THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
MICHAEL BROWN	OEA Matter No. 1601-0012-09
STEPHANIE DODSON	1601-0013-09
ZELDA DONALDSON	1601-0014-09
LONNIE DUREN	1601-0015-09
ROBERT GRAY	1601-0027-09
KEVIN JACKSON	1601-0016-09
RICHARD JOHNSON	1601-0019-09
JESSE KINGSBERRY, II	1601-0018-09
RENÉ MARQUEZ	1601-0020-09
VALERIE MYERS	1601-0021-09
KENNETH OLIVER	1601-0022-09
MICHAEL PEARSON	1601-0023-09
THOMAS J. SMALL	1601-0024-09
ALVIN SYDNOR	1601-0017-09
DERRICK TELESFORD	1601-0025-09
WARREN TURNER	1601-0026-09
ALFRED JOHNSON	1601-0054-09
LINDA ELLIS	1601-0053-09
PHILLIP MILLER,	1601-0052-09
Employees	
	Date of Issuance: January 26, 2011
D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,	
Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael E. Brown, Stephanie Dodson, Zelda Donaldson, Lonnie Duren, Robert Gary,

Kevin Jackson, Richard Johnson, Jesse Kingsberry, II, René Marquez, Valerie Myers, Kenneth Oliver, Michael Pearson, Thomas J. Small, Alvin Syndor, Derrick Telesford, Warren Turner, Alfred Johnson, Linda Ellis, and Phillip Miller ("Employees") worked at the D.C. Department of Consumer and Regulatory Affairs ("Agency"). Agency issued removal notices to Employees which were effective on September 26 and October 31, 2008. The notices provided that they were removed because they failed to become International Code Council ("ICC") certified. ICC is a nationally recognized comprehensive certification program for code professionals which included residential and commercial inspectors. On October 27 and December 1, 2008, Employees filed Petitions for Appeal with the D.C. Office of Employee Appeals ("OEA"). In those petitions, they argued that their failure to pass the ICC examination did not constitute inexcusable neglect of duties nor was it cause for removal.[1]

Agency responded on May 1, 2009, and argued that the ICC certification was essential to the effectiveness of its program to ensure the public health and safety in the District. It provided that Employees received substantial salary increases in August of 2006. Moreover, Employees received new position descriptions requiring them to become ICC certified as a condition of their employment. After several extensions, they were given a deadline of August 15, 2008 to become certified. Agency asserted that it legitimately invoked its authority to remove those employees who were not certified. Under the collective bargaining agreement and the D.C. Official Code, Agency contended that the causes for such removals were inexcusable neglect of duty and

[1] *Petition for Appeal,* p. 3 (October 27, 2008).

insubordination.[2]

Employees disagreed with Agency's assertion that the ICC certification was mandatory. They argued that Agency could not legally remove them on the basis that they failed to be ICC certified because failure to pass the exam did not constitute a charge of neglect of duty. Employees further provided that Agency could not establish that their failure to become ICC certified adversely affected their abilities to perform their jobs effectively. Therefore, they requested that they be reinstated to their positions with back pay and compensation for physical and mental pain and suffering.[3]

On June 26, 2009, OEA's Administrative Judge ("AJ") issued his Initial Decision in this matter. After reviewing all Employees' positions descriptions, the AJ found that under the section titled "other significant requirements," ICC certification was listed as a requirement. He also highlighted the extensive effort and significant financial investment Agency made to ensure that all employees were ICC certified.[4] Based on previous OEA rulings, the AJ held that because Employees failed to obtain their required certification prior to the deadline, they were converted to "at-will" employees. Thus, Employees could have been discharged by Agency at any time, for any reason, or no reason at all.[5]

Moreover, the AJ found that inexcusable neglect of duty and insubordination were appropriate basis upon which to remove Employees. He provided that Employees had a duty to

---

[2] *Department of Consumer and Regulatory Affairs' Pre-hearing Statement,* p. 2-4 (May 1, 2009).
[3] *Employees' Pre-hearing Statement,* p. 3, 6-10 (May 7, 2009).
[4] Agency provided that it entered into contracts to train Employees; it made vouchers available to them to take the test; and it extended its original certification deadline to accommodate those employees who had not passed the ICC exam.
[5] *Initial Decision,* p. 4-6 (June 26, 2009).

become ICC certified by the deadlines. He held that this duty was established in their position descriptions and in various Agency memoranda addressed to them. Hence, their failure to become certified, despite the efforts made by Agency, was an inexcusable neglect of their duties. Additionally, the AJ ruled that Employees' failure to comply with direct commands to become certified constituted insubordination.[6]

As for the issues of Employees' retirements and resignation, the AJ found that the law is well settled that there is a presumption that such actions are voluntary and that OEA lacks jurisdiction to adjudicate voluntary retirements. He held that Employees presented no credible evidence that Agency's misrepresentation or deceit impacted their decisions to retire or resign. The AJ stated that this was another reason OEA lacked jurisdiction to consider these matters. Accordingly, he dismissed the matters.[7]

Employees disagreed with the AJ's Initial Decision and filed Petitions for Review with the OEA Board on July 31, 2009. They argued that the AJ's decision that they failed to become certified was based on an erroneous statute, regulation, or policy. They also stated that he failed to provide any credible evidence or law to sustain his decision. As argued before the AJ, Employees contended that their position descriptions did not require them to become certified. Additionally, they provided that their becoming certified was not a requirement when they achieved permanent career status or when they were promoted. Thus, the AJ's determination that they lost their career status was erroneous. Employees also stated that their decisions to retire or resign did not preclude them from appealing their removal to OEA. Further, Employees

[6] *Id.* at 6.
[7] *Id.*, 8-9.

asserted that the AJ should have held a hearing to determine if Agency had cause to remove them.[8]

There is one essential issue in these matters – OEA's jurisdiction to consider them. The AJ provided two reasons why this Office lacks jurisdiction to adjudicate these cases, and his analysis was proper. First, the AJ reasoned that because Employees failed to become ICC certified, they converted to at-will employees, and OEA lacks jurisdiction over at-will employees. Secondly, OEA lacks jurisdiction because Employees either retired or resigned from their positions.

OEA has held that if an employee neglects to obtain proper licensure or certification by the effective date of their removal, then they are deemed at-will employees. Accordingly, they are subject to Agency's discretion regarding their qualifications to continue employment.[9] None of Employees obtained the required ICC certification. The AJ correctly provided that the relevant portions of their position descriptions and several memoranda from Agency required such certification.[10] Agency set August 2008 as the final deadline for Employees to become ICC certified. Thus, in accordance with *Gizachew Wubishet v. D.C. Public Schools* and *Robin Suber v. D.C. Public Schools*, Employees were converted to an at-will status after the August deadline. Because OEA has consistently held that it lacks jurisdiction over at-will employees, this Board

[8] *Petition for Review*, p. 3-5 (July 31, 2009).
[9] *Gizachew Wubishet v. D.C. Public Schools*, OEA Matter No. 1601-0106-06 (March 23, 2007), __ D.C. Reg. __( ) and *Robin Suber v. D.C. Public Schools*, OEA Matter No. 1601-0107-07R10, *Second Initial Decision on Remand* (January 22, 2010), ___ D.C. Reg. ___ ( ).
[10] *Attachments for the Department of Consumer and Regulatory Affairs*, Tabs 1, 5-6 (June 19, 2009).

cannot consider the merits of Employees' cases.[11]

Additionally, OEA has held that it lacks jurisdiction over voluntary retirements. According to the historical decisions of *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995) and *Christie v. United States*, 518 F.2d 584 (1973), an employee's decision to retire or resign is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. For a retirement or resignation to be considered involuntary, an employee must establish that the retirement was due to agency's coercion or misinformation upon which they relied. The burden, therefore, rests on Employees to show that they involuntarily retired.[12] Such a showing would constitute a constructive removal and allow OEA to adjudicate their matters.

However, Employees failed to establish that Agency coerced them or gave them misleading information. Similar to the employees in *Jenson* and *Christie*, Employees each had the option to retire or resign *or* stand pat and challenge the actions taken against them by Agency. Being faced with removal is a difficult position for most people. However, merely being faced with a difficult situation does not obviate the voluntariness of Employees' retirements and resignation. Because Employees failed to prove that they involuntarily retired or

---

[11] *Penelope Minter v. D.C. Office of the Chief Medical Examiner,* OEA Matter No. J-0116-07 (July 22, 2009), __ D.C. Reg. __ ( ); *Parney Jenkins v. Department of Public Works*, OEA Matter No. 1601-0037-01, *Opinion and Order on Petition for Review* (April 5, 2006), ___ D.C. Reg. ___ ( ); *Subrata Sanyal v. D.C. Office of the Chief Technology Officer,* OEA Matter No. J-0070-08, *Opinion and Order on Petition for Review* (January 25, 2010), ___D.C. Reg. ___ ( );

[12] *Esther Dickerson v. Department of Mental Health,* OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006), ___ D.C. Reg. ___ ( ); *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), ___ D.C. Reg. ___ ( ); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05, *Opinion and Order on Petition for Review* (July 24, 2008), ___ D.C. Reg. ___ ( ); and *Larry Battle, Jasper Burnette, Ralph Spencer, Brenda Fuller, and Jerry W. Lanum 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 Order on Petition for Review* (May 23, 2008), ___ D.C. Reg. ___ ( ).

resigned from Agency, their Petitions for Review are DENIED.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petitions for Review are **DENIED**.

FOR THE BOARD:

_____
Clarence Labor, Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.