THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0043-16
LINDA BUSSEY Employee	Date of Issuance: February 1, 2017
v	
	Lois Hochhauser, Esq. Administrative Judge
DISTRICT OF COLUMBIA OFFICE OF ADMINISTRATIVE HEARINGS Agency	

David Branch, Esq. and Louise Ryder, Esq., Employee Representatives
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Linda Bussey, Employee, filed a petition with the Office of Employee Appeals (OEA) on April 18, 2016, appealing the final decision of the District of Columbia Office of Administrative Hearings, Agency, to terminate her employment, effective March 18, 2016. The matter was assigned to this Administrative Judge (AJ) on September 9, 2016.

Agency moved to dismiss the appeal on August 12, 2016, arguing that this Office lacked jurisdiction since Employee retired before the effective date of the removal. Employee opposed the motion, contending that her decision to retire was a result of duress, and therefore involuntary. Additional briefs were filed on November 17, 2016; and oral argument was heard on November 29, 2016. Thereafter, the record was closed.[1]

JURISDICTION

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

[1] The AJ determined, after carefully reviewing the written submissions and oral arguments, that an evidentiary hearing was not needed since relevant fact were undisputed. The facts and the positions of the parties in this Initial Decision are based on the written submissions, attachments, and oral arguments.

ISSUE

Was this Office's jurisdiction established by a preponderance of evidence?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee began her employment with Agency in 2006. She was promoted to the position of Legal Administrative Specialist in 2008, and remained in that position for the duration of her employment. By March 2016, she had worked for the D.C. Government for about 30 years.

On November 16, 2015, Agency issued an Advanced Written Notice of Proposed Removal, notifying Employee that it intended to remove her, based on the charge of "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." The charge contained four specifications, *i.e.*, neglect of duty, incompetence, misfeasance in performance of work duties, and unreasonable failure to give assistance to the public." The Notice stated that the charge and specifications were based primarily on the findings and conclusions contained in the November 13, 2015 report of investigation and supporting documentation, which detailed, according to Agency, "numerous instances" in which Employee failed to follow instructions, failed to carry out assignments and/or engaged in "careless or negligent work habits." The Notice stated that Employee could submit a written response to the Hearing Officer (HO). She did so on November 24, 2015 and January 26, 2016; and also participated in a telephone conference with the HO and Agency counsel. Her request for a hearing before the HO was denied. In the Administrative Review of Proposed Notice of Removal issued on March 13, 2016, the HO concluded that Agency had presented grounds to support all of the specifications, but that only the "neglect of duty" specification supported the penalty of removal.

In its Final Agency Decision, issued on March 16, 2016, Agency stated that based on the "evidence, recommendations, rationale and conclusions" of the proposing official and HO, Employee would be removed, effective March 18, 2016.[2] On March 16, 2016, after receiving the Final Agency Notice, Employee met with a retirement specialist and initiated the retirement process. Her retirement took effect on March 17, 2016.

The jurisdiction of this Office is set forth in D.C. Official Code §1-606.03(a), which states, in pertinent part:

> 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.

This Office has long maintained, consistent with federal precedent, that it lacks jurisdiction to hear an appeal of a retired employee unless "it is established that the decision to retire was involuntary." *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C.Reg. 1587, 1589 (1995). Since Employee retired before the effective date of her removal, this Office's

[2] Agency stated that the penalty of removal was based on the "neglect of duty" specification.

jurisdiction is at issue. OEA Rule 628.1, 59 D.C.Reg. 2129 (2012) states that employees have the burden of proof on all issues of jurisdiction. The burden must be met by a "preponderance of the evidence," which is defined in OEA Rule 628.2 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."

It is presumed when an employee initiates the retirement process and completes all the requirements, that the decision to retire was made voluntarily. Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975). *See, also, Vega v. District of Columbia Public Schools*, OEA Matter No. J-0174-08 (January 23, 2009). Since Employee initiated the retirement process on November 16, when she met with the retirement specialist and since she completed the paperwork and other requirements, it is presumed that she voluntarily made the decision to retire. The presumption, however, can be rebutted if Employee presents "sufficient evidence" to establish that her decision to retire was "obtained by external coercion or duress." 518 F2d. at 588. *See also, Terban v. Department of Energy*, 216 F.3d 1021 (Fed. Cir. 2000). In determining if an employee has rebutted the presumption, courts use an objective standard and not the employee's perceptions. *Stone v. University of Maryland Medical Systems Corp*., 855 F.2d 167 (4th Cir. 1988). The objective standard is based on the "totality of the circumstances" presented in the particular case at issue. Pearlman v. United States, 490 F.2d 928 (Ct. Cl. 1974). In this matter, Employee argued that she acted under duress caused by the limited time she had to make a decision since she was notified on November 16 that she would be removed on November 18. This short period of time, she contended, deprived her of the opportunity to carefully consider her options. She said that she thought she could lose her pension if she was removed. She maintained that if she had had sufficient time to make a decision, she would have accepted, and then challenged, the removal.

Employee raised a threshold issue, *i.e.*, that Agency lacked good cause when it proposed the adverse action. This threshold issue must be resolved first, since the voluntariness of a retirement is based on the presumption that the employer had good cause to initiate the adverse action that resulted in the employee's decision to retire:

> [T]he threatened termination must be for good cause in order to precipitate binding, voluntary resignation. But this good cause requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated. 518 F2d. at 587-588

In order to prevail on this issue, Employee has the burden of establishing that Agency "knew or believed" that it did not have good cause when it initiated the adverse action. *Pitt v. United States*, 420 F.2d 1028 (Ct. Cl. 1970). Employee argued that the charges against her were baseless, were the result of retaliation, and were motivated by Agency's wish to end her employment. In support, she asserted that in 2012, after she successfully accused supervisors of misconduct, Agency began retaliating against her by reassigning her to the file room and transferring her five times. She asserted that at a conciliation meeting in 2014, following her successful challenge to Agency's denial of her leave request, Agency demanded that she resign.

Agency maintained that it acted with good cause and could substantiate the charges. It stated that in October 2015, Thomas Martin, an attorney who often represented clients before Agency, complained that Employee caused numerous problems, such as mailing Orders to the wrong address and giving incorrect information on the status of motions. It asserted that he told Agency that Employee was "hurting the agency" and giving it a "bad reputation." Agency stated that as a result of these complaints, it undertook an investigation of Employee's performance. Employee disputed Agency's assertions, claiming that she did not know Mr. Martin; and since she had never spoken with him about her work, he could not know what she did or the reason she performed her duties in a certain way. She contended that Mr. Martin was not present when she received assignments and never attended training sessions that she attended. However, she did not claim that Mr. Martin was not an attorney who regularly appeared before Agency, that he did not complain to Agency with the allegations described above, or that he acted in bad faith or with *animus.* The Administrative Judge finds that Employee's challenges to Mr. Martin and his lack of familiarity with her, her assignments and her training, even if accepted as true, are insufficient to establish that Agency knew or believed the allegations were baseless when it undertook its investigation.

After receiving Mr. Martin's complaints about Employee, Agency assigned Rachel Ricker Lukens and James Ishida to investigate the allegations. The two interviewed approximately 12 present and former employees, including team leaders, and Administrative Law Judges (ALJs), who knew and had worked with Employee. Every interviewee cited specific incidents and/or general problems with Employee's performance and/or work ethic, including those raised by Mr. Martin. A number of interviewees raised the same criticisms or cited the same or similar instances of misconduct. For example, several interviewees asserted that Employee was responsible for "double booking judges," which resulted in cancelled hearings and frustrated parties. One interviewee stated that Employee had been counseled on this issue "too many times to count." An ALJ stated that Employee was removed as team leader because she was unable to complete her work accurately and timely. Another ALJ stated that Employee's "lack of attention to detail" resulted in poor case preparation. She also reported that she had heard Employee advise a party to deny receiving notice of a proceeding in order to obtain a continuance. A Team Leader who had been in daily contact with Employee for a period of time, stated that Employee made "a ton of mistakes," and contended that judges constantly complained about Employee's errors and poor performance, providing specific examples.

The investigative report, issued on November 13, 2015, included summaries of the interviews as well as supporting documentation. Ms. Lukens and Mr. Ishida found, based on their investigation, that Employee often made mistakes "over and over and over again," and that she resisted attempts "to correct or improve her work made by team leaders and supervisors." They characterized her as a "poor employee" based on her "inferior work product, substandard work ethic, time and attendance problems, and general negativity." They concluded that as a result of her poor performance, Agency's "reputation and standing in the public and legal community was damaged." They recommended that Agency initiate "immediate, appropriate and commensurate disciplinary action against" Employee. On November 15, Agency issued the proposed notice of removal, based on the information, findings and recommendations in the report.

Employee challenged the report, alleging that the interviewees did not provide dates or specific details in their allegations, and that they never discussed the matters with her. She said that she first learned of complaints about her performance from her supervisor in August 2015, and that she had responded that she was "overwhelmed" with having to care for her mother who had recently suffered a stroke. However, the AJ found that the report and attachments contained information regarding work-related problems with Employee and notifications to Employee of these problems going back to 2013, if not earlier. In addition, the AJ noted that Employee did not contend that the interviewees or interviewers acted in bad faith or based on *animus;* or that all the claims were baseless. As stated earlier, assuming *arguendo* that Employee was correct that interviewees did not bring their complaints to her, that some of the allegations lacked details and dates, and that in August 2015 she was under a great deal of stress, these facts would be insufficient to support a claim that the charges lacked good cause. Even if Employee is correct that Agency retaliated against Employee in 2012 and demanded her resignation in 2014, these facts do not establish that Agency knew or believed when it initiated the proposed removal based on the findings and conclusions in the investigation, that the allegations could not be substantiated. As noted above, each person interviewed identified longstanding problems with Employee's performance, work ethic and attendance. While the stress created by her mother's illness could account for some of Employee's problems during the summer of 2015, the problems identified by the interviewees, were longstanding, and predated her mother's illness. In sum, for the reasons discussed, the AJ concludes that Employee did not meet her burden on the threshold issue of establishing that Agency knew or believed that it could not substantiate the charges when it initiated the proposed notice based on the findings, conclusions and recommendations in the investigative report, and therefore lacked good cause to bring the charges.

Since Employee failed to meet her burden on the threshold issue, the analysis proceeds to her claim that her decision to retire was made under duress thus rendering it involuntary. Black's Law Dictionary (5th ed. 1979) defines "duress" as a condition where a person "is induced by wrongful act or threat" to do something that he or she would not normally do because the person is overpowered and deprived of free will by the wrongdoer. Duress can be "implied, legal or constructive," such as when a person is "constrained by subjugation" to do what he or she would not otherwise do." Duress, used in the context of involuntary retirements, is generally implied or constructive. Employee asserts that the duress was caused by the lack of time she was given to make a decision. She maintains that the facts in this matter are similar to those in *District of Columbia Metropolitan Police Department v. Stanley,* 942 A.2d 1172 (D.C. 2008) and require the same result.

In *Stanley*, John Daniels,[3] a Metropolitan Police Department (MPD) District Commander, was at home on his day off, when MPD telephoned him in the afternoon, and ordered him to report to an unscheduled meeting at 2:45 p.m. that day. At the meeting, he was told, for the first time, that he was immediately being replaced as District Commander. He was also told that he had until 4:00 p.m. that day to either retire, accept a demotion or be fired. MPD denied his request for additional

[3] Daniels was one of three individuals in the initial lawsuit, but the claims of the named plaintiff and other individual were resolved, so that the Court's findings, analysis and decision were limited to Daniels.

time to make a decision, and refused to tell him how his pay and benefits would be impacted by the demotion. Daniels, who, according to the Court, had an "unblemished record" and was unaware of any performance problems, left the meeting in a "state of shock and humiliation." He immediately contacted the MPD payroll office to find out if a demotion would result in a salary reduction, but the office was closed. Daniels first accepted the demotion, but was allowed to retire when he changed his mind the following day. He claimed that his decision to retire was made under duress, rendering it involuntary, citing the short time allowed to make the decision and the lack of information.

The Court in *Stanley* stated that time constraints and insufficient information were often present in cases in which courts reached decisions that the retirements were voluntary:

> [T]ime pressure or deficient information may be present to a greater or lesser degree in many *unquestionably* voluntary retirement…decisions. (emphasis added). 942 A.2d at 1179.

The Court in *Stanley* stated that it reached its decision regarding the voluntariness of Daniels's retirement based not on any one fact, but instead on the totality of circumstances. It looked at the manner and timing of MPD's notification to Daniels to report to a meeting. It considered Daniels's unblemished record and view of having a good reputation and good relationship with the Department. Based on those facts, it found that Daniels was left humiliated and in a state of shock when he learned for the first time he was being replaced, and that if he did not accept a demotion or retire, he would be fired. It added to the relevant facts that Daniels, in this state of shock, was given less than an hour to make this decision. It noted that Agency failed to provide accurate or complete information at the meeting, and that Daniels's efforts to obtain the information failed because the office that provided the information was closed. Based on the "totality of [these] circumstances", the Court determined that Daniels established that his decision to retire was a result of duress, and therefore involuntary. The Court stated that in reaching its decision, it found "no evidence [of] any other circumstance that relieved or mitigated the duress under which Daniels was placed."

The AJ does not find that the facts in this matter are so similar to those in *Stanley* that they warrant the same result. One of the facts in *Stanley* that the Court considered significant was that Daniels was given, at most, about an hour to make a decision. In addition, during that hour, he could not get any information he needed, because the office that provided the information was closed. Employee, on the other hand, stated that upon receiving the final notice by email on the morning of March 16, she immediately went to meet with a retirement specialist. Therefore, she had most of March 16 and all of March 17 to reach a decision, which may be a lot of time but is considerably more time than Daniels had to make a decision. In addition, Employee had the opportunity to have her questions and concerns addressed, while Daniels was denied that opportunity. Employee did not contend that the retirement specialist was unqualified, or that the retirement specialist refused to spend sufficient time with her to fully address her questions and concerns.

In order for Employee to successfully challenge the sufficiency and accuracy of the information she received and upon which she based her decision, she must present sufficient evidence that Agency engaged in "improper acts" that left her "no alternative" but to retire. *Schultz v. U.S. Navy*, 810 F.2d 1133 (Fed. Cir. 1987). In *Beverly v. United States Postal Service*, 88 M.S.P.R. 247, 250 (2001), for example, an employee who had been on limited duty for more than ten years due to a

work-related injury, was ordered to return to full duty by his employer who claimed that employee was no longer deemed disabled and should return to full-time employment. The employer had, in fact, based his order on a decision involving a different employee. In fact, the employee's status as disabled and eligible for part-time duty was unchanged. However, the employer refused to consider employee's contention that the employer had made an error. Since the employee was not physically able to work full-time, he resigned. The Merit Systems Protection Board determined that under these circumstances, the employee's resignation was "tantamount to a removal." In this matter, however, Employee did not provide specific instances of false or misleading information. In addition, she did not explain why she would have reached a different decision if she had been given more time.

In *Stanley*, Daniels had no reason to investigate retirement options prior to the meeting, because he had no advance notice of MPD's intentions, and had an "unblemished record." Employee, on the other hand, was notified of Agency's intention to remove her four months before the final notice since the proposed notice was issued on November 16, 2015. Therefore, the final notice would not have left her in a "state of shock," and unable to act. Employee's argument that she did not know of the removal until the final Agency notice may be technically accurate since Agency could have changed its mind. However, Employee maintained that she had been a victim of Agency retaliation since 2012, had been ordered by Agency to resign in 2014, and was denied due process after the proposed notice was issued. Thus, she cannot reasonably argue that she thought Agency would not follow through with the removal or that its final decision left her in a "state of shock." Further, unlike Daniels, Employee did not have an "unblemished" record, since she was aware of complaints against her at least since the August 2015 meeting with her supervisor, and certainly since the November 2015 proposed notice.

Courts may reach different results in these types of challenges by considering that attributes of the individual. There may have different expectations for someone new in the job market than someone with 30 years of experience. It may accept an assertion from someone who has little education or experience that it would not accept from a Legal Administrative Specialist, CS-0900-11. *See, e.g., Williams v. Walker-Thomas Furniture Company*, 350 F2d 445 (1965). It may consider whether the individual had advice of counsel. Employee was represented by counsel, who vigorously represented her at least from the time the proposed notice was issued, and who advanced the arguments that are addressed in this Initial Decision with fervor and conviction. The fact that Employee retained counsel indicates that she was aware that her situation was serious. As noted earlier, she charged that she was the victim of Agency retaliation since 2014, that Agency demanded her resignation in 2014, and that Agency denied her due process rights throughout this process. Given all of these circumstances, an employee would have a reasonable basis to believe that removal was a *fait accompli* and would thoroughly explore her options and determine the best way to proceed when the removal was proposed, rather than wait for the inevitable to occur. In *Stanley*, the Court, concluded that MPD was "wholly responsible" for Daniels's "inability to make an informed choice" and that there was nothing that mitigated Agency's actions. 942 A.2d at 1179. In this matter, the proposed notice in November 2015 notified Employee of Agency's intention to remove her which allowed her ample time to investigate her options and make an informed decision in the likely event that Agency went forward with its decision. Agency was not "wholly responsible" for Employee's "inability to make an informed choice." (*Id*).

Therefore, based on a thorough review of the submissions and arguments, and for the reasons discussed herein, the AJ concludes that Employee did not meet the burden of proof required to rebut the presumption that her retirement was voluntary. She further concludes that Employee did not present sufficient evidence that she was acting under duress or that her decision was based on insufficient or inaccurate information. Finally, she concludes that Employee failed to meet her burden of proof that this Office has jurisdiction to hear this appeal. *Bagenstose v. D.C. Office of Employee Appeals*, 888 A.2d 1144, 1145 (D.C. 2005).

ORDER

This petition for appeal is dismissed.

FOR THE OFFICE: _____
Lois Hochhauser, Esq.
Administrative Judge