THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matters of:	)	
	)	
MICHAEL E. BROWN,	)	OEA Matter No. 1601-0012-09
STEPHANIE DODSON,	)	OEA Matter No. 1601-0013-09
ZELDA DONALDSON,	)	OEA Matter No. 1601-0014-09
LONNIE DUREN,	)	OEA Matter No. 1601-0015-09
ROBERT GARY,	)	OEA Matter No. 1601-0027-09
KEVIN JACKSON,	)	OEA Matter No. 1601-0016-09
RICHARD JOHNSON,	)	OEA Matter No. 1601-0019-09
JESSE KINGSBERRY, II,	)	OEA Matter No. 1601-0018-09
RENÉ MARQUEZ,	)	OEA Matter No. 1601-0020-09
VALERIA MYERS,	)	OEA Matter No. 1601-0021-09
KENNETH OLIVER,	)	OEA Matter No. 1601-0022-09
MICHAEL PEARSON,	)	OEA Matter No. 1601-0023-09
THOMAS J. SMALL,	)	OEA Matter No. 1601-0024-09
ALVIN SYDNOR,	)	OEA Matter No. 1601-0017-09
DERRICK TELESFORD,	)	OEA Matter No. 1601-0025-09
WARREN TURNER,	)	OEA Matter No. 1601-0026-09
ALFRED JOHNSON,	)	OEA Matter No. 1601-0054-09
LINDA ELLIS,	)	OEA Matter No. 1601-0053-09
PHILLIP MILLER,	)	OEA Matter No. 1601-0052-09
Employees,	)	
	)	
v.	)	Date of Issuance: June 26, 2009
	)	
D.C. DEPARTMENT OF	)	ERIC T. ROBINSON, Esq.
CONSUMER AND	)	Administrative Judge
REGULATORY AFFAIRS,	)	
Agency	)	
	)	

L. Saundra White, Esq., Employees Representative
Charles Thomas, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On or around October 27, 2008, Derrick Telesford, Thomas Small, Warren Turner, Robert Gary, Alvin Sydnor, Jesse Kingsberry, II, Richard Johnson, René Marquez, Valeria Myers, Stephanie Dodson, Zelda Donaldson, Lonnie Duren, Kevin Jackson, Kenneth Oliver, Michael Pearson, and Michael Brown filed petitions for appeal with the Office of Employee Appeals (hereinafter "OEA" or "the Office") contesting their removals from the D.C. Department of Consumer and Regulatory Affairs (hereinafter "Agency" or "DCRA"). The effective date of their removals was September 26, 2008. On or around December 1, 2008, Linda Ellis, Alfred Johnson, and Phillip Miller filed petitions for appeal contesting their removals from the Agency. The effective date of their removals was October 31, 2008.

I was assigned these matters *en masse* on April 1, 2009. After reviewing each of the appeals, I determined that a prehearing conference was necessary, which was held on May 14, 2009. During this conference, the parties were required, *inter alia*, to address whether the OEA may exercise jurisdiction over any or all of these matters on a number of grounds. After considering the breadth of the parties' oral arguments relative to the jurisdiction of this Office, I determined that they should be afforded the opportunity to provide final briefs on jurisdiction. Accordingly, I issued an order dated May 15, 2009, which required the parties to address whether this Office may exercise jurisdiction on the following grounds:

a. Taking into account D.C. Official Code § 1-616.52 *et seq.*, discuss whether the OEA may exercise jurisdiction over these matters considering that Employees and/or their Union (AFGE Local 2725), acting on their behalf, grieved their cause of action pursuant to their collective bargaining agreement ***before*** filing their petitions for appeal with the Office of Employee Appeals ("OEA").

b. Whether Employees' failure to get and/or maintain ICC licensure converted said Employees from career service to at-will status with no attendant appeal rights to the OEA.

c. Whether some/any of the above named Employees opted to either retire or resign from their positions. If so, whether those Employees would be precluded from appealing their removal from service before the OEA.

In said order, the parties were advised that if the Employees were unable to establish the jurisdiction of the OEA over any or all of these matters, I would issue an Initial Decision that finds as much. Employees were required to submit their brief, through counsel, on or before May 29, 2009, via email to the undersigned. Employees brief was transmitted via email on June 2, 2009. Employees' counsel cited computer

issues as to the reason for submitting Employees brief late. Agency's brief was due by June 12, 2009. Agency requested, via email, an extension of time to file its brief in this matter. Said request was granted and Agency filed its brief on June 17, 2009. Employees filed their responsive brief, via email, on June 23, 2009. After reviewing the parties' respective submissions in these matters, I have determined that no further proceedings are necessary. The record is now closed.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

ISSUE

Should this matter be dismissed for lack of jurisdiction?

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states that:

> 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 629.2, *id.*, states that "the employee(s) shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

The following represents the undersigned's understanding of the relevant facts and application of the law in this matter which is derived from the documents of record. All the employees in this matter were members of American Federation of Government Employees Local 2725 (hereinafter "Local 2725") and ostensibly career service employees. Prior to their removal, all of the Employees were employed by the Agency as either Neighborhood Stabilization Specialists (hereinafter "NSS") or Code Compliance Specialists (hereinafter "CSS"). Taking into account their membership with Local 2725, Employees' employment was subject to the Collective Bargaining Agreement ("CBA") between Local 2725 and the Agency as well as the District of Columbia Comprehensive Merit Personnel Act.

According to the Agency, the charges and specifications that led the Agency to

impose the instant adverse actions against Employees involve charges of inexcusable neglect of duty and insubordination. To wit: according to the Agency, during August 2006, Employees received substantial increases in grade and pay as well as new position descriptions that required them to be International Code Council certified as a condition of their employment.[1] The initial deadline for ICC certification was extended until June 30, 2008. The Agency granted Employees additional extensions of time in which to become ICC certified until July 14 and August 15, 2008. DCRA contends that it entered into a contract, at considerable expense, to train all of its inspectors to become ICC certified. DCRA made vouchers available to all inspectors to take the ICC test. Agency contends that some inspectors took the ICC test and became ICC certified. Other Employees have taken the ICC test, one or more times, but have not been successful. And, some did not take the test at all by the deadline(s). Agency further argues that all of the above referenced Employees failed to become ICC certified in their respective fields' even though the Agency gave them, what it considered, a considerable amount of time and resources in order to assist Employees in becoming ICC certified.

Certification

On or around June 19, 2009, at the undersigned's request, Agency submitted position descriptions for the positions of CSS or NSS. At the time of their removals, all of the above named Employees encumbered one of these positions. These position descriptions use similar language in detailing certain salient requirements for their positions. The position description for NSS provides in relevant part as follows:

> OTHER SIGNIFICANT REQUIREMENTS
>
> Incumbent is required to possess and maintain DCRA current certification for DCMR-14; **and current certification for International Code Council (ICC) Property Maintenance and Housing inspections.**
>
> This position requires that the incumbent possess a valid motor vehicle operator's license. (Proof of valid driver's license is required). **(Emphasis Added).**

Similarly, the position description for CSS provides in relevant part as follows:

> OTHER SIGNIFICANT REQUIREMENTS
>
> Incumbent at this level must possess the Commercial Building Inspection Certification **in addition to the D.C. Municipal Regulations Certification and International Construction**

[1] The International Code Council (ICC) is a nationally recognized comprehensive certification program for code professionals, including residential and commercial inspectors. ICC certification provides national recognition and evidence of knowledge and technical expertise for inspectors.

> **Codes (ICC) Certifications for electrical. (Emphasis in Original.)**

Further, the record is replete with several documents detailing Agency's efforts to assist Employees in becoming ICC certified. An example is best typified by a memorandum dated March 12, 2008, from Linda K. Argo, Agency Director to DCRA Residential Inspectors[2] which states in pertinent part that:

> The deadline for ICC certification is fast approaching and it has been brought to my attention that no Residential Inspectors have informed either the Personnel or Training Departments that they have passed the certification exam…
>
> The training sessions began in April of 2007, and the expectation was that Inspectors would complete the exams and certification process by May 2008. All Inspectors should have received revised job descriptions early last year that reflected the requirement for ICC Certification to qualify for the position. All newly hired Residential Inspectors at Grades 9 and 11 must obtain ICC certification within one year of employment and current employees were given one year to achieve certification. Failure to obtain the ICC certification will affect either your continued employment or employment at your current grade.

Employees admit that they lack ICC certification. Employees contend that the ICC test was an unnecessary component to them properly performing their respective duties. Further, Employees argue that the imposition of the ICC test as a licensure requirement for performing their work related duties violated their rights pursuant to the CBA and should not be considered as a viable argument in favor of their removal.[3]

Gizachew Wubishet v. District of Columbia Public Schools[4], involved a teacher whose provisional teachers license had expired and he had been unable to obtain a permanent teachers license prior to his removal from service. Therein, I found that "the Employee did not fully complete the certification requirements [of his position] and [failed to] obtain his license by June 30, 2006, and once his provisional license expired, he served solely in an "at will" capacity, subject to Agency's determinations with regard to whether he qualified for continued employment." *Id*. at 3. *Wubishet* was upheld by

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[2] Although not expressly stated, I find that this memorandum was addressed to, among others, Employees herein who are appealing their respective removals. Also, I find that all references to "Inspectors" in this and other memoranda in the documents of record specifically references, among others, the above named Employees.

[3] Given the instant circumstances, I find that the OEA is not the proper quasi-judicial forum to determine whether the aforementioned licensure requirements violate Employees rights pursuant to the CBA between DCRA and Local 2725. That matter is properly decided before some other judicial or quasi-judicial forums, possibly the D.C. Superior Court or perhaps the Public Employee Relations Board.

[4] OEA Matter No. 1601-0106-06, (March 23, 2007), __ D.C. Reg. __.

the Board of the OEA in an Opinion and Order on Petition for Review[5] wherein the Board of the OEA held that because of his lack of proper licensure, *Wubishet* was in an at-will employment status with no attendant appeal rights to the OEA.[6] Likewise, I find that in these instant matters, Employees herein did not fully complete the certification requirements necessary to obtain their licenses by the effective date of their removals from service. Accordingly, they served solely in an "at will" capacity, subject to Agency's discretion with regard to whether they qualified for continued employment. It is well established that in the District of Columbia, an employer may discharge an at-will employee "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.,* 597 A.2d 28, 30 (D.C. 1991). *See also Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). As an "at will" employee, Employee did not have any job tenure or protection. *See* D.C. Official Code § 1-609.05 (2001). Further, as an "at will" employee, Employee had no appeal rights with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

I find that both "Inexcusable neglect of duty" and "insubordination" constitute appropriate bases for adverse actions against the above named Employees who, for whatever reason, failed to become ICC certified by the deadline(s) afforded by the Agency. I further find that Employees had a duty to become ICC certified by the deadline(s) both because the duty was set forth as a requirement in their position descriptions and because they were instructed by several DCRA memoranda to become ICC certified. Further, their collective failure to become certified, despite the fact that they all had ample time to do so and that DCRA provided them with necessary training to become certified, is an inexcusable neglect of this duty. Moreover, their failure to comply with the direct commands to become ICC certified constitutes "insubordination," applicable especially to those who did not even take the ICC test.

It is regrettable that the Agency elected to not grant these Employees a further extension of time to finalize the earning of their credentials and licenses. However, given the instant circumstances, Agency's decision is beyond my jurisdiction to set aside, based upon Agency's decision regarding how it will address the continued non-licensure status of its "at will" employees who were nearing, but still had not completed all of the certification requirements. Hopefully, Employees will soon obtain all of the necessary credentials and a license, so that they can resume the important mission of ensuring the public health, safety, economic interests, and quality of life of the residents, businesses, and visitors in the District of Columbia.

Election of Venue

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:

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[5] OEA Matter No. 1601-0106-06, (June 23, 2009), __ D.C. Reg. __.
[6] *See generally*, *Id*. at 3.

> (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]. . . .

D.C. Official Code § 1-616.52, provides as follows

> (e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, but not both.
>
> (f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever event occurs first.

This Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ ( ). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ D.C. Reg. __ ( ); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ ( ); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ ( ).

Based upon the documents of record, it is clear that Employees filed their grievance in this matter contesting Agency's *proposed* action of removal. What remains in contention is whether Local 2725 action of filing grievances regarding Agency final decision to remove Employees from service, on the Employees behalf, without their alleged knowledge or consent, prior to Employees filing their respective petition for appeals, precludes the OEA from adjudicating said appeals. As will be made clear *infra*, I find that, given the instant circumstances, it does not.

Both Agency and Employees provided the undersigned with a copy of the CBA in effect at the time of the Employees removal. Article 9 § B of the aforementioned CBA states in relevant part that:

> Employees have the right to contest corrective or adverse actions taken for cause through either [the OEA] or the negotiated

> grievance procedure. An employee shall elect either of these procedures in writing and the selection once made cannot be changed.
>
> 1. Should the employee elect to appeal the action to OEA, such appeal shall be filed in accordance with OEA regulations.
>
> 2. Should the employee elect to grieve the action under the negotiated grievance procedure, the grievance must be filed at the appropriate step within twenty (20) work days from the effective date of the action. However, should the employee elect to utilize the negotiated grievance procedure, only the Union may take the appeal of a corrective or adverse action to arbitration.

It would seem, based on the documents of record and Employees argument that they were erroneously instructed that, with respect to DCRA's proposal to remove them from service, they had the option of either grieving said action through the negotiated grievance procedure or filing an appeal with the OEA. At that juncture, Employees did not have the option of filing an appeal with the Office because they did not have a final Agency decision that would call into question the jurisdiction of this Office. As was stated previously, pursuant to D.C. Official Code § 1-606.03(a), aggrieved employees may only appeal *final* agency decisions with the OEA. Here, Employees voluntarily filed a grievance of their *proposed* removal through their negotiated grievance procedure. Once Employees received Agency's *final* notice of removal, they then opted to file an appeal with the OEA which, I find, in of itself, is allowable pursuant to D.C. Official Code § 1-606.03 *et al*.

Retirement/Resignation/Reassignment

According to the documents of record, prior to the full implementation of their removals from service, Employees Michael Brown, Zelda Donaldson, Lonnie Duren, René Marquez, Valerie Myers, Kenneth Oliver, Linda Ellis, and Phillip Miller, retired from their positions. Similarly, Robert Gary resigned from his position. The issue of an Employee's voluntary or involuntary retirement and/or resignation has been adjudicated on numerous occasions by this Office. The law is well settled with this Office, that there is a legal presumption that retirements are voluntary. *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), ___ D.C. Reg. ___ ( ). 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. *Id*. at 587. A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception." *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.2.d 937 (Fed. Cir. 1984).

The Employee must prove that his retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which they relied on when making their decision to retire. They must also show "that a reasonable person would have been misled by the Agency's statements." *Id.*

Regardless of Employees' protestations to the contrary, it is irrelevant whether Employees opted to resign or retire prior to or after filing an appeal with the OEA. The mere fact that they chose to either retire or resign instead of continuing to litigate their claims voids the Office's jurisdiction over their appeals. Furthermore, I find no *credible* evidence of misrepresentation or deceit on the part of the Agency in procuring the retirement or resignation of the above named Employees. Based on Employees position, as stated during the prehearing conference, and the documents of record, I find that the Employees' retirement, while a difficult financial decision, was nevertheless voluntary.[7] Consequently, I find that this represents another reason why this Office lacks jurisdiction over these matters.[8]

According to the documents of record, Employee Kevin Jackson was reinstated to a new position within DCRA that has a lower grade and pay than the one he is appealing his removal from herein. I find that, in of itself, reassignment to a new position with lower pay and grade shall not preclude an aggrieved employee from appealing his removal from a position with higher grade and/or pay to the OEA. Regardless of this finding, Employee Kevin Jackson, like the other Employees listed herein, lacks jurisdiction to have his appeal heard before the OEA based on the aforementioned analysis.

ORDER

Based on the foregoing, it is hereby ORDERED that these matters be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE

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[7] 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).

[8] This finding is only applicable to the following Employees: Michael Brown, Zelda Donaldson, Lonnie Duren, René Marquez, Valerie Myers, Kenneth Oliver, Linda Ellis, Phillip Miller and Robert Gary.