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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
CHARLOTTE CLIPPER,)
Employee)
)
v.)
)
DC NATIONAL GUARD,)
Agency)
_____)

OEA Matter No.: 1601-0125-11

Date of Issuance: August 26, 2013

SOMMER J. MURPHY, Esq.
Administrative Judge

Charlotte Clipper, Employee, Pro Se
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 28, 2011, Charlotte Clipper (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the DC National Guard’s (“Agency”) decision to terminate her. Agency’s notice stated that Employee was being removed from service as a result of charges of: 1) malfeasance; 2) insubordination; and 3) neglect of duty. Employee worked as a Supervisory Human Resource Specialist with Agency prior to being terminated. The effective date of Employee’s termination was May 20, 2011.

This matter was assigned to me on September 1, 2011. I issued an Order on September 2, 2011, directing the Employee to present legal and factual arguments to support her argument that this Office has jurisdiction over her appeal. The Order directed Employee to submit her brief by September 12, 2011. Employee was advised that she had the burden of proof with regard to the issue of jurisdiction. Employee was further advised that failure to respond to the order in a timely fashion could result in sanctions, including dismissal of her appeal. Employee did not submit a response to the Order.

On September 16, 2011, the Undersigned issued an Initial Decision (“ID”), holding that Employee failed to submit a jurisdictional brief, as ordered. The decision further stated that OEA did not have jurisdiction over the instant matter because Employee filed her appeal more than

thirty (30) days after the effective date of her termination. Employee's Petition for Appeal was therefore dismissed for lack of jurisdiction.

Employee subsequently filed a Petition for Review with OEA's Board on October 11, 2011. In her appeal, Employee asserted that she submitted a timely response to the jurisdictional order, via certified mail, on June 11, 2011. In an Opinion and Order on Petition for Review, dated February 5, 2013, OEA's Board granted Employee's petition, and remanded the matter to the Undersigned for consideration of the case on its merits. The Board noted that Employee provided sufficient documentation to support her contention that her appeal was mailed "and should have been received by OEA within a timely manner."¹

On March 22, 2013, I issued an Order Rescheduling Prehearing Conference for the purpose of considering Employee's appeal on its merits. I subsequently issued an Order Convening an Evidentiary Hearing; however, Agency filed a Motion to Dismiss for Lack of Jurisdiction on July 3, 2013. Because the threshold issue of jurisdiction was raised by Agency, I ordered the parties to submit written briefs. The parties were ordered to submit briefs to address the following issue: whether OEA lacks jurisdiction over Employee's Petition for Appeal because Employee elected to retire in lieu of being terminated. Both parties submitted responses to the order. After reviewing the record, I determined that an evidentiary hearing was not warranted. The record is therefore closed.

JURISDICTION

As will be explained below the Jurisdiction of this Office has not been established.

ISSUE

Whether OEA has jurisdiction over this matter.

Employee's Position

Employee contends that OEA has jurisdiction over the instant appeal. Employee states she was asked by Herman Preston, the Deciding Official, to sign a letter of resignation on May 17, 2011. Employee submits that she refused to sign the letter and was still receiving a paycheck from Agency after being placed on Administrative Leave in 2010. In her submission to this Office, Employee states the following:

"Until Mr. Preston informed me that I was fired, I was holding on to the hope that I would return to my duties, and I had no intention or thought of retiring. That is why I was begging everyone involved to let me return to my office."²

¹ *Clipper v. D.C. National Guard*, OEA Matter No. 1601-0125-11, Opinion and Order on Petition for Review (February 5, 2013).

² Employee Brief (August 5, 2013).

Employee submits that she refused to sign the letter and was still receiving a paycheck from Agency until the effective date of her termination.

Agency's Position

Agency argues that OEA lacks jurisdiction over the instant appeal because Employee retired in lieu of being terminated. According to Agency, Employee has been receiving a retirement annuity since June 1, 2011.³ Agency further submits that since Employee's retirement was voluntary, this Office lacks jurisdiction to adjudicate the matter.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

“An employee may appeal 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....”

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

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 628.2 *Id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

³ Agency's Motion to Dismiss for Lack of Jurisdiction (July 3, 2013).

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. OEA has consistently held that there is a legal presumption that retirements are voluntary.⁶ Thus, 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 or her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he/she relied when making his/her decision to retire. The employee must also show "that a reasonable person would have been misled by the agency's statements."⁹

Employee's official personnel file includes a copy of her retirement application. The application is accompanied by a letter, dated May 22, 2011, from Employee, which states "[e]nclosed is my application for immediate retirement to be forwarded in order for it to be processed in a timely manner and my benefits will not be interrupted...."¹⁰ The personnel file reflects that Employee's effective retirement date was May 20, 2011.

In this case, Employee does not contend that her retirement was involuntary. Employee concedes in her August 5, 2013 submission to this Office that she submitted an application for immediate retirement after being informed by Agency of her termination. I find that there is no credible evidence in the record to support a finding that Employee's retirement was procured through fraud, undue coercion, misinterpretation, or deception. Employee's retirement was her own choice, and Employee has enjoyed the benefits of retiring.

Based on the foregoing, I find that Employee's retirement was voluntary. I further find that Employee has failed to meet her burden of proof by establishing that OEA has jurisdiction over this appeal, as required by OEA Rule 628.2.¹¹ Accordingly, this Office lacks jurisdiction in the instant matter, and I am unable to address the factual merits, if any, of Employee's appeal.

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

⁵ See *Brown v. District of Columbia Public Schools*, 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.2d 937 (Fed. Cir. 1984).

⁹ *Id.*

¹⁰ Agency's Submission (July 26, 2013).

¹¹ 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

ORDER

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

FOR THE OFFICE:

SOMMER J MURPHY, ESQ
ADMINISTRATIVE JUDGE

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).