THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Ella Cuff	)	OEA Matter No. 1601-0009-12R17
Employee	)	
	)	Date of Issuance: April 17, 2018
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Department of General Services[1]	)	Senior Administrative Judge
Agency	)	
	)	

Talon Hurst, Esq., Employee Representative
C. Vaughn Adams, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION

On October 14, 2011, Ella Cuff ("Employee") appealed to the Office of Employee Appeals ("OEA") from the Department of General Services' ("DGS" or "Agency") action of terminating her employment effective October 4, 2011, for "any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." Specifically, Employee, a Protective Services Officer, failed to successfully qualify with a firearm as required by her position.

Administrative Judge Sommer Murphy was assigned this matter in July of 2013. On July 10, 2014, Judge Murphy granted Agency's Motion to Dismiss and dismissed Employee's appeal for lack of jurisdiction due to Employee's retirement in lieu of being terminated.[2]

Employee filed a Petition for Review with the Office of Employee Appeals ("OEA") Board, alleging that she had involuntarily retired. On March 29, 2016, the OEA Board upheld Judge Murphy's Initial Decision, holding that Employee failed to prove involuntary retirement as there was no evidence that Agency coerced her or gave her misleading information.[3]

1 The Department of Real Estate Services merged into the Department of General Services in 2011.
2 *Cuff v. D.C. Dept. of General Services,* OEA Matter No. 1601-0009-12, (July 10, 2014).
3 *Cuff v. D.C. Dept. of General Services,* OEA Matter No. 1601-0009-12, *Opinion and Order on Petition for Review* (March 29, 2016).

Employee appealed the OEA Board's decision, and on April 21, 2017, the District of Columbia Superior Court remanded this matter to OEA for a hearing on the voluntariness of Employee's retirement.[4]

Because Judge Murphy moved to the General Counsel's Office, this matter was reassigned to me. I held a Status Conference on May 24, 2017, and approved the commencement of discovery. I held a hearing on November 20, 2017. I closed the record on January 8, 2018, after the submission of closing arguments.

JURISDICTION

Jurisdiction in this matter has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

JOINT STIPULATION OF FACTS

1. Employee Ella Cuff was hired by the Department of General Services, formerly known as the Department of Real Estate Services, in June of 1987.

2. Employee was hired under the Civil Service Retirement System ("CSRS").

3. The U.S. Office of Personnel Management has overall responsibility for administering the CSRS.

4. Protective Services Police Department ("PSPD") General Order 901.1, Handling Service Weapons, describes the protocol for Protective Services Department ("PSD") officers for qualifying for their service weapons at the shooting range.

5. According to PSPD General Order 901.1 and the Agency's Amended Answer to Employee's interrogatories, "If a first attempt to qualify is unsuccessful, as directed by the range officer, an officer is required to return to the firing range on his or her next tour of duty to qualify or receive additional training as may be directed by the range officer. If the officer is still unsuccessful on the range after having undergone 40 hours of classroom instruction and retesting, the officer is referred to the PFC Clinic for a medical evaluation to determine if there is a medical problem prohibiting the successful completion of re-training. If the medical evaluation determines that there is no medical problem prohibiting successful completion of re-training, the officer is permitted an additional 40 hours of re-

4 *Ella Cuff v. District of Columbia Office of Employee Appeals, et. al.*, 2016 CA 003043 P(MPA) (D.C. Super. Ct., April 17, 2017).

training. This re-training includes another opportunity to re-test at the firing range. If the officer is then unable to qualify, the office is then recommended for termination."

6. On November 20, 2009, Employee received an Advance Notice of Proposed Removal from her position with the Protective Services Police Department.

7. In response to the November 20, 2009 Advance Notice of Proposed Removal, Ms. Ann-Kathryn So filed a response on behalf of Employee.

8. Employee was assigned to Phase 1 of the 2011 bi-annual firearms qualification course which was scheduled for February 17, 2011.

9. On February 17, 2011, Employee failed her first attempt to qualify under Phase 1 of the 2011 bi-annual qualification course.

10. On February 22, 2011, Employee failed her second attempt to qualify under Phase 1 of the 2011 bi-annual qualification course.

11. On February 23, 2011, Employee was assigned to begin remedial training.

12. On March 3, 2011, following 40 hours of remedial training, Employee made her third attempt at qualifying under Phase 1 of the 2011 bi-annual qualification course.

13. On March 3, 2011, Employee successfully shot the daylight course, but failed the low light course three times.

14. On April 12, 2011, Employee, through Attorney J. Michael Hannon of the Hannon Law Group, LLP, filed an appeal on a different matter, OEA Matter No.: 1601-0096-11, *Ella Cuff v. Department of Real Estate Services*. This matter was subsequently dismissed by Judge Sommer Murphy in *Ella Cuff v. Department of Real Estate Services*, OEA Matter No.: 1601-0096-11 (December 22, 2011).

15. On June 27, 2011, Stephen R. Watkins sent a memorandum to PFC Associates, LLC Police and Fire Clinic ("Police and Fire Clinic") Medical Director, Olusola Malomo, M.D., requesting a fitness for duty examination for Employee.

16. On July 13, 2011, Employee was sent to the Police and Fire Clinic for a fitness for duty examination.

17. On July 13, 2011, Police and Fire Clinic issued Employee her evaluation and determined that she was fit for duty.

18. Employee received no additional remedial training following her fitness for duty examination on July 13, 2011.

19. On August 8, 2011, Employee was served with an Advanced Written Notice of Proposed Removal.

20. The Advance Written Notice of Proposed Removal dated August 8, 2011, contained the following sentence: "You have the right to be represented by an attorney or other representative."

21. This Notice stated that Employee had made twenty one attempts at qualifying with only six successes, earning a 32% passing rate, and outlined Employee's right to respond to the notice and review material upon which the proposed action was based.

22. Sometime in September, 2011, Employee's employer, Department of Real Estate Services, merged into the Department of General Services.

23. On September 21, 2011, Hearing Officer Jamie Lantinen issued a recommendation to sustain the proposed removal.

24. On September 30, 2011, the Agency issued a Notice of Final Decision sustaining the proposed removal for neglect of duty and incompetence. The effective date for the removal was close of business on October 4, 2011.

25. On October 14, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals. The case was assigned OEA Matter No.: 1601-0009-12.

26. On November 14, 2011, the Agency filed its response to Employee's Petition for Appeal, arguing that Employee was removed for cause.

27. On January 25, 2012, Employee submitted her completed retirement application under discontinued service retirement to District of Columbia Human Resources Department (DCHR).

28. DCHR is the D.C. government agency solely responsible for processing Employee's retirement paperwork.

29. Shawn Winslow, then-employee specialist at the DCHR, assisted Employee with her retirement process.

30. Employee's former employer, DGS did not advise or process Employee's retirement paperwork nor did it have any authority to authorize Employee's retirement.

31. DCHR processed Employee's retirement with an effective date set retroactive to her last day of employment on October 4, 2011.

32. DCHR does not provide legal advice to former District employees seeking to retire.

33. According to testimony from DCHR and Mr. Winslow, DCHR does not train its staff to inform employees that by submitting retirement papers and completing the retirement process, they would forfeit any pending appeal.

34. Shawn Winslow of DCHR was not aware that Employee had a pending OEA appeal at the time he processed her retirement paperwork.

35. Mr. Winslow testified that he did not offer Employee any counseling on the effect her retirement may have on her pending appeal of her removal, and would have informed her to seek legal advice if she had asked.

36. DCHR is unaware of any government agencies that inform their employees that by submitting retirement papers, they would forfeit any pending appeals.

37. Mr. Winslow prepared the Standard Form 50 reflecting Employee's retirement.

38. Employee's SF-50, processed on February 3, 2012, states in Section 45. Remarks the following: "***(Separation/Termination) letter dated 09/28/2011. Employee elected to retire on Discontinued Service Retirement."

39. According to DCHR records, Employee's removal remains reflected in her official personnel file.

40. Although Employee was eligible to retire as of October 4, 2011, she was not required to accept retirement as of October 4, 2011. Employee was 61 in February of 2012.

41. On June 30, 2014, OEA Judge Sommer Murphy issued an Initial Decision[5] dismissing OEA Matter No. 1601-0009-12, Ella Cuff v. Department of Real Estate Services.

EVIDENCE

a. Shawn Winslow ("Winslow") testified as follows (Tr. 14-111).

Winslow worked for Child Protective Services Agency as a Human Resources ("HR") manager.[6] During his tenure, he was the benefits and retirement specialist and processed retirements for District government employees.

Winslow testified that when an employee completed a signed retirement application, it

5 Judge Murphy subsequently issued an Errata and Addendum to the Initial Decision on July 10, 2014, and a second Errata and Addendum to the Initial Decision on July 21, 2014. There were no substantive changes made to the Decision. The Errata merely updated the names of the attorneys involved in the matter.
6 Winslow was not offered as an expert witness, but as a factual witness.

goes to HR. Next, HR processed the Standard Form ("SF") 50, a form that depicted any action that has happened to an employee and Winslow would place the form into their personnel file. So long as an employee met the eligibility requirements of age and service and was not removed for misconduct, the employee may elect to retire.

Winslow explained the process for voluntary retirement under Federal civil service rules.[7] He stated that voluntary retirement could occur when an employee met the age and standard of years of service, eligibility to retire, or if the individual retired on their own volition. An involuntary retirement under civil service occurs when an employee is separated from District employment and choses to retire due to an involuntary separation. He further explained that it was also referred to as discontinued service retirement. Winslow stated that if an employee wanted to retire under the discontinued service retirement, the employee would have to submit an application for retirement. Winslow stated that the only difference between a discontinued service retirement and a voluntary retirement under civil service was that with a voluntary service retirement, it was the employee's choice to leave while they were still employed. With a discontinued service, or an involuntary service retirement, an employee elected to receive retirement because they were separated from their position. To determine if an employee was eligible for discontinued service retirement, HR would review the employee's years of service, age, and Agency's letter stating that they were terminated. The years of service necessary for retirement were the same, but with an involuntary service retirement, an employee had the option to retire because they were removed from their position for any other reason outside of a grievance, egregious act, or misconduct. Winslow stated that an employee would be unable to involuntarily separate or retire if they were separated for an egregious act or misconduct.

Winslow testified that retirement in lieu of involuntary action was the same as a discontinued service retirement. He stated that the age requirement for discontinued service retirement was at least fifty years of age with twenty years of service or any age and twenty-five years of service. Winslow explained that Employee selected involuntary separation as her retirement option because with involuntary separation, an employee had the option of returning to work for the District and resume contributing to her annuity plan. He further explained that an employee could receive their retirement check and receive an annuity. However, if the employee was later rehired by the District, their retirement check would stop and they were eligible to contribute back to the civil service again. When the employee voluntarily retires again, their retirement amount would be higher.

Winslow stated that he assisted Employee with her retirement. While he could not recall the method that he used to communicate with Employee, Winslow said that it was either via email or by telephone. He stated that the effective date of Employee's termination was October 4, 2011. Winslow determined that Employee was eligible for discontinued service retirement because of her years of service plus Employee's age at the time of her separation. He said it takes 90 to 120 days to process a retirement and explained that Agency made sure Employee

7 D.C. employees hired before 1987 were under the Federal Civil Service. Employees hired afterwards were no longer entitled to be under Federal Civil Service.

received a retroactive check that paid her from October of 2011 to March of 2012.

Winslow stated that HR does not train its staff to offer counseling to retiring District employees. He further explained that HR does not inform District employees that completing and submitting their retirement papers would cause them to forfeit any pending appeal rights that they might have. Thus he did not inform Employee that by filing for her retirement, she would forfeit her pending appeal before OEA.

Winslow stated that he was not aware that Employee had a pending case with the Office of Employee Appeals ("OEA"). However, if Employee had informed him, he would have told her to seek legal advice to determine how it would have impacted her appeal as that was not his area of expertise. Winslow testified that it took four months to process Employee's retirement. He explained that Employee submitted her paperwork on January 25, 2012, although her termination was October 4, 2011.

Winslow clarified that even if Employee had submitted her retirement application at a later date, she would not have forfeited her right to retire. He further explained that Employee initiated the retirement process because Agency cannot retire an employee unless the employee signed off on the application for retirement Form 2801. If Employee had not gone to HR to process her retirement, no action would have been taken. Additionally, Winslow stated that discontinued service retirement and retirement in lieu of involuntary action could not be initiated without Employee submitting the paperwork. He stated that Employee did not choose to be terminated, but she chose to retire.

Winslow testified that he was not obligated to inform Agency that Employee had submitted retirement papers nor was he obligated or trained to advise an employee the effect that retirement would have on any OEA appeals.

At times, Winslow contradicted himself, saying that an employee being removed for an egregious act does not have the option to retire, and then saying he wasn't sure if such an employee could still retire before the effective date of his termination. He was also unfamiliar with the personnel regulations regarding retirement.

Winslow stated that employees who were removed because of lack of fitness for duty were still eligible for retire. Winslow testified that Employee's personnel file would show that she was terminated and then retired. He explained that her retirement was not in lieu of termination. Winslow stated that the only circumstance that would cancel out termination was if Employee voluntarily retired before she was terminated. He further explained that if an employee retired ten days before their separation, the employee would still be able to retire voluntarily as long as he or she retired before their effective termination date. Winslow could not recall the protocol for the egregious acts and stated that he would have to review the regulation in the progressive discipline section of the D.C. Human Resources ("DCHR") progressive log and review the District Personnel Manual ("DPM") under progressive discipline and adverse actions. He attested that an employee who was terminated for fitness of duty was

not egregious.

b. Ella Cuff ("Employee") testified as follows (Tr. 113-164).

Ella Cuff ("Employee") worked for the D.C. Protective Services ("Agency") as a Protective Services Police Officer for twenty-four years. She began her employment on June 8, 1987, and was terminated on October 4, 2011. She testified that she received a Notice of Proposed Removal on August 8, 2011, and submitted her response to the proposed removal to Agency thereafter. Employee testified that she was not represented by counsel during the time of her removal action. She received her final notice on September 30, 2011, and the effective date of her termination was October 4, 2011. At the time, Employee stated that Agency did not offer the option to retire prior to the effective date of her removal.

Employee filed a Petition for Appeal with OEA on October 14, 2011, without benefit of legal counsel and remained *pro se* until January of 2012. Employee testified that neither Winslow nor anyone in HR informed her that submitting her retirement would cause her to forfeit her right to appeal her removal. She did not seek legal advice about her decision to retire. Employee stated that she filed an appeal because she wanted her job back and that she did not intend to give up her right to appeal her removal when she submitted her retirement application. She explained that she would not have retired under discontinued service retirement had she known that she would lose her right to appeal.

Employee stated that Winslow assisted her with her retirement application. She opted to retire under the discontinued service retirement. Employee stated that it was her understanding that her retirement choice was involuntary and she did not volunteer to retire. Employee testified that she did not choose to retire on October 4, 2011.

Employee attested that she did not understand what it meant to be retired in lieu of involuntary action. She stated that she did not intend to retire in lieu of removal when she submitted her request for retirement. Employee claimed that she still wanted to work and that she was not ready to retire.

On cross-examination, Employee admitted that she was advised of her right to be represented by an attorney or other representative as stated in the Advanced Written Notice of Proposed Removal. Employee stated that she was served with a prior proposed removal from a different District agency in February of 2003. She was represented by attorney Ann Catherine Sowell ("Sowell"), who worked for the same firm that represented her in the current matter. Employee could not explain why she did not contact an attorney for legal advice before she submitted her retirement paperwork. Employee stated that she had a proposed removal in 2003, 2009, and again in 2011, and that she had legal counsel who represented her in the removal action.

Employee testified that she did not know that she was going to appeal when she applied for retirement and that was why she did not inform the HR representative that she had an appeal.

She explained that she did not think that she had any reason to inform HR of her outstanding appeal. Employee stated that she could not explain why she did not inform her attorney that she was considering retirement.

Employee testified that she received some paperwork and went to speak to Winslow about retirement, but could not recall the date that she received the paperwork. She testified that she decided to retire involuntarily because she did not want to voluntarily retire. Employee explained that she retired because she needed the money.

Employee stated that she spoke to Mr. Hannon, an attorney who worked for the same firm that represented her in the current matter. She stated that she spoke to him about the appeal and Mr. Hannon told Employee that she would have to file an appeal with OEA first. Employee filed the appeal and stated that she received a letter from OEA, but could not recall what the letter stated.

Position of the Parties

Employee's position is that her retirement was not voluntary, but rather that she was first removed from her position before she filed for retirement under discontinued service retirement. Thus, Employee argues, her retirement did not replace her removal action. Employee asserts that when she filed her appeal on October 14, 2011, this Office had jurisdiction as determined when the adverse action has already taken effect. Employee insists that her subsequent retirement does not cancel her adverse action, and thus, this Office should exercise jurisdiction over this matter.

Employee contends that because Agency withheld material information regarding the effect her retirement would have on her appeal rights, her retirement was made "with blinders" and thus was involuntary.[8]

Agency argues that because Employee retired voluntarily, OEA has no jurisdiction over this appeal.

FINDINGS OF FACT

The following findings of fact are based on the witnesses' demeanor during testimony and the documentary evidence of record. On the key question of whether Employee's retirement was voluntary or involuntary, the fact that neither party presented an expert witness on this particular issue presented difficulties. If I find that the retirement was voluntary, then this Office has no jurisdiction.

I hereby make the following findings of fact:

8 Employee's Post Hearing Brief, p.11 (Dec. 22, 2017).

1. Employee was advised of her right to be represented by an attorney or other representative as stated in the Advanced Written Notice of Proposed Removal.

2. Although Employee had an attorney representing her with her other OEA appeals, she chose not to inform her attorney or ask legal advice regarding her intention to retire.

3. Employee did not inform Agency about her retirement.

4. There is no evidence to suggest that Agency coerced or provided misinformation to Employee regarding retirement.

5. Employee did not inform DCHR that she had an OEA appeal pending when she applied for retirement.

6. Even if she had informed DCHR about her OEA appeal, DCHR would have simply told her to seek legal counsel as their personnel are not trained to provide legal advice.

7. There is no statute or regulation that mandates DCHR to inform would-be retirees about the ramifications that retirement would have on any pending appeals.

8. On January 25, 2012, with the assistance of Mr. Winslow, Employee completed the paperwork given to her and retired under "Discontinued Service Retirement." She agreed to this process because she was receiving no income and wanted to return to District employment in the future

9. Employee's Standard Form 50 reflecting her discontinued service retirement used Code 304 as the nature of action code, and "Retirement-ILIA" as the nature of action.

10. Retirement-ILIA means retirement "in lieu of involuntary action." According to Chapter 30 of the CSRS and FERS Handbook issued by OPM, retirements in lieu of involuntary action are voluntary retirements.

11. Code 304 is reserved for voluntary retirements in lieu of involuntary action, which is a voluntary retirement. (Chapter 30 of the CSRS and FERS Handbook, Employee Ex. 16 at 30-9.)

12. Because the retirement was in lieu of involuntary action, the retirement action replaced the prior removal action against Employee. This allowed Employee to receive a retirement pension from her prior removal date.

13. For discontinued service retirements, the effective date for the action would be set to the employee's last day of employment. (Tr. at 48:5-21, 77:22-79:21.) Thus, the effective date of Employee's retirement was backdated to October 4, 2011—the same

effective date as her removal. This is done so that the retiree receives money from the effective date of separation.

14. In November 2012, Employee decided to retain an attorney from Hannon Law Group to represent her in the instant matter.

15. It was only during the time period of late 2013 to early 2014 that Agency learned that Employee had retired, thus scuttling their pending settlement of this appeal.

16. On February 27, 2014, the Agency filed an Amended Answer and a Motion to Dismiss, alleging that OEA did not have jurisdiction over Employee's appeal because of her voluntary retirement.

ANALYSIS AND CONCLUSION

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Pursuant to OEA Rule 629.1, *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."

Here, Employee retired in lieu of being separated. This Office does not have the statutory authority to adjudicate an appeal in connection with a voluntary retirement. However, a retirement wherein the decision to retire was involuntary is treated as a constructive removal and may be appealed to this Office.[9]

The issue of whether a resignation (or retirement) is voluntary or involuntary has been addressed in several cases before this Office. Typically, the issue arises as a jurisdictional question, where, for example, an employee is appealing a reduction in force (RIF) and she or he accepts an early retirement instead of being released in the RIF.[10] Other cases involve employees who resign or retire and then appeal to this Office contending that their resignation or retirement was coerced or was a constructive discharge.[11]

There is a presumption that retirements are voluntary.[12] It is incumbent upon employees to first prove that their retirements were involuntary, that is, were the product of undue coercion on Agency's part, or the product of mistaken information provided to them by Agency and upon which they relied in making their decision to retire. Where an employee resigns or retires to

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[9] *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

[10] *See, e.g., Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96 (August 20, 1998).

[11] *See, e.g., Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

[12] *Christie v. United States, supra*.

avoid being removed for cause, the resignation or retirement is voluntary if the proposed removal is precipitated by good cause.

Here, Employee does not deny that Agency had good cause for removal nor does she allege that Agency provided her with misleading or mistaken information.

Neither does Employee allege coercion by Agency as would have been the case if her retirement is secured by duress, intimidation, or deception. In order to prove that his or her retirement is the product of duress, intimidation, or coercion, an employee must show each element of the established tripartite test.[13] Those elements are: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of coercive acts by the other party.[14] The test for duress is an objective one, thus, duress is not measured by the employee's subjective evaluation or perception of a situation.[15]

Instead, Employee argues that OEA has jurisdiction over her appeal despite her retirement on two grounds. First, Employee asserts that her retirement after the filing of her appeal does not preclude OEA from adjudicating her appeal on the merits. Second, Employee's retirement was involuntary because her decision to retire was induced by Agency's withholding of information, specifically, the effect her retirement would have on the viability of her appeal.

To support her first ground for appeal, Employee cites *Elias Covington v. Department of Health and Human Services,*[16] where an employee accepts involuntary separation and then applies for discontinued service retirement.

However, the facts in *Covington* are not analogous to the instant matter and thus, does not apply here. In *Covington,* the Court held that Employee's retirement was involuntary in the context of a reduction-in-force ("RIF") because the agency failed to correct misinformation in its notice informing employee that he had no right to assignment to another position, leading the employee to believe that he had no grounds to believe an appeal of his RIF action might be productive.[17] There, the agency's former Director of Personnel also sent a letter declaring that certain other former CSA employees "may have taken advantage of early retirement, however none of you voluntarily resigned your position" and "[a]ny records to the contrary are in error."[18]

In *Covington,* the agency gave misinformation to the employee and was thus responsible for the employee's uninformed choice to retire. Such is not the case here whereby, Employee is

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[13] *Christie, supra* at 587 (citing *Fruehhauf Southwest Garment Company v. United States*, 111 F.Supp.945, 951 (Ct.Cl. 1953).
[14] *Christie, ibid*. See also *Chambers v. DOC,* at 18-19.
[15] *McGlucken v. United States*, 407 F.2d 1349, (1969) cert. denied, 396 U.S. 894 (1969).

[16] 750 F.2d 937 (U.S. Ct. of Appeals, Federal Cir. 1984).
17 *Id*. at page 6.
18 *Id*. at page 3.

not alleging misinformation, but rather an alleged withholding of information on the effect of retirement upon her appeal.

Employee also cites *Scalese v. Dep't of the Air Force*,[19] *Williams v. DHHS,* [20] and *Dobratz v. HHS,*[21] to support her contention that a retirement retroactive to the same date of the removal does not deprive the Board of jurisdiction to adjudicate the removal or otherwise extinguish the employee's right to challenge the removal.

However, the facts and the rulings in *Scalese, Williams* and *Dobratz* are dissimilar to that of the instant matter. In *Scalese,* the issue of whether the appellant's retirement was involuntary was not even addressed. Instead, the Merit Systems Protection Board ("MSPB") focused on whether Agency could support its removal decision, holding that if the agency is unable to support its removal decision, then appellant could show that his retirement was coerced. MSPB went on to hold that, "Conversely, if the agency is able to show that it properly decided to remove the appellant based on physical inability to perform, then he could not establish that his retirement was involuntary."[22]

In *Williams,* MSPB dismissed appellant's appeal by finding that it was precluded by a valid settlement and thus did not address the voluntariness of appellant's retirement. In *Dobratz,* MSPB found that appellant's retirement was invalid because the removal was improper.

In addition OEA has held that MSPB decisions are not controlling, holding that "Even though we recognize that the Merit Systems Protection Board ("MSPB") is our federal counterpart, we have not, however, adopted every practice of the MSPB. Moreover, there is no law, rule or regulation that requires us to do so."[23]

In the instant matter, it is undisputed that Employee could not qualify with her service weapon, a valid and critical safety requirement for her armed police position, and thus, Agency had support for its removal decision.

Employee moves on to her second argument to claim that her retirement was involuntary because her decision to retire was induced by Agency's withholding of information, specifically, the effect her retirement would have on the viability of her appeal. Employee avers that her retirement was involuntary under *D.C. Metropolitan Police Department v. Stanley*.[24] *Stanley* recognizes that an employee's retirement or resignation may be involuntary if it is induced by the

19 68 M.S.P.R. 247 (1995).
20 112 M.S.P.R. 628 (2009)
21 53 M.S.P.R. 9 (1992).
22 *Id*. at 2.
23 *Sondra Phillips-Gilbert v. DHS*, OEA Matter No. 1601-0059-99, *Opinion and Order on Petition for Review* (December 21, 2005).
24 942 A.2d 1172 (2008).

employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information.[25]

Again, the facts and the rulings in *Stanley* are dissimilar and thus not analogous to that of the instant matter. In *Stanley,* the Court held that an employee who was given mere hours to decide whether to accept demotion, retire, or be terminated, could not be said to retire voluntarily as said employee was unable to obtain information about the financial consequences of his election and was thus unable to make an informed choice. The *Stanley* Court did not mandate that the agency must provide all possible information on the ramifications an employee's decision to retire would incur; rather, the Court simply said that the employee threatened with demotion or termination must be given sufficient time to obtain information about the financial consequences of his election and thus be able to make an informed choice.

In the instant matter, there was never any pressure on Employee to accept retirement. In fact, Employee made her decision to retire almost four months after her removal and there was no allegation that Agency pressured Employee to retire.

The Court in *Stanley* went on to hold that the doctrine of coercive involuntariness does not apply to a case in which a public employee decides to resign or retire because he does not want to accept a new assignment, a transfer, or other measures that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that he feels that he has no realistic option but to leave. In the instant matter, Agency had every legal right to insist that its employee meet the statutory requirements of their position, including maintaining a gun qualification. Agency's insistence that Employee qualify with her service weapon does not constitute coercion.

Because there was no evidence of Agency's application of duress or coercion, time pressure, or the misrepresentation to induce Employee to retire, Employee's remaining rationale for OEA's jurisdiction is to allege that Agency withheld material information regarding the effect her retirement would have on her appeal.

There are three problems with Employee's allegation. First, I did not find any evidence that Agency withheld information. Second, even if we were to assume for the sake of argument that Agency had this information, it would not have known to give this information to Employee because Employee never informed Agency about her decision to retire. In the D.C. government, the Department of Human Resources, which alone handles retirement matters, is a separate agency from Employee's former employer DGS. There is no evidence that DGS would have the knowledge or expertise to advise its employees regarding retirements or its effect on appeals. The evidence produced at the hearing revealed that even DHS, the sole agency charged with processing retirements, did not train its employees to advise retirement applicants about the effect such a step would have on their appeals.

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25 *Id*. at page 3.

Third and lastly, Employee's argument rests on the assumption that Agency *had an obligation to inform or educate her on the effect her retirement may have on her appeal*. [Emphasis supplied]. However, Employee could not offer any statute, regulation, or case law that mandates Agency to offer such legal advice. In this instance, Employee has filed several prior appeals with OEA with the assistance of counsel, but chose not to seek their advice when she decided to retire.

Because Employee failed to meet her burden of proving jurisdiction, in other words, proving involuntary retirement, this Office has no jurisdiction over their appeal.

ORDER

It is hereby ORDERED that the petition in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE: JOSEPH E. LIM, ESQ.
Senior Administrative Judge