THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JANINE JOHNSON,	)	
Employee	)	OEA Matter No. 2401-0383-10
	)	
v.	)	Date of Issuance: November 20, 2012
	)	
DISTRICT DEPARTMENT	)	
OF TRANSPORTAION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Janine Johnson, Employee *Pro Se*
Melissa Williams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 25, 2010, Janine Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District Department of Transportation's ("Agency" or "DCPS") action of abolishing her position through a Reduction-In-Force ("RIF"). The effective date of the RIF was July 30, 2010. Employee's position of record at the time her position was abolished was a Statistical Assistant. On September 23, 2010, Agency filed an Answer to Employee's Petition for Appeal.

I was assigned this matter on or around July 18, 2012. On July 30, 2012, I issued an order convening a Status Conference for August 22, 2012. Both parties were in attendance. Thereafter, on August 29, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. The parties were also required to address the issue of whether Employee retired in lieu of being RIFed. Agency submitted its brief on September 13, 2012, noting that Employee voluntarily retired around July 30, 2010. Employee's brief was due on September 27, 2012. On October 2, 2012, the undersigned issued an Order for Statement of Good Cause to Employee for her failure to comply with the August 29, 2012 Order. On October 5, 2012, Employee submitted a request for an Extension of time to submit her brief, noting that she had not received Agency's brief. This request was granted in an Order dated October 10, 2012. According to this Order, Employee

had until October 31, 2012, to submit her brief. Employee did not comply. On November 6, 2012, I issued an Order for Statement of Good Cause. Employee was ordered to submit a statement of good cause on her failure to submit her brief as required in the previous Orders. Employee had until November 16, 2012, to respond to the November 6, 2012, Order. As of the date of this decision, Employee has not responded to this Order. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

ANALYSIS AND CONCLUSIONS OF LAW

During the Status Conference, Employee noted that she was guaranteed that no RIFs would be conducted, yet Agency conducted a RIF in which her position was abolished.[1] Agency submits in its Answer that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her separation.[2] Agency further states in its brief that Employee voluntarily retired on or around July 30, 2010, and as such, OEA does not have jurisdiction to hear Employee's appeal.[3]

There is a question as to whether OEA has jurisdiction over this appeal. Agency stated in its brief that Employee voluntarily retired from Agency after receiving the RIF notice. Agency attached Employee's Personnel Action ("SF-50") in support of this contention. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

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."

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[1] Employee did not raise any issues in her Petition for Appeal. *See* Petition for Appeal (August 25, 2010).
[2] Agency's Answer (September 23, 2010).
[3] Agency's Brief, Exhibit B (September 13, 2012).

This Office has no authority to review issues beyond its jurisdiction.[4] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[5] 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.[6] 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.[7] A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[8] The employee must prove that his/her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which she relied when making a decision to retire. An employee must also show "that a reasonable person would have been misled by the Agency's statements."[9]

Here, Employee was given the opportunity to address the voluntary retirement issue raised in this matter, but Employee failed to comply. According to the SF-50 effective July 30, 2010, Employee's retirement from Agency was processed and approved on August 17, 2010, and Employee has received 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. Based on the foregoing, I find that Employee's retirement was voluntary.[10] I further find that, because Employee has the burden of proof in issues of jurisdiction, by not responding to the Orders from this Office, Employee has failed to meet her burden of proof in this matter. Consequently, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this matter.

In addition, OEA rule 621,[11] grants an Administrative Judge ("AJ") the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ "in the exercise of sound discretion may dismiss the action or rule for the appellant" if a party fails to take reasonable steps to prosecute or defend an appeal.[12] This Office has held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a

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[4] *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[5] *See Brown v. District of Columbia Pub. Sch.*, 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 Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[6] *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).
[7] *Id*. at 587.
[8] *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.2.d 937 (Fed. Cir. 1984).
[9] *Id.*
[10] The Court in *Christie* stated that "[w]hile it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports CSC's finding that plaintiff chose to resign and accept discontinued service retirement rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the involuntariness of her resignation." *Christie ,supra* at 587-588. (citations omitted).
[11] 59 DCR 2129 (March 16, 2012).
[12] *Id.*

deadline for such submission.[13] Here, Employee was warned in the August 29, 2012, October 2, 2012, October 10, 2012 and November 6, 2012, Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to these Orders. These were required for a proper resolution of this matter on its merits. I therefore conclude that, Employee's failure to prosecute her appeal is consistent with the language of OEA rule 621. Employee was notified of the specific repercussions of failing to comply with these Orders. Accordingly, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office, and this represents another reason for dismissal.

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

[13] *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).