THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MERLE MONU,	)	
Employee	)	OEA Matter No. 1601-0202-12
	)	
v.	)	Date of Issuance: March 11, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Merle Monu, Employee *Pro Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 14, 2012, Merle Monu ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") decision to terminate her from her position as an English Teacher, effective August 10, 2012. Employee was terminated for not being able to secure a permanent placement for school year 2011-2012 after she was excessed.[1] Employee was a WTU employee at the time of her termination. On September 20, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

I was assigned this matter on November 22, 2013. On December 2, 2013, I issued an order convening a Status Conference for January 13, 2014. Both parties were in attendance. Thereafter, on January 14, 2014, I issued an Order wherein, I ordered Employee to address the jurisdiction issue that was raised at the Status Conference. Employee's brief was due on or before January 28, 2014, and Agency had the option to submit a reply brief on or before February 7, 2014. Subsequently, on January 30, 2014, I issued a Statement of Good Cause,

[1] Agency's Brief at Exhibit 1, Article 4.5.1.1. (February 25, 2014). According to the Collective Bargaining Agreement ("CBA") between Agency and the Washington Teachers' Union ("WTU"), "excessed" is "an elimination of a teacher's position at a particular school due to a decline in student enrollment, a reduction in the local school budget, a closing or consolidation, a restructuring, or a change in the local school program, when such elimination is not a 'reduction in force' (RIF) or abolishment.'"

wherein, Employee was ordered to explain her failure to submit a response to the January 14, 2014, Order, on or before February 10, 2014. On February 1, 2014, Employee submitted her brief addressing the jurisdiction issue in this matter. On February 4, 2014, Agency filed a Motion to Set Deadline for Responsive Brief. In an Order dated February 11, 2014, the Undersigned granted Agency's Motion, setting the deadline for Agency's reply brief for February 25, 2014. Agency filed a timely brief. 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.[2] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[3] 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."

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

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[2] *See Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

[3] *See Brown v. District of Columbia Public. School*, 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).

[4] *See Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

[5] *See Brown v. District of Columbia Public School*, 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*

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]

Employee's position

In this case, Employee states in her brief that "I am receiving retirement benefits because I had applied for involuntary retirement and received it." Employee explains that she did not meet the requirements of voluntary retirement under the DCPS retirement plan when she applied for retirement benefits because at the time of her termination and involuntary retirement, she had not completed thirty (30) years of service, and she was not yet fifty-five (55) years old.[10]

Employee alleges that she was coerced, deceived and forced into choosing Option three (3) instead of Option two (2) when she was excessed. Employee contends that, because she did not want to be terminated, she felt forced to accept Option three (3).[11] She also maintains that Agency's deception and/or misrepresentation that it did not have the budget to grant her Option two (2), was undue coercion and it forced her into Option three (3). Additionally, Employee notes that her retirement application stated that her retirement was "Involuntary" and this was

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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); *Bagenstose v. District of Columbia 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] Employee's Brief (February 1, 2014).

[11] According to CBA Article 4.5.5.3, an excessed permanent status employee has the following three options:

1. Option 1: Buyout – the excessed permanent employee shall have the option to receive $25,000 cash buyout resulting in separation from DCPS. The excessed permanent employee who opts for the buyout shall not be eligible for employment with DCPS for a period of three (3) years. This option is only available to permanent status employees whose most recent evaluation score was "Effective" of higher.
2. Option 2: Early Retirement – excessed permanent status Teacher with twenty (20) years of more of creditable service shall have the option of retiring with full benefits. This provision shall be subject to necessary government and budgetary approvals. This option is only available to permanent status Teachers whose most recent evaluation score was "Effective" of higher.
3. Option 3: A year to secure a new placement – excessed permanent status Teachers who have been unable to secure a new placement during the sixty (6) calendar days following the effective date of the excess, and who have not selected Option 1 or Option 2 above, shall have the right to select Option 3: An extra year to secure a new placement. The extra year shall begin on the effective date of the excess and shall conclude exactly one calendar year thereafter.

preceded by a personnel action of "termination."[12] Employee avers that if there was no deception, she would not have filed an appeal with OEA.

Agency's position

Agency contends that, Employee was excessed pursuant to the CBA in August of 2010. Agency explains that Employee was advised of the three options available to excessed permanent teachers, and Employee elected Option 2 on August 20, 2010. Agency noted that, due to lack of funding, it was unable to execute Employee's Option 2 request. Consequently, in a letter dated July 15, 2011, Employee was asked to select a new option by July 22, 2011, and Employee selected Option 3. Agency states that, Employee received her temporary assignment for school year 2011-2012, and she was advised to secure a mutual consent position with DCPS. Agency also stated that on July 26, 2012, Employee was notified that, consistent with Article 4.5.5.3.3.5 of the CBA, she would be separated from service effective August 10, 2012. Agency highlights that, in lieu of termination, Employee retired on August 10, 2012, and as such, OEA does not have jurisdiction over this matter.[13]

Analysis

Employee highlights that her retirement application indicated that her retirement was involuntary. Employee also explains that she understood that her retirement was involuntary under these circumstances because she did not have the required years of service and age at the time of her termination. Therefore, I find that Employee was aware of the meaning of the term "Involuntary" as it applied to her retirement benefits based on her own admission. Employee understood Agency's retirement plan, and the retirement application correctly identified the benefit type Employee was eligible for under the DCPS retirement classification - "Involuntary".[14] Under the District of Columbia Teachers Retirement Plan, "Involuntary" is a retirement classification used when an employee 1) is separated from DCPS; 2) she has met the age requirement; and 3) she is able to obtain additional years of service. As a permanent excessed teacher with over twenty-five (25) years of service, and under fifty-five (55) years of age, I conclude that Employee qualified for involuntary retirement under DCPS Retirement plan.

Although "Involuntary retirement" is a term of art in the legal community and can be misleading, this is not the case here. DCPS uses this term in a different context with regards to how it classifies the various types of retirement benefits. Employee admits that she understood the meaning of "involuntary retirement" as it applies to her specific circumstances when she noted that she did not meet the requirements for Voluntary Retirement. Thus, I conclude that Employee was aware that the inscription of the term "Involuntary" in this situation simply referred to the type of retirement benefit she qualified for under DCPS retirement plans.

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[12] *Id.*
[13] Agency's Brief (February 25, 2014).
[14] The Retirement Plan defined "Involuntary" as retirement benefits payable if an employee was involuntarily separated from service (unless the reason is for cause on charges of misconduct or delinquency); and the employee has 25 years of service, including at least five years as a DCPS teacher; or 20 years of services, including a minimum of five years as a DCPS teacher and the employee is at least age 50.

OEA has consistently held that a mere assertion of force or coercion is not enough to prove that Employee involuntarily retired.[15] In the instant matter, while Employee alleges that she was coerced, forced and deceived into selection Option 3, instead of Option 2, this assertion is irrelevant to the issue of Employee's retirement. Moreover, Employee notes that "I am receiving retirement benefits because I had applied for involuntary retirement and received it." At no time does Employee allege that Agency procured her retirement through deceit, misrepresentation or undue coercion. Accordingly, I find no *credible* evidence of misrepresentation, misinformation or deceit on the part of Agency in procuring the retirement of Employee. Further, Employee has failed to provide any evidence to prove that Agency deceived her or gave her misleading information with regards to her retirement. And there is no evidence that Agency misinformed Employee about her option to retire. Regardless of Employee's protestations, I find that the facts and circumstances surrounding Employee's retirement was Employee's own choice and Employee has enjoyed the benefits of retiring. Based on the foregoing, I conclude that Employee's retirement was voluntary. I further find that this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this appeal.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[15] *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, 1601-0019-019, 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).