THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LARRY BATTLE	)	OEA Matter Nos. 2401-0076-03
JASPER BURNETTE	)	2401-0067-03
RALPH SPENCER	)	2401-0077-03
BRENDA FULLER	)	2401-0068-03
JERRY W. LANUM,	)	2401-0073-03
Employees	)	
	)	Date of Issuance: May 23, 2008
	)	
	)	
D.C. DEPARTMENT OF MENTAL	)	
HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Larry Battle, Engineering Equipment Operator; Jasper Burnette, Facility Management Officer; Ralph Spencer, Safety and Occupational Health Manager; Brenda Fuller, Facilities Management Officer; and Jerry Lanum, Supply Management Officer ("Employees") worked for the Department of Mental Health ("Agency"). On January 24, 2003, Employees each received letters from Agency advising them that due to a reduction-in-force ("RIF") they would be removed from their positions.[1] On February 28,

[1] *Agency's Response to Petition for Appeal*, Tab # 4 (December 17, 2003).

2003, Employees each chose discontinued service retirement before the RIF action was effective.[2]

Employees filed Petitions for Appeal with the Office of Employee Appeals ("OEA") on March 27, 2003 (Jasper Burnette and Brenda Fuller); March 28, 2003 (Jerry Lanum); and March 31, 2003 (Larry Battle and Ralph Spencer). They argued that the RIF guidelines were not followed by Agency. Therefore, the Agency action should be reversed.

Agency filed its response to Employees' Petitions for Appeal on December 17, 2003. It argued that City Council and the Mayor established the Department of Mental Health and granted it independent personnel authority for all employees of the Department. It also stated that the RIF procedures were conducted by the guidelines in the District Personnel Regulations. Further, Agency provided that each Employee was afforded one round of lateral competition within their assigned competitive level. However, they each decided to retire on discontinued service retirement instead of being separated under the RIF.[3]

On April 14, 2005, the Administrative Judge issued her Initial Decision. She found that OEA lacked jurisdiction to consider the appeals because Employees could not show that they retired involuntarily. The AJ held that there is a presumption that retirement is voluntary. Voluntary retirements do not fail under OEA's purview, but

[2] *Id* at Tab #6.
[3] *Id.*

involuntary removal is within the Office's jurisdiction. According to the AJ, Employees did not prove that they involuntarily retired. They failed to show that Agency officials coerced them or gave them misinformation upon which they relied when they retired. Therefore, their retirements were deemed voluntary, and their appeals were dismissed.[4]

Employees then filed Petitions for Review with the OEA Board. In their Petitions, they alleged that Agency's action was improper and defective; that the RIF notice was issued without the proper authority and approval of the Mayor through reorganization; that the 30-day notice was defective because Agency failed to justify its use of the designated competitive levels; that the competitive levels and retention register were not properly established; and that the Initial Decision did not address all issues of law and fact properly raised on appeal.[5]

On June 22, 2005, Agency filed its Response to Employees' Petitions for Review. It argued that the Initial Decision was based on substantial evidence. It maintained that OEA lacked jurisdiction to hear the appeals and that the Employees failed to address the jurisdictional issue in their Petitions for Review. As a consequence of OEA's lack of authority to consider these appeals, Agency requested that the Board deny Employees' Petitions for Review.[6]

Many of the issues raised by Employees in their Petitions for Review are pre-

[4] *Initial Decision* (April 14, 2005).
[5] *Petition for Review* (May 18, 2005).
[6] *Agency's Response to Employees' Petition for Review* (June 22, 2005).

RIF issues. They concede this point in their Petitions.[7] In addressing pre-RIF issues raised on appeal, OEA has consistently held that it cannot consider anything outside of its authorized scope concerning RIF appeals.[8]

Employees claim that Agency failed to justify its use of designated competitive areas. However, Agency properly asserted that in accordance with Chapter 24 of the D.C. Personnel Regulations and pursuant to Administrative Order DMH-2001-10, that it could establish lesser competitive areas for conducting its RIF. Section 2409.2 of the D.C. Personnel Regulations provides that lesser competitive areas within an Agency may be established by the personnel authority. Agency is the personnel authority, therefore, it could designate the competitive areas.[9]

Next, Employees claim that Agency failed to gain approval for the reorganization. The Court of Appeals in *Anjuawan v. D.C. Department of Public Works,* 729 A.2d. 883 (December 11, 1998), provided that OEA does not have jurisdiction to make any decisions pertaining to the shortage of funds that an agency may face. The court provided that as long as an agency can show that there was a shortage of funds to justify the RIFs, then it is within its discretion to do so. Consequently, OEA can not second guess a Mayor's decision about a shortage of funds or an agency's management decisions

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[7] *Petition for Review*, p. 7 (May 18, 2005).
[8] *Wharton v. District of Columbia Public Schools,* OEA Matter No. J-0111-02 (March 3, 2003), __ D.C. Reg. __ ( ); *Powell v. Office of Property Management*, OEA Matter No. 2401-0127-00 (February 3, 2003), __ D.C. Reg. __ ( ); *Booker v. Department of Human Services*, OEA Matter No. 2401-0190-97 (October 11, 2000), __ D.C. Reg. __ ( ).
[9] Agency provided that the positions were approved for abolishment in Administrative Orders DMH-03-06 and DMH-03-07.

about which positions need to be abolished. The court was clear in its ruling that OEA only has authority to determine if the RIF complied with DC Personnel statutes and regulations.

Employees also provided in their Petitions for Review that Agency's action was improper and defective because it failed to provide a valid 30-day written notice and one round of lateral competition within each Employee's competitive level. In accordance with D.C. Official Code § 1-624.08, OEA is authorized to review RIF cases where an employee claims Agency did not provide one round of lateral competition, or where an employee was not given a 30-day written notice prior to their separation. However, instead of being removed as a result of the RIF, Employees chose to retire. Therefore, it was their retirement and not the RIF that removed them from Agency. Their retirements nullify OEA's authority to consider the 30-day notice and one round of lateral competition arguments.

The question that remains is whether Employees' retirement was voluntary. According to *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. For a retirement to be considered involuntary, an employee must establish that the retirement was due to agency's coercion or misinformation upon which the employee relied.

Employees argue in their Petitions for Review that they relied on erroneous

information provided in Agency's RIF notices. Therefore, their decisions to retire should be viewed as involuntary because none of them planned to retire. However, Employees failed to offer any proof of the erroneous information upon which they relied. This burden rests squarely on them to prove. Such a showing would constitute a constructive removal and allow OEA to adjudicate their matters. However, they neglected to show that Agency's representatives coerced them or gave them misleading information. Consequently, OEA lacks jurisdiction to consider their cases.

Similar to the employee in *Christie*, Employees each had the option of retiring or challenging the RIF action 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. Because the office lacks authority to consider pre-RIF issues and because Employees failed to prove that they involuntarily retired from Agency, their Petitions for Review are DENIED.

ORDER

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

FOR THE BOARD:

_____
Sherri Beatty-Arthur, 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.