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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ELLA CUFF,	)	
Employee	)	OEA Matter No. 1601-0009-12
	)	
v.	)	
	)	Date of Issuance: March 29, 2016
DEPARTMENT OF GENERAL	)	
SERVICES,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Ella Cuff (“Employee”) worked as a Police Officer with the Department of General Services (“Agency”). Agency issued a final notice of removal on September 30, 2011. The notice provided that Employee was terminated from her position for neglect of duty and incompetence which interferes with the efficiency and integrity of government operations.<sup>1</sup> The effective date of Employee’s removal was October 4, 2011.<sup>2</sup>

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on October 14, 2011. She conceded that she failed the low light portion of her firearms’ qualifying exam, but she claimed that she did not point her weapon at another officer. Employee explained

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<sup>1</sup> The notice provided that Employee was removed for failing her weapon’s qualification exam and inadvertently pointing her loaded weapon at another police officer.

<sup>2</sup> *Petition for Appeal*, p. 9-11 (October 14, 2011).

that she had not had weapon's training in nine years and requested that OEA investigate the matter.<sup>3</sup>

On November 14, 2011, Agency filed its response to Employee's petition. It contended that in accordance with District Personnel Manual ("DPM") § 1603, Employee was removed for cause. Agency asserted that Employee was required by the Metropolitan Police Department General Orders to complete a bi-annual firearms' qualification exam. It argued that after six attempts, Employee failed to qualify and was removed from the gun range for inadvertently pointing a loaded weapon at another police officer. As a result, Employee was required to complete mandatory remedial classroom training. However, after this training, Employee was still unsuccessful in passing her firearm's exam. Consequently, she was removed from her position for neglect of duty and incompetence which interferes with the efficiency and integrity of government operations.<sup>4</sup>

Before the OEA Administrative Judge ("AJ") issued an Initial Decision on this matter, Agency filed a Motion to Dismiss the case for lack of jurisdiction. Agency claimed that Employee elected to retire in lieu of being terminated. It explained that Employee's retirement was effective on October 4, 2011. Therefore, OEA lacked jurisdiction to consider the merits of her appeal.<sup>5</sup> As a result of these allegations, the AJ requested that both parties submit briefs addressing whether the case should be dismissed because Employee elected to retire in lieu of being terminated.<sup>6</sup>

Employee filed her brief on March 28, 2014. She asserted that the effective date of her termination action was October 4, 2011. However, in early 2012, she received a package from

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<sup>3</sup> *Id.*, 2-4.

<sup>4</sup> *Agency's Answer*, p. 3-5 (November 14, 2011).

<sup>5</sup> *Agency's Amended Answer and Motion to Dismiss for Lack of Jurisdiction*, p. 3-5 (February 27, 2014).

<sup>6</sup> *Order on Jurisdiction* (March 4, 2014).

Agency which included retirement documents. Employee explained that “with the help of the D.C. Human Resources[?] Office, she completed the paperwork and retired, effective retroactive[ly] to the date of her termination.” Employee claimed that soon after, she started to receive retirement payments. However, she continued to assert that she was terminated by adverse action; she did not voluntarily retire; and her retirement served as mitigation to the damages which resulted from her termination action.<sup>7</sup> Accordingly, she argued that OEA had jurisdiction to consider her case.<sup>8</sup>

The AJ issued her Initial Decision on June 30, 2014.<sup>9</sup> She held that Employee voluntarily retired, and there was no evidence of deception or coercion by Agency which would have rendered Employee’s retirement as involuntary. The AJ reasoned that Employee’s Standard Form 50 (“SF-50”) provided that the action taken was a retirement in lieu of involuntary action. Moreover, the AJ opined that Employee’s decision to retire after the effective date of her termination action did not render the retirement involuntary. Additionally, she explained that being faced with financial difficulties did not make Employee’s retirement involuntary. Therefore, she dismissed Employee’s appeal for lack of jurisdiction.<sup>10</sup>

Employee disagreed with the AJ and filed a Petition for Review with the OEA Board. She alleges that her employment record reflects that she was terminated from her position, not that she retired. Thus, in her opinion, the effect of the retroactive retirement was only to preclude her from establishing that OEA had jurisdiction to consider the merits of her case. Additionally, Employee claims that the SF-50 provides contradictory language. She argues that

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<sup>7</sup> Employee posited that she went several months without a paycheck and had no prospect of receiving a regular paycheck. Thus, when she received the retirement documentation, she decided to go through with the retirement so that she could receive a regular paycheck.

<sup>8</sup> *Petitioner Ella Cuff’s Jurisdictional Brief and Motion to Enforce the Settlement Agreement* (March 28, 2014).

<sup>9</sup> The decision was later amended on July 21, 2014, to reflect the names of both attorneys who represented Agency in this matter.

<sup>10</sup> *Initial Decision*, p. 4-6 (June 30, 2014).

the form provides that she retired in lieu of an involuntary action, and the retirement was based on discontinued service due to separation/termination. Therefore, she believes that the Initial Decision should be reversed.<sup>11</sup>

On September 8, 2014, Agency filed its response to Employee's Petition for Review. It submits that Employee's Official Personnel File provides her work status as retired, not terminated. Moreover, Agency contends that OEA has consistently held that it lacks jurisdiction over matters where an employee opts to voluntarily retire even when a termination action is pending. It further asserts that Employee's SF-50 denotes that she ". . . elected to retire on Discontinued Service Retirement." It is Agency's position that the word "elected" demonstrates that Employee's actions were voluntary. Therefore, Agency requests that Employee's petition be denied.<sup>12</sup>

Employee makes several arguments regarding what she considers contradictory language used in her SF-50. However, she does not dispute that she did retire from Agency. Employee also does not dispute that she received retirement payments from 2012, to include payments from October 4, 2011 forward. It is clear from the SF-50 that Employee retired, and the effective date of her retirement was October 4, 2011, which was also the effective date of her removal action. As previous AJs and this Board have ruled, retirements that occur after a removal action are valid. This Office has reasoned that when the retirement action is back-dated to the effective date of Employee's termination action, it essentially nullifies the termination.<sup>13</sup> Accordingly, per Employee's SF-50, the last action of record is her retirement.

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<sup>11</sup> *Petition for Review of Initial Decision* (August 4, 2014).

<sup>12</sup> *Respondent Department of General Services' Answer to Petition for Review* (September 8, 2014).

<sup>13</sup> *Andrew Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0215-11, *Opinion and Order on Petition for Review* (February 16, 2016); *Mary Ross v. D.C. Public Schools*, OEA Matter No. 2401-0208-10 (May 2, 2012); *Mary Ross v. D.C. Public Schools*, OEA Matter No. 2401-0208-10, *Opinion and Order on Petition for Review* (August 2, 2013); and *Hsiao Zen Lu v. Department of General Services*, OEA Matter No. J-0153-13 (November 25, 2013).

Employee chose to forego her termination action and instead retired. Thus, the essential question that must be answered is whether the retirement was voluntary or involuntary. This will determine if OEA has jurisdiction to consider the merits of Employee's arguments.

According to *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995), an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. For a retirement to be considered involuntary, an employee must establish that the retirement was due to agency's coercion or misinformation upon which the employee relied. OEA has consistently held that the burden, therefore, rests on employees to show that they involuntarily retired.<sup>14</sup> Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter. In the current matter, Employee failed to present any arguments of coercion or misrepresentation by Agency. Employee explained that after receipt of the retirement package from Agency, she completed the paperwork and retired, effective retroactively to the date of her termination.<sup>15</sup> Thus, as the AJ ruled, Employee's retirement was voluntary.

As for Employee's claim that she retired to mitigate the damages of not receiving a paycheck, OEA has held that financial hardship is not sufficient to make a retirement rise to the level of involuntariness.<sup>16</sup> Similar to the employee in *Christie v. United States*, 518 F.2d 584

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<sup>14</sup>*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, 1601-0019-09, 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).

<sup>15</sup> *Petitioner Ella Cuff's Jurisdictional Brief and Motion to Enforce the Settlement Agreement* (March 28, 2014).

<sup>16</sup> *Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96, August 20, 1998; *Barbara Lappin v. D.C. Public Schools*, OEA Matter No. 2401-0135-10, *Opinion and Orders on Petition for Review* (May 31, 2013); and *Frances Simmons v. D.C. Public Schools*, OEA Matter No. 2401-0030-10, *Opinion and Orders on Petition for Review* (April

(Ct. Cl. 1975), Employee had the option of retiring or challenging the removal action taken against her by Agency. She chose to retire instead of standing firm and questioning the validity of her removal. Being faced with removal is a difficult position for most people. However, merely being faced with a difficult situation does not obviate the voluntariness of Employee's retirement.

### Conclusion

Employee failed to establish that Agency coerced her or gave her misleading information. Similar to the employees in *Jenson* and *Christie*, Employee had the option to retire or stand pat and challenge the action taken against her by Agency. Because she failed to prove that she involuntarily retired from Agency, Employee's Petition for Review is denied.

**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.