THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PATRICIA HILL,	)	
Employee	)	OEA Matter No. 2401-0343-10
	)	
v.	)	Date of Issuance: September 11, 2012
	)	
D.C. DEPARTMENT OF CONSUMER	)	
AND REGULATORY AFFAIRS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Stephen White, Employee's Representative
Adrianne Lord-Sorensen, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 2010, Patricia Hill ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Consumer and Regulatory Affairs' ("Agency" or "DCRA") action of abolishing her position through a Reduction-In-Force ("RIF"). The effective date of the RIF was June 25, 2010. At the time her position was abolished, Employee's official position of record within the Agency was an Investigator. On August 20, 2010, Agency filed its Answer to Employee's petition for appeal.

This matter was assigned to me on or around July 17, 2012. Subsequently, I issued an Order wherein, I required the parties to address whether the RIF was properly conducted in this matter. Both parties have complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. And since this matter could be decided based upon the documents of record, no proceedings were conducted. 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.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Agency asserts that Employee voluntarily retired from her Investigator position effective June 25, 2010, in lieu of being subjected to the RIF.[1] Employee contends that her retirement was not voluntary since it was "based on direct misrepresentation, misrepresentation by omission, misinformation, possible deceptive acts, possible illegal personnel actions and miscommunication by the agency, the D.C. Department of Human Resources and AFSCME."[2]

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 628.2, 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 628.1, *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.[3] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[4] 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.[5] 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.[6] A

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[1] Agency's Motion to Dismiss for Lack of Jurisdiction (July 27, 2012).
[2] Employee's brief at Pg. 1 (August 17, 2012).
[3] *See Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[4] *See Brown v. District of Columbia Pub. Sch.*, 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).
[5] *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).
[6] *Id*. at 587.

retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[7] The Employee must prove that her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which she relied when making her decision to retire. She must also show "that a reasonable person would have been misled by the Agency's statements."[8]

Here, Employee submits that her retirement was involuntary for the following reasons: 1) despite requests and attempts to get her personnel action, Agency failed to provide Employee with said document; 2) she was placed in the wrong Competitive area and she received conflicting information as to her official employment status for the RIF and retention purpose; and 3) the AFSCME ("Union") failed to properly assist her following the RIF. I disagree with Employee's contention that her retirement was involuntary. The RIF Notice informed Employee and all the other employees affected by the RIF of their options to either appeal the RIF or retire if they qualify. This was not a mandate to retire. The RIF Notice also provided Employee with appeal and retirement information. If Employee strongly felt that she was placed in the wrong Competitive area and/or that the instant RIF was illegal, Employee had the option to appeal the RIF to this Office for further consideration and a ruling on the merits. But instead, Employee decided to apply and receive retirement benefits.

Additionally, Employee notes in her brief that she attended a mandatory RIF seminar at the District of Columbia Department of Human Resources ("DCHR") where all the participants, not just Employee, were informed about their retirement eligibility. While Employee notes that she was unsure as to whether she was eligible for retirement, she further explains that she made an appointment with a Personnel Staff the following day, who calculated her retirement time and advised her that she had enough time to retire. However, Employee does not submit that this individual forced her into retiring. Employee asserts that she informed this individual that she felt the RIF was illegal; however, she has not provided this Office with any information to prove that this individual or any other District of Columbia government agent provided her with incorrect information, misinformed or deceived her into retiring. Employee further notes that the Personnel Staff she spoke with informed her that she could still come back and work for the government after she retires and that Employee needed to make an appointment to meet with someone in the Benefit Office. However, Employee has failed to demonstrate that the statements made by this individual are untrue, a misrepresentation or misstatement of District of Columbia rules and regulations, and nothing within the record corroborates that Employee was threatened, or given a mandate to retire by Agency. Moreover, Employee has not provided any credible evidence to prove that any other DCRA agent provided her with misinformation, or that she was coerced into applying for retirement.

Regardless of Employee's protestations, the fact that she chose to retire instead of continuing to litigate her claims voids OEA's jurisdiction over her appeals. Employee's choice to retire in the face of a seemingly unpleasant situation does not make Employee's retirement involuntary. And the facts and circumstances surrounding Employee's retirement was Employee's own choice and Employee has enjoyed the benefits of retiring. Furthermore, I find

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[7] *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).
[8] *Id.*

no *credible* evidence of misrepresentation or deceit on the part of Agency in procuring the retirement of Employee. Simply choosing to retire over being RIFed does not make an employee's retirement involuntary. Additionally, I find that the thirty (30) days from the date of the RIF notice to the effective date of the RIF, was a reasonable time within which Employee would have utilized to get information, seek counsel and make an informed decision about retirement.

Based on the foregoing, I find that Employee's retirement was voluntary.[9] Consequently, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this matter.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[9] 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).