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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the matter of:	)	
	)	
JULIUS MILLER,	)	OEA Matter No. J-0103-07
Employee	)	
	)	Date of Issuance: July 30, 2010
v.	)	
	)	
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Julius Miller ("Employee") is employed as a firefighter with the D.C. Fire and Emergency Medical Services Department ("Agency"). He has been with Agency since October 15, 1984. On June 15, 2007, Employee enrolled in a drug rehabilitation clinic. Employee did not notify Agency that he enrolled in a substance abuse program although the hours he was required to attend the treatment facility made it impossible for him to report for his assigned shifts. Initially, Employee was granted emergency annual leave ("EAL"). On June 24, 2007, Employee's request for EAL was denied. Agency notified Employee that he must report for duty. Employee did not comply. On June 28, 2007, Employee called Agency to request a substitute for his next tour of duty. When he was

unable to procure a substitute, believing he faced possible termination, Employee requested to resign. Employee submitted this request on June 28, 2007.

On July 2, 2007, Employee submitted a request to rescind his resignation after learning from an outside source that Agency had a treatment program.[1] That same day Fire Chief Dennis L. Rubin ("Chief Rubin") endorsed Employee's resignation.[2] On July 10, 2007, Employee was admitted into Agency's substance abuse program. On July 19, 2007, Chief Rubin informed Employee via letter that his request to withdraw his resignation was denied.[3]

On July 27, 2007, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA or Office"). He testified that Agency did not inform him of its drug rehabilitation clinic and that he did not intend his resignation to take effect immediately.[4] Agency responded to Employee's Petition for Appeal by filling a Motion to Dismiss, arguing that Employee's resignation was voluntary and that this Office has no jurisdiction over voluntary separations.

A hearing was conducted on April 4, 2008. On January 14, 2009, the Administrative Judge ("AJ") issued an Initial Decision ("ID"). The AJ noted the well settled principal that OEA does not have jurisdiction over *voluntary* resignations. However, if an employee can establish that his resignation was *involuntary,* it may be considered a constructive removal. The AJ held that because OEA has jurisdiction over

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[1] *Tr. 59.*
[2] *Agency Exhibit 3. Also see Memorandum: Substance Abuse Policy& Procedures,* (July 10, 2007). According to Lt. Lenaldo Mathew's ("Lt. Mathews") testimony, in order to resign, a special report must be endorsed first by Lt. Mathews, second by Battalion Chief Strawderman , and third by Fire Chief Dennis L. Rubin .*TR. 27.* Employee's resignation received the first two endorsements from Lt. Mathews and Chief Strawderman on June 28, 2007. *Agency Exhibits 4 and 5.*
[3] *Agency Exhibit 6.*
[4] Employee's written request for resignation stated the following: "I [Employee] hereby request my resignation on this date 6-28-2007."*Agency Exhibit 2. Also see TR. 59.*

removals resulting from adverse actions, involuntary separations fall within the purview of the OEA's authority.[5] The AJ further reasoned that Agency's failure to provide Employee with information pertinent to his decision to resign negatively impacted his ability to make an informed choice; therefore the resignation was involuntary.[6]

The AJ stated that Agency's failure to provide any information regarding the impact of voluntary resignation was as significant as the failure to provide accurate information. She maintained that Agency should have provided Employee with information about the consequences of his decision; including whether, given his length of service, he could retire rather than resign, what benefits he was entitled to, and the significance of an effective date of resignation. The AJ concluded that Employee established that Agency's failure to provide him with this information inhibited Employee's ability to choose and his understanding of the transaction. Thus the removal was deemed involuntary. The ID ordered Employee to be reinstated to his position of record and it awarded back pay benefits.[7]

On February 19, 2009, Agency filed a Petition for Review. Agency argues that the ID was not supported by substantial evidence.[8] Agency argues that Employee's resignation was effective on June 28, 2007, and that the AJ misinterpreted D.C. Official

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[5] *Initial Decision,* p. 4 (January 14, 2009), citing to *Massey v. Dept. of Public Works,* OEA Matter No. 1602-0076-90 (June 29, 1992), __D.C.Reg. __, and *Jefferson v. Dept. of Human Servs.,* OEA Matter No. J-0043 (November 8, 1995), __ D.C. Reg. __.
[6] *Initial Decision,* p. 5, citing to *Sharf v. Dept. of the Air Force,* 710 F.2d 1572 (Fed. Cir. 1983) and *Covington v. Dept. of Health & Human Servs.,* 750 F.2d 937 (Fed. Cir. 1984).
[7] Pursuant to *Massey,* OEA Matter No. 1602-0076-90 (June 29, 1992), __D.C.Reg. __.
[8] Agency does not clarify this assertion made in its *Petition for Review and Motion for Enlargement of Time to file a Memorandum of Points and Authorities,* p. 1 (February 19, 2009).

Code § 1-606.03,[9] which does not confer jurisdiction to the Office on issues of voluntary separation.[10]

The Board will uphold an AJ's decision as long as it is supported by substantial evidence found in the record.[11] Evidence is considered substantial if it is "more than a mere scintilla."[12] Substantial evidence is defined as that which a reasonable mind might accept as adequate to support a conclusion.[13]

OEA has jurisdiction only over matters committed to it by statute under § 1-606.03, such as adverse actions for cause that result in removal.[14] Involuntary resignations may be deemed constructive removals resulting from adverse actions and may be appealed to this Office.[15]

A public employee's decision to retire or resign is voluntary if the employee is 1) free to choose, 2) understands the transaction, 3) is given a reasonable time to make the choice, and 4) is permitted to set the effective date.[16] An employee may support an allegation of involuntary removal in two ways: 1) by showing that the resignation or retirement was the result of duress,[17] or 2) that the resignation was the result of

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[9] (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

[10] *Memorandum of Points and Authorities in Support of Petition for Review,* p.1-4 (August 12, 2009).

[11] *Ferreira v. D.C. Dept. of Empl. Servs.,* 667 A.2d 310, 312 (D.C. 1995).

[12] *Vogel v. D.C. Office of Planning,* 944 A.2d 456, 463 (D.C. 2008).

[13] *WMATA v. D.C. Dept. of Empl. Servs.,* 926 A.2d 140, 147 (D.C. 2007), quoting *Ferreira,* 667 A.2d at 312.

[14] N. 9, *supra*.

[15] *See Christie v. U.S.,* 518 F.2d 584, 587 (Ct. C. 1975); *Jefferson,* OEA Matter No. J-0043-93.

[16] *Stanley v. D.C. Metropolitan Police Dept.,*942 A.2d 1172, 1176 (D.C., 2008)., quoting *Taylor v. U.S.*, 219 Ct.Cl. 86, 591 F.2d 688, 691 (1979); see also *Stone v. Univ. of Md. Med. Sys. Corp*., 855 F.2d 167, 174 (4th Cir.1988).

[17] *Christie,* 518 F.2d at 587 (when one side involuntarily excepts the terms of another; the circumstances permit no alternative; and the circumstances were the result of coercive acts by the opposite party, the separation is considered involuntary).

misinformation on the part of the agency.[18] The matter before us is a question of misinformation.

When an employee retires or resigns in reliance on misinformation (provided by the agency), the separation is considered involuntary because it deprives the employee of the ability to make an informed choice or fully understand the transaction.[19] Lack of information may be equated with misinformation under certain circumstances.[20]

This Board defers to the AJ's findings regarding Employee's compelling testimony, to the effect that Agency did not advise him of any treatment programs and there were no posters or bulletins to notify him of this option. This is supported by the fact that Employee located and entered into a treatment facility on his own, but entered into Agency's treatment program upon learning of it.[21] Lt. Mathews testified that he did not inform Employee of his retirement and/or resignation options, what benefits were available to him, what an effective date of retirement was, its significance, or that he should indicate the effective date on his request to resign. According to Lt. Mathews' testimony, when Employee indicated his intention to resign, the only information he was given regarding this decision was that he must submit a written request to Agency.[22] Employee essentially made his decision with "blinders on."[23]

This Board finds that the AJ did not err in finding that Employee did not understand the transaction because of the lack of information regarding treatment

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[18] *Covington,* 750 F.2d 937 (if an employee relies on an agency's misinformation, whether given negligently or innocently, the separation is considered involuntary).
[19] *Jenson v MSPB,* 47 F.3d 1183 (Fed. Cir., 1995).
[20] *Id.*
[21] *TR. 14.*
[22] *Tr.* 39 – *52*; n. 4, *supra*.
[23] "A decision made "with blinders on", based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." *Covington*, 750 F.2d at 943, quoting *Shubinsky v. U.S.*, 488 F.2d 1003, 1006, 203 Ct.Cl. 199, 204 (1973).

facilities, retirement options, available benefits, the consequences of the resignation, or the significance of an effective date. There is substantial evidence to support the AJ's finding that the lack of information on the part of Agency, though innocent, resulted in an involuntary removal, over which the Office may exercise jurisdiction.

For the foregoing reasons, we are compelled to uphold the ID and deny Agency's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Richard Johns

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Barbara Morgan

The initial decision in this matter shall become a final decision of the Office of Employee Appeals five (5) days after the issuance of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.