THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FRANCINE THOMAS,	)	
Employee	)	
	)	OEA Matter No.: 2401-0025-12
v.	)	
	)	Date of Issuance: June 6, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Francine Thomas ("Employee") worked as an Information Technology Customer Support Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was October 14, 2011.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 10, 2011. In her appeal, Employee argued that Agency violated several D.C. Municipal Regulations ("DCMR") when it conducted the RIF. Specifically, she stated that Agency failed to properly define the RIF competitive levels and the retention standing of affected employees. Employee also contended that Agency was required to engage in Impact and

Implementation bargaining prior to the RIF under the terms of the Collective Bargaining Agreement between Agency and her union.[1]

Agency filed its Answer to the Petition for Appeal on December 13, 2011. It denied the allegations against it and requested that an oral hearing be held in the matter. An OEA Administrative Judge ("AJ") was assigned to the case on August 2, 2013. On October 3, 2013, the AJ held a prehearing conference to assess the parties' arguments. Both Employee and Agency were ordered to submit legal briefs addressing whether Agency's RIF action should be upheld.[2] The AJ subsequently ordered the parties to submit a second round of briefs addressing whether this Office can exercise jurisdiction over the instant appeal because Agency asserted that Employee elected to voluntarily retire after the effective date of the RIF action.[3] After receiving the briefs and holding several status conferences, the AJ determined that an evidentiary hearing was warranted. Therefore, a hearing was held on July 7, 2015, wherein the parties presented testimonial and documentary evidence in support of their respective positions.[4]

The AJ issued his Initial Decision on December 30, 2015. He first highlighted the holdings in *Covington v. Department of Health & Human Services*, 750 F.2d 937, 941 (Fed.Cir.1984) and *Christie v. United States*, 207 Ct.Cl. 333, 518 F.2d 584, 587 (1975), wherein the United States Court of Appeals, Federal Circuit, held that employees have the burden of proof in showing that their decision to retire was involuntary because a retirement request that is initiated by an employee is presumed to be voluntary. Next, the AJ highlighted *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155 (D.C. 2005), in which the D.C. Court of Appeals addressed whether a retirement could be deemed involuntary if the employing

[1] *Petition for Appea*l, Attachment 1 (November 10, 2011).
[2] *Order Requesting Briefs* (February 2, 2015).
[3] *Order on Jurisdiction* (July 8, 2015)
[4] *Order Scheduling Hearing* (September 2, 2015).

agency did not make it affirmatively clear to the employee that he would lose the right to appeal the RIF action if he submitted a retirement application.

In applying the standard of review provided in *Covington, Christie, and Bagenstose*, the AJ held that Employee failed to meet her burden of proof in establishing that her retirement was involuntary. The AJ explained that there was no credible documentary or testimonial evidence in the record to prove that Agency misinformed Employee about her retirement options. In addition, he stated that Employee submitted a retirement application with an effective date of October 14, 2011, the same date as the effective date of the RIF. According to the AJ, Employee could have sought legal advice about the consequences that submitting a retirement application would have on her appeal before OEA. Lastly, he noted that Employee's Notification of Personnel Action Form 50 ("Form 50") stated in the "Nature of the Action" section that the retirement was a "Retirement—Retire w/ Pay." As a result, he held that Employee's retirement was voluntary and that OEA lacked jurisdiction over her appeal. Therefore, Employee's Petition for Appeal was dismissed for lack of jurisdiction.[5]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 3, 2016. She contends that the AJ utilized the incorrect standard of review when he determined that Employee's retirement was involuntary. Employee also asserts that the case precedent relied upon by the AJ is not analogous of the facts in the instant case. In addition, she states that the AJ's findings are not based on substantial evidence. Accordingly, Employee requests that her Petition for Review be granted.[6]

Agency filed its Opposition to Employee's Petition for Review on March 9, 2016. It provides that the case law relied upon by the AJ in his Initial Decision was correctly applied to

[5] *Initial Decision* (December 30, 2015).
[6] *Petition for Review* (February 3, 2016).

the facts in this case. It further opines that the Initial Decision was based on substantial evidence. Therefore, Agency argues that Employee's Petition for Review should be denied and that the Initial Decision should be upheld.[7]

Involuntary Retirement

Employee argues that the AJ erred in dismissing her Petition for Appeal for lack of jurisdiction. Thus, the essential question that must be answered in this case is whether her retirement was voluntary or involuntary. This will determine if OEA has jurisdiction to consider Employee's substantive 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 their retirement was due to the agency's coercion or misinformation upon which the employee relied. OEA has consistently held that the burden rests on employees to show that their retirement was involuntary.[8] Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's substantive arguments.

According to Employee, the AJ should have applied the standard of review as provided in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008), instead of *Bagenstose*, to determine whether her decision to retire was voluntary or involuntary. In *Stanley*, the D.C. Court of Appeals held that "the fact that an employee is faced with an

[7] *Opposition to Petition for Review* (March 9, 2016).
[8] *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).

inherently unpleasant situation or that his choice is limited to two unpleasant alternatives is not enough by itself to render the employee's choice involuntary." It provided that the test to determine voluntariness is an objective one that, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. In addition, the Court in *Stanley* noted that as a general principle, an employee's decision to resign is considered voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information."[9]

This Board finds that Employee's argument regarding the involuntariness of her retirement fails under the standard of review provided in *Stanley*. In *Stanley*, two police commanders were informed that their employment would be terminated immediately unless they retired that very day. A third commander was given the same choice, unless he agreed to a demotion. All three employees in *Stanley* chose to retire under protest after being given only hours to make a decision.[10] In this case, Employee was not subject to coercion and duress by Agency. Moreover, there is no credible evidence in the record to support a finding that she was presented with a "quit or be fired" ultimatum. Therefore, we are unpersuaded by Employee's argument.

After adducing the testimony from witnesses during the evidentiary hearing before OEA, the AJ held that Employee was not mislead by Agency about the retirement process. He found the testimony of Agency's witness, Human Resource Specialist, Shawn Winslow, to be

[9] *Id*.
[10] *Stanley*, 942 A.2d at 1776

forthright and more credible than Employee's testimony. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[11]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[12] Based on the foregoing, there is substantial evidence in the record to support the AJ's decision that Employee retired voluntarily. Furthermore, the AJ correctly held that OEA lacks jurisdiction over voluntary retirements. Accordingly, Employee's Petition for Review must be denied.

[11] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[12] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

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

FOR THE BOARD:

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Sheree L. Price, Chair

_____
Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams.

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.