THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BARBARA LAPPIN,	)	OEA Matter No. 2401-0135-10
Employee	)	
	)	Date of Issuance: May 31, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Barbara Lappin ("Employee") worked as a Special Education Teacher with D.C. Public Schools ("Agency"). On October 2, 2009, Employee received a reduction-in-force ("RIF") notice from Agency. The notice provided that Employee's position would be eliminated, and as a result, she would be separated effective November 2, 2009.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 5, 2009. She argued that she was terminated despite receiving positive performance evaluations. Additionally, she contended that the information provided on her Competitive Level Documentation Form ("CLDF") was unfounded and exaggerated.[2]

On December 9, 2009, Agency filed its response to Employee's Petition for Appeal. It explained that it conducted the RIF pursuant to D.C. Official Code § 1-624.02 and Title 5,

[1] *Petition for Appeal*, p. 5-6 (November 5, 2009).
[2] *Id.*, Exhibit #11.

Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It argued that the RIF was conducted in accordance with the regulations, and Employee was provided with one round of lateral competition. Moreover, Agency claimed that it provided Employee a written, thirty-day notice that her position was being eliminated. As a result, it believed the RIF action was proper.[3]

Before the OEA Administrative Judge ("AJ") issued her Initial Decision, Employee provided that she retired from Agency. However, she argued that her retirement was involuntary because she had no other way to support herself financially. More importantly, she believed that OEA retained jurisdiction over her appeal because she retired after the effective date of her RIF action.[4]

The AJ disagreed and issued her Initial Decision in the matter on April 25, 2012. She held that Employee retired on November 3, 2009, one day after the effective date of the RIF action. The AJ ruled that the Office lacked jurisdiction to adjudicate a voluntary retirement. She found that Employee contacted the Office of Pay and Retirement and chose to retire to continue to receive income. Moreover, she reasoned that because Employee enjoyed the benefits of retirement, she was unable to address the merits of the RIF action taken against her.[5]

Employee disagreed and filed a Petition for Review with the OEA Board. She argued that she actually retired on November 1, 2009, one day before the effective date of the RIF action. She provided that she retired because of financial obligations. As a result, she requested that the RIF action be reversed.[6]

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[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* p. 2-3 (December 9, 2009).
[4] *Employee, Barbara Lappin's, Response to District of Columbia Public School Brief,* p. 3 (March 20, 2012).
[5] *Initial Decision,* p. 3-4 (April 25, 2012).
[6] *Petition for Review* (May 14, 2012).

It is clear from Agency's RIF notice that the effective date of the RIF action was November 2, 2009.[7] However, Agency provided in its brief that Employee voluntarily retired on November 3, 2009.[8] Thus, on its face, it would appear that Employee retired one day after the effective date of the RIF action, according to Agency. Contrary to Agency's assertion, Employee contends in her Petition for Review that her retirement date was actually on November 1, 2009. If this is indeed the case, then Employee's retirement would have occurred one day before the effective date of the RIF action. Unfortunately there is no documented evidence in the record pertaining to Employee's retirement. Thus, for the reasons stated below, it is imperative that this matter be remanded to the AJ to determine the actual date of Employee's retirement.

If Employee's retirement occurred after the effective date of the RIF action, then the AJ should consider the holding provided in *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155 (2005). The employee in *Bagenstose* offered the same argument as that presented in the current case -- that he retired after the RIF action. The D.C. Court of Appeals held that "had he already been terminated from his employment via the RIF, he would have been ineligible to retire because he would no longer have been a government employee."[9] The same would apply in the current case. If Employee was terminated on November 2, 2009, she would not have been eligible to retire on November 3, 2009. Following the reasoning in *Bagenstose*, Employee ceased being employed by the District government when the RIF was effectuated – November 2nd.[10] As a result, the AJ should have considered the RIF action on its merits if the effective date of the RIF occurred before Employee's retirement.

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[7] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* Tab 4 (December 9, 2009).
[8] *District of Columbia Public Schools' Brief,* p. 2 (March 5, 2012).
[9] *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1158 (2005).
[10] Consequently, she should not have been allowed to retire, but we will defer to Agency's discretion in allowing her to retire. Without documentation, we can only assume that Agency rescinded the RIF action against Employee if she was allowed to retire after the RIF date.

On the contrary, if Employee retired one day before the RIF action -- as she contends -- then this Office would be barred from considering the merits of the RIF action, unless Employee could prove that the retirement was involuntary. [11] In this case, the AJ has already rendered the proper analysis and arrived at the correct determination that Employee's retirement was voluntary. Employee argued that she retired out of financial necessity. She explained that she needed her income to cover her mortgage and bills. Additionally, she provided that she retired because the insurance cost for teachers who did not retire was more expensive than the District government's plan.[12] However, OEA has consistently held that claims of financial hardship are not sufficient to make a retirement rise to the level of involuntariness. Similar to the employee in *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), Employee had the option of retiring or challenging the removal action taken against her by Agency. She chose to retire instead of standing firm and questioning the validity of the RIF. Being faced with removal is a difficult position for most people. However, merely being faced with a difficult situation does not obviate the voluntariness of Employee's retirement. Employee failed to establish that Agency coerced her or gave her misleading information. She had the option to retire or stand pat and challenge the action taken against her by Agency.

For the aforementioned reasons, this case is REMANDED to the AJ to determine when the retirement occurred. If the retirement was effective after the RIF action, then the AJ must consider the case on its merits. If it is proven that the retirement happened before the RIF, then the AJ's ruling, as provided in her Initial Decision, will stand.

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[11] According to *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995), an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. For a retirement to be considered involuntary, an employee must establish that the retirement was due to agency's coercion or misinformation upon which the employee relied. OEA has consistently held that the burden, therefore, rests on employees to show that they involuntarily retired. Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter.

[12] *Petition for Review*, p. 2 (May 14, 2012).

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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Necola Y. Shaw

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A. Gilbert Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.