THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HELEN MULKEEN,	)	
Employee	)	OEA Matter No. 2401-0063-10
	)	
v.	)	Date of Issuance: March 20, 2012
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
	)	

John Mercer, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 23, 2009, Helen Mulkeen ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public School's ("Agency" or "DCPS") action of terminating her employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was a Librarian at Prospect Learning Center. Employee was serving in an Educational Service at the time she was terminated.

I was assigned this matter on or around December 19, 2011. On December 20, 2011, I issued an Order requiring the parties to appear for a prehearing conference, which was originally scheduled to occur on January 19, 2012. However, the conference date was rescheduled for February 14, 2012. On that date, the conference was held as scheduled. During this conference, it was disclosed that Employee retired from service. Accordingly, I issued a written order dated February 16, 2012, wherein I required the parties to submit briefs on whether the OEA may exercise jurisdiction over this matter due to Employee's retirement which was effectuated on November 3, 2009. According to this order, Employee, through counsel, was required to submit her brief on or before February 29, 2012. On February 29, 2012, Employee, through counsel, requested an extension of time of seven (7) additional days from that date in which to file

Employee's brief. According to this request, Employee wanted to submit her brief by March 7, 2012. Pursuant to an order dated March 6, 2012, Employee's request for an extension of time of seven additional days from when her brief was originally due was granted. On March 9, 2012[1], the OEA had not received Employee's brief. Accordingly, on that same date, I issued an Order for Statement of Good Cause to John Mercer, Esq., wherein I required him to explain his failure to file the aforementioned brief on Employee's behalf and it also required him to file the aforementioned brief. According to said order, Mr. Mercer was required to respond on or before March 19, 2012. Mr. Mercer has since filed Employee's brief in this matter. After reviewing the documents of record, I have determined that no further proceedings are warranted in this matter. The record is now closed.

JURISDICTION

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

ISSUE

Whether this Office may exercise jurisdiction over this matter.

BURDEN OF PROOF

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.

[1] By this date, Employee brief was approximately nine days late from the original due date. Moreover, it was two days late from the date outlined in my order wherein I granted Employee's request for an extension of time.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

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 628.2, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to OEA Rule 621.1, *id.*, 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.[2] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[3] 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.[4] 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.[5] A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[6] 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/she relied when making his/her decision to retire. He/she must also show "that a reasonable person would have been misled by the Agency's statements."[7]

Here, Employee contends that her retirement was not voluntary because she interpreted the RIF Notice as requiring her to apply for retirement or lose all her retirement benefits, life insurance and health benefits; she was immediately placed on administrative leave; she did not chose her retirement date; she was not given a reasonable time to make a choice; and that she only retired after she had received the RIF notice. Employee felt that she was under duress due

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[2] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[3] *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).
[4] *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).
[5] *Id*. at 587.
[6] *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).
[7] *Id.*

to a number of factors including:

> …Unlikely probability of finding further employment based upon the nature of her removal; absence of information concerning her most recent performance; Employee's age and the possibility of work in area of here (sic) training in expertise; negative public information distributed by DCPS and media concerning all teachers subject (sic) to the RIF and removed from their positions during the RIF; Harsh, intimidating and hostile actions by DCPS in the removal process; Encouragement by DCPS and the Teachers' Union to immediately file for "involuntary" retirement without providing pertinent information including the legal burden of "involuntary retirement" to be carried by the proposed Retiree in order to proceed with OEA litigation.
>
> Employee's Brief Pertaining to Jurisdiction at 11.

I disagree with Employee's contentions. The RIF Notice simply informed Employee of her options – appeal the RIF or retire if you qualify. Nothing in the RIF notice, nor any of DCPS' actions, gave Employee a *mandate to retire*. The Notice provided Employee with details on how to go about getting appeal or retirement information. Also, I find that thirty (30) days is sufficient time to get information, seek counsel and make an informed decision. Regardless of Employee's protestations, the fact that she chose to retire instead of continuing to litigate her claims voids the Office's jurisdiction over her appeal. Moreover, the retirement was Employee's own choice and Employee has enjoyed the benefits of retiring. Employee's choice to retire in the face of a seemingly unpleasant situation – financial hardship, instead of being RIFed does not make Employee's retirement involuntary.

Furthermore, I find no *credible* evidence of misrepresentation or deceit on the part of Agency in procuring the retirement of Employee. There is no evidence that Agency misinformed Employee about her option to retire. Employee's misinterpretation of the options in the RIF Notice is of her own doing and not Agency's. Based on the foregoing, I find that Employee's retirement was voluntary.[8] As such, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this appeal.

Employee also argues that her appeal process is flawed due to the inordinate amount of time that has transpired since her OEA petition for appeal was filed. She also takes umbrage with respect to the pace that her matter has progressed since it was assigned to the undersigned. According to Employee, her due process rights were violated because this Office allegedly took too long to calendar and decide her appeal. Employee now takes offense because the pace has quickened too fast now that it has been assigned. Employee notes that this Office has been

[8] 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 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).

processing a large number of similarly situated DCPS employees due to a Writ of Mandamus that was filed on November 1, 2011, by the Washington Teachers' Union, on behalf of DCPS employees removed from service via the instant RIF. Employee correctly notes that approximately two years transpired prior to this matter being assigned to my docket. Employee claims that she has not had an appropriate amount of time in which to conduct discovery and to otherwise prepare for further litigation in this matter. I disagree. Employee, either on her own, or through counsel, could have completed all or at least some of the legwork necessary in order to prepare for her "day in court" for two years. She opted to sit and wait for the matter to be assigned. Employee could have obtained counsel, propounded discovery requests, attempted mediation, or completed any number of other logistical items in order to prepare for the moment when she would be able to actively prosecute her appeal. Employee could have started her preparation from the moment she received her RIF notice. Instead, she chose to sit and wait. Employee, either on her own, or through counsel, has made her decision – she must now live with the consequences.

ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE