THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0233-10
NANCY GAILLIARD GORDON,	)	
Employee	)	
	)	Date of Issuance: June 14, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge

Nancy Gailliard Gordon, Employee *Pro Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2009, Nancy Gailliard Gordon ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public Schools' ("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 an ET-15 Science Teacher at McKinley Technology High School. Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 7, 2012. On February 16, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. The order also informed Employee that if she had retired in lieu of being RIFed, she has to address OEA's jurisdiction over her appeal. Both parties submitted timely responses to the order. After reviewing the documents of record, I find that there are no material issues of fact in dispute. Therefore, I further find that an evidentiary hearing is unwarranted in this matter. The record is now closed.

JURISDICTION

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

ISSUE

Whether this Office has jurisdiction over Employee's Appeal.

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.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are undisputed:

On September 10, 2009, former D.C. Public Schools Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools[1].

On October 2, 2009, Agency issued Employee her RIF notice indicating that her position as an ET-15 Science Teacher at McKinley Technology High School would be abolished effective November 2, 2009. The RIF notice informed her that she could retire in lieu of being subject to the RIF so long as she satisfied the criteria for retirement.

Based on the Standard Form 50, Notification of Personnel Action, that Employee submitted, she retired effective November 2, 2009.

Employee's Position

In her response to my order, Employee addressed the issue of her retirement only briefly. Her contention that her retirement was involuntary rest solely on her signed form memo whereby she marked her retirement as "involuntary."[2] Apart from that, she enumerated a laundry list of grievances that Agency management inflicted upon her which caused her enormous stress. Employee also alleged numerous deficiencies in her alleged RIF. Employee did not address the

[1] *See Agency's Answer*, Tab 1 (January 7, 2010).
[2] *See Employee's Brief*, Exhibit 9 (March 29, 2012).

fact that her Standard Form 50, Notification of Personnel Action, indicated simply that her retirement was labeled mandatory.[3]

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of her termination. Agency failed to mention that Employee had retired.

Analysis

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 D.C. Reg. 2129 (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.[4] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[5] 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.[6] 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.[7] A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[8] The employee must prove that his/her

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[3] *See* Employee's Standard Form 50, Notification of Personnel Action.
[4] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[5] *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).
[6] *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).
[7] *Id*. at 587.
[8] *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).

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."[9]

Here, Employee contends that her retirement was not voluntary because she only retired after she had received the RIF notice. I disagree. The RIF Notice simply informed Employee of their options – appeal the RIF or retire if you qualify, and not a *mandate to retire*. The Notice also provided Employee with details on how to go about getting appeal or retirement information. Also, I find that thirty (30) days is a reasonable 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 claim voids the Office's jurisdiction over her appeal. The facts and circumstances surrounding Employee's 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 –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.[10] As such, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits of Employee's grievances in this appeal.

ORDER

It is hereby ORDERED that Employee's appeal is dismissed for lack of jurisdiction.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

[9] *Id.*

[10] 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).