

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Francine Thomas,)	OEA Matter No. 2401-0025-12
Employee)	
)	Date of Issuance: December 30, 2015
v.)	
)	Joseph E. Lim, Esq.
Metropolitan Police Department,)	Senior Administrative Judge
Agency)	
_____)	
Robert Shore, Esq., Employee Representative)	
Frank McDougald, Esq., Agency Representative)	

INITIAL DECISION¹

INTRODUCTION

On November 10, 2011, Francine Thomas (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Metropolitan Police Department’s (“Agency”) final decision to separate her from government service pursuant to a Reduction-in-Force (“RIF”). This matter was assigned to me on August 2, 2013. After several continuances requested by the parties, I conducted a Prehearing Conference on October 3, 2013, at which time I ordered the parties to brief the statutes applicable to this RIF. I decided the applicable statute issue on February 27, 2014, and after a series of status conferences, I ordered the parties to finish discovery by January 5, 2015.² After several motions by the parties, discovery deadlines were extended and finally closed on January 29, 2015. On February 2, 2015, I ordered the parties to submit briefs on the RIF by April 17, 2015. The parties complied. Thereafter, I issued an Order for the parties to submit a joint stipulation of facts and to identify any potential issues.

I held an Evidentiary Hearing on July 7, 2015. At the hearing, Employee testified that she had retired. Because the issue of whether Employee’s decision to leave Agency employment was voluntary or forced, there was a question of whether the Office had jurisdiction to consider this matter. On July 8, 2015, I issued an Order directing the parties to establish jurisdiction. After the parties made their submissions, I determined that another hearing was needed to determine whether Employee elected to voluntarily retire. Thus, I held a second Evidentiary Hearing on October 27, 2015. The record is now closed.

1 Correction of Initial Decision of December 16, 2015, to correct the Agency’s name on the caption.

2 Part of the reasons for the conferences was the busy schedules of the parties, continued discovery, and the marriage planning and honeymoon of Employee’s attorney which necessitated continuances consented to by Agency. Mr. Shore also represented four other employees versus Agency during this time period.

JURISDICTION

The jurisdiction of the Office in this matter, pursuant to *D.C. Official Code* § 1-606.03 (2001), has not been established.

ISSUE

Does the record reflect that Employee elected to voluntarily retire?

Summary of Material Testimony

Francine Thomas (“Employee”) testified as follows: (Tr. Pgs. 7 – 51)

Employee, Agency’s Information Technology Customer Support Specialist for seventeen (17) years until she was informed that she was being RIFed in September or October of 2011, testified that she was not given any information about retirement. During the exit counseling meeting, the affected employees were told to go to the employee benefit office if they were considering retirement. They were not informed that retirement would affect any RIF appeals. Employee recalled that her union attorneys helped her file her appeal with OEA. However, she did not inform her attorneys a year later that she decided to retire.

Employee had no intention of retiring after her RIF, as she intended to return to government service. However, in August 2012, Employee was frustrated by Agency’s failure to add her to the re-employment priority list. So she went to the District Government Retirement Branch on August 12, 2012, to ask about retirement. She was instructed to go to the Federal Office of Personnel Management because she was designated as a Civil Service employee. Employee got a retirement package³ and went back to the District Government where a Mr. Winslow assisted her in filling out the paperwork. Although the form indicated that Employee was retiring on October 14, 2012, her actual retirement date, as indicated on her Personnel Standard Form 50,⁴ is October 14, 2011, the same day she would have been RIFed. Employee admitted that the Form 50 identified her personnel action as a Discontinued Service Retirement and not as an involuntary retirement.

Employee testified that when she asked if retirement would affect her RIF appeal, Mr. Winslow assured her that it would not. At another point in her testimony, Employee said that she did not specify that it was an OEA appeal but simply stated an “appeal case” because she assumed that Mr. Winslow would understand what she meant.⁵ Employee said, apart from Mr. Winslow, no one else informed her of the effect a retirement would have on her OEA appeal.

3 Employee Exhibit 3. Both parties agree that these forms were generated by the Federal Office of Personnel Management and not by the D.C. Government, as Employee was covered under the Federal Civil Service.

4 Employee Exhibit 4.

5 Transcript, p. 40.

Employee received her 401K fund,⁶ six months of severance pay, and after her retirement, her civil service pension.

Shawn Winslow (“Winslow”) testified as follows: (Tr. Pgs. 51 - 98)

Winslow testified that in August of 2012, he worked as a Human Resources Specialist wherein his duties included advising and processing retirements. He first met Employee when he conducted a RIF seminar in 2012 where he explained the RIF process.

Winslow saw her again when Employee decided to retire. Employee had come to see if Winslow could add specific language in her Personnel Form 50 to indicate that her retirement was involuntary. Winslow indicated that he could not do that, but agreed that her retirement was due to an involuntary separation because of the RIF. Winslow stressed that he would never tell any applicant what the effect of their retirement would have on their appeal because he was not knowledgeable about that.

On August 28, 2012, Winslow memorialized his conversation with Employee, stating that at the time of the RIF seminar, Employee was not informed of her retirement option and that Employee had requested that her retirement be effective “backdated to the date in which she was involuntarily separated.”⁷ The date of Employee’s RIF would have been effective on October 14, 2011. Winslow clarified that Employee’s retirement date was October 14, 2011, and not 2012. He explained that the purpose of the letter was to help Employee obtain her health and life insurance.

Winslow testified that he does not recall Employee asking him if her retirement would have any effect on her RIF appeal. In any case, he would never have given his opinion on that matter as he knows nothing about the appeal process. His only expertise is the retirement process. Instead, what he would do in that situation would have been to urge Employee to seek legal counsel on that issue.

Winslow also explained that based on the Federal Civil Service rules, someone who had been RIFed two to five years earlier may still be eligible for retirement by getting their retirement backdated to the date of the RIF. This way, the employee gets to retire before any RIF action could take effect.

Winslow explained that for D.C. government employees who were hired after 1980 and thus are not under the Federal Civil Service, these employees can only retire if they meet the Social Security eligibility requirements.

FINDINGS OF FACT, LEGAL ANALYSIS AND CONCLUSIONS

⁶ A retirement fund administered by the D.C. Government as an employee benefit.

⁷ Employee Exhibit 5.

Voluntary verses involuntary retirement

Employee maintains her election to retire, was solely the result of Agency misinformation and lack of information. Agency argues that Employee's decision to retire was entirely voluntary, arrived at only after she had more than ample time to deliberate and evaluate all of the available options, before ultimately making the decision to retire. Further, since the decision was voluntary, consistent with the law on the subject and OEA's prior rulings in similarly situations, OEA lacked jurisdiction to even consider the merits of this appeal.

Agency further asserts that there is a presumption that an employee's decision to retire is voluntary, unless the affected employee can present evidence to prove otherwise. *See Toliver v. D.C. Public Schools*, OEA Matter No. 2401-0290-96, 47 D.C. Reg. 9963 (2000); *Dunham v. D.C. Public Schools*, OEA Matter No., 47 D.C. Reg. 9970 (2000).

Jurisdiction

OEA Rule 628.1, 59 D.C. Reg. 2129 (March 16, 2012) states that "[t]he employee shall have the burden of proof as to issues of jurisdiction . . ." Employee has the burden of proving that this Office has jurisdiction over his appeal. Moreover, the D.C. Official Code has established those matters over which OEA has jurisdiction to consider. D.C. Official Code § 1-606.03 states that:

[a]n employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

Although this case does involve a RIF, Agency claims that OEA lacks jurisdiction to consider Employee's substantive arguments because she voluntarily retired. Contrary to Agency's claim, Employee asserts that her retirement was involuntary because she was misled by a government employee and offers her Standard Form 50 as evidence.

Employee has the burden of proving that her retirement was involuntary since a retirement request initiated by an employee is presumed to be a voluntary act. *Covington v. Department of Health & Human Servs.*, 750 F.2d 937, 941 (Fed.Cir.1984); *Christie v. United States*, 207 Ct.Cl. 333, 518 F.2d 584, 587 (1975). An employee's decision to retire is deemed

voluntary unless the employee presents sufficient evidence to establish otherwise. *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995).

For a retirement to be considered involuntary, an employee must establish that the retirement was due to an agency's coercion or misinformation upon which they relied. OEA has held that the burden therefore rests on employees to show that they involuntarily retired. Such a showing would constitute a constructive removal and allows OEA to adjudicate the merits of an employee's case.⁸ Thus, if Employee can adequately prove that she involuntarily retired, then OEA may adjudicate her RIF matter.

Employee's Evidence of Involuntary Retirement

Employee's argument that her retirement was involuntary rests on three prongs: 1) her signed and dated Standard Form 50 from Agency; 2) her sworn testimony that Agency misled her; and 3) that Agency failed to provide her explicit advice that retiring would adversely affect her ability to appeal her RIF.⁹

The Standard Form 50 document is titled, "Notification of Personnel Action." In the field designating the nature of the action, it clearly states "Retirement – Retire w/ Pay." The form is signed and dated August 30, 2012.¹⁰ However, this document is not persuasive as even Employee conceded in her testimony that the form does not indicate an involuntary retirement, but rather, that she "elected to retire on Discontinued Service Retirement."¹¹ Thus, I do not find this document to substantiate her claim of involuntary retirement.

Next, Employee contends that Human Resources Specialist Shawn Winslow misled her by claiming that her retirement would have no effect on her RIF appeal. However, based on Winslow's courtroom demeanor and forthright testimony, I find Winslow to be more credible

⁸*Esther Dickerson v. Department of Mental Health*, OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006); *Georgia Mae Green v. District of Columbia Department of Corrections*, OEA Matter No. 2401-0079-02, *Opinion and Order on Petition for Review* (March 15, 2006); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05, *Opinion and Order on Petition for Review* (July 24, 2008); *Larry Battle, et al. v. D.C. Department of Mental Health*, OEA Matter Nos. 2401-0076-03, 2401-0067-03, 2401-0077-03, 2401-0068-03, 2401-0073-03, *Opinion and Orders on Petition for Review* (May 23, 2008); and *Michael Brown, et al. v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09, 1601-0013-09, 1601-0014-09, 1601-0015-09, 1601-0016-09, 1601-0017-09, 1601-0018-09, 1601-0019-019, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09, 1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

⁹ Employee Exhibit 4.

¹⁰ *Id.*

¹¹ *Id.*

than Employee when he consistently denies ever giving any opinion on the effect of a retirement on an employee's appeal. As Winslow credibly stressed, he has no knowledge about appeal rights, as his sole duty is in helping eligible employees retire with the maximum monetary benefits they can get. In addition, Employee has not shown that Winslow had any motive to perjure his testimony.

Lastly, Employee states that her retirement was involuntary since Agency failed to provide her with information pertinent to the effect that retirement would have on her RIF appeal. Although Employee's RIF notice (Employee Exhibit 1) informs her of her appeal rights, it is devoid of any information on retirement. Her RIF Counseling form (Employee Exhibit 2) shows that Employee signed her acknowledgment that she received information on, among other topics, her retirement options. It does not, however, reveal what, if any, effect that retirement would have on her RIF appeal. Employee Exhibits 3 and 5 indicate that Employee was counseled on her retirement options and that she requested her retirement to be backdated effective to the date in which she was involuntarily separated.

Thus, the issue is whether Agency's failure to proactively provide information on the effect that a retirement would have on her appeal renders his or her retirement involuntary? The D.C. Court of Appeals has addressed this issue in *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1156 (D.C. 2005).

In *Bagenstose*, one of the grounds that the employee pointed to in arguing that his retirement was involuntary was that the notice of his RIF did not affirmatively make it clear to him that he would lose the right to appeal his RIF if he submitted his retirement application. The Court stated that the notice did not expressly provide the consequence of each choice, but that there was nothing in the notice that was incorrect or would have led a reasonable person to conclude that retirement was his or her only option. Similar to *Bagenstose*, I find that neither the Agency nor the RIF notice misled Employee into retiring.

Similarly, *Bagenstose*, and the instant Employee did not avail himself or herself of the opportunity afforded to them to speak with a counselor about their situation. See *Keyes v. District of Columbia*, 362 U.S.App. D.C. 67, 72, 372 F.3d 434, 439 (2004), where the Court held that if an employee was confused about information presented in the notice, he or she was in a position to consult an attorney or take additional steps to confirm the accuracy of the information. I also note that Employee had ample time, in this case almost a year, to seek counsel before deciding to retire.

Again, similar to that of *Bagenstose's* argument, Employee's final argument is that because she retired after her RIF, that her retirement did not preclude her appeal of the RIF. Likewise, the record does not support this contention. As evidenced by the documents that she acknowledged receiving, Employee applied for her retirement to be effective commencing October 14, 2011, which would have been the date the RIF was to take effect. Had she already been terminated from her employment via the RIF, she would have been ineligible to retire because she would no longer have been a government employee.

Accordingly, I find Employee has failed to prove that her retirement was involuntary, as there was no credible evidence that it was the result of Agency's misinformation. Therefore, I conclude that Employee's appeal should be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this matter is dismissed due to Employee's failure to establish that the Office has subject matter jurisdiction to consider this appeal.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge