THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ANDREW JOHNSON, Employee	
v.	OEA Matter No.: 1601-0215-11
D.C. PUBLIC SCHOOLS, Agency	Date of Issuance: February 16, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Andrew Johnson ("Employee") worked as a School Psychologist with the D.C. Public Schools ("Agency" or "DCPS"). On July 15, 2011, Employee was notified that he would be terminated because he received a final rating of "Minimally Effective" under IMPACT, Agency's performance assessment system, for the 2009-2010 and 2010-2011 school years.[1] The effective date of his termination was August 12, 2011.[2] On May 1, 2012, Employee met with Agency's Office of Human Resources ("OHR") to inquire about his retirement options.[3] Employee subsequently submitted a retirement application and began receiving his pension funds.

[1] IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.
[2] *Petition for Appeal* (September 9, 2011).
[3] *See* Declaration of Andrew Johnson.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 9, 2011. He disagreed with the termination and requested that OEA reinstate him to his previous position. Employee also requested that this Office award him back pay and benefits lost as a result of his termination.[4] Agency filed its Answer to the Petition for Appeal on October 12, 2011, explaining that Employee was properly evaluated under IMPACT pursuant to the standards for Group 12 Related Services Providers.[5] According to Agency, Employee received a final rating of "Minimally Effective" for two consecutive years, and was, therefore, subject to termination.[6]

The matter was assigned to an Administrative Judge ("AJ") for adjudication on June 26, 2013. On June 27, 2013, the AJ issued an Order scheduling a Prehearing Conference for the purpose of assessing the parties' arguments.[7] On July 22, 2013, a Post Conference Order was issued, directing Employee to submit a written brief addressing whether his Petition for Appeal should be dismissed for lack of jurisdiction because he elected to retire in lieu of being terminated.[8] The Order noted that employees have the burden of proof on issues of jurisdiction; however, Agency was also directed to submit a response to Employee's brief.[9]

In his brief, Employee argued that his termination notice failed to state that he would waive his appeal rights to OEA if he filed for retirement.[10] Employee further stated that he was under the impression that his retirement was involuntary because he "was litigating the matter and intended to return to DCPS but needed the funds to survive."[11] Agency submitted a response

[4] *Id*. at 3.
[5] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 2 (October 12, 2011).
[6] *Id*.
[7] *Order Convening a Prehearing Conference* (June 27, 2013).
[8] *Post Conference Order* (July 22, 2013).
[9] *Id*.
[10] *Employee's Brief on Jurisdiction*, p. 2 (August 8, 2013).
[11] *Id*. at 3.

to Employee's brief on August 28, 2013, asserting that Employee voluntarily retired from DCPS and that OEA lacks jurisdiction over this matter.[12] Agency argued that DCPS made no misrepresentations regarding Employee's retirement options and that the existence of a financial hardship is not sufficient to establish jurisdiction before this Office.[13] In addition, Agency noted that neither DCPS nor the District of Columbia Retirement Board were under an obligation to inform Employee that retirement may preclude his right to pursue an appeal before OEA.[14]

The Initial Decision ("ID") was issued on May 20, 2014. The AJ found that Employee voluntarily elected to retire in lieu of being terminated and that there was no evidence in the record to prove that his retirement was procured through Agency's misrepresentation, fraud, or coercion.[15] Moreover, the AJ held that designating a retirement as "Involuntary" pursuant to the District of Columbia Teachers' Retirement Plan did not render Employee's retirement a constructive removal.[16] As a result, the AJ determined that OEA lacked jurisdiction over Employee's appeal and the matter was therefore dismissed.

Employee subsequently filed a Petition for Review with OEA's Board on June 26, 2014. In his petition, Employee argues that he did not choose to retire when he visited the retirement office in May of 2012 because he intended to return to work with DCPS.[17] According to Employee, Agency obtained his application for retirement by providing him with incorrect information and failing to disclose material information regarding the ramifications that retiring would have on his right to file an appeal with this Office. In response, Agency reiterates that

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[12] *District of Columbia Schools' Jurisdiction Response Brief* at 4 (August 28, 2013).
[13] *Id*. at 6.
[14] *Id*.
[15] *Initial Decision*, p. 6.
[16] *Id*. at 5.
[17] *Petition for Review*, p. 2 (June 26, 2014). Employee states that the Initial Decision was based on an erroneous interpretation of statute, regulation or policy and that the AJ's decision to dismiss the Petition for Appeal for lack of jurisdiction was not based on substantial evidence.

Employee's retirement was not procured through misinformation or fraud. Agency, therefore, requests that the Board deny the Petition for Review and uphold the AJ's Initial Decision.[18]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

In *Jenson v. Merit Systems Protection Board*, the U.S. Court of Appeals for the Federal Circuit held that an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise.[19] For a retirement to be considered involuntary, an employee must establish that the retirement was due to Agency's coercion or misinformation upon which they relied. OEA has held that the burden, therefore, rests on employees to show that they involuntarily retired.[20] Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter.

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[18] *District of Columbia Public Schools' Response to Employee's Petition for Review* (May 20, 2014).
[19] 47 F.3d 1183 (Fed. Cir. 1995).
[20] *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-

In *Ross v. D.C. Public Schools*, this Board determined that the employee failed to establish that her retirement was involuntary.[21] The employee *Ross* received notice that she was being separated from service as a result of a Reduction-in-Force. Ross argued that Agency made misrepresentations to her concerning the retirement process and contended that a reasonable person would have been misled by Agency's misrepresentations.[22] Similar to the instant case, the employee in *Ross* noted the word "involuntary" on her retirement application. In its decision, OEA's Board held that the employee offered no evidence to prove that DCPS deceived her or provided misleading information regarding the ramifications of retiring.[23]

In this case, Employee submitted a one (1) page retirement application to OHR on May 1, 2012.[24] The document, which was signed and dated by Employee, listed the application type as "Involuntary" and requested an effective retirement date of August 12, 2011.[25] A Standard Form 50 ("SF50") was subsequently generated to memorialize Employee's retirement designation.[26] The form indicated that the nature of action was "Retirement ILIA" or Retirement in Lieu Immediate Action.[27] The effective date of Employee's retirement was August 12, 2011, the same day as the effective date of his termination under IMPACT. The "Remarks" section of Employee's SF50 stated that he elected to retire on Discontinued Service Retirement.[28]

0013-09, 1601-0014-09, 1601-0015-09, 1601-0016-09, 1601-0017-09, 1601-0018-09, 1601-0019-019, 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).
[21] OEA Matter No. 2401-0208-10, *Opinion and Order on Petition for Review* (August 2, 2013).
[22] *Id*. at 3.
[23] *Id*. at 4.
[24] *Declaration of Andrew Johnson*, Exhibit C (August 8, 2013).
[25] *Id*.
[26] *District of Columbia Public School's Jurisdiction Response Brief*, Exhibit 19 (August 28, 2013).
[27] After an employee is approved for involuntary retirement, the reason for separation on the corresponding SF50 is changed from "Termination" to "Retirement." *See District of Columbia Public School's Response to Employee's Petition for Review*, p. 6 (July 28, 2014). Thus, Employee's personnel file would no longer reflect that he was terminated; only that he retired retroactively.
[28] *Id*.

In light of the above, the Board finds that there was no information in Employee's termination notice that was false or misleading. Employee was afforded an opportunity to consult with an attorney, union representative, or other advisor regarding the implications that retiring would have on his right to pursue an appeal before OEA. Moreover, there was nothing in the notice that would lead a reasonable person to conclude that retirement was his or her only option. The Board understands that Employee was faced with a difficult decision in light of financial difficulties. However, a showing of financial hardship does not establish sufficient proof that an employee's resignation involuntary.[29] Similar to the employees in *Jenson* and *Christie*, Employee had the option to retire or challenge the termination action.

Employee further contends that his retirement was involuntary because he did not actually intend to retire. While he has failed to expound upon this argument, this Board notes that there is no credible evidence in the record to indicate a lack of intent on Employee's part. In his August 8, 2013 Declaration, Employee states that he approached the OHR Retirement Office to seek information on obtaining funds from his retirement account approximately one (1) year after being terminated.[30] Employee was not forced to submit a retirement application, and he could have sought legal advice prior to submitting the application for processing. Employee appears to believe that he only needed temporary access to his retirement funds until he won his case against DCPS and was returned to work.[31] This argument is misguided, as Employee prematurely concluded that he would be the prevailing party before an Initial Decision was issued on the merits of his appeal. Furthermore, Employee has failed to prove that DCPS had an

[29] *See Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975).
[30] *Declaration of Andrew Johnson*, p. 3.
[31] *Id*.

affirmative duty to inform Employee that he would waive his appeal rights if he elected to retire.[32]

In sum, the evidence supports a finding that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part. The Board finds that the Administrative Judge's decision to dismiss Employee's Petition for Appeal for lack of jurisdiction was based on substantial evidence. The Board further finds that the Initial Decision was not based on an erroneous interpretation of statute, law, or regulation. Based on the foregoing, OEA lacks jurisdiction over the instant appeal. As such, Employee's Petition for Review must be denied.

[32]*See Bagenstose v. D.C. Office of Employee Appeals*, 888 A.2d 1155, 1158 (holding that that DCPS' failure to advise an employee about the consequences that retiring would have on his appeal rights was not misleading. See also *Keyes v. District of Columbia*, 362 U.S.App. D.C. 67, 72, 372 F.3d 434, 439 (2004) (holding that if an employee was confused about information presented in the termination notice, he or she was in a position to consult an attorney or take additional steps to confirm the accuracy of the information.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.