Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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.: 2401-0027-12
WANDERLINE BENJAMIN-BANKS, Employee	
	Date of Issuance: October 28, 2014
v.	
METROPOLITAN POLICE DEPARTMENT, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Robert J. Shore, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 10, 2011, Wanderline Benjamin-Banks ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") challenging a Reduction-in-Force (RIF) conducted by the Metropolitan Police Department ("Agency" or "MPD"). At the time that Employee's position was abolished, she was a Computer Programmer Analyst with Agency.[1] Agency filed its Answer on December 13, 2011. I was assigned this matter on August 9, 2013.

A Status Conference was held on November 18, 2013; thereafter, a Post-Status Conference Order was issued requiring the parties to submit briefs addressing which RIF Statute should apply in the instant case. Both parties submitted their briefs accordingly. Upon consideration of the briefs, I determined that D.C. Code § 1-624.02 primarily governed the instant appeal. A Briefing Order was then issued on May 20, 2014, which required the parties to submit briefs addressing whether Agency's action of separating Employee pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations; specifically D.C. Code §§ 1-

[1] Petition for Appeal (November 10, 2011).

624.02 and 1-624.04. Both parties submitted their briefs accordingly and it was determined that an Evidentiary Hearing was unwarranted. 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 Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The authority for conducting a RIF is primarily set forth in two statutes, D.C. Code §§ 1-624.02 and 1-624.08. In a May 7, 2014 Order, it was determined that D.C. Code § 1-624.02 is the more applicable statute in the instant RIF. A RIF pursuant to D.C. Official Code § 1-624.02 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. D.C. Official Code § 1-624.02.

Agency's position

Agency asserts that on or about August 24, 2011, it submitted a memorandum to the City Administrator, Allen Lew, "requesting authorization to realign programs and functions within the Office of the Chief Information Officer ("OCIO"), Executive Office of the Chief of Police [to] conduct a Reduction in Force (RIF) to abolish 14 positions in the OCIO."[2] Attached to the Memo was Administrative Order ("AO") FA-2001-01, which cited the reasons for the RIF: realignment and shortage of work.[3] This AO also identified the positions for abolishment and the competitive area for each employee. One of the fourteen (14) positions recommended for abolishment in the AO was Computer Program Analyst, CS-334-11, a position encumbered by Employee.

On September 14, 2011, Agency's request to conduct a RIF was approved by the Director of the District of Columbia Human Resources ("DCHR").[4] Pursuant to the approval of the RIF,

[2] *See* Agency's Brief in Support of Reduction -in-Force, Attachment 1 (July 11, 2014).
[3] *Id*., Attachment 3.
[4] *Id*.

competitive levels were identified and Retention Registers were developed. The competitive level for the position encumbered by Employee was identified as DS-0334-11-10-N.[5] The Retention Register developed for competitive level DS-0334-11-10-N lists Employee as the only individual in that competitive level. Employee's position was a Computer Programmer Analyst.

Agency contends that §1-624.08 was the applicable statutory provision to govern this appeal. However, in light of the ruling by the undersigned that D.C. Code § 1-624.02 was the more applicable statutory provision governing this appeal, Agency also asserted that it complied with D.C. Code § 1-624.02; specifically, the provisions set forth in § 1-624.02(a).

Agency asserts that it issued a prescribed order of separation based upon Employee's tenure of appointment and length of service and notes that Employee was not entitled to any length of service enhancement for District residency, veterans' preference, or work performance.[6] Further, Employee was the only person in her competitive level, therefore making the one round of lateral competition inapplicable. With respect to priority reemployment consideration, Agency contends that Employee was registered in the reemployment programs, i.e., the Agency Reemployment Priority Program and the Displaced Employee Program.[7] Agency also contends that job sharing and reduced hours were incompatible with the reasons for the RIF, i.e., realignment and lack of work. Finally, Agency asserts that it is undisputed that Employee was provided her appeal rights.

Employee's position

Employee asserts that Agency did not follow the process and procedures for conducting a realignment and a subsequent RIF as required by D.C. rules and regulations. Specifically, Employee contends that Agency failed to adhere to the Electronic-DPM Instruction No. 24-1, which states that to proceed with a RIF, "[c]oncurrence by the Director, DCHR, and the City Administrator, along with approval of the agency's personnel authority shall constitute authority for the agency to conduct a RIF." Employee further asserts that pursuant to the "General Information Guide to Reorganization and Realignments," published by DCHR, in order for an agency to conduct a realignment and RIF, the agency must perform a number of steps prior to initiating the realignment and RIF, including receiving the concurrence of the City Administrator. Employee's argument highlights that the RIF was unauthorized because there was no concurrence by the City Administrator.

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

A RIF 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;

[5] *Id.*, Attachment 4.
[6] *Id.*
[7] *Id.*, Attachment 7.

(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. *See* D.C. Official Code § 1-624.02.

Prescribed order and one round of lateral competition

The first two provisions enumerated in §1-624.02(a) are closely related. The prescribed order of separation must take into account the one round of lateral competition that an employee must be afforded.

The prescribed order mentioned in subsection (a)(1) above is for the purpose of developing a Retention Register so that employees may be afforded one round of lateral competition when an agency intends to effectuate a RIF. The factors mention in subsection (a)(1) above shall determine the retention standing of each competing employee. Together these factors determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released. According to the DPM, assignment to a competitive level shall be based upon an employee's position of record.[8] Additionally, the DPM specifies that competitive levels shall include positions in the same grade (or occupational level) and classification series, and which are sufficiently alike in qualifications requirements, duties, responsibilities, and working conditions so that the incumbent of one position could successfully perform the duties and responsibilities of any of the other positions without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.[9]

Here, the Administrative Order, dated August 24, 2011, provides that the there was one Computer Program Analyst position that was identified for abolishment.[10] This position was a series 0334, grade 11. This Computer Program Analyst position was encumbered by Employee.[11] Employee seems to assert that Agency failed to provide any corroborating evidence that Employee was in fact the only person in her competitive level. Employee further asserts that without any comparator, presumably in the one round of lateral competition, that Agency has failed to meet its burden to establish that the RIF was conducted properly. [12] I find Employee's argument in this regard to be unclear and unpersuasive.

Agency provided the Administrative Order, which provides Employee's position number, title, series, and grade as a position identified to be abolished. Agency also provided the Retention Register, listing Employee as the only person in her competitive level. Employee does not argue that another employee should have been included on the Retention Register in Employee's competitive level. OEA has consistently held that one round of lateral competition

[8] 6-B DCMR § 2410.2.
[9] 6-B DCMR § 2410.4.
[10] Agency's Brief in Support of Reduction-in-Force, Attachment 3 (July 11, 2014).
[11] *Id*., Attachment 6
[12] *See* Employee's Brief, p. 7 (August 11, 2014.)

does not apply to employees in single-person competitive levels. [13] Because Employee was the only person in her competitive level, the requirement under D.C. Code § 1-624.02(a)(2) is inapplicable in the instant appeal and Employee was not entitled to one round of lateral competition.

Priority Reemployment Consideration

D.C. Code § 1-624.02(a)(3) provides that employees separated pursuant to a RIF under this section shall be given consideration for priority reemployment. In the RIF Notice issued September 14 2011, Agency states, "[e]mployees in tenure group I and II who have received a notice of separation by reduction in force have a right to priority placement consideration through the Agency Reemployment Priority Program."[14] Agency also provided the Registration Sheet for its Reemployment Priority Program in its brief, bearing Employee's name.[15] Thus, I find that Agency complied with the RIF procedure to consider Employee for priority reemployment.

Consideration of job sharing and reduced hours

Under D.C. Code § 1-624.02(a)(4) and DPM Section 2404, when a RIF is effectuated, an Agency *may* consider job sharing and reduced hours for employees separated pursuant to the RIF. The DPM addresses Agency's responsibility for considering job sharing and reduced working hours. Specifically, DPM section 2404.1 provides:

> An employee *may* be assigned to job sharing or reduced working hours, provided the following conditions are met:
>
> (a) The employee is not serving under an appointment with specific time limitation; and
>
> (b) The employee has voluntarily requested such an assignment in response to agency's request for volunteers for the purpose of considering the provisions of subsection 2403.2(a) of this chapter in order to preclude conducting, or to minimize the adverse impact of, a reduction in force.

Furthermore, DPM section 2403.2 provides that, "[a]n Agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency." An example given for an action that could minimize the adverse impact on an employee is "job sharing and reduced working hours."[16]

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[13] *See Lyles v. D.C. Dept. of Mental Health*, OEA Matter No. 2401-0150-09 (March 16, 2010); *Cabaness v. Dept. of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0156-99 (January 30, 2003); *Fagelson v. Dept. of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0137-99 (August 28, 2003); *Dyson v. Dept. of Mental Health*, OEA Matter No. 2401-0040-03, Opinion and Order on Petition for Review (April 14, 2008).
[14] *See* Agency's Brief in Support of Reduction-in-Force, Attachment 5 (July 11, 2014).
[15] *Id*., Attachment 7.
[16] *See* DPM Section 2403.2(a).

DPM section 2403.2 *does not require* an Agency to make certain considerations prior to planning a RIF, rather it gives Agency the discretion to implement various actions that may mitigate the adverse impact on employees or the agency in anticipation of effectuating a RIF. Here, it is apparent that Agency elected not to request volunteers for the purpose of considering job sharing and reduced working hours. Agency states that job sharing and reduced hours were incompatible with the reasons for the RIF.[17] Thus, I find that Agency did not violate the RIF procedures and regulation under D.C. Code § 1-624.02(a)(4).

Employee appeal rights

D.C. Code § 1-624.02(a)(5) states that Agency must provide employees separated pursuant to a RIF their appeal rights. Each employee separated pursuant to a RIF shall be entitled to written notice at least thirty (30) days before the employee's separation from service.[18] Here, the RIF Notice issued to Employee on September 14, 2011, states that Employee may "appeal this action to the Office of Employee Appeals…" Agency also provides that Employee may appeal the RIF "no later than 30 calendar days after the effective date of [the RIF]." The effective date of the RIF was October 14, 2011. It is noted that Employee refused to sign the RIF Notice; however, that does not negate the fact that the RIF notice provided Employee her rights to appeal the RIF. Employee argues that the RIF notice was defective since Agency never had the RIF approved by the City Administrator thereby negating the appeal rights provided in the RIF notice. Employee does not deny that she received the September 14, 2011 RIF Notice. While the purported authorization to conduct the RIF may be at issue, I find that Employee was provided the appropriate appeal rights set forth in D.C. Code § 1-624.02(a)(5) and DPM § 2422. Accordingly, I find that Agency has complied with the RIF procedures set forth in D.C. Code § 1-624.02.

RIF Authorization

Employee maintains that the RIF was unauthorized because it was not approved by the City Administrator; thus, not in accordance with all applicable laws, rules, or regulations.

District Personnel Regulations sections 2405.4 provides 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." Therefore, although Agency may have correctly complied with the implementation of the RIF action, it may still be invalid without prior approval from the Mayor to conduct the RIF.[19]

D.C. Personnel Regulations 2406 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

[17] *See* Agency's Brief in Support of Reduction-in-Force, p. 4 (July 11, 2014).
[18] *See* DPM § 2422.
[19] *Hunter v. D.C. Child and Family Services Agency*, OEA Matter No. 2401-0321-10, Opinion and Order on Petition for Review (March 4, 2014).

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 Administrative Order . . .shall constitute the authority for the agency to conduct a reduction in force.

Additionally, the Electronic-DPM ("E-DPM") Instruction No. 24-1, provides that to proceed with a RIF, "[c]oncurrence by the Director, DCHR, and the City Administrator, along with approval of the agency's personnel authority shall constitute authority for the agency to conduct a RIF."[20] The Instruction further states that "subordinate agencies under the personnel authority of the Mayor, through the Director of the D.C. Department of Human Resources (DCHR), must follow the procedures set forth in this Instruction."[21] Pursuant to the DPM, Part II, Chapter 1, §§ 1.6 and 1.7, MPD falls under the personnel authority of the Mayor.

Furthermore, DCHR published a "General Information Guide to Reorganization and Realignments," which also provides that in order for an agency to conduct a realignment and RIF, that the agency must perform a number of steps prior to initiating the realignment and RIF, including receiving the concurrence of the City Administrator.[22] Specifically, the last two steps of the DCHR Guide require an agency to submit a proposal for realignment ("PFR") to DCHR for review and approval, as well as submitting the PFR to the "City Administrator for concurrence" prior to implementation.[23] The Guide further states, "An agency may not effect a RIF until the City Administrator has approved the agency realignment."[24] Agency was clearly aware of this requirement as the Memorandum from DCHR Director, Shawn Stokes, to City Administrator Lew, accompanied the documents proposing the realignment and RIF, state that the package is submitted to Mr. Lew "for [his] review and approval."[25] .

[20] E-DPM Instruction No. 24-1.
[21] *Id.*
[22] *See* Employee's Brief, Attachment 17 (August 11, 2014).
[23] *See* Employee's Brief, Attachment 17, p. 2 (August 11, 2014).
[24] *Id*. at p.7.
[25] *See* Employee's Brief, Attachment 18 (August 11, 2014).

Although I find that Agency followed the applicable RIF procedures in D.C. Code §1-624.02, Employee asserts that the RIF was unauthorized, thereby making it unlawful.

Here, Agency failed to procure the City Administrator's signature for concurrence to approve the RIF. In Employee's request for discovery, she sought "any request or approval sent to or signed by the City Administrator."[26] Although Agency purports to have provided documents establishing approval from the City Administrator, it provides no documents signed by the City Administrator.[27] In fact, the Realignment Approval Form, which provides a line for the City Administrator's signature, is unsigned.[28] The Realignment Approval Form, bears the signatures of the Chief of MPD, the Chief Financial Officer, the Director of DCHR, but did not contain the signature from the City Administrator.

D.C. Personnel Regulations § 2406.4, requires approval by the appropriate personnel authority to conduct a RIF. DPM Instruction No. 24-1, provides that to proceed with a RIF, "[c]oncurrence by the Director, DCHR, and the City Administrator, along with approval of the agency's personnel authority shall constitute authority for the agency to conduct a RIF." All of the necessary signatures granting approval of the instant RIF were obtained except that of the City Administrator. The Realignment Approval Form indicates that Agency was aware that the City Administrator's approval was required to conduct the instant RIF. None of the documents relating to the RIF contain the signature of the City Administrator. Accordingly, I must find that Agency failed to receive the necessary approval to conduct a RIF; thus, the RIF lacked authorization and was unlawful pursuant to D.C. Personnel Regulations § 2406.4 and DPM Instruction No. 24-1.

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[26] *See* Employee's Brief, p. 6 (August 11, 2014); *See also* Agency's Brief, Attachment 8 (July 11, 2014). In Attachment 8 of Agency's brief, it is noted that Agency did not provide the complete document of its Answers to Employee's First Discovery Request. It is further noted that Employee's Interrogatory No. 1(d) seeks "Any request or approval sent to or signed by the City Administrator.

[27] Agency's Discovery responses, tabs 5 and 6, can be found in Employee's Brief, at Attachment 18 (August 11, 2014.) Agency also provides its Discovery responses in its Brief in Support of Reduction-in-Force, at Attachment 8 (July 11, 2014). It is noted that Agency did not provide its complete response to Employee's First Discovery Request.

[28] *See* Employee's Brief, Attachment 18 (last page of Tab 5) (August 11, 2014).

ORDER

Based on the aforementioned, it is hereby **ORDERED**, that Employee's Petition for Appeal is **GRANTED** and Agency's RIF action is **REVERSED**. It is further **ORDERED** that, Agency shall:

1. Reinstate Employee back to her last position of record, or an equivalent position;
2. Reimburse Employee all back-pay and benefits lost as a result of the RIF action; and
3. 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