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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
HSIAO ZEN LU,	)	OEA Matter No.: J-0153-13
Employee	)	
	)	
v.	)	Date of Issuance: November 25, 2013
	)	
DEPARTMENT OF GENERAL SERVICES,	)	Monica Dohnji, Esq.
Agency	)	Administrative Judge
_____	)	
Barbara Hutchinson, Esq., Employees' Representative	)	
Charles Brown, Esq., Agency's Representative	)	
C. Vaughn Adams, Esq., Agency's Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On September 3, 2013, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Department of General Services’ (“Agency”) action of abolishing his position through a Reduction-in-Force (“RIF”). Employee’s termination was effective on March 27, 2009. Subsequently, on September 16, 2013, Employee submitted an Addendum to his Petition for Appeal.

I was assigned this matter in September of 2013. On October 15, 2013, Agency filed a Motion for Extension of Time to file its Answer. This Motion was granted in an Order dated October 17, 2013. On October 30, 2013, Agency submitted its Motion to Dismiss for lack of jurisdiction. On November 1, 2013, the undersigned issued an Order requiring Employee to address the jurisdiction issue in this matter. Thereafter, counsel for Employee filed Employee’s Response to the Agency’s Motion to Dismiss. The November 1, 2013, Order also provided Agency with the option to submit a reply brief, but Agency opted not to do so. After considering the arguments herein, I have determined that an evidentiary hearing is unwarranted. The record is now closed.

**JURISDICTION**

As will be discussed below, the jurisdiction of this office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

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:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction

ANALYSIS AND CONCLUSIONS OF LAW

In its Motion to Dismiss, Agency highlights that OEA lacks jurisdiction in this matter because Employee’s appeal is untimely because it was filed with this Office more than thirty (30) days from the effective date of his termination. Agency also alleges that this Office lacks jurisdiction over this matter since Employee elected to grieve his RIF termination under the terms of his Collective Bargaining Agreement. Lastly, Agency notes that Employee’s voluntary retirement deprives OEA of jurisdiction over this matter.

In his response to Agency’s Motion to Dismiss, Employee notes that his appeal was filed within thirty (30) days of the D.C. Superior Court decision related to Employee’s appeal from the Public Employee Relations Board (“PERB”). Employee further states that the union’s grievance was timely filed and the August 1, 2013 Superior Court decision was the first ruling stating his appeal rights for the instant RIF were limited to OEA. Employee also argue that he was not informed of his rights – he was not given the notice of appeal forms, the regulations of this Office, as well as his rights under the negotiated grievance procedure when he was RIF’d in 2009. Additionally, Employee submits that his position was targeted for elimination because the position was represented by a union. Also, Employee maintains that his position was contracted out in violation of District law and regulation. Lastly, Employee highlights that he retired after receipt of his RIF notice. Employee explains that his retirement is not voluntary because it occurred after receipt of his RIF notice.

This Office’s jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (“CMPA”), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B

of the District of Columbia Municipal Regulation (“DCMR”) § 604.1<sup>1</sup>, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force.

As previously noted, OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to this rule, 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.” This Office has no authority to review issues beyond its jurisdiction.<sup>2</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>3</sup>

A “[d]istrict government employee shall initiate an appeal by filing a Petition for Appeal with the OEA. The Petition for Appeal must be filed within thirty (30) calendar days of the effective date of the action being appealed.”<sup>4</sup> The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.<sup>5</sup> Also, while this Office has held that the statutory thirty (30) days time limit for filing an appeal in this Office is mandatory and jurisdictional in nature,<sup>6</sup> there is an exception whereby, a late filing will be excused if an agency fails to provide the employee with “adequate notice of its decision and the right to contest the decision through an appeal.”<sup>7</sup>

Here, according to the parties’ submissions to this Office, Employee’s termination was effective on March 27, 2009. Because Employee’s termination effective date was March 27, 2009, Employee had thirty (30) days from that date to file an appeal with OEA, but failed to do so. Instead, upon his termination, Employee, through his union, filed a grievance. When Agency refused to arbitrate the grievance, Employee filed an Unfair Labor Practice complaint with PERB, and later with the D.C. Superior Court which found that while PERB had jurisdiction over the Unfair Labor Practice claim, employees affected by a RIF had appeal rights only to OEA. After receiving the ruling from the D.C. Superior Court on August 1, 2013, Employee filed his appeal to this Office on

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<sup>1</sup> See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

<sup>2</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>3</sup> See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia General Hospital*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

<sup>4</sup> DC Official Code §1-606.03.

<sup>5</sup> See, e.g., *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985).

<sup>6</sup> *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).

<sup>7</sup> OEA Rule 605.1, 59 DCR 2129 (March 16, 2012); See also *Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008) citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0077-09, *Opinion and Order on Petition for Review* (May 23, 2011).

September 3, 2013. While this was within thirty (30) days from the August 1, 2013, D.C. Superior Court ruling, the matter in front of PERB and the D.C. Superior Court did not toll the mandatory thirty (30) days within which to file an appeal with this Office, unless Agency failed to provide Employee with “adequate notice of its decision and the right to contest the decision through an appeal” in compliance with OEA Rule 605.1.

In his response to Agency’s Motion to Dismiss, Employee submit that he was not given the notice of appeal forms, or the regulations of this Office. I disagree with this assertion. A review of the Final Agency Decision (“FAD”) which was signed by Employee proves that Employee in fact received a copy of the OEA appeal forms and OEA regulations, in compliance with OEA Rule 605.<sup>8</sup> Clearly, Employee was aware of OEA’s jurisdiction over this matter, as well as the rules governing appeals in this Office. Additionally, because the appeals to PERB and the D.C. Superior Court were from unrelated issues and because Employee was aware of his appeal rights with this Office, as well as the mandatory thirty (30) days time limit for filing an appeal in this Office, I find that Employee’s Petition for Review is untimely. Employee was terminated on March 27, 2009, and he did not file his appeal until September 3, 2013, approximately four and a half (4.5) years from the termination effective date. According to the FAD, Agency complied with OEA Rule 605.1 when it terminated Employee, and as such, Employee’s untimely Petition for Appeal does not fall within the exception to the thirty (30) days mandatory filing requirement. Therefore, I conclude that this Office does not have jurisdiction over Employee’s appeal. And for this reason, I am unable to address the factual merits, if any, of this matter.

Assuming *arguendo* that Employee’s Petition for Appeal with this Office is considered timely, the fact that he decided to file a grievance with his union prior to filing his appeal with this Office takes away this Office’s jurisdiction over his appeal. D.C. Official Code (2001) §1-616.52 reads in pertinent part as follows:

(d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter [providing appeal rights to OEA] for employees in a bargaining unit represented by a labor organization.

(e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to Section 1-606.03, or the negotiated grievance procedure, **but not both**. (Emphasis added).

(f) An employee shall be deemed to have exercised their option (*sic*) pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever occurs first** (emphasis added).

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<sup>8</sup>Employee’s Response to the Agency’s Motion to Dismiss (November 12, 2013), TAB 2. The FAD stated that “a copy of the OEA appeal form and the OEA regulations are enclosed (Enclosure 1).” And by signing the FAD, Employee acknowledged receiving the FAD and all the enclosures.

In the instant matter, Employee was a member of the American Federation of Government Employees, AFL-CIO Local 631 (“Union”). Employee argues that election of remedies is inapplicable in this matter. He explains that his appeal is not barred by election of remedies because the D.C. Superior Court determined that jurisdiction in this matter was limited to this Office. I disagree with this assertion. Pursuant to the above referenced code, Employee had the option to appeal his termination with either OEA or through his Union, **but not both**. (Emphasis added). The Collective Bargaining Agreement between the Union and Agency permitted the Union to file a group grievance to resolve issues. Employee elected to appeal his RIF by filing a grievance under the CBA between Agency and his Union, several years before filing a Petition for Appeal with OEA.<sup>9</sup> By doing so, Employee waived his rights to be heard by this Office. Therefore, I conclude that this Office does not have jurisdiction over Employee’s appeal.

With regards to the issue of retirement, Agency argues that this Office lacks jurisdiction over Employee’s appeal because Employee voluntarily retired. Employee on the other hand contends that his retirement from Agency occurred after he received his RIF notice on February 19, 2009. The issue of an Employee’s voluntary or involuntary retirement has been adjudicated on numerous occasions by this Office, and the law is well settled with this Office that, there is a legal presumption that retirements are voluntary.<sup>10</sup> Furthermore, I find that this Office lacks jurisdiction to adjudicate a voluntary retirement. However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.<sup>11</sup> A retirement is considered involuntary “when the employee shows that retirement was obtained by agency misinformation or deception.”<sup>12</sup> The Employee must prove that his retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which she relied when making his decision to retire. He must also show “that a reasonable person would have been misled by the Agency’s statements.”<sup>13</sup>

Here, Employee contends that his retirement was not voluntary because he only retired after receiving his RIF notice on February 19, 2009. While I do agree with Employee’s assertion his retirement occurred after he received his RIF notice, according to his SF-50, the effective date of his retirement is March 27, 2009, the same date as the effective date of the RIF.<sup>14</sup> Moreover, Employee has not made any claims of misrepresentation, fraud, or deception, in connection with his retirement. Nor has Employee provided any credible evidence to prove that any DGS agent provided him with misinformation, or that he was coerced into applying for retirement.

Regardless of Employee’s protestations, the fact that he chose to retire instead of continuing to litigate his claims voids OEA’s jurisdiction over his appeal. Employee’s choice to retire in the face of a seemingly unpleasant situation does not make Employee’s retirement involuntary. And the facts and circumstances surrounding Employee’s retirement was

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<sup>9</sup> *Id.*

<sup>10</sup> 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).

<sup>11</sup> *Id.* at 587.

<sup>12</sup> 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).

<sup>13</sup> *Id.*

<sup>14</sup> Employee’s Response to the Agency’s Motion to Dismiss, *supra*, at Tab 4.

Employee's own choice and Employee has enjoyed the benefits of retiring. Furthermore, I find no *credible* evidence of misrepresentation or deceit on the part of Agency in procuring the retirement of Employee. Simply choosing to retire over being RIF'd does not make an employee's retirement involuntary.

ORDER

It is hereby **ORDERED** that the petition in this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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MONICA DOHNJI, ESQ.  
ADMINISTRATIVE JUDGE