction-in-Force (“RIF”). The effective date of her termination was October 14, 2011.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on November 10, 2011. In her appeal, Employee 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 applicable D.C. Municipal Regulations (“DCMR”).¹ She further contended that

¹ *Petition for Appeal*, Attachment A (November 10, 2011).

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, denying 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. Both Employee and Agency were ordered to submit legal briefs addressing whether the RIF should be analyzed under D.C. Official Code § 1-624.02 or D.C. Official Code § 1-624.08. After reviewing the briefs, the AJ determined that D.C. Official Code § 1-624.02 was the appropriate statute to utilize in evaluating Agency's RIF action. 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 ("ID") on October 28, 2014. He held that Agency provided Employee with thirty (30) days' written notice prior to the effective date of her termination, but stated 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, therefore, not entitled to one round of lateral competition.⁵ However, the AJ determined that Employee's separation from service was unlawful because MPD failed to procure the D.C. City Administrator's signature for approval prior to implementing the RIF, in violation of D.C. Personnel Regulation ("DPR") § 2406.4 and District Personnel Manual ("DPM") Instruction No. 24-1.⁶ The AJ, therefore, reversed

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).

⁶ *Initial Decision*, p. 8 (October 28, 2014).

the RIF action and ordered Agency to reinstate Employee to her last position of record with back pay and benefits.⁷

Agency filed a Petition for Review with OEA's Board on December 2, 2014. In its petition, Agency argues that the Initial Decision should be reversed because new and material evidence is now available that despite due diligence, was not available when the record was closed by the AJ.⁸ It contends that it exercised due diligence in an effort to produce the Realignment Approval Form ("RAF") with the City Administrator's signature for submission prior to the issuance of the Initial Decision. In support thereof, Agency submits 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 claims that Agency attempted to retrieve a copy of the RAF prior to the issuance of the AJ's decision.⁹ As such, Agency requests that the Board grant its Petition for Review and reverse the Initial Decision.

Employee filed an Answer to Agency's Petition for Review on January 6, 2015. She requests that Agency's Petition for Review be denied because it failed to satisfactorily authenticate the Realignment Form that was submitted after the issuance of the AJ's Initial Decision.¹⁰ Employee argues that Agency failed to establish that due diligence was exercised in an effort to locate the RAF. Therefore, he asks that this Board uphold the AJ's decision and reinstate him to his previous position of record.¹¹

Agency's Petition for Review

Administrative Order

Pursuant to OEA Rule 633.3, the Board may grant a Petition for Review when new and material evidence is available that, despite due diligence, was not available when the record closed.

⁷ *Id.*

⁸ *Petition for Review* at 6 (December 2, 2014).

⁹ Norman works as a Supervisory Human Resource Specialist with DCHR.

¹⁰ *Employee's Answer to Agency's Petition for Appeal*, p 4 (January 6, 2015).

¹¹ *Id.*

DPR § 2405.4 states that “personnel authorities have authority over the preparation for, and implementation of, a reduction in force, provided that agencies under the personnel authority of the Mayor shall not plan or conduct the reduction in force without the Mayor’s approval, as provided in subsection 2406.4 of this chapter.” An agency’s implementation of a RIF may, therefore, be unlawful without the requisite approval from the appropriate authority. DPR § 2406, provides 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.

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

Moreover, E-DPM Instruction No. 21-4 provides the procedures for agencies who wish to request authority to conduct a RIF.¹² 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.” Lastly, 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.”¹³

In September of 2011, the MPD Chief of Police submitted a Request for Approval of Realignment and Reduction In Force to City Administrator, Allen Lew, to abolish fourteen (14)

¹² E-DPM Instruction No. 24-1 (October 27, 2011).

¹³ *Id.*

positions within the Office of the Chief Information Officer (“OCIO”), Executive Office of the Chief of Police.¹⁴ Agency’s request included Administrative Order (“AO”) FA-2011-01, which stated that the requested RIF action was being taken pursuant to D.C. Official Code § 1-624.01; Chapter 24 of the DCMR; and Mayor’s Order 2008-92, dated June 26, 2008.¹⁵

Agency’s primary argument is that it made several efforts to obtain a copy of the RAF containing the City Administrator’s signature to approve the 2011 RIF, but it was unable to do so until after the Initial Decision was issued. In support thereof, Agency offers the affidavit of Norman, who worked as a Human Resource Specialist for DCHR at the time of the 2011 RIF.¹⁶ Norman claims that Agency did, in fact, attempt to retrieve a copy of the RAF prior to the closing of the record. According to Norman, after searching for several weeks, he verbally informed Agency’s counsel that the RAF could not be located on DCHR’s internal “J” drive database.¹⁷

In addition, Agency provides the affidavit of Diana Haines Walton (“Walton”), who serves as the Director of the Human Resource Management Division of MPD’s Corporate Support Bureau.¹⁸ Walton states that counsel for Agency requested her to search for the fully-executed RAF in August of 2014. After reviewing all of the correspondence, emails, and documents related to the 2011 RIF, Walton was unable to locate the RAF documents that contained the City Administrator’s signature. On or around September 1, 2014, Walton informed Agency’s counsel that she could not locate a copy of the signed memorandum.¹⁹

At the time the Initial Decision was issued, Agency was aware that the Realignment Approval Form containing the City Administrator’s signature was required to authorize the RIF; however, no such document was produced.²⁰ Agency submitted to this Office a RAF that contains

¹⁴ *Agency Answer to Petition for Appeal*, Tab 2 (December 13, 2011).

¹⁵ *Id.*

¹⁶ *Petition for Review*, Attachment 1 (December 2, 2014).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Initial Decision*, p. 8 (October 28, 2014).

the City Administrator's signature, only after the AJ reversed its RIF action.²¹ The document reflects that the City Administrator (or their designee) signed the document for concurrence of the RIF on September 9, 2011. However, this Board agrees with Employee's argument that Agency has failed to satisfactorily establish that the RAF was actually signed by the City Administrator prior to the implementation of the RIF.²² The peculiar circumstances under which the signed RAF has been located and submitted to OEA for consideration greatly calls into question the veracity and authenticity of the document. We, therefore, believe that this matter must be remanded to the Administrative Judge for the purpose of determining whether the newly-produced RAF can be sufficiently authenticated as to warrant a different outcome in the disposition of this matter.

Employee's Limited Petition for Review

On December 2, 2014, Employee, who was the prevailing party, filed a Limited Petition for Review of the Administrative Judge's Decision.²³ Employee argues that the ID failed to address three issues that were raised in his November 10, 2011 Petition for Appeal or the subsequent August 11, 2014 legal brief. Specifically, she states that the AJ did not address her contention that the creation of new positions through realignment was a "sham" that Agency utilized to remove employees under the RIF. Employee also submits that MPD failed to meet its burden of proof in establishing that there was an actual shortage of work and that the RIF action was actually a reclassification, not a realignment.²⁴ Lastly, Employee argues that the AJ failed to address her contention that even if Agency conducted a realignment, the action could have been accomplished without conducting a RIF.²⁵

Agency filed an Opposition to the Limited Petition for Review on January 5, 2015, arguing that Employee failed to present evidence to support her contention that the RIF was a sham or that

²¹ *Petition for Review*, Attachment 1 (December 2, 2014).

²² *Employee's Answer to Petition for Review*, p. 7 (January 6, 2015).

²³ *Employee's Limited Petition for Review* (December 2, 2013).

²⁴ *Id.*, p. 2.

²⁵ *Id.*

an evidentiary hearing was warranted.²⁶ Agency posits that Employee failed to object to the AJ's briefing order that required the parties to submit written briefs that addressed each issue discussed during the Prehearing Conference. In addition, agency states that Employee's argument that MPD conducted a reclassification, and not a realignment, is unsubstantiated.²⁷ Agency also argues that Employee failed to raise argument concerning the absence of a shortage of work in her Petition for Appeal or any subsequent pleadings before the AJ.²⁸ Accordingly, Agency asks that the Limited Petition for Review be denied.

Since Employee is the prevailing party in this matter, the Board will not address the substantive arguments in her Limited Petition for Review. However, with respect to the pre-RIF issues, OEA has consistently held that we cannot adjudicate claims that are outside the purview of our authorized scope of jurisdiction.²⁹ Pre-RIF issues are not within the jurisdiction of this Office. Employee has not given us any reason to disturb the Initial Decision. Therefore, her Limited Petition for Review must be denied.

²⁶ *Agency Opposition to Employee's Limited Petition for Review* (January 5, 2015).

²⁷ *Id.* at 3.

²⁸ *Id.* at 4.

²⁹ *Wharton v. District of Columbia Public Schools*, OEA Matter No. J-0111-02 (March 3, 2003); *Powell v. Office of Property Management*, OEA Matter No. 2401-0127-00 (February 3, 2003); and *Booker v. Department of Human Services*, OEA Matter No. 2401-0190-97 (October 11, 2000)

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further determinations to be made.

In addition, it is hereby ordered that Employee's Limited Petition for Review is **DENIED**.

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.