

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	OEA Matter No.: 2401-0148-10
WILLIE BREWER, JR.,	)	
Employee	)	
	)	Date of Issuance: June 18, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Joseph E. Lim, Esq.
_____	)	Senior Administrative Judge

Kerry J. Davidson, Esq., Employee Representative  
Sara White, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On November 13, 2009, Willie Brewer, Jr. (“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 his 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 his position was abolished was an ET-15 Music Teacher at Marshall Education Campus (“Marshall”). Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 6, 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. 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.

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<sup>1</sup>.

On October 2, 2009, Agency handed Employee his RIF notice indicating that his position as an ET-15 Music Teacher at Marshall Education Campus would be abolished effective November 2, 2009. The notice informed him that he could retire in lieu of being subject to the RIF so long as he satisfied the criteria for retirement.

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

### ***Employee’s Position***

Employee submits that Agency set him up to fail when he was involuntarily transferred to Marshall from another school and made to teach Vocal Music instead of the Instrumental Music in which he had expertise.<sup>2</sup> Employee also complained that his outstanding performance evaluation for the 2008-2009 academic year was rescinded. Employee made no mention of his retirement.

### ***Agency’s Position***

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<sup>1</sup> See *Agency’s Answer*, Tab 1 (December 17, 2009).

<sup>2</sup> Employee Brief (March 19, 2012).

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 his termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked ET-15 Music Teacher, Employee, was terminated as a result of the round of lateral competition. Agency also failed to mention Employee's retirement. However, a check of its personnel records revealed that Employee did, in fact, retire.

### *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.<sup>3</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."<sup>7</sup> The employee must prove that his retirement was involuntary by showing that it resulted from undue coercion or misrepresentation

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<sup>3</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> *Id.* at 587.

<sup>7</sup> 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.2d 937 (Fed. Cir. 1984).

(mistaken information) by Agency upon which he relied when making his decision to retire. He must also show “that a reasonable person would have been misled by the Agency’s statements.”<sup>8</sup>

Here, Employee does not contend that his retirement was involuntary. Indeed, he chose to omit this salient fact even after he received my February 16, 2012, Order which specifically stated, “If Employee elected to retire in lieu of being separated under the RIF, then the parties must also address this issue...Employee must prove, by a preponderance of the evidence, that the retirement was involuntary.” In this instance, I find no 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 his option to retire. Based on the foregoing, I find that Employee’s retirement was voluntary.<sup>9</sup> 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.

### 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

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<sup>8</sup> *Id.*

<sup>9</sup> 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).