

DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Andrew Johnson)	OEA Matter No. 1601-0215-11
Employee)	
)	Date of Issuance: May 20, 2014
v.)	
)	Joseph E. Lim, Esq.
D.C. Public School)	Senior Administrative Judge
Agency)	
Olekanma Ekekwe-Kauffman, Esq., Employee Representative		
Carl Turpin, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 9, 2011, Andrew Johnson (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public School’s (“Agency”) final decision to remove him from his position as a School Psychologist due to two consecutive years of a “Minimally Effective” IMPACT¹ rating. Employee’s termination was to be effective on August 12, 2011.

This matter was assigned to me on June 26, 2013. On July 19, 2013, I held a Prehearing Conference for the purpose of assessing the parties’ positions regarding this matter. At the conference, I ordered the parties to submit post conference briefs on the issue of jurisdiction based on their disclosure that Employee had retired in lieu of being terminated. After reviewing the record, I determined that there are no material facts in dispute and therefore a hearing is not warranted.

JURISDICTION

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

ISSUE

Whether this Office has jurisdiction over Employee’s Appeal.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The following facts are uncontroverted:

¹ IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.

1. Employee was employed as a School Psychologist by Agency for approximately seventeen (17) years.
2. On July 12, 2011, Agency gave Employee a letter informing him of its final decision to remove him from his position as a School Psychologist due to receiving two consecutive years of a “Minimally Effective” IMPACT rating. Employee’s termination was to be effective on August 12, 2011. (See Employee Exhibit A.)
3. The above Notice of Termination provided information as to Employee’s appeal rights, among which was that Employee had the right to appeal the termination to OEA. No mention was made that Employee’s appeal could be subsequently dismissed if the employee filed for retirement benefits.
4. Employee states that he also applied for and received unemployment benefits from August 7, 2011, to September 29, 2012. (See Employee Exhibit B.)
5. Employee filed his appeal with this Office on September 9, 2011².
6. Realizing that his unemployment benefits would end, Employee went to Agency’s Office of Human Resources (“OHR”) in May of 2012 to inquire about retirement. (See Declaration of Andrew Johnson.)
7. In filling out his retirement form, the word “Involuntary” was written. Employee asserted, and Agency did not deny, that it was an OHR personnel who wrote the word “Involuntary” on his form. Employee then signed the form and indicated that his retirement was to be effective on August 12, 2011. (See Employee Exhibit C.) Employee believed this meant that Agency deemed his retirement as involuntary. (See Declaration of Andrew Johnson.)
8. Pursuant to the District of Columbia Teachers’ Retirement Plan, involuntary retirement means the following:
 - Retirement benefits may be payable if the employee was involuntarily separated from service (unless the reason is for cause of misconduct or delinquency), and the employee has
 - 25 years of service, including at least five years as a DCPS teacher; or
 - 20 years of service, including a minimum of five years as a DCPS teacher, and you are at least age 50.(See Agency Exhibit 17, District of Columbia Teachers’ Retirement Plan Description, pgs. 27 and 76).

² In his brief, Employee claimed that he filed his appeal on September 3, 2011. However, the OEA date stamp says “September 9, 2011.”

9. Agency allowed Employee to retroactively retire before the effective date of the proposed adverse action. As a result of being granted involuntary retirement, Employee's separation type was retroactively changed from termination to retirement with the same separation date of August 12, 2011. The Notification of Personnel Action Standard Form 50 indicated the nature of action to be "Retirement-ILIA"³ with an effective date of August 12, 2011. (See Agency Exhibit 18 and 19, Personnel Action Forms.)
10. Employee began receiving his retirement pension.

Arguments of the Parties

Employee argues that when the word "Involuntary" was written on his retirement form, he was led to believe that his retirement was indeed involuntary. Employee further argues that "to the extent that the Agency's designation of my retirement application as 'Involuntary' was not in fact true, if so, I was misled and acted upon such information to my detriment. I have proceeded (sic) all my actions in justifiable reliance upon the information given to me by the Agency." (Declaration of Andrew Johnson.)

Employee goes on to state, "I also advised Mr. Greene and Ms. Reid (of Agency OHR) that I did not want to retire, but was forced to seek my retirement funds to survive on account of my loss of funds and the absence of future income possibility. I also discussed with them that it was my intent to litigate my wrongful termination and thereafter return to work at DCPS." (*Id.*)

Employee complains that no one at the Agency informed him that by retiring, he would be foregoing his right to proceed with his OEA appeal.

In its Jurisdiction Response Brief, Agency contends that Employee's retirement was voluntary as it was Employee who voluntarily submitted an application for retirement. In addition, Agency points out that Agency made no misrepresentations and that Agency had no legal obligation to inform Employee that retirement may preclude his appeal.

With regards Employee's contention that he had informed OHR that he was litigating the IMPACT determination, Agency said that it was a self-serving statement and totally irrelevant. Agency points out that OHR Benefit employees have nothing to do with whether an employee is terminated, nor do they have knowledge about appeal rights. Instead, the OHR Benefit personnel's task center on whether an employee is eligible for retirement and the type of retirement such employee is eligible for. Agency points out that as a union member, Employee should have discussed the consequences of retirement on his OEA appeal with a union representative or attorney. In addition, the District of Columbia Teachers' Retirement Plan Summary Plan Description specifically instructs all applicants for retirement to seek guidance from their union on issues involving collective bargaining rights. (Agency Exhibit 17, p. 65).

³ ILIA stands for "In Lieu of Immediate Action."

Agency also contends that Employee's claim of financial hardship because his unemployment benefits had run out does not negate the voluntariness of an employee's retirement.

Whether this Office has jurisdiction over Employee's Appeal.

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1 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: "[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."

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

This Office has no authority to review issues beyond its jurisdiction.⁴ Thus, issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁵ The law is well settled with this Office, that there is a legal presumption that retirements are voluntary.⁶ OEA therefore lacks jurisdiction to adjudicate appeals where an employee voluntarily retires in lieu of being terminated.

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 his or her retirement was involuntary by showing that: 1) the retirement resulted from undue coercion or misrepresentation by Agency; 2) the employee relied

⁴ See *Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992).

⁵ See *Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993).

⁶ 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. ___ ().

⁷ See *Saunders v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0259-09 (March 25, 2011).

⁸ 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.2d 937 (Fed. Cir. 1984).

upon such information when making their decision to retire; and 3) a reasonable person would have been misled by the agency's statements.⁹

The issue of whether an employee's retirement from DCPS was voluntary or involuntary has been dealt with by this Office in *Ross v. District of Columbia Pub. Sch.*, OEA Matter No. 2401-0208-10, *Opinion and Order on Petition for Review* (August 2, 2013), and *Williams v. District of Columbia Pub. Sch.*, OEA Matter No. 2401-0124-10, *Opinion and Order on Petition for Review* (September 18, 2013). Both matters involved an employee who claimed that his or her retirement should be deemed involuntary because he or she was faced with the unpleasant predicament of financial difficulty caused by the impending loss of their job and thus had to apply for retirement benefits.

In *Williams*, this Office held that the retirement was involuntary because it was the Agency who issued Employee's Personnel Action Form (Form 50) indicating that the personnel action taken was "Involuntary retirement-retire with pay" and said form was sanctioned and signed by the acting Director of Human Resources.

In *Ross*, this Office held that the employee's retirement was voluntary even though the employee signed a form with the Agency's letterhead where the word "involuntary" was handwritten by Agency personnel. In addition, the employee's official Notification of Personnel Action, Standard Form 50 provides "...Employee elected to retire on Discontinued Service Retirement." This Office noted that the only documentation of an involuntary retirement is the word "involuntary" handwritten on the document provided by the employee. This Office held that such is not proof of misinformation by Agency, and thus, the employee failed to prove that she involuntarily retired.

In the instant case, Employee admits that apart from marking his retirement as "Involuntary," Agency made no misrepresentations. Designating a retirement as "Involuntary" pursuant to the District of Columbia Teachers' Retirement Plan does not render his retirement a constructive removal. The said Retirement Plan makes it clear that its definition of involuntary retirement arises only if the employee was involuntarily separated from service other than for cause of misconduct or delinquency and said employee meets the age and service requirements for retirement. This does not establish that Agency coerced or mislead him regarding his retirement. I also note that employee's official Notification of Personnel Action, Standard Form 50 provides that the action taken was "Retirement." Based on Employee's own declaration, he elected to retire after he filed his appeal with this Office. (*See Declaration of Andrew Johnson.*) OEA has consistently held that a mere assertion of force or coercion or misinformation is not enough to prove that Employee involuntarily retired.¹⁰ As a result, lacking any such evidence, I find that Employee failed to

⁹ *Id.*

¹⁰ *Esther Dickerson v. Department of Mental Health*, OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006); *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); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05, *Opinion and Order on Petition for Review* (July 24, 2008); *Larry Battle, et al. 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 Orders on Petition for Review* (May 23, 2008); and *Michael Brown, et al. v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09, 1601-0013-09, 1601-0014-09, 1601-0015-09, 1601-0016-09, 1601-0017-09, 1601-0018-09, 1601-0019-09, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09,

establish that Agency deceived him or gave him misleading information.

In addition, the fact that Employee's unemployment benefits had run out or that he faced financial difficulties and whether this renders his retirement to be involuntary has been addressed by this Office. OEA has held that financial hardship is not sufficient to make a retirement rise to the level of involuntariness.¹¹ Similar to the employee in *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), Employee had the option of retiring or challenging the removal action taken against him by Agency. He chose to retire instead of standing firm and questioning the validity of the adverse action.

Lastly, Employee's complaint that Agency failed to inform him that if he retired he would waive his right to pursue his OEA appeal has been addressed by the D.C. Court of Appeals in *Bagenstose*. In *Bagenstose*, the Court stated the following:

We first consider Bagenstose's contention that his notice of the RIF failed to inform him that his retirement application would result in the loss of his right to appeal the RIF. The notice did not expressly state the consequence of the choices. As the administrative judge found, however, there was nothing in the notice that was incorrect or would have led a reasonable person to conclude that retirement was his or her only option. Thus, there was substantial evidence to support the administrative judge's finding that the notice did not mislead Bagenstose into retiring.¹²

In conclusion, I find that Employee elected to voluntarily retire in lieu of being terminated. Agency submitted Employee's Personnel Action Form (Form 50),¹³ which reflects that Employee chose to retire. Furthermore, Employee has not offered any evidence to indicate that his retirement was a result of misinformation or deception on Agency's part. Because Employee voluntarily retired retroactively prior to being terminated, I am unable to address the merits of his appeal before this Office. Accordingly, Employee's petition for appeal must be dismissed.

ORDER

It is hereby ORDERED that Employee's appeal is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

¹¹ *Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96 (August 20, 1998); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05 (July 24, 2008); *Esther Dickerson v. Department of Health*, OEA Matter No. 2401-0039-03 (May 17, 2006); and *Frances Simmons v. D. C. Public Schools*, OEA Matter No. 2401-0030-10 (April 30, 2013).

¹² *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1158 (DC 2005).

¹³ Agency Exhibit 19 to Agency Jurisdiction Response Brief