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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:)	
)	
MICHAEL WILLIS,)	
Employee)	OEA Matter No. J-0043-15
)	
v.)	Date of Issuance: May 20, 2015 ¹
)	
DISTRICT OF COLUMBIA FIRE AND)	
EMERGENCY MEDICAL SERVICES,)	
Agency)	MONICA DOHNJI, Esq.
)	Administrative Judge

Michael Willis, Employee *Pro Se*
Milena Mikailova, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 18, 2015, Michael Willis (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Fire and Emergency Medical Services’ (“Agency” or “DCFEMS”) decision not to accept his withdrawal of his Optional Retirement request. Employee was a Deputy Fire Chief with Agency, and his retirement was effective January 10, 2015. On March 23, 2015, Agency filed a Motion to Dismiss Employee’s Petition for Appeal.

I was assigned this matter on February 23, 2015. On March 30, 2015, I issued an order requiring Employee to address the jurisdiction issue that was raised in Agency’s Motion to Dismiss. Employee’s brief was due on or before April 13, 2015, and Agency had the option to submit a reply brief on or before April 20, 2015. Employee filed his brief on jurisdiction on April 9, 2015. Subsequently, on April 17, 2015, Agency filed a Motion for an Enlargement of time to submit its reply brief. This Motion was granted in an Order dated April 21, 2015. Both parties have filed their respective briefs. After considering the parties’ arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

¹ The prior decision (dated March 19, 2015) indicated the wrong issue date.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

On December 10, 2014, Employee filed a request to exercise his rights to Optional Retirement effective January 10, 2015. Agency's Acting Fire and EMS Chief granted Employee's request for Optional Retirement in a letter dated December 22, 2014. On or around January 8, 2015, Employee forwarded an email to Agency noting that he would like to rescind his request for Optional Retirement as noted in the December 10, 2014, letter. Agency informed Employee in a letter dated January 9, 2015, that it was in receipt of Employee's request to rescind his request for Optional Retirement. Citing to District Personnel Manual ("DPM") Instruction No. 8-53, 9-25, 36-3, and 38-12, Agency noted in the January 9, 2015, letter that Employee's request to withdraw his Optional Retirement request was denied. Agency further explained that upon receiving Employee's initial request for Optional Retirement, Agency made a commitment to detail another employee to Employee's current position, and Agency has already issued a Special Order to that effect.

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.² Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.³ 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]. . . . , or placement on enforced leave for ten (10) days or more.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat degree of relevant evidence which a

² See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

³ See *Brown v. District of Columbia Public. School*, 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).

reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.”

Employee’s position

In this case, Employee concedes that he voluntarily applied for Optional Retirement with an effective date of January 10, 2015. Additionally, Employee acknowledges that Agency’s Acting/Interim Fire and EMS Chief in a letter dated December 22, 2014, approved his request for retirement prior to his attempt to withdraw his retirement request. Employee however argues that the Acting Fire and EMS Chief’s refusal to accept his request to rescind his retirement request constitutes an involuntary separation that falls within OEA’s jurisdiction. Employee notes that he was ordered to come to work on the effective date of his retirement which was a Saturday to turn in all Agency property, which is not common practice for a retiree to meet with the office of Internal Affairs. Employee further maintains that he was ordered by Agency’s Human Resources (“HR”) personnel to report to their office and complete the necessary documents to seek Optional Retirement. Employee maintains that his retirement was an adverse action because he was informed that the Acting Fire and EMS Chief’s executive staff was not going to allow him to remain employed with Agency. Employee highlights that Agency had a preconceived intent to terminate him against his intention to remain employed with Agency. Also, Employee states that the Special Order was posted after he notified his acting supervisor on January 5, 2015, that he was considering rescinding his retirement request.

According to Employee, this matter should not be dismissed for lack of jurisdiction because it was not a voluntary retirement but rather an adverse action. Employee states that it is clear that he no longer wanted to seek Optional Retirement and he notified Agency. Employee further asserts that as an Interim/Act appointee to the position of Fire and EMS Chief, there is no law or precedent which allows an individual acting in such position to promise a promotion to an employee. Employee maintains that the Acting Fire and EMS Chief did not have the authority to promise to promote another employee to Employee’s current position upon Employee’s retirement. Employee highlights that Agency did not follow the requirement for posting temporary promotions, and that it is an illegal act to promise a promotion under District laws.⁴

Agency’s position

Agency states that the record confirms that Employee initiated his own retirement action. Agency explains that by its plain text, the Optional Retirement memo submitted by Employee reflects that Employee freely chose to retire at the time he deemed reasonable. Agency further explains that Employee understood the retirement transaction and set the effective date of his retirement. Further, Agency notes that it approved Employee’s retirement twice before the effective date – by stamped approval from the Interim Fire and EMS Chief on December 17, 2014, and again in a letter dated December 22, 2014. Agency asserts that on January 7, 2015, it issued Special Order No. 2, series 2015, in which Employee was optionally retired effective January 10, 2015, and another employee detailed to Employee’s former position effective January 11, 2015.

⁴ Employee’s Brief (April 6, 2015).

Agency contends that upon receiving Employee's January 8, 2015 email stating his intention to rescind his retirement request, Agency informed Employee on January 9, 2015 of its decision to deny Employee's request to withdraw his retirement request. Agency further argues that this matter should be dismissed for lack of jurisdiction because the record clearly demonstrates that Employee voluntarily chose to retire and after expressly granting Employee's retirement request, Agency identified another employee to assume Employee's duties. According to Agency, Employee had a choice and exercised this option to his own purported detriment.

Agency maintains that although an agency may permit an employee to withdraw his retirement application before the effective date of separation, such request may be disapproved when the agency has a valid reason and explains that reason in writing to Employee. Accordingly, Agency notes that it exercised its discretion to disapprove Employee's request to withdraw his Optional Retirement, and Agency expressly communicated its valid reason to Employee. Nothing about the transaction could be deemed wrongful in the circumstance. Agency additionally notes that assuming that it wrongfully disapproved Employee's retirement withdrawal, nothing about its decision confers subject matter jurisdiction upon OEA because the decision itself does not meet the statutory requirement for appealable actions to OEA.⁵ Agency further contends that Employee failed to address the jurisdiction discrepancies that Agency raised in its Motion to Dismiss. Agency highlights that its refusal to allow Employee to withdraw his retirement is not an adverse action and does not confer jurisdiction on OEA. And since Employee cannot meet his burden of proof in this matter, his Petition for Appeal should be dismissed.⁶

Rescinding Retirement

Employee argued that Agency should have rescinded his retirement because Agency received his letter to rescind his retirement prior to the effective date of his retirement. Employee explained that his retirement amounted to involuntary retirement because Agency denied his request to rescind his retirement. Agency on the other hand argued that it exercised its discretion to disapprove Employee's request to withdraw his Optional Retirement, and it expressly communicated its valid reason to Employee in writing.

The Court in *Watson v. District of Columbia Water and Sewer Authority*, 923 A.2d 903, 907 (2007) held that "once an employee voluntarily resigns from her job, the employer's decision not to accept a subsequent withdrawal of that resignation does not transform the employee's act into an involuntary one." While the current matter involves a retirement and not a resignation, I find that these actions are similar since they are both considered voluntary separation under District law. The facts of the current case are analogous with those in *Wright v. District of Columbia Department of Employment Services*, 560 A.2d 509 (1989). Similar to this case, in *Wright*, agency accepted the resignation letter on the date it was tendered. Days prior to the effective resignation date, the employee in *Wright* attempted to withdraw her resignation. However, agency refused to accept the withdrawal.

⁵ Agency's Motion to Dismiss (March 23, 2015); *See also* Agency's Brief (April 27, 2015).

⁶ *Id.*

The Court in *Wright* (citing *Guy Gannett Publishing Co. v. Maine Employment Security Commission*, 317 A.2d 183, 187 (1974)), reasoned that:

a resignation, when voluntary, is essentially an unconditional event the legal significance and finality of which cannot be altered by the measure of time between the employee's notice and the actual date of departure from the job. An employer who accepts an unequivocal notice of resignation from an employee is entitled to rely upon it . . . unless, of course, the employer chooses to return to status quo by rehiring the employee, or accepting a retraction of the notice.

The Court went on to provide that "requir[ing] an employer to accept a withdrawal of a resignation at any time prior to its effective date would severely hamper the employer's ability to function efficiently."⁷ Therefore, Agency was not required to accept Employee's withdrawal of her resignation. As noted in *Wright*, Employee should have been sure of what he was doing before deciding to take such drastic action to retire from his position. In *Wright*, the Court of Appeals ruled that the "burden should rest with the employee who initiated the action by giving the initial notice and who in every real and practical sense is the moving party[;] . . . it would be a distortion of reason and common sense to hold under these circumstances that the employer is the moving party and that the severance of the employment was involuntary."⁸

Moreover, pursuant to DPM Instruction No. 8-53, 9-25, 36-3 & 38-12, an Agency may permit an employee to withdraw his or her retirement application before the effective date of separation, except that: a request to withdraw a retirement application before the effective date of separation may be disapproved when the employee agency has a valid reason and explains the reason in writing to the employee. A valid reason includes, but is not limited to administrative disruption, or the hiring or commitment to hire a replacement.

In the instant matter, Agency issued Special Order No. 2, series 2015, on January 7, 2015, in which Employee was optionally retired effective January 10, 2015, and another employee detailed to Employee's former position effective January 11, 2015. Agency received Employee's request to withdraw his Optional Retirement on January 8, 2018. Thus, I conclude that, because Agency had already made a commitment to detail another employee to Employee's position, Agency had a valid reason to disapprove Employee's request to withdraw his retirement, prior to its effective date. Moreover, the above instruction states that Agency may permit an employee to withdraw his or her retirement application before the effective date of separation (emphasis added). The use of the discretionary word may, gives Agency the discretion to approve or disapprove an employee's request to withdraw his/her retirement application.

⁷ The Court offered reasoning that the employer would be "unable to hire and train a replacement for the vacated position, or otherwise adjust his work force to prepare for the employee's absence, except at his peril; the employee might at any time, at his whim, decide to rescind his resignation, thereby wasting both the time and financial resources expended in training his replacement." *Wright v. District of Columbia Department of Employment Services*, 560 A.2d 509, 512 (1989).

⁸ *Id.* at 513. See also *Paula LaGrand v. District of Columbia Metropolitan Police Department*; OEA Matter No. J-0194-12, *Opinion and Order on Petition for Review* (June 10, 2014); *Paula LaGrand v. District of Columbia Office of Employee Appeals and District of Columbia Metropolitan Police Department*, 2014 CA 4256 P(MPA).

Based on the foregoing, I conclude that Agency rightfully exercised its discretion to disapprove Employee's request to withdraw his retirement application.

Involuntary Retirement

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.⁹ 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.¹⁰ A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."¹¹ The employee must prove that his/her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he relied when making a decision to retire. An employee must also show "that a reasonable person would have been misled by the Agency's statements."¹² In *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (2008), the D.C. Court of Appeals provided that the test to determine voluntariness is an objective one that, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. As a general principle, an employee's decision to retire is considered voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. OEA has consistently held that a mere assertion of force or coercion is not enough to prove that Employee involuntarily retired.¹³

In the current case, Employee conceded that he initiated the retirement process, and it was Employee who set his retirement effective date, as evidenced in his December 10, 2014, Optional Retirement notice to Agency. Employee further acknowledges that the retirement request was approved by the Interim Fire and EMS Chief prior to the effective date of his retirement. I find that Employee had the freedom of choice in deciding when to retire. While Employee alleges that his retirement was involuntary because Agency was aware of his intention to withdraw his retirement request prior to the effective date of his retirement and that he was ordered to report to Agency on a Saturday to turn in Agency property and he was also ordered to

⁹ See *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Bagenstose v. District of Columbia Public Schools*, OEA Matter No. 2401-1224-96 (October 23, 2001).

¹⁰ *Id.* at 587.

¹¹ 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).

¹² *Id.*

¹³ *Esther Dickerson v. Department of Mental Health*, OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006); *Georgia Mae Green v. District of Columbia Department of Corrections*, OEA Matter No. 2401-0079-02, *Opinion and Order on Petition for Review* (March 15, 2006); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05, *Opinion and Order on Petition for Review* (July 24, 2008); *Larry Battle, et al. v. D.C. Department of Mental Health*, OEA Matter Nos. 2401-0076-03, 2401-0067-03, 2401-0077-03, 2401-0068-03, 2401-0073-03, *Opinion and Orders on Petition for Review* (May 23, 2008); and *Michael Brown, et al. v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09, 1601-0013-09, 1601-0014-09, 1601-0015-09, 1601-0016-09, 1601-0017-09, 1601-0018-09, 1601-0019-09, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09, 1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

report to HR to complete the necessary Optional Retirement documents, I find these assertions irrelevant to the issue of Employee's retirement. At no time does Employee allege that Agency procured his retirement through deceit, misrepresentation or undue coercion. Accordingly, I find no *credible* evidence of misrepresentation, misinformation or deceit on the part of Agency in procuring the retirement of Employee. Further, Employee has failed to provide any evidence to prove that Agency deceived him or gave him misleading information with regards to his retirement. And there is no evidence that Agency misinformed Employee about his option to retire. Regardless of Employee's protestations, I find that the facts and circumstances surrounding Employee's retirement was Employee's own choice. Based on the documents on record, and Employee own admission, Employee's retirement can only be deemed voluntary.

In accordance with District laws, rules and regulation, I find that Agency adequately complied with the requirements pertaining to denying Employee's request to rescind his retirement. Agency was under no obligation to accept Employee's request to rescind his retirement. Finally, Employee's decision to retire was voluntary and for this reason, I am unable to address the factual merits, if any, of this appeal.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge