THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DENNIS N. BLAKE Employee	OEA Matter No. 1601-0014-05
v.	Date of Issuance: October 5, 2005
	Rohulamin Quander, Esq. Senior Administrative Judge
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, DIVISION OF TRANSPORTATION Agency	

Dennis N. Blake, *Pro se*
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On January 10, 2005, Employee, an Information Technology Specialist, DS 12-7, with the District of Columbia Public Schools, Division of Transportation (the "Agency"), filed a Petition for Appeal with the Office of Employee Appeals (the "Office"), appealing Agency's final decision, effective December 15, 2004, removing him from his position due to allegations of unsatisfactory work performance. Although his effective termination date was December 15th, on December 21, 2004, Employee filed retirement documents with the Agency, effective December 15, 2004. The primary retirement document listed Employee's retirement as an "Involuntary Separation". Agency accepted the documents and allowed Employee to retire, retroactive to December 15, 2004.

On February 15, 2005, Agency filed a *Motion to Substitute DCPS as Respondent and for Extension of Time in Which to File Answer*. The Motion noted that the D.C. Public Schools was seeking to replace the DCPS Division of Transportation as Agency

and party of legal record, and as the properly named party respondent in this matter. The motion also noted that the Employee had inaccurately named the DCPS Division of Transportation as the Agency. However, while the motion was under advisement before this AJ, the Division of Transportation filed *D.C. Public School's Response to Complainant's Petition for Appeal, and Motion for Summary Disposition,* which document was accepted as an Answer to the Petition for Appeal. The Answer defended Agency's termination actions as properly based upon cause, after Employee failed to improve the unsatisfactory nature of his work product, despite both verbal and written warnings from the Agency and his being accorded a 90-day performance improvement plan, which evaluation period included counseling meetings with supervisors, as well as the establishment of specific job-related goals and duties, all with a focus upon helping Employee improve his job performance. When he did not, Agency initiated termination procedures, which were effective December 15, 2004.

This matter was assigned to me on August 2, 2005. On August 5, 2005, I issued an Order *Convening A Prehearing Conference,* which was held on August 30, 2005. By that date, Harriet Segar, Esq., had been substituted as Agency counsel, having also filed the *Agency Pre-Hearing Statement* on August 26, 2005. In her Statement, she requested that the Petition be dismissed, noting, "Upon information and belief, the Agency contends that the Employee is retired. Therefore it requests that the instant matter be dismissed."[1]

What was initially noticed to be convened as a Pre-Hearing Conference, became a Jurisdictional Conference, once it was revealed that Employee had retired. Agency argued at the conference that, in lieu of being terminated for cause, Employee voluntarily retired, retroactive to the effective date of the termination, and is therefore not entitled to any relief from the Office. Harriet Segar, Esq., the substituted Agency counsel, renewed Agency's Motion to Dismiss on the basis of a lack of jurisdiction.

When the AJ questioned Employee regarding the voluntariness of his retirement, he replied that although he delayed visiting the retirement office of D.C. personnel until December 21, 2004, six days after the effective date of his termination, he was still allowed to process retirement papers, the essence of which reflects that he elected to retire in lieu of being fired. The AJ queried Employee why his retirement documents referred to his status as a "Regular Involuntary Separation". Although he was unable to provide a definitive answer, this AJ takes administrative notice of D.C. Personnel Regulations, Chapter 26, Retirement Chart, which lists discontinued service retirements as those retirements in which the retiree is at least 50 years of age and has at least 20 years of service, as "Involuntary" retirements. To be considered as a non "involuntary' retirement, Employee would have to be at least 55 years of age, and have a minimum of 30 years of service. Therefore, anything less than that level of service, is considered to be

[1] Although the Agency did not specifically assert a lack of jurisdiction as the basis for its Motion to Dismiss, the AJ takes administrative notice that under the law, the Office lacks jurisdiction to hear and decide appeals filed at the Office where the evidence reveals that the employee voluntarily retired, the effect of which removes jurisdiction from the Office to hear and decide the case.

an involuntary retirement.

Since the matter could be decided on the basis of the documents of record, no further proceedings were held. The record is now closed.

JURISDICTION

As will be discussed, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Pursuant to OEA Rule 629.1, *id.*, the burden of proof is by a "preponderance of the evidence", which is defined as "[t]hat 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."

There is a legal presumption that retirements are voluntary. Although this Office lacks jurisdiction to adjudicate a voluntary retirement, a retirement where the decision to retire was involuntary, may, depending upon the circumstances, be treated as a constructive removal and sometimes may be appealed to this Office. *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Charles M. Bagenstose v. D.C. Public Schools*, OEA Matter No. 2401-1224-96 (October 23, 2001), __ __ D.C. Reg. ___ ( ).

A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception." *See Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995), and *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed. Cir. 1984). To be considered by the Office, Employee must prove that the retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which reliance was placed when making the decision to retire. The Employee must also show "that a reasonable person would have been misled by the Agency's statements." *Id.*

Here, Employee retired in lieu of being involuntarily separated as a result of a proposed termination for cause, due to allegations of an unsatisfactory work product. The issue of whether a resignation (or retirement) is voluntary or involuntary has been addressed in several cases before this Office. Typically, the issue arises as a jurisdictional question, where, for example, an employee is appealing a RIF and s/he accepts an early retirement instead of being released in the RIF. *See, e.g., Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96 (August 20, 1998), ___ D.C. Reg. ___ ( ). Other cases involve employees who resign or retire and then appeal to this Office contending that

their resignation or retirement was coerced or was a constructive discharge. *See, e.g., Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000). In these cases, this Office has looked to *Christie* as the seminal case in the federal sector on the issue of whether a resignation or retirement is voluntary or involuntary.

In *Christie*, the plaintiff claimed that she was wrongfully separated from the government by means of a coerced resignation. The U.S. Court of Claims held that, as a matter of law, the plaintiff's resignation was voluntary. Christie was a veteran's preference employee of the U.S. Navy Department. She was issued an advance notice of proposed removal for cause for attempting to inflict bodily injury on her supervisor. She denied the charge. The agency issued a final decision to remove Christie, but allowed her an opportunity to accept a discontinued service retirement instead of being fired. Christie resigned and accepted the retirement benefit. Then, she filed an appeal with the U.S. Civil Service Commission (CSC). The CSC dismissed the appeal for lack of jurisdiction and the plaintiff appealed to the U.S. Court of Claims.

In finding that the resignation was voluntary, the Court of Claims stated:

> Employee resignations are presumed to be voluntary. This presumption will prevail unless plaintiff comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. Plaintiff had the opportunity to rebut this presumption before the CSC. . . .
>
> Upon review of the facts as they appear in the record before the CSC, it is clear the plaintiff has failed to show that her resignation was obtained by external coercion or duress. Duress is not measured by the employee's subjective evaluation of the situation. Rather, the test is an objective one. While it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports CSC's finding that plaintiff chose to resign and accept discontinued service retirement rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the involuntariness of her resignation.
>
> This Court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. But this 'good cause' requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated.

Christie, supra at 587-588. (emphasis in original). (citations omitted).

If the Employee herein could have established that his decision to retire was a result of coercion or erroneous information provided by his former Agency, his decision to retire would be viewed as having been involuntarily obtained, and this Office would have treated his retirement as a constructive removal, over which this Office has jurisdiction. See *Dunham v. District of Columbia Public Schools,* OEA Matter No. 2401-0291-96, *Opinion and Order on Petition for Review* (September 28, 2000), ___ D.C. Reg. ___ ( ); *Siblo v. Department of Human Service,* OEA Matter No. 2401-0382-96, *Opinion and Order on Petition for Review* (September 16, 2002), ___ D.C. Reg. ___ ( ).

Relying on *Christie*, prior decisions of this Office have held that there is a presumption that an employee's resignation or retirement is voluntary. It is incumbent on the employee to present sufficient evidence to prove that the retirement was involuntary. Like plaintiff's election to retire in *Christie,* Employee's decision herein was generated by being faced with a termination for cause. Employee had to elect between painful options, either to voluntarily retire or await imposition of Agency's termination action.

Employee clearly was in duress due to the painful options before him, but *Christie* held that duress "is inherent in the choice presented . . . " Employee's circumstance is exactly the inherently unpleasant situation or alternatives envisioned by *Christie*, wherein the Employee's choice is limited to "two unpleasant alternatives", i.e., to either take the early retirement, or remain on the job and be subjected to being terminated for cause. As the Court found in *Christie*, such a situation "does not obviate the involuntariness of [the] resignation." As it was with Ms. Christie, here Employee had the option to stand pat and wait to be fired, or to retire. He chose the latter option.

I conclude that Employee's retirement was voluntary and even though it was effectuated six days after the official date of his termination, Agency elected to accept his action as a retirement, rather than to create an adverse circumstance in his personnel records which would reflect that he was terminated for cause. Therefore, the Office is without jurisdiction to hear and decide this case, and Agency's motion to dismiss must be granted.

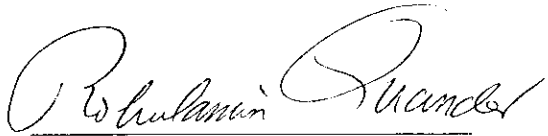
ORDER

It is hereby ORDERED that:

1. Agency's Motion to Dismiss is GRANTED; and

2. This matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:



ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge