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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DAVETTE BUTLER,)	
Employee)	OEA Matter No. 2401-0090-17
)	
v.)	Date of Issuance: August 27, 2018
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Michelle R. Harris, Esq.
)	Administrative Judge
_____)	
Dirk McClanahan, Esq., Employee Representative)	
Carl K. Turpin, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 30, 2017, Davette Butler (“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 removing her from service through a Reduction-In-Force (“RIF”). The effective date of the RIF was August 4, 2017. Agency submitted its Answer to Employee’s Petition for Appeal on October 2, 2017. This matter was assigned to the undersigned Administrative Judge (“AJ”) on October 3, 2017. On October 11, 2017, I issued an Order Convening a Prehearing Conference in this matter. The Prehearing Conference was scheduled for November 29, 2017. On November 21, 2017, the parties submitted a joint request for mediation in this matter. As a result, I issued an Order on November 28, 2017, granting this request and submitted the matter for mediation. Following an unsuccessful attempt at mediation, this matter was returned to the undersigned AJ for adjudication. Consequently on January 23, 2018, I issued an Order for a Prehearing Conference. The Prehearing Conference was held on February 21, 2018, and both parties were present.

Following the Prehearing Conference, I issued an Order on February 22, 2018, requiring both parties to submit briefs in this matter. Agency’s brief was due on or before March 19, 2018, and Employee’s brief was due on or before April 13, 2018. Agency had the option to submit a Sur-Reply brief on or before April 25, 2018. Upon review of the briefs as submitted, the undersigned determined that both parties needed to address Agency’s administration of the RIF pursuant to D.C. Code §1-624.02. As a result, on July 5, 2018, I issued an Ordering requiring Agency to address this issue and gave Employee the opportunity to respond. On July 24, 2018, Agency filed a Motion for

an Extension of Time to File, and subsequently filed its response on July 24, 2018. Employee submitted her response on August 8, 2018. Upon review of the documents submitted in the record to date, the undersigned determined that there was no copy of the Chancellor's authorization for the instant RIF. As a result, on August 14, 2018, the undersigned sent an email to both parties and required Agency to submit the Chancellor's authorization for the RIF. Agency submitted its response on August 20, 2018, citing that the Chancellor verbally authorized the 2017 RIF. I have determined that an Evidentiary Hearing is not warranted. 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.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee's Position

Employee contends that the RIF was improper. Employee asserts that she was on workers' compensation at the time of the RIF, and that pursuant to D. C. Code §1-623.45 (b)(1) and Administrative Order No. 14-05, she was afforded protection from being subject to a RIF.¹ Specifically, Employee avers that under this code provision, she was to be afforded "safeguards from reduction-in-force procedures."² Employee asserts that she was injured on February 21, 2017, and filed for workers' compensation.³ Employee notes that she was rewarded benefits on March 8, 2017, through a notice of determination. Employee contends that she was on "both workers' compensation

¹ Employee's Post Hearing Brief at Page 6 (April 13, 2018).

² *Id.*

³ *Id.* at Page 4 (April 13, 2018).

and modified/restricted duty until at least September 12, 2017.⁴ Employee asserts that Agency knew she was on workers' compensation at the time of the RIF, pursuant to an email correspondence between DCPS personnel on May 22, 2017. As a result, Employee asserts that the RIF should be reversed, as she was improperly removed from service.

Agency's Position

Agency states that it had authority to conduct the instant RIF and in separating Employee, it complied with the procedures required for a school-based RIF, pursuant to D.C. Code §1-624.02 and Title 5-E Chapter 15 of the District of Columbia Municipal Regulations ("DCMR").⁵ Agency argues that the Chancellor had the authority to define the competitive areas for the RIF in accordance with 5-E DCMR § 1500 and that each school was identified as a separate competitive area. Additionally, the Chancellor identified positions and pay plans as separate competitive levels.⁶ Agency explains that "school principals were required to rate each staff member who occupied a position in a competitive level that was recommended for reduction."⁷ Further, during this time, school principals that "needed to meet budget reduction targets or schools that were reorganizing; made recommendations for the elimination of filled teaching and non-teaching positions, vacant positions, or non-personnel services."⁸

Agency cites that Employee was the only Registrar assigned to Miner Elementary School. Agency further asserts that Miner Elementary School was determined to be a competitive area, and Employee's position was a competitive level subject to the RIF. Further, Agency notes that Employee was the only person in her competitive level subject to the RIF. Agency explains that because Employee was the only Registrar, they were not required to develop a competition for her position. Agency also asserts that Employee's workers' compensation has no bearing on the RIF. Agency contends that the code provision only affords Employee the safeguards provided in all RIFs, and does not mean that she cannot be subject to a RIF because she received workers compensation. Agency maintains that the RIF was proper and that Employee was appropriately removed from service.

Authorization for RIF

On May 24, 2017, Employee was notified that her position was being abolished pursuant to a RIF, effective August 4, 2017. Agency asserted that it followed all applicable District laws, rules and regulations in conducting the instant RIF. However, for the reasons cited below, the undersigned finds the instant RIF to be invalid because Agency failed to provide this Office with the Administrative Order or equivalent documentation 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*

⁴ *Id.* at Page 5.

⁵ Agency's Answer (October 2, 2017).

⁶ *Id.*

⁷ *Id.* at Page 2.

⁸ *Id.*

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 the instant matter, there is an issue as to whether Agency adhered to the provisions set forth in DCPR § 2406. This provision requires that once an Agency determines that a reduction in personnel is needed, the agency head (in this instance, the Chancellor) was required to submit *a request to the appropriate personnel authority to conduct a RIF*.⁹ In the instant matter, Agency asserts that the Chancellor gave verbal authorization during managerial meetings in March and April of 2017.¹⁰ In an affidavit submitted by Michael Defabbo, Director of Strategic Staffing in the Office of Talent and Culture, Agency cites that the Chancellor provided verbal authorization during managerial meetings in March and April of 2017, for the RIF and that the Office of Talent and Culture then carried out the RIF as directed.¹¹ Agency argues that D.C. Code §1-624.02 and DCMR 1500 do not require a written authorization.¹² Further, Agency cites that Mayor's Order 2007-186 dated in August 10, 2007, and Mayor's Order 2007-158, dated July 5, 2007 ("2007 Orders"), supports its contention that a written authorization was not required, and that the Chancellor was authorized to make personnel decisions, including those regarding RIFs.¹³

However, the undersigned finds that this argument fails, given that Agency has not complied with the aforementioned RIF provisions as directed in DCMR 2400, specifically, 2406.2, *et.seq.* Agency maintains that it received verbal authorization from the Chancellor during meetings in March and April of 2017, and as a result has not provided this Office with sufficient documentation of the authorization of this RIF. The affidavit submitted by Michael Defabbo does not provide sufficient evidence that this RIF was authorized by the Chancellor's authority, who is the Mayor's designee for DCPS. DCPR 2406.2 provides 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 requested Agency to produce the documentation authorizing the RIF, but Agency asserts that it was guided only by the verbal authorization that occurred over the course of managerial meetings in March and April of 2017 and the 2007 Orders from the Mayor which designates the Chancellor to handle matters for DCPS.

⁹ 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.

¹⁰ Agency's Supplemental Brief (July 24, 2018).

¹¹ Agency's Supplemental Brief at Attachment (August 20, 2018).

¹² *Id.* at Brief.

¹³ *Id.*

D. C. Official Code § 38-172 provides that:

(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).*

The undersigned finds that while D.C. Code §38-172, along with the 2007 Orders grants the Chancellor the authority to conduct RIFs, it *does not* dismiss Agency's responsibility under DCPR Section 2400 to provide an Administrative Order authorization for RIFs that have been approved and authorized by the Chancellor. Further, I find that the notice to Employee regarding the RIF is the not the equivalent of an administrative authorization of the RIF, and as a result, the undersigned has no documentation to rely upon to indicate that this RIF was in fact authorized. Historically, when RIFs have been administered by Agency and later been appealed to this Office, Agency has provided the Administrative Order or equivalent documentation to cite that the RIF was appropriately authorized by the Chancellor, but it has failed to do so in this matter.

As a result, I find that Agency has not provided sufficient evidence to support that the instant RIF was approved and authorized, and has not met the requirements set forth in DCPR 2406.2.¹⁴ While Agency may have implemented the elements of this instant RIF in accordance with other applicable laws rules and regulations; without the requisite authorization to conduct the RIF, I find that the RIF is invalid. This Office has held that if an Agency cannot produce the administrative order authorizing a RIF, then the RIF is invalid.¹⁵ Consequently, I conclude that Agency did not meet its burden of proof in this matter.

CONCLUSION

The undersigned finds that Agency has failed to establish that it had proper authority to conduct the RIF, and as a result, the instant RIF is invalid. Accordingly, I will not address whether Agency, in administering this RIF, properly followed RIF procedures or any other issues raised by the parties during the course of this appeal.

¹⁴ 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 or her designee prior to conducting a RIF.

¹⁵ *Gennifer Cunningham v. DCPS*, OEA Matter No. 2401-0058-17 (June 5, 2018).

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:

Michelle R. Harris, Esq.
Administrative Judge