THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LORETTA KELLY,	)	
Employee	)	OEA Matter No.: 1601-0262-12
	)	
v.	)	Date of Issuance: March 24, 2014
	)	
DISTRICT OF COLUMBIA	)	STEPHANIE N. HARRIS, Esq.
PUBLIC SCHOOLS,	)	Administrative Judge
Agency	)	
	)	

Loretta Kelly, Employee *Pro-Se*
Carl K. Turpin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 17, 2012, Loretta Kelly ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Public Schools' ("Agency" or "DCPS") decision to terminate her. On October 22, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

I was assigned this matter on December 9, 2013. On January 22, 2014, I ordered the parties to submit briefs addressing whether OEA had jurisdiction in this matter in response to Agency's contention that Employee retired from her position after filing her Petition for Appeal.[1] The undersigned is in receipt of both parties briefs. After reviewing the record, I have determined that there are no material facts in dispute and therefore, a hearing is not warranted. The record is now closed.

JURISDICTION

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

[1] *See* Agency Answer, p. 3, Tab 4 (October 22, 2012).

ISSUE

Whether this Office may exercise jurisdiction over this matter.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> 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 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Employee asserts in her brief that she "opted to retire … because [she] had no other recourse to maintain some financial stability."[2] Employee's assertion that she retired raises a question as to whether OEA has jurisdiction over this appeal.

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:

> (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]. . . .

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to OEA Rule 621.1, *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."

This Office has no authority to review issues beyond its jurisdiction.[3] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[4] The issue

[2] Employee's Brief at p. 1 (March 4, 2014).

of an Employee's voluntary or involuntary retirement 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.[5] Furthermore, OEA has consistently held that it lacks jurisdiction to adjudicate a voluntary retirement.[6]

However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.[7] A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[8] The Employee must prove that her retirement was involuntary by showing that (1) the retirement resulted from undue coercion or misrepresentation by Agency; (2) Employee relied upon such information when making her decision to retire; and (3) a reasonable person would have been misled by Agency's statements.[9]

Here, Employee contends that she opted to retire from DCPS because she "had no other recourse in order to maintain some financial stability."[10] While Employee faced the difficult choice between retiring or facing termination, I disagree with Employee's contention that she was forced to retire. In her brief, Employee acknowledges that she "opted" to retire in the face of financial uncertainty. The record shows that Agency provided Employee with a termination notice, which stated that her termination would be effective on August 16, 2012 and relayed information regarding appealing to OEA.[11] Nothing in the record or the termination notice indicates that Employee was threatened, coerced, deliberately misled, or given a *mandate to retire* by Agency (emphasis added).

Additionally, I find no credible evidence of misrepresentation, coercion, or deceit on the part of Agency in procuring the retirement of Employee. There is no evidence that Agency misinformed Employee about her option to retire; that she relied on Agency misinformation to her detriment; or that her retirement was tantamount to a constructive discharge. Additionally, Employee's choice to retire in the face of a seemingly unpleasant situation – financial hardship, instead of being terminated does not make Employee's retirement involuntary.[12]

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[3] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[4] *See Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[5] *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).
[6] *See* Deborah Gray-Avent v. D.C. Department of Human Resources, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2008); Adele LaFranque v. D.C. Public Schools, OEA Matter No. 2401-0032-10 (February 8, 2011); Curtis Woodward v. D.C. Public Schools, OEA Matter No. 2401-0029-10 (February 8, 2011).
[7] *Christie*, 518 F.2d at 587.
[8] *See Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed. Cir. 1984); *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995).
[9] *Covington*, 750 F.2d. at 942.
[10] Employee's Brief, p. 1 (March 4, 2013).
[11] Agency Answer, Tabs 2, 4 (October 22, 2012).
[12] The court in *Covington* held that "[t]he fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives does not make an employee's decision any less voluntary." *Covington,* 750 F.2d at 942.

Based on the foregoing, I find that Employee elected to voluntarily retire in lieu of being terminated.[13] Additionally, despite Employee's protestations, the fact that she chose to retire instead of continuing to litigate her claims voids OEA's jurisdiction over her appeal. As such, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this appeal.

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

[13] 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,* 518 F.2d at 587-588. (citations omitted).