THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TANYA DESKINS	)	OEA Matter No. J-0108-13
Employee	)	
v.	)	Date of Issuance: March 25, 2015
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Lois Hochhauser, Esq.
Agency	)	Administrative Judge

Carl Turpin, Esq., Agency Representative
E. Lindsey Maxwell, Esq., Employee Representative[1]

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Tanya Deskins, Employee, filed a petition with the Office of Employee Appeals (OEA) on June 25, 2013, contending that the District of Columbia Public Schools (DCPS), Agency, effectively removed her from her position by allegedly failing to apply her reversion rights and failing to provide accurate retirement information. She maintained that her retirement was involuntary, resulting from Agency's misinformation and deception; and that her non-reappointment was, in fact an adverse action. In her petition, Employee stated she was in permanent status and had a one year appointment as principal. The petition was filed at the directive of the Superior Court of the District of Columbia (*Infra*, p. 4).

The matter was assigned to me on July 10, 2013.[2] The parties presented oral argument on January 28, 2014. The parties thereafter briefed several issues At the May 14, 2014 proceeding, the parties presented additional oral argument and agreed on a number of issues. The Order issued on May 22, 2014 memorialized the agreements reached at the May 14 proceeding and directed the parties to submit a joint document on the issue(s), undisputed facts and other matters. The parties filed the submission on June 6, 2014. On June 27, 2014, an Order was issued scheduling an evidentiary hearing for August 27, 2014. The parties were notified that the only issue that would be addressed at the proceeding was the "disputed issue" stated in the joint submission. They were

[1] On January 9, 2015, Mr. Maxwell sent an email stating that he was withdrawing his appearance.
[2] Prior to the January 28, 2014 proceeding, the parties responded to Orders issued on July 15, 2013; September 27, 2013; October 17, 2013; and October 29, 2013 regarding jurisdictional matters or requests for extensions.

further notified that their "Joint Statement of Undisputed Facts" would be entered into the record. (Ex J-1). Finally, they were informed that they would be limited to the witnesses identified in their Joint Memorandum. Diana Wyles, Esq., who initially represented Employee, withdrew her appearance on August 15, 2014. The hearing date was thereafter continued twice at the request of Employee, and without Agency opposition, to allow Employee additional time to retain counsel. Employee did retain counsel. The hearing took place on December 30, 2014.[3] Final closing arguments were filed on or before February 5, 2015, on which date the record closed.

JURISDICTION

The jurisdiction of this Office was at issue in this matter.

ISSUE

Did Employee "voluntarily or involuntarily retire from her position with [Agency] in August 2010?"[4]

FINDINGS OF FACT, SUMMARY OF EVIDENCE, ANALYSIS AND CONCLUSIONS

A. Undisputed Facts and Procedural Background[5]

1. Employee has a "dual degree" in elementary education and physical education. She has a master's degree in adult education, "with an emphasis in human resources in a consulting process." She has a doctorate in educational leadership. (Tr, 19).

2. Employee began her employment with DCPS in 1978, and was employed in several temporary positions. She left for a period of time, but returned in 1988, when she was appointed a classroom teacher. She was promoted to a staffing development coordinator, then to assistant principal. In August 2000, she was appointed principal. She served as principal or assistant principal for 13 years. (Tr, 17-18). As of August 2010, she had worked for DCPS for a total of about 30 years

3. Her most recent Notice of Reappointment, dated May 18, 2009, was for school year (SY) 2009-10. (Tr, 26-27).

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[3] The hearing was transcribed and witnesses testified under oath. The transcript is cited as "Tr" followed by the page number. Exhibits (Ex) are followed by "J" (joint), "A" (Agency) or "E" (Employee), and then by the exhibit number. Ex A-1 includes numerous tabs which are cited as "#" followed by the tab number.

[4] This is the issue stated by the parties in their joint submission. Employee also raised the issue of whether OEA had jurisdiction to determine if Agency owed Employee a $20,000 salary bonus, which the parties were permitted to address in their in their closing arguments. The specific issues raised by the Court are also addressed in this Initial Decision

[5] The Administrative Judge relied primarily on the June 6, 2014 Joint Memorandum and the May 28, 2013 Order issued by Judge Epstein in drafting the "Undisputed Facts and Procedural Background" and the summary of the positions of the parties in the next section. For the sake of expediency, citations to exhibits are not included. Readers should refer to the Memorandum and accompanying documents which cite the exhibits.

4. Employee did not receive a Notice of Reappointment for SY 2010-11.

5. On August 10, 2010, Employee was asked to meet with Agency staff. At the meeting, she was given a letter which stated that she was not being reappointed as principal for SY 2010-11. The letter stated in pertinent part:

> The action is effective at the close of business on August 27, 2010. You will continue to be paid at your current salary and you will continue to accrue both annual and sick leave.
>
> DCPS will honor any valid reversion rights that you may possess. [footnote cites DCMR, Title 5, Chapter 5, Section 520.3]. If you believe you have these rights and wish to exercise them, you must provide written notification to Maia Blankenship, Director of School Staffing…to be received no later than August 13, 2010…If you do not provide written notification of your intent to exercise your right to revert by August 13, 2010, your employment with DCPS will terminate on August 27, 2010. *(emphasis in original)*
>
> From now until August 27, 2010, you will be placed on paid administrative leave…Questions related to your retreat rights should be directed to Maia Blankenship…Any other questions related to employment benefits to which you may be entitled,…should be directed to Nicole Wilds. (Ex A-1, Tab 1).

6. By letter dated August 12, 2010 and delivered by Employee to DCPS on that date, Employee notified Agency that she elected to exercise her reversion rights. In the letter, she requested copies of documents pertaining to her reversion rights; retirement; health and insurance benefits' current pay status; and her "non-reappointment and subsequent termination (adverse action)." (Ex A-1, Tab 2).

7. On August 12, 2010, Employee met with staff of the Budget and Compensation Department (BCD) of Agency's Human Resources Department and requested an application for retirement and other retirement-related information and documents. (Tr, 12).

8. On August 17, 2010, Employee submitted a completed retirement application to the BCD. (TR, 13). Agency submitted Employee's retirement application with a cover sheet to the D.C. Retirement Board (DCRB) on August 24, 2010. (Tr, 13).

9. Employee's retirement became effective on August 27, 2010. As of this date, Agency had not offered Employee another position.

10. On April 24, 2012, Employee filed suit against DCPS in the Superior Court of the District of Columbia for breach of contract, alleging that she had been "reappointed in the position of principal commencing for a one-year term on August 2, 2010 for the 2010-2011 school year" She asserted that after she chose to revert to her former position, DCPS "intentionally and maliciously failed to revert [her] back to her last highest position" and that as a result Agency had "constructively terminated [her,] forcing her to retire to avoid being terminated." She also argued that she was entitled to a retroactive bonus.

11. On April 25, 2013, Judge Anthony Epstein dismissed the lawsuit without prejudice, concluding that Employee did not exhaust her administrative remedies under the Comprehensive Merit Personnel Act (CMPA) before filing her lawsuit. In the Order, he stated that OEA has "exclusive appellate jurisdiction over claims against the District arising under the CMPA." The Court directed this Office to determine whether it had jurisdiction to hear Employee's claims, including her claim of constructive discharge. He stated that the issue was not whether the CMPA applied, but rather "whether there is a substantial question about whether the CMPA applied":

> The Office of Employee Appeals…should decide in the first instance whether it has jurisdiction to review [Employee's] claims [and] if so, whether [Agency] violated [Employee's] rights under the CMPA.

12. Employee thereafter filed her petition for appeal with OEA on June 25, 2013.

B. Position of the Parties and Summary of Evidence

Employee's position is that her retirement was involuntary, since she was "coerced and given misleading information" by Agency which caused her to file for retirement. She asserts that Agency's failure to provide her with information she sought about her reversion rights, including confirmation that she would remain a paid employee until placed in a position, led her to believe she would be terminated on August 27, 2010 and led her to file for retirement. She maintains that no Agency employee discussed her reversion rights with her. (Tr, 69). Employee contends that her non-reappointment was an adverse action. She maintains that she was effectively placed in the principal position for SY 2010-11 since Agency did not notify her of her non-appointment until August 10, 2010. She argues that July 1 was the beginning of SY 2010-11, which, she stated, starts on July 1. Employee asserts that principals, as 12 month employees, work throughout the summer; and that although they often take their vacations during the summer months, they are expected to return to work by August 1 to participate in the Principals' Academy. (Tr, 23-25).

Employee testified that she received annual reappointment letters most years while serving as principal, but that the letters were not always signed by the same administrator. (Tr, 27). She stated that the most recent reappointment letter was dated May 18, 2009 and was for SY 2009-10. She said

that she signed the letter, indicating her acceptance, and returned it to Agency. (Tr, 26-27, Ex E-1). Employee stated that she did not receive a reappointment letter prior to the close of the 2009/10 SY. She testified she continued her duties as principal during that summer, preparing for SY 2010-11. (Tr, 29-30). She testified that she met Erick Greene, the new assistant instructional superintendent, on or about August 1, 2010. She said she also attended a cluster meeting with other principals during that time. (Tr, 30).

Employee testified that on August 10, 2010, while attending the Principals Academy, Mr. Greene approached her, asking her to leave the meeting and accompany him to a meeting. She said that Mr. Greene, Barbara Adderly, instructional superintendent, and Nicole Wilds, were at the meeting. She said that at the meeting, Ms. Adderly handed her the notice of non-appointment, dated August 10, 2010. (Tr, 35). She stated that she did not speak with Ms. Wilds at all, and did not discuss her reversion rights at the meeting. (Tr, 72, 79). Employee stated that she was very upset and was crying, and that left the meeting shortly after receiving the letter. (Tr, 73).

Employee stated that after she left and was putting her things in her car, Ms. Adderly approached her, apologizing for the letter and telling her that she "probably should just go ahead and resign [because it was] better to resign and retire than to be terminated, non-appointed." (Tr, 46). Employee said that she responded by asking Ms. Adderly why would she want to retire, explaining that she did not think it made sense for her to resign or retire. (Tr, 75). She said that she wanted to keep her salary and the other benefits that "came along with being a full-time employee," but did not explain this to Ms. Adderly or talk with her about her reversion rights, because she felt Ms. Adderly was responsible for the non-reappointment. (Tr, 77).

Employee testified that she understood from the August 10 letter that she had reversion rights. (Tr, 43). She said that she understood that she had the "right to go back to [her] next highest position" before becoming principal. (Tr, 39). She stated that she was aware of principals who had reverted to teaching positions. (Tr, 71). She agreed that the August 10 letter did not refer to retirement. (Tr, 81).

Employee testified that on August 12, she brought the letter she had written in which she elected exercise her reversion rights. In the letter she also asked for clarification about her reversion rights and the process that would be used. She also requested documents relevant to retirement and insurance. Employee said she brought the letter to Ms. Blankenship, but was unable to see her, so she left a copy with Ms. Wilds. (Tr, 44-47). She said that she asked to meet with Ms. Blankenship or someone else to address her questions, but was unable to do so at the time. (Tr, 48).

Employee stated shortly after leaving the letter with Ms. Wilds, she saw Linx Yearwood, who she identified as a longtime Agency employee who was knowledgeable about legal issues. She said she showed him the letter and asked him for assistance. She said that, at his suggestion, she then met with Ms. Reed, who worked in the retirement division of HR. (Tr, 49). Employee stated that Ms. Reed told her that since she was being terminated, she could be eligible for "involuntary retirement." Employee said that Ms. Reed her paperwork to complete so that HR could determine if she qualified for involuntary retirement. Employee stated that her understanding was that she was eligible for "involuntary retirement" since she had no choice because she was being separated and she would have

benefits and pay. (Tr, 58). She said Ms. Reed did a "work-up" and then told her that she was eligible for involuntary retirement. Employee said that Ms. Reed reviewed benefits with her and provided her with a printout of the information. (Tr, 50-53, Ex A-1, #17). Employee testified that Ms. Reed also discussed involuntary retirement with her, and suggested she "think about it" and if she decided to proceed, to return with the completed application. (Tr, 54). Employee testified that at some point Ms. Reed told her that she would lose all her benefits if she was terminated, and that she would keep her benefits if she elected to retire. (Tr, 76-77).

Employee testified that she thought that Ms. Reed gave her the Summary Plan Description of the Retirement Plan. (Tr, 61; Ex A-1, #20). She recalled seeing a statement in the Plan that an employee could "qualify for an involuntary retirement benefit if you are involuntarily separated from service (unless the separation is for cause on charges of gross misconduct or delinquency)" on the day she met with Ms. Reed. (Tr, 64).

Employee stated she spoke with Aona Jefferson, president of the Council of School Officers (CSO) , within a few days of receiving the August 10 letter. She said when she told Ms. Jefferson that she wanted to file a grievance, Ms. Jefferson told her that generally non-reappointments are not grievable. She said she asked Ms. Jefferson whether she had any contractual rights, but that Ms. Jefferson did not have an answer. She said CSO did not file a grievance on her behalf. (Tr, 66).

Employee testified that on August 17, she returned to DCPS to bring the completed retirement application to Ms. Reed. She said that she first went to see Ms. Blankenship since she had not received a response to her letter and wanted clarification. She said that she was unable to meet with her or anyone in that office. She testified that she then submitted the paperwork to Ms. Reed. Employee stated that she thought Ms. Reed told her that if she did not retire and if DCPS did not revert her, she would "lose everything." (Tr, 56). She testified that Ms. Reed never told her that DCPS was required to keep her on the payroll after August 27, 2010 if she exercised her reversion rights. (Tr, 59). Employee also stated that the non-reappointment letter did not state if she would stop being paid after August 27 or if her pay would continue. She maintained that she should not have had to make assumptions, but rather should have been given this information by Agency. (Tr, 91).

Ms. Jefferson testified that she has been CSO president since 2008 and that Employee was a member of CSO. She said Employee approached her about the matter on or about August 10. She considered it "odd" that the letter was issued in August, because letters of non-reappointment are issued in May, and inform the recipient that the non-reappointment would take effect "as of the close of business June of that school year." (Tr, 96). The witness explained that reversion rights entitle the individual to return to the position held by that individual prior to appointment to principal. (Tr, 105).

Ms. Jefferson stated that non-reappointments cannot be grieved because appointments are for a one year period. (Tr, 107, 110). She stated that as a principal, Employee was a 12 month employee. She stated that the school year begins the first or second week in August. (Tr, 116). She said that since Employee had already begun her duties as principal for SY 2010-11, "at that particular moment," the Union considered the non-reappointment to be an adverse action. (Tr, 113,114). She said she was unsure if she contacted any Agency official about the letter. (Tr, 115).

Sheila Reed testified that she has worked in the benefits, compensation and retirement department of Agency's Office of Human Resources for more than 20 years; and that as part of her duties, she counsels employees about retirement. (Tr, 118). She did not recall talking with Employee about her retirement or preparing the documents pertaining to the retirement, noting that she sees "many people." She explained that when she is not available with an employee, other members of her team will meet with that individual. (Tr, 119, 122, 125, 129).

Ms. Reed stated that the term "involuntary retirement" refers to the retirement of an individual who is not being separated "for cause." (Tr, 123). According to the witness, in order to be eligible for "involuntary retirement," an employee must have at least 20 years of service, be at least 50 years old and must be paying into his or her current retirement plan. (Tr, 124). Ms. Reed stated that when she counsels individuals, she does not discuss their reversion rights. (Tr, 129-130).

Agency's position is that it acted appropriately in this matter, and that Employee's retirement was voluntary, and not a result of coercion or deception. It asserts that it often takes more than two weeks for it to identify a position to which an employee can revert, but that regardless of how long it takes Agency to identify a position, the employee remains on the payroll and continues to be paid.

Peter Weber testified that between 2007 and 2010, he directed Agency's Office of Human Resources, and was involved with the non-reemployment and retreat processes. He said that in August 2010, although he was no longer Director, he "still played a big role in HR." (Tr, 153). He explained that once the Chancellor decides not to reappoint a principal, HR issues the notification letter and then works with individual to either retire or exercise retreat rights. (Tr, 134). He stated that retreat rights allow the employee to return to the "previously held permanent position." (Tr, 135). The witness stated that the principal receiving the non-appointment letter has "an opportunity to retreat." (Tr, 139). Mr. Weber stated that he was familiar with the August 10 non-appointment letter issued to Employee.

The witness testified that the school year starts on or about August 25, and that although it is not "customary" for a non-appointment letter to be issued on August 10, it is not "unheard of" for the letter to be issued on that date. (Tr, 137). He stated that the non-appointment letter should "certainly" be issued before the first day of school. (Tr, 165).

Mr. Weber noted that Employee was required to notify Agency of her decision by August 13. He testified that based the representations in her letter, Employee had reversion rights, since she had been a teacher which is a permanent appointment. He noted that Employee had listed a previous position of assistant principal, but that this was not a position to which she could revert since it was not a permanent position, but rather was also a one year appointment.

Mr. Weber testified that the August 27 deadline contained in the non-reappointment letter was probably selected because it was the last day of the pay period before the start of the school year. (Tr, 168). He stated that Employee may not have been placed in a position by August 27, since it is often difficult to identify specific placements so close to the beginning of the school year. (Tr, 142). He noted, however, Employee would be paid according to the position to which she would have retreated,

even if a position was not identified by that date, explaining that that HR has the capacity within its payroll system to identify the position to Employee would revert in order to determine and ensure that she received the appropriate pay. (Tr, 143). He stated that the reversion right is determined "[a]s soon as the employee applies for reversion rights," and that even before the individual elects to retreat, HR "would look at the employment history to determine…who was eligible and who wasn't." (Tr, 154). He stated that Ms. Blankenship or another member of the staffing team would "make the change in the personnel system" to ensure that the employee was paid correctly. He testified that a placement letter would then be sent to the employee based on that information. (Tr, 162). Mr. Weber stated that even though he did not know what additional information Employee had wanted, Ms. Blankenship or another team member should have responded to her letter. (Tr, 163).

Mr. Weber testified that retirement and reversion are mutually exclusive; because an employee cannot "both retreat to a new position and retire." (Tr, 144). He explained that the reference to an August 27 termination date in the August 10 letter did not mean that Employee would be forced to retire, but rather if she did not exercise her retreat rights as required, she would no longer be employed by DCPS. He added that an employee who elected to retire, but did not complete the necessary paperwork, would no longer be employed. (*Id*).

Nicole Wilds testified that she was HR Director of Employee Services between 2002 and 2012. She stated that she was very familiar with the non-reappointment process. She said that non-reappointment letters can be issued at any time. (Tr, 188). She said that one of her duties during that time, was to attend non-reappointment meetings as the HR representative, and one of her functions at these meetings was to answer questions raised by the affected employee about the process. (Tr, 180). She stated that she attended the August 10 meeting with Employee, and that Employee "visibly upset" when she saw the individuals waiting to meet with her. The witness testified that they were unable to discuss the letter because Employee told her that they didn't "have to go through all of this" when she tried to review the letter with her; and then took the letter and left the meeting. (Tr, 184).

Ms. Wilds stated that she next saw Employee on August 12 when she accepted Employee's reversion letter. She testified that at that time, the two had "a quick discussion" about Employee's reversion rights and options. (Tr, 192). She said that she explained to Employee that she could not tell her "exactly what position she was eligible for because that's what the staffing director's role was, but that [she] would give the letter to [the staffing director] and we would determine what was available, in terms of the position." She said that Employee told her that "she was interested also into looking into retirement," so she referred her to someone to talk with about retirement. (Tr, 187).

Jana Woods-Jefferson, HR Director of Benefits and Compensation since March 2010, stated that her office is responsible for retirement, classification, compensation and benefits. She said that the retirement section is responsible for counselling and processing-out employees participating in the teachers' retirement and civil service retirement plans. (Tr, 195). She stated that in 2010, Pat Crosson, Mary Greene and Sheila Reed worked in that section. The witness explained that there are several types of retirement: "voluntary" if the employee meets the age (55) and years in service (30); "disability" if the employee cannot perform duties due to a physical or mental incapacity; "deferred" if the employee is separated and elects to defer retirement until age 62; or "involuntary" if the employee

is separated for reasons other than misconduct and is qualified. She said that she considered involuntary retirement to be a "special" type of retirement because it lessens the age and number of years needed for retirement. She noted that there is a reduction of one sixth of one percent of the annuity each month that the individual is under age 55. (Tr, 197-198, Ex A-1, #20). The witness stated that Employee was eligibility for involuntary retirement.

The witness stated that the retirement staff discuss only retirement rights, and not reversion rights, with individuals they are counselling about retirement. (Tr, 201). She stated that even if Employee had not chosen to retire by August 27 and was separated, she would still be eligible for involuntary retirement because once that right is established it cannot be lost. (Tr, 208). She explained that the right would be lost, however, if she had reverted to another position. Ms. Woods-Jefferson stated that the decision to retire supersede the decision to revert. (Tr, 210).

Mary Greene, who has worked in the HR retirement unit for 17 years, stated that her duties include processing retirement applications, and providing applicants with estimates of their estimated retirement annuities. She testified that she met with Employee on August 12, and was responsible for processing Employee's application, and providing her with the retirement-related information. She said that the completed application was sent to the D.C. Retirement Board (DCRB) on August 24. She described DCRB as the entity that makes the "final adjudication for processing all of the retirement applications." Ms. Greene stated that she did not discuss retreat or reversion rights with Employee, and was not familiar with that process. (Tr, 215-221; Ex A-1, ## 17-20).

C. Analysis, Findings of Fact and Conclusions of Law

It is well established that most employment disputes involving adverse actions between the District of Columbia Government and its employees are governed by the Comprehensive Merit Personnel Act (CMPA); and that the Office of Employee Appeals is the entity authorized to hear hears these appeals that arise under the CMPA. *Grillo v. District of Columbia*, 731 A2d 485 (D.C. 1999). Employee argues that Agency's decision not to reappoint her and its failure to implement her reversion constituted adverse actions over which this Office has jurisdiction.

The threshold issue to be resolved is whether Employee's retirement was voluntary. Pursuant to D.C. Code Section 1-617.1(b) (1992 Repl.), with few exceptions not relevant here, only permanent employees in the career and educational services may appeal to this Office. If Employee voluntarily retired, regardless of the type of appointment she held, she cannot appeal Agency's action since she willingly ended her employment. However, if her decision is found to be involuntary, then her appeal may go forward before this Office.

Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), employees carry the burden of proof on all jurisdictional issues. The burden must be met by a "preponderance of the evidence, defined in OEA Rule 629.1, as 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." The right to appeal a matter to this Office is a jurisdictional issue. If Employee was retired, and the retirement was not voluntary, she can exercise this right. Therefore, she must present sufficient

evidence to rebut the presumption that the retirement is voluntary. If this burden is met, the retirement will be deemed a constructive removal and that jurisdictional bar will be removed. *See. e.g., Holmes v. District of Columbia Department of Corrections,* OEA Matter No. J-0129-00 (February 3, 2003).

This Office has often addressed this threshold issue, *i.e.*, whether a retirement can be deemed involuntary. *See, e.g., Vega v. District of Columbia Public Schoo*ls, OEA Matter No. J-0174-08 (January 23, 2009), *Gray v. District of Columbia Public Schools*, OEA Matter No. 1601-0122-08 (October 23, 2009). It has consistently utilized the rationale presented in *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975). Pursuant to *Christie,* there is a rebuttable presumption that a retirement is voluntary. Employee can rebut that presumption by presenting sufficient evidence that she only reached that decision because of Agency's coercion, misinformation and/or deception.[6] *See, e.g.*, *Terban v. Department of Energy,* 216 F.3d 1021 (Fed. Cir. 2000).

In order to establish that a retirement was involuntary, Agency must be found to have engaged in coercion or duress, or to have provided misleading information. Coercion is defined as "compulsion" or "constraint." It may be "actual, direct, or positive" when physical force is used to compel someone to act against one's will; or "implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." Duress has been defined as a condition where "one is induced by wrongful act or threat" which essentially "overpowers will and coerces or constrains performance of an act which otherwise would not have been performed."[7]

In assessing whether employers have used coercion or duress, courts and administrative agencies have increasingly recognized that employers may engage in actions or inaction that do not meet those definitions, but nevertheless sufficiently impact on the ability of the employee to make a reasoned decision. Therefore the "totality of the circumstances," must be reviewed in order to determine if an employee was denied freedom of choice during the decision-making process. *Pearlman v. United States*, 490 F.2d 928 (Ct. Cl. 1974). This "totality of circumstances" is assessed by an objective standard and not by the employee's subjective evaluation. *See, e.g., Stone v. University of Maryland Medical Systems Corp.*, 855 F.2d 167 (4th Cir. 1988), and *Heining v. General Services Administration,* 68 M.S.P.R. 513 (1995). In assessing "the surrounding circumstances to test the ability of the employee to exercise free choice," the Federal Circuit stated, in *Sharf v. Department of the Air Force,* 710 F.2d 1572 (Fed. Cir. 1983) , that the fact that the choice "may not be a pleasant one…does not make it less voluntary." The D.C. Court of Appeals used the same rationale in *D.C. Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-76 (D.C. 2008):

> The fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives is not enough by itself to render the employee's choice involuntary. The test, an objective one, is whether, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. As a general principle in this context, an employee's decision to

[6] There are a few other conditions, such as mental incompetence, that may be used to challenge the voluntariness of a retirement; but these other conditions are not relevant in this matter.

[7] Black's Law Dictionary (5th edition, 1979). Each definition refers the reader to the definition of the other word.

> retire or resign is said to be voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's retirement or resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information.

Using this analysis, the Court in *Stanley* concluded that the employee had met his burden of proof, stating:

> [H]is decision to retire was induced by other factors that, in combination, substantially undermined his freedom of choice –namely, the extremely short time frame in which he was forced to elect between retirement and demotion (or, it appeared termination); his inability to obtain information from MPD about the financial consequences of that election; and the daunting misrepresentation that the Chief of Police could fire him summarily at any time without cause or due process.

In this matter, Employee must present sufficient evidence that Agency engaged in "improper acts" that created "circumstances [that permitted] no alternative" but for her to retire, in order to rebut the presumption of voluntariness. *Schultz v. U.S. Navy*, 810 .F2d 1133 (Fed. Cir. 1987). However, she is not required to establish that DCPS's conduct was intentional or malicious. Both the Merit Systems Protection Board (MSPB) and the Federal Circuit have addressed this issue. In *Kolstad v. Department of Agriculture*, 30 M.S.P.R. 143 (1986), for example, the MSPB held that an agency must provide an employee who is considering retirement, with information that is not only correct, but is "adequate in scope" to allow the employee to make an informed decision. This can occur in several ways. In *Beverly v. United States Postal Service*, 88 M.S.P.R. 247, 250 (2001), the MSPB determined that an "agency need not be aware that its statements were misleading, but may instead have provided them negligently or innocently. The resignation will be considered involuntary if the employee materially relied on the misinformation, to his detriment, based on an objective evaluation of the surrounding circumstances." In *Beverly*, the employee who had been on limited duty since 1991 as a result of a work-related injury, was notified in 2000 that his work-related disability claim had been closed. However, Agency had used the wrong claim number, and the employee's efforts to convince his employer of that fact were unsuccessful. Agency insisted that the employee return to full duty. Since the employee was not physically able to do so, he resigned. Finding that the employer based its action and information on the wrong claim, the Board held that the resignation was "tantamount to a removal."

The Federal Circuit reached a similar conclusion in Covington *v. Department of Health and Human Services*, 750 F2d 937, (Fed Cir 1984), the Community Services Agency (CSA). In that matter, CSA notified its employees that the agency was being abolished, and all of the position would be abolished with it. Covington was eligible to retire and did so. However, CSA was not abolished and all positions were not therefore abolished. The Federal Circuit agreed with MSPB that CSA's notification was "misleading and erroneous in material ways" and that a "person in this

situation could reasonably rely on the government's statement that he would have no opportunity to be reassigned." 750 F2d. at 942.

In this matter, Employee alleged that Agency encouraged, even urged her, to retire. However, after carefully reviewing the evidence, the Administrative Judge finds the evidence does not support Employee's contentions. For example, Employee claims that following the meeting on August 10, Ms. Adderly suggested to her that she retire. However, even if Ms. Adderly made the suggestion, it was not alleged that Ms. Adderly made anything but a suggestion or that it was offered in her official capacity. Of more significance, Employee testified that she strongly disagreed with Ms. Adderly when the suggestion was made. (*Infra* at 5). According to Employee, the other person who suggested that she retire was Mr. Yearwood. However, Employee stated that she approached him while he was in the building because of her personal regard for him. She did not allege, and no evidence was offered, that Mr. Yearwood was acting in any official capacity for Agency when he allegedly made the suggestion. (*Id*). Thus Employee did not establish that Agency directed, encouraged or urged her to retire.

However, the inquiry does not end with that finding. As noted above, case law has established that the information provided by an employer and the context in which it was given, must be assessed. A retirement may be deemed involuntary if Agency, intentionally or unintentionally, acted in such a way to constrict free choice. In this regard, Employee argues that the three days given to her to exercise her reversion rights in the August 10 letter did not provide sufficient time for her to make a decision. She further contends that the letter did not provide her with adequate information about the process. She also asserts that Agency did not respond to her questions or provide the information she sought; and which she needed to make a decision. Employee also pointed out that she had financial concerns and did not know if she would continue to be paid. Employee must establish that these factors, individually or in combination, negatively impacted on her ability to freely choose her course of action.

In order to make this assessment, one must assess the "totality of the circumstances" and the standard of "reasonableness" in the context of Employee's unique circumstances. The reasonable person test is often used in determining the voluntariness of a decision. Employee must present enough evidence to show that a reasonable person would have been misled by the information and documentation provided by Agency. *See e.g., Sharf* at 1575. The reasonableness standard requires consideration of an individual's education, background, resources and sophistication in making the decision if the individual could make a reasoned decision or if there were "gross inequities" that foreclosed the ability to do so. *Williams v. Walker-Thomas Furniture Company*, 350 F2d 445 (1965). Employee is a well-educated, intelligent and articulate individual, who, during her career, earned a Master's degree in adult education, with an emphasis in human resources, and a Doctorate in educational leadership. She had 30 years of experience as an Agency employee, having been promoted to positions of increasing importance and status during her tenure. (*Infra* at 2). In addition, Employee appeared from her testimony to be at least somewhat familiar with her reversion rights and knew a number of principals who had reverted to teaching positions. (*Infra* at 5). She was also a member of CSO, and was aware that CSO staff could provide her with information regarding the alternatives.

The Administrative Judge does not find, under these circumstances, that the three day requirement imposed by DCPS created undue duress. In *Vega v. District of Columbia Public Schools*, OEA Matter No. J-0174-08 (January 23, 2009), the employee similarly argued that his retirement was made under duress since he had insufficient time to consider his options. Senior Administrative Judge Eric Robinson disagreed, stating that "[w]hile Employee may have felt "rushed" into making a decision he later regretted, that is not enough to constitute duress." *See also, e.g., Esther Dickerson v. Department of Mental Health*, OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006). In reaching the decision that the three day turnaround time did not constitute duress, the Administrative Judge notes that the August 10 letter advised Employee that her response was not necessarily her final choice, but rather would protect her right to claim that right. Indeed, immediately after submitting the letter, Employee met with retirement personnel. It is reasonable, therefore, to conclude that Employee was aware that she still had choice, and that the letter did not foreclose choosing another option.

Employee is correct that the August 10 letter provided little if any information about how the reversion process would work. Employee tried to see Ms. Blankenship, the person identified in the letter, on August 12 and August 17. When Ms. Blankenship was not available, she said she asked to see "anyone" because of her wish to get answers to her questions. (*Infra* at 5). Although DCPS should have responded promptly; it is noteworthy that at the time of her second visit, only three business days had elapsed from the date that she first sought answers. The delay at that point was not unreasonable. Employee did not explain why she did not continue to seek answers. Employee had 30 years of experience with Agency, and had been appointed to positions only few achieve. It is reasonable to assume that she understood how to effectively deal with a sometimes less than responsive employer. It is also reasonable that, in view of her education, experience, and familiarity with the system, she would not give up after two or three tries. Employee also had other sources, such as CSO and the other principals she knew or doing some research, to obtain answers to her questions. In *Vega, infra*, the employee, also alleged that DCPS failed to provide him with needed information. Judge Robinson did not dispute Employee's contention that DCPS failed to provide him with the advice, but rather stated the finding was not significant, noting that "Employee still had the burden to seek counsel on the issue or take additional steps such as consulting with an attorney or his Union to clarify any misunderstanding he may have had about this issue." Similarly, in *Gray v. District of Columbia Public Schools*, OEA Matter No. 1601-0122-08 (October 23, 2009), a principal who received a non-reappointment letter first submitted a request to revert and then completed the retirement process. Administrative Judge Sheryl Sears disagreed with the employee's assertion that she relied on Agency's promise to appoint her to a teaching position, noting:

> In fact, Employee protected herself against the risk of relying upon that representation by initiating the retirement process in time to prevent the removal from becoming effective.[8]

Unlike the employees in *Covington*, *Beverly* and *Kolstad*, Employee was not given critical misinformation by Agency upon which she relied in making her decision to retire. Rather, the issue

[8] Although Gray was considered an "at will" employee and not eligible to retreat to a teaching position, these facts are not relevant to Judge Sears's statement.

in this matter is whether Agency's failure to provide requested information created an inequitable situation under the circumstances presented. Although Agency's process was flawed, Employee did not offer sufficient evidence to establish that a reasonable person in these circumstances could not have obtained the necessary information during the required period of time. In addition, she did not have to submit her retirement papers on August 17, at which point her right to revert ceased. She actually did preserve her reversion rights while pursuing the retirement option. As stated in *Stanley*, 942 at 1178, the question is not if an employee was under time pressure or was given deficient information, but rather the issue of the severity of the time pressure or lack of accurate information:

> [T]ime pressure or deficient information may be present to a greater or lesser degree in many unquestionably voluntary retirement and resignation decisions. Nevertheless, in this case those handicaps were severe ones.

The issue of the financial strain raised by Employee is often raised by employees under these circumstances. However, this Board, consist with courts and other administrative agencies, has maintained the position that financial hardship does not amount to coercion or duress. *See, e.g., Christie v. United States, cited above, Lee v. Department of Corrections*, OEA Matter No. 2401-0172-97 (April 24, 2000).

Employee also argues that the term "involuntary retirement," used to describe her retirement in official documents, is proof that Agency recognized that she was being forced to retire. However, the term "involuntary retirement" has a different meaning in the retirement context than it does in the legal context. In the retirement context, as used in the District of Columbia Teachers' Retirement Plan, the term "involuntary retirement" is a category describing the retirement of an employee who lacks the age or years of service usually required, who chooses to retire in lieu of being separated, provided that the separation is not a result of "gross misconduct or delinquency" and provided the individual meets the relaxed age and years of serve requirements. (Ex A-1, p. 27). It does not refer to coercion or duress, required in the legal context. A teacher who elects an "involuntary retirement" chooses to do so. The word "involuntary" refers to the fact that the teacher was being separated for non-disciplinary reasons and was therefore eligible to retire if the individual met a more relaxed standard. In this instance, the use of the term "involuntary retirement" as it refers to the category of retirement provides no assistance in determining if the retirement was involuntary in the legal context. Indeed, Employee was aware of the meaning of the term, testifying that on the day she met with Ms. Reed she saw the statement in the Plan that she could "qualify for an involuntary retirement benefit if you are involuntarily separated from service (unless the separation is for cause on charges of gross misconduct or delinquency)." (*Infra* at 6).

Employee had been in the highly respected position of principal for one-third of her career. Suddenly, she was told that she would no longer serve in that position, but rather, if she chose to stay, must again be a classroom teacher, her last permanent appointment. Employee was understandably devastated by Agency's decision. However, as the Court of Appeals for the Federal Circuit stated in *Schultz v. U.S. Navy*, 810 F2d 1133, 1136-37 (Fed. Cir. 1987), the doctrine of constructive discharge is "a narrow one" and does not encompass those concerns:

> The doctrine of coercive involuntariness is a narrow one. It does not apply to a case in which an employee decides to resign or retire because [she] does not want to accept [actions] that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that [she] feels [she] has no realistic option but to leave.

Based on a thorough review of the evidence and arguments presented in this matter, as discussed in this analysis, the Administrative Judge concludes that a preponderance of the evidence does not support the conclusion that Employee was effectively deprived of free choice, and that her retirement was involuntary. *See, Gregory v. Federal Communications Commission,* 84 M.S.P.R. 22 (1999). Therefore, the Administrative Judge further concludes that Employee's retirement was deemed voluntary. Thus, since Employee had voluntarily retired, she did not have the right to appeal to this Office, and her petition for appeal must be dismissed.

Therefore, in response to the Court's first question regarding OEA's jurisdiction to review Employee's claims, the answer is that Employee did not meet her burden of establishing that her retirement was involuntary. Thus OEA did not have jurisdiction to hear a matter involving an employee who had voluntarily retired. However, in order to fully respond to the Court's directives, the inquiry must continue. Assuming Employee had met her burden of proving that her retirement was involuntary, she would have to confront another jurisdictional issue based on the type of appointment she held. Principals are appointed to their positions for a specific period of time. As a time-specific tenure, principals are considered to have term appointments without tenure. District Personnel Manual §826.1 states:

> The employment of an individual under a temporary or term appointment shall end on the expiration date of the appointment, on the expiration date of an extension granted by the personnel authority, or upon separation prior to the specified expiration date in accordance with this section.

This Office has long held that principals, who serve under annual contracts, are term employees. Since there is no guarantee that the appointment will be extended, this Office lacks jurisdiction to hear appeals regarding Agency's decision not to reappoint an employee who served as principal the previous year. *See, e.g., Guzman v. District of Columbia Public Schools*, OEA Matter No. J-1047-08 (January 27, 2009). Therefore, Employee's appeal would still be dismissed. In addition, if Employee argued that she was not seeking reinstatement to her position of principal, but rather wanted to be placed in her in her reverted position, a decision could have been reached that she was entitled to relief.

In the alternative, Employee could have argued that she was a permanent employee at the time she filed her petition for appeal because she reverted to her status as a permanent employee pursuant to 5 DCMR §520.3 which states:

> A person who is not retained in the position of Principal…and who holds permanent status in another position in the D.C. Public Schools shall revert to the highest prior

> permanent level of employment upon …her removal from the position of Principal…provided, that this right shall not include the right to any particular position or office previously held.

It appears from the record that Employee had valid reversion rights. She could have reasonably argued that "shall" is a precatory word, and that she reverted to permanent status as of the effective date of the decision of non-reappointment. As a permanent employee, Employee could have alleged that Agency's action constituted an adverse action, thereby establishing at least threshold jurisdiction. For the reasons discussed in this Initial Decision, that argument would have failed. But, the response to the Court's question as to "whether there is a substantial question about whether the CMPA applied," is affirmative, *i.e.*, there is a substantial question regarding the applicability of the CMPA.

ORDER

It is hereby

ORDERED: This petition for appeal is dismissed. [9]

FOR THE OFFICE:

LOIS HOCHHAUSER, Esq.
Administrative Judge

[9] Given this outcome, the other issues raised by Employee, including entitlement to a bonus, are moot and are not addressed in this Initial Decision. In addition, Employee did not meet her burden of proof that she automatically was appointed to the position of principal on August 1 or that the school year begins on August 1.