**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| SYLVIA JOHNSON | ) | OEA Matter No. 2401-0143-08 |
| Employee | ) | |
| | ) | |
| v | ) | Date of Issuance: July 28, 2009 |
| | ) | |
| DEPARTMENT OF HUMAN RESOURCES | ) | Muriel A. Aikens-Arnold<br>Administrative Judge |
| | ) | |

Stewart Fried, Esq., Employee Representative
Phillip A. Lattimore, III, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL HISTORY

On August 8, 2008, Employee, a Human Resources Specialist, filed a Petition for Appeal (PFA) with this Office regarding Agency's final decision separating her from Government service pursuant to a modified Reduction-in-Force effective July 11, 2009. On August 20, 2008, Agency was notified regarding this matter and required to respond within thirty (30) days, to which Agency complied.

This matter was assigned to this Judge on January 9, 2009. On March 6, 2009, an Order to Convene a Prehearing Conference was issued, scheduling said meeting on March 26, 2009. During that conference, the parties were advised that a review of the record reflected that there was a question regarding this Office's jurisdictional authority to consider the arguments presented by Employee. Following discussion of those arguments, the Judge advised that various issues must be clarified for further evaluation of this matter. On March 30, 2009, an Order was issued directing Agency to file specific documents to complete the record. Agency complied. After a review of the written record, this Judge determined that this matter could be decided based thereon, and thus, no further proceedings were held. Accordingly, the record is closed.

## JURISDICTION

This jurisdiction of this Office has not been established.

## ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

## BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) reads:

> 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 629.2, id., reads: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness."

## POSITIONS OF THE PARTIES

*Employee's Position.*

Employee's appeal primarily contests the Mayor's authority to delegate personnel functions to (with the exception of Agency) twenty-three (23) other District of Columbia (D.C.) government departments; and cites the Mayor's failure to follow D.C. Code, § 1-315.01, *et seq.* requirements related to agency reorganization. During the prehearing conference, the Judge recited several other issues raised by Employee, including, but not limited to: 1) that employees with less seniority were transferred to avoid the RIF; and 2) the RIF had an invalid purpose. Although Employee cited various requirements of Chapter 24 of the D.C. Personnel Regulations in conducting RIF's, no specific allegations were made relative to the limited review of RIF's by this Office. Following the prehearing conference Employee filed a Motion to Amend Petition For Appeal alleging Agency's violation of D.C. Code § 1-624.08(d), § 1-624.08(l) and §1-315.01, *et seq.* [1]

[1] See Petitioner's Motion to Amend PFA, Exhibit A, (filed 3/24/09) where Employee alleges: 1) that Agency failed to afford her one round of lateral competition in her competitive level based on its identification of the incorrect series of Employee's position on the retention register; 2) the RIF was not conducted in accordance with Agency's Management Reform Plan; and 3) the purported reason for the

*Agency's Position.*

In its initial answer to the PFA, Agency contends that Employee was properly terminated in compliance with D.C. Code § 1-624.08 (d) and (e); and requests dismissal based thereon. Further, Agency asserted that Employee was offered an opportunity to participate in Agency's reemployment priority program, but refused to do so. Nevertheless, in its prehearing statement filed on March 19, 2009, Agency advised that Employee elected to retire on Discontinued Service Retirement effective July 11, 2008. On April 10, 2009, Agency filed a Brief in support of its request to dismiss this matter. As such, Agency filed documents to complete the record, as instructed by this Judge. Those documents included, *inter alia,* a corrected retention register with Employee's correct position title and series, Employee's signed Application for Immediate Retirement dated July 9, 2008, and a Standard Form (SF) 50, Notification of Personnel Action reflecting Employee's RIF effective July 11, 2009.[2]

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

D.C. Official Code, Subchapter XXIV, Reduction in Force, §1-606.03 (2001) bestows upon this Office the authority to review, *inter alia,* appeals from separations as a result of a reduction-in-force (RIF). Pursuant to §1-624.08 of the Code, this Office is not authorized to determine broadly whether the RIF violates any law. Rather, this Office is limited by law to determining: 1) whether an agency afforded an employee, who is entitled to compete for retention, one round of lateral competition pursuant to Chapter 24 of the District Personnel Manual; and 2) that employee was given written notice at least 30 days prior to the effective date of his or her separation.

D.C. Official Code § 1-624.08, Abolishment of positions for fiscal year 2000 and subsequent years (2002), states in pertinent part:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of

---

RIF (Agency realignment) was beyond the authority of the Mayor or Agency.

[2] Agency's issuance of an incorrect retention register on 06/04/08 was corrected the same day and reflected that three Human Resource Specialist positions, in the same competitive level, were abolished. Said register was provided to Employee during discovery, in 11/08. Agency further represented that the Form 50 reflecting the RIF was subsequently processed for the sole purpose of allowing Employee's receipt of severance pay, to which she was entitled, and involuntarily retire in lieu of involuntary separation (RIF).

his or her separation.

(f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:

(1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and

(2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.[3]

In a modified RIF appeal, this Office cannot address any arguments pertaining to the necessity of the RIF, the creation of a competitive area smaller than the entire agency, the selection of a specific position to be abolished, any pre-RIF transfers, reassignments, promotions, demotions, or any claimed violation of post-RIF employment rights. Here, Employee did not challenge the sufficiency of the notice or the entitlement to one round of lateral competition within her competitive level in the original PFA.[4] Indeed, it appears, to this Judge, that the latter argument was only added after discussions were held regarding the jurisdiction issues. In any event, as will be explained below, said issue is otherwise moot.

The record reflects that Employee retired effective July 11, 2009.[5] There is a presumption that an employee's decision to retire is voluntary unless the employee presents evidence to prove otherwise. *See Christie v. United States,* 518 F.2d 584 (Cl. Ct. 1975). In cases where an employee voluntarily retires, this Office lacks jurisdiction to consider that employee's appeal.[6]

However, where an employee can prove that an agency coerced him or her into retiring or

[3] During the prehearing conference, the parties were advised regarding the jurisdictional limitations of this Office to address RIF issues.

[4] This Judge takes notice that the argument regarding the incorrect retention register, albeit late, is not applicable due the abolishment of all positions within Employee's competitive level. No other vacant position within her competitive level existed for lateral consideration.

[5] See Agency's prehearing statement, Exhibit 1, SF-50, Notification of Personnel Action which shows, in Item 5B "Retirement-ILIA" [In lieu of involuntary action] and in Item 4, Effective Date "07-11-2008."

[6] This Office was established by the D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Code Ann. § 1-606.01 et seq. (2001) and has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in D.C. Code Ann. § 1-606.03. Those actions include, inter alia, removals and reductions-in-force.

that an agency provided him or her with misleading information on which the employee relied to his or her detriment, the resulting retirement will be considered involuntary. Under these circumstances, the employee's decision to retire will be treated as a constructive removal and may be appealed to this Office. *See Bagenstose v. D.C. Public Schools,* OEA Matter No. 2401-0224-96, *Opinion and Order On Petition For Review* (June 23, 2003).

Even though a retirement could be viewed as involuntary for purposes of establishing discontinued service retirement, that fact does not amount to an allegation that the retirement decision was wrongfully extracted by deception or coercive agency action which would render Employee's retirement involuntary for purposes of establishing jurisdiction of this Office. Here, Employee does not claim that she was coerced into retiring or that Agency gave her misinformation on which she based her decision. Further, the record reflects that: 1) Employee participated in a Reduction-In-Force (RIF) Counseling on June 25, 2008 where a number of topics were discussed, including, but not limited to, retirement options, severance pay, and retention registers; and 2) Employee signed and submitted an Application For Immediate Retirement on July 9, 2009, prior to the effective date of the RIF.[7] Therefore, this Judge finds, based on the record, that Employee chose to retire, which rules out a viable appeal to this Office.

Based on the above analysis, this Judge concludes that Employee did not meet the burden of proof regarding jurisdiction and therefore, this matter should be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE: _____
MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

[7] See Agency Answer filed 9/19/08 at Exhibits 1 and 2; and Agency Brief filed 4/10/09 at Exhibit 6. The Office of Personnel Management (OPM) considers resignation/retirement while RIF procedures are in progress to be involuntary for purposes of retirement under Title 5, U.S. Code, Part III, Subpart G, Chapter 83, Subchapter III, §8336(d). *Perlman v. United States*, 203 Ct. Cl. 397, 490 F.2d 928 (1974).