THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Claudia Bezaka,	)	OEA Matter No. 1601-0119-15
Employee	)	
	)	Date of Issuance: February 23, 2016
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Public Schools,	)	Senior Administrative Judge
Agency	)	

Ari Wilkenfeld, Esq., Employee Representative
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On August 7, 2015, Employee, a Program Coordinator for the World Languages Department, Grade 7 in the Career Service, filed a Petition for Appeal in which she alleged that she was appealing Agency's final decision removing her from service for "Incompetence." However, it is undisputed that before the adverse action was processed, Employee retired effective July 23, 2015. Thus, the proposed removal was never effected.

This matter was assigned to me on December 10, 2015. Agency maintained that because the proposed removal was never effectuated due to Employee's retirement, there was no adverse action over which this Office had jurisdiction. On December 16, 2015, I ordered both parties to address the jurisdictional question presented by Employee's retirement.

Both parties complied. Since the matter could be decided on the basis of the documents of record, no further proceedings were held. The record is now closed.

JURISDICTION

As will be discussed, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

The following facts are uncontested:

1. Employee was hired as a World Language Specialist. She was responsible for assisting in the language education for Agency's staff and students.

2. On November 18, 2013, Agency placed Employee on an Employee Performance Development Plan due to alleged poor work performance.[1]

3. During the 2014-2015 school year, Agency determined that Employee failed to meet specific goals it required.[2]

4. 5-E DCMR § 1401.2(c) defines incompetence to include an inability or failure to perform satisfactorily the duties of the person's position of employment.

5. Agency notified Employee of her failure to meet expectations in her most recent performance evaluation.

6. By letter dated July 8, 2015, Agency gave notice of its decision to terminate Employee's employment effective on July 23, 2015.[3]

7. Before Employee could be removed from her position, she applied for retirement effective July 23, 2015. Agency's Motion to Dismiss, Tab Two. Her signed Standard Form 50, Notification of Personnel Action, dated October 8, 2015, indicated that Employee's retirement was in lieu of termination.[4]

ANALYSIS AND CONCLUSIONS

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), 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 for cause. 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 s/he accepts an early retirement instead

1 Agency Answer to Employee's Petition for Appeal, Tab Two.

2 Agency Answer to Employee's Petition for Appeal, Tab Four and Five.

3 Agency Answer to Employee's Petition for Appeal, Tab One.

4 Agency's Motion to Dismiss, Tab One.

of being released in the RIF. *See, e.g.*, *Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96 (August 20, 1998). 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. *See, e.g.*, *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000). In these cases, this Office has looked to the seminal case in the federal sector on the issue of whether a resignation or retirement is voluntary or involuntary, *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975).

In *Christie*, the plaintiff claimed that she was wrongfully separated from the government by means of a coerced resignation. The U.S. Court of Claims held that, as a matter of law, the plaintiff's resignation was voluntary. Christie was a veteran's preference employee of the U.S. Navy Department. She was issued an advance notice of proposed removal for attempting to inflict bodily injury on her supervisor. She denied the charge. The agency issued a final decision to remove Christie but allowed her an opportunity to accept a discontinued service retirement instead of being fired. Christie resigned and accepted the retirement benefit. Then, she filed an appeal with the U.S. Civil Service Commission ("CSC"). The CSC dismissed the appeal for lack of jurisdiction and the plaintiff appealed to the U.S. Court of Claims.

In finding that the resignation was voluntary, the Court of Claims stated:

> Employee resignations are presumed to be voluntary. This presumption will prevail unless plaintiff comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. Plaintiff had the opportunity to rebut this presumption before the CSC. . . .
>
> Upon review of the facts as they appear in the record before the CSC, it is clear the plaintiff has failed to show that her resignation was obtained by external coercion or duress. Duress is not measured by the employee's subjective evaluation of the situation. Rather, the test is an objective one. While 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.
>
> This Court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. Of course, the threatened termination must be for good

> cause in order to precipitate a binding, voluntary resignation. But this good cause requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated.

Christie, supra at 587-588. (emphasis in original). (citations omitted).

The plaintiff in *Christie* admitted that an incident took place but claimed that she only inadvertently touched her supervisor. This admission was fatal to the plaintiff's argument. The Court of Claims stated that "[w]hether this charge could have been sustained had plaintiff chosen to appeal her discharge for cause is irrelevant. What is relevant is that the admission of this incident is prima facie evidence that an arguable basis for discharge existed." Thus, the Court of Claims found that the plaintiff's resignation was voluntary.

Relying on *Christie*, prior decisions of this Office have held that there is a presumption that an employee's resignation or retirement is voluntary. It is incumbent on the employee to present sufficient evidence to prove that the retirement was involuntary. Where an employee resigns or retires to avoid being removed for cause, the resignation or retirement is voluntary if the proposed removal is precipitated by good cause. Furthermore, good cause exists unless the employee presents sufficient evidence to establish that the agency "knew or believed that the proposed termination could not be substantiated." *See Pitt v. United States,* 420 F.2d 1028, 1032 (Ct. Cl. 1970) and *Jefferson, supra*.

Employee maintains that her retirement was involuntary because the Agency failed to inform her of her right to appeal Agency's decision to reclassify her position which meant the loss of union benefits, and decrease in salary. Specifically, Employee states that Agency's Chancellor announced in March 2015 that positions would be eliminated due to budget cuts. Employee asserts that she was provided with a letter explaining that she would become an at-will employee and that, after a year, her salary would be reduced by $13,908.[5]

In short, Employee states that because Agency failed to inform her of her appeal rights when Agency made the March 2015 announcement, Agency had misrepresented Employee's options and prevented Employee's freedom of choice. Thus, Employee concludes, this renders her retirement involuntary.

There are two problems with Employee's arguments. First, apart from her bare assertions, Employee failed to provide any evidence to back up her claims. She did not provide this Office with a copy of the purported March 2015 letter. Thus, I find that Employee fails to meet her burden of proof.

The second problem is that Employee did not substantiate her claim of Agency's alleged misrepresentation. Agency's July 8, 2015, notice of termination to Employee accurately details

5 Employee's Motion in Opposition to Agency's Motion to Dismiss Employee's Petition for Appeal.

her right to appeal said termination. Employee does not, and cannot, claim that the July 8, 2015, letter contained any misrepresentation. Faced with the prospect of losing her job for Agency's claim of her incompetence, Employee instead chose to retire on October 8, 2015, and asked Agency to backdate her retirement to July 23, 2015, the date her termination for cause would have been effective.[6]

In *Christie*, supra, the Court of Claims stated that

> Duress is not measured by the employee's subjective evaluation of a situation. Rather the test is an objective one. (Citations omitted) while it is possible [Employee] . . . perceived no viable alternative but to tender [his] resignation, the record evidence supports . . . that [Employee] chose to resign and accept . . . retirement rather than challenge the validity of [his] proposed discharge for cause. The fact remains, [Employee] had a choice. [He] could stand pat and fight. [He] chose not to. Merely because [Employee] was faced with an inherently unpleasant situation in that [his] choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of [his] resignation.

As it was with Ms. Christie, here Employee had the option to "stand pat and fight" her proposed removal, but voluntarily chose not to do so. I conclude that Employee's retirement was voluntary. Thus, the Office is without jurisdiction to hear this case and Agency's motion to dismiss must be granted.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

6 Standard Form 50, Notification of Personnel Action, dated October 8, 2015. Agency's Motion to Dismiss, Tab One.