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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
TILAHUN DEJENE,	)	
Employee	)	OEA Matter No. 1601-0144-11
	)	
v.	)	Date of Issuance: February 7, 2014
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	MONICA DOHNJI, Esq.
_____	)	Administrative Judge
Thomas Ziehnert, Employee Representative	)	
Carl Turpin, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On July 25, 2011, Tilahun Dejene (“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 him from his position as a Teacher at Cardozo Senior High School, effective August 12, 2011. Employee was terminated for receiving an ‘Ineffective’ rating under the IMPACT Performance Assessment System for the 2010-2011 school year. On September 12, 2011, Agency submitted its Answer to Employee’s Petition for Appeal.

I was assigned this matter on March 29, 2013. On April 8, 2013, I issued an order convening a Status Conference for May 8, 2013. Both parties were in attendance. Thereafter, on May 9, 2013, I issued a Post-Status Conference Order wherein, I ordered the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties requested an extension of time to file their respective briefs. These requests were granted and both parties submitted their Post-Status Conference briefs.

In its brief dated June 7, 2013, Agency noted that because Employee voluntarily retired from DCPS, OEA lacks jurisdiction over this matter. Employee on the other hand stated in its July 9, 2013, brief that he did not voluntarily retire. Subsequently, on July 17, 2013, the undersigned issued an Order requiring Employee to address the jurisdiction issue in this matter.

Agency was also given an option to submit a reply brief if it chose to do so. Both parties complied. Thereafter, a Prehearing Conference was held on September 11, 2013. On September 30, 2013, the Undersigned Administrative Judge (“AJ”) issued an Order scheduling an Evidentiary Hearing for November 13, 2013. On October 11, 2013, Agency filed a Motion to Dismiss Employee’s Petition for Appeal for lack of jurisdiction. Agency’s Motion also requested that the Evidentiary Hearing scheduled for November 13, 2013, be canceled. This motion was denied in an Order dated October 17, 2013. Both parties were present for the November 13, 2013 Evidentiary Hearing.

Following the Evidentiary Hearing, I issued an Order, dated January 2, 2014, notifying the parties that the transcripts from the Evidentiary Hearing were available for pick up at this Office. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on or before January 29, 2014. On January 28, 2014, Agency filed a Motion for Extension to File Closing Argument. Agency requested to file its written closing argument on January 31, 2014. Both parties have submitted their written closing arguments. 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.

### SUMMARY OF MATERIAL TESTIMONY

#### *Employee’s Case in Chief*

##### **1. Tilahun Dejene (Transcript pgs. 13- 34)**

Tilahun Dejene (“Employee”) is a former DCPS teacher. Employee worked for Agency for over seventeen (17) years prior to his termination in 2011 under IMPACT. Employee taught Social Studies and English as a Second Language. Employee explained that he was terminated because he received a low IMPACT score. (Tr. pg. 15). According to Employee he enjoyed working as a teacher but, things changed and became bitter. (Tr. pg. 14-15). He alleged that there was conflict between the administrators and him. (Tr. pg. 15). Employee claimed that he was targeted by administrators and did everything he could to challenge his termination. (Tr. pg. 15). Employee stated that after receiving his termination letter, he started looking for employment and filed for retirement. (Tr. pg. 16). Employee testified that he then launched a complaint with OEA to challenge his termination. (Tr. pg. 16). He conceded that at the time he was terminated, DCPS notified him of all of the options available for appealing his case. (Tr. pg. 16). He further admitted that he filed for retirement before filing a complaint with OEA and that he went to the retirement office voluntarily. (Tr. pgs. 17 & 28). Employee stated that he spoke to Sheila Reid (“Ms. Reid”) and Mary Greene (“Ms. Greene”) in the Retirement Office about retirement. (Tr. pg. 17). Employee asserted that although he informed the retirement officers about his pending

appeal with OEA, they failed to inform him that filing for retirement would preclude his appeal with OEA. (Tr. pg. 19-20). He alleged that the Retirement Office told him that his retirement was involuntary. (Tr. pg. 19). He stated that Ms. Reid wrote “involuntary” on the retirement form and then processed his retirement. (Tr. pg. 22). He testified that Ms. Reid told him that he was forced to retire. (Tr. pg. 29). However, he later noted that “...I don’t know if she [Ms. Reid] said...she wrote involuntary and that tells me that I’m forced to retire...” (Tr. Pg. 30). Employee explained that he understood “involuntary” to mean that he was forced to retire. (Tr. pg. 23). He further stated that the Retirement Office did not explain or define the term “involuntary.” (Tr. pg. 23). Employee stated that he filed for retirement because his income went down. (Tr. pg. 24). He later claimed that he filed for retirement because he was terminated. (Tr. pgs. 25 -26).

### **Agency’s Case in Chief**

#### **1. Jana Woods-Jefferson (Transcript pgs. 35- 57)**

Jana Woods-Jefferson (“Ms. Jefferson”) currently works for DCPS and has been doing so for three and a half (3.5) years. (Tr. pg. 35). She is the Director of Benefits and Compensation and prior to that she was the Director of Retirement and Compensation. (Tr. pg. 36). She expounded that there was no term known as *forced* retirement. (Tr. pg. 41). She testified that there were four different types of retirement which were “Voluntary”, “Involuntary”, “Disability” and “Deferred” retirement. (Tr. pg. 42). She further stated that “Involuntary” retirement is for employees who have been terminated from service which includes employees who received impact scores that required termination. (Tr. pg. 43). Ms. Jefferson conceded that employees were not told that filing for retirement would preclude a claim with OEA. (Tr. pg. 55). She went on to state that her office does not advise employees that if they file for retirement they would be barred from filing a claim with OEA. (Tr. pg. 57).

#### **2. Mary Greene (Transcript pgs. 58-77)**

Mary Greene (“Ms. Greene”) currently works for DCPS as a Retirement Analyst and has been with DCPS for seventeen (17) years. (Tr. pg. 58). She is responsible for processing retirements and counseling employees on eligibility for retirement and involuntary retirement. (Tr. pg. 59). She explained that “Involuntary” retirement was for employees who had been separated from the school system. (Tr. pg. 73). Ms. Greene testified that she was unaware that Employee had filed an appeal with OEA and Employee did not discuss his appeal with her. (Tr. pg. 75). According to Ms. Greene, her discussion with Employee was limited to his eligibility for retirement. (Tr. pg. 75). Moreover, she stated that she did not recall Employee stating that he was forced to retire. (Tr. pg. 75). She further testified that the term “Involuntary” was explained to Employee. (Tr. pg. 77).

#### **3. Sheila Reid (Transcript pgs. 78-82)**

Sheila Reid (“Ms. Reid”) currently works for DCPS as a Human Resources Specialist. She has been with DCPS for almost twenty (20) years. (Tr. pg. 79). Ms. Reid contended that she did not recall counseling Employee about retirement. (Tr. pg. 80). She further stated that she never advised employees that they are forced to retire. (Tr. pg. 81). Ms. Reid further testified

that there was no concept as *forced* retirement. (Tr. pg. 81). She asserted that she never advised Employee that he was forced to retire. (Tr. pg. 82).

### ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether this Office had jurisdiction over Employee's Petition for Appeal because Employee retired from Agency. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. In a nutshell, I find that the testimonies of Agency's witnesses were very compelling. On the other hand, Employee has an interest in the outcome of this matter and I find that his testimony was often contradictory and self-serving. For instance, Employee testified that he was forced to retire, explaining that Ms. Reid told him that he was forced to retire. However, he later contradicted himself when he stated that he does not know if Ms. Reid said he was forced to retire, but when Ms. Reid wrote involuntary on his retirement form, he understood that he was being forced to retire. (Tr. Pgs. 29-32). Employee also explained that while no one told him that he had to retire, involuntary retirement was written on his retirement form. (Tr. Pg. 28). Employee testified that he informed the Retirement Office staff when he was filing for retirement that he had filed an appeal with OEA, however; he contradicted himself when he stated that he filed for retirement before filing an appeal with OEA. (Tr. pg. 18 & pg. 16).

Employee was given the opportunity to address the voluntary/involuntary retirement issue that was raised by Agency. Employee argues that his retirement from Agency was not voluntary since it was obtained by Agency's misinformation, misrepresentation and deception.<sup>1</sup> In support of his argument, Employee explains that he had several interactions with Agency's Retirement Office, and "was not notified either verbally or in writing that by taking retirement, he would forfeit any rights to contest his termination."<sup>2</sup> Employee testified that he told the Retirement Office staff that he had filed an appeal with OEA, and they did not inform him that retiring will affect his OEA appeal. He maintains that the Retirement Office signed his retirement form as "Involuntary" fully knowing that he had already filed a Petition for Appeal with OEA. Employee contends that he was not given any information regarding whether his election to receive retirement benefits would preclude his right to contest his termination from DCPS. He notes that "[a] reasonable person would not conclude, without being apprised via disclosure or otherwise, that he or she would forfeit the right to contest a faulty termination by merely seeking to access the retirement benefits he or she earned."<sup>3</sup>

Furthermore, Employee testified that he was told by Ms. Reid that he was being forced to retire, as she wrote "Involuntary" on his Retirement form. He later stated that he does not recall if Ms. Reid said he was being forced to retire, but his understanding of the term "Involuntary" as Ms. Reid wrote it on his Retirement Form was that he was being forced to retire. Employee notes that Agency sent him a termination letter with no indication that seeking retirement benefits would preclude him from pursuing his termination claim at OEA.

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<sup>1</sup> Employee's Brief Regarding Jurisdiction, p. 4. (July 26, 2013); *See also* Closing Argument (February 3, 2014).

<sup>2</sup> *Id.* at p. 5.

<sup>3</sup> *Id.* at p. 6.

Agency however contends that Employee voluntarily retires and thus, OEA lacks jurisdiction over this matter. Agency maintains that Employee voluntarily submitted an application for retirement, and upon receipt of this application, DCPS determined that Employee was eligible for “Involuntary” retirement because 1) he was separated from DCPS; 2) he met the age requirement; and 3) he was able to obtain additional years of service.<sup>4</sup> Agency further notes that Employee has not submitted any specific documentation or affidavit in support of his allegation of misrepresentation, deception or use of force to obtain Employee’s retirement from DCPS. Agency explains that Employee started obtaining information about his possible retirement as early as December of 2009. Agency provided testimony and affidavits from two DCPS Benefit and Compensation employees noting that they were not aware of, nor did they discuss Employee’s OEA appeal with him.<sup>5</sup> In addition, Agency states that the Benefits and Compensation Department employees were not aware that Employee had filed an OEA appeal, and are not obligated to inform Employee that retirement may preclude his appeal. Agency explains that the job of the Benefit and Compensation Department is to determine if an employee is eligible for retirement, the type of retirement the employee may obtain and to process the retirement. Agency further explains that Employee was a member of the Washington Teachers’ Union (“WTU”) and the District of Columbia Teachers’ Retirement Plan specifically states that employees should contact their union representative to discuss issues concerning potential consequences of retirement, which Employee did avail himself to. Agency specifically notes that Employee discussed his pending retirement with WTU officials in 2010 and 2011.<sup>6</sup>

***Whether this Petition for Appeal should be dismissed for lack of Jurisdiction***

There is a question as to whether OEA has jurisdiction over this appeal. 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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<sup>4</sup> Agency’s Response to Employee’s Brief Regarding Jurisdiction (August 8, 2013). It is worth noting that while the term “Involuntary” is a term of art in the legal community in the context of a retirement - retirement obtained by coercion, misrepresentation, or deception, DCPS uses this term in a different context with regards to how it classifies the various types of retirement benefits. (*See* Exhibit 27 at p.27).

<sup>5</sup> *Id.* at Exhibits 30 and 31.

<sup>6</sup> Agency’s Closing Brief (January 31, 2014).

This Office has no authority to review issues beyond its jurisdiction.<sup>7</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."<sup>11</sup> 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 he 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."<sup>12</sup>

In this case, Employee claims that his retirement was "Involuntary" due to Agency's misrepresentation. Employee provided a document on Agency's letterhead which is addressed to the Director of the Office of Human Resources regarding Employee's retirement. The letter is typed but has the handwritten word "Involuntary" with a check mark indicated.<sup>13</sup> Employee argues that this constitutes misrepresentation because he understood this to mean he was forced to retire, and a reasonable person would have been misled by it. Giving the totality of the circumstances, I disagree with this argument. The document correctly identified the benefit type Employee was eligible for under the DCPS retirement classification - "Involuntary". Under the District of Columbia Teachers Retirement Plan, "Involuntary" is a retirement classifications used when an employee 1) is separated from DCPS; 2) he has met the age requirement; and 3) he is able to obtain additional years of service. I find that Employee was aware of the meaning of the term "Involuntary" as it applied to his retirement benefits because Employee bought additional years of service, as noted under the "Involuntary" retirement section of the Retirement Benefits Handbook, in order to qualify for this type of retirement benefit. Ms. Jefferson also testified that a Retirement Benefits handbook is often distributed to employees, and used at teachers' retirement workshops held by WTU. Moreover, there is evidence in the record to show that Employee was communicating with WTU officials about retiring even before he actually retired, thus, it can be reasonably assumed that he was aware of the meaning of the term as it related to his retirement benefits.

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<sup>7</sup> See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>8</sup> 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).

<sup>9</sup> 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).

<sup>10</sup> *Id.* at 587.

<sup>11</sup> 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).

<sup>12</sup> *Id.*

<sup>13</sup> The letter bears Employee's signature. There are two boxes with typewritten words "Regular" or "Disability"; there are boxes next to each, with the one next to "Regular" checked. Additionally, there is a handwritten word "Involuntary" next to the checked box.

Additionally, Ms. Mary Greene, the Benefits and Compensation Analyst who worked with Employee testified that upon receipt of Employee's application for retirement form, she determined that Employee was eligible for "Involuntary" retirement according to the District of Columbia Teachers' Retirement Plan.<sup>14</sup> Ms. Greene also testified that she explained the meaning of "Involuntary" retirement to Employee and that she received several emails from Employee's WTU representative, Mr. Henry Collins, regarding Employee's application for retirement.<sup>15</sup>

Although "Involuntary retirement" is a term of art in the legal community and can be misleading, this is not the case here. Employee was provided with the Retirement Benefits Classification Handbook utilized by DCPS Retirement Office in advising employees of their retirement options; he took advantage of this specific retirement type and bought additional years of service so he could qualify for "Involuntary" retirement; and he was counseled by WTU officials. 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 he qualified for under DCPS retirement plans.

Relying on *Bagenstose*, Employee further asserts that because DCPS failed to disclose the effects retiring would have on his pending appeal with OEA, his retirement was not voluntary. While the AJ in *Bagenstose*, *supra* suggested that DCPS in the future should consider modifying its RIF Notice form to inform employees that by retiring they lose the right to challenge the RIF, the D.C. Court of Appeals in *Bagenstose v. District of Columbia Office of Employee Appeal*, 888 A. 2d 1155, 1158 (DCC 2005) held that, although the RIF Notice did not expressly state the consequence of the choices, as the AJ found, there however, was nothing in the notice that was incorrect or would have led a reasonable person to conclude that retirement was his or her only option. Thus, there was substantial evidence to support the AJ's finding that the notice did not mislead Bagenstose into retiring. Moreover, the Court further noted that "Bagenstose did not avail himself of the opportunity afforded him to speak with a counselor about his situation."<sup>16</sup>

Consistent with the Court of Appeals' ruling in *Bagenstose*, I conclude that while Agency in this case failed to inform Employee of the consequences of his retirement, Employee still had the burden to seek counsel on the issue or take additional steps such as consulting with an attorney or his Union to clarify any misunderstanding he may have had about this issue. Furthermore, the record shows that Employee, as a member of the WTU, was in contact with his Union throughout the retirement process, and as such he could have sought further clarification from his Union representative on these issues, just as he is now doing.

Employee additionally claims that he told the Retirement Office staff that he had filed an appeal with OEA, yet they did not notified him either verbally or in writing that by taking

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<sup>14</sup> 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.

<sup>15</sup> See Agency's Response to Employee's Brief Regarding Jurisdiction at Exhibit 30.

<sup>16</sup> See *Bagenstose*, citing *Keyes v. District of Columbia*, 362 U.S.App. D.C. 67, 72, 372 F.3d at 440 (2004) (if employee was confused about information presented in notice, he was in a position to consult an attorney or take additional steps to confirm the accuracy of the information).

retirement, he would forfeit any rights to contest his termination. I find this argument implausible. The record shows that Employee commenced his retirement process on July 30, 2009, more than a year before he filed his Petition for Appeal with OEA and he completed the application for retirement form more than a week before he filed his appeal with OEA.<sup>17</sup> Moreover, Employee also testified that he applied for retirement before filing an appeal with this Office. And as Agency noted, the duties of the Benefit and Compensation employees are to determine retirement eligibility, inform employees on the different types of retirement plans available, process retirements, and not advise employees on their appeal rights.

OEA has consistently held that a mere assertion of force or coercion is not enough to prove that Employee involuntarily retired.<sup>18</sup> Here, apart from his blanket assertion that he was forced to retire, 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 him or gave him misleading information. There is no evidence that Agency misinformed Employee about his 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. Employee testified that he had to retire in order to get some source of income. Employee's choice to retire in the face of a seemingly unpleasant situation – financial hardship, does not make Employee's retirement involuntary. 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:

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MONICA DOHNJI, Esq.  
Administrative Judge

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<sup>17</sup> *Id.* at Exhibits 22, 23, 24, and 25. Employee listed a proposed retirement date of June 30, 2011 on Exhibit 22.

<sup>18</sup> *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, 1601-0019-09, 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).