THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BERTINA ADKINSON,	)	
Employee	)	OEA Matter No. 2401-0012-11
	)	
v.	)	Date of Issuance: February 12, 2013
	)	
DISTRICT OF COLUMBIA HOMELAND SECURITY & EMERGENCY MANAGEMENT AGENCY,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge

Julianne Bongiorno, Union Representative
Andrea Comentale, Esq., Assistant Attorney General

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 21, 2010, Bertina Adkinson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Homeland Security and Emergency Management Agency's ("HSEMA" or the "Agency") action of abolishing her last position of record through a Reduction-In-Force ("RIF"). Employee's last position of record with HSEMA was an Emergency Video Interoperability for Public Safety ("VIPS") Technician. According to the Retention Register created as part of the RIF, Employee's competitive Area was HSEMA and her competitive level was DS-0303-06-18-N. According to the Agency in its Answer, this entire competitive level was abolished pursuant to the instant RIF. According to the RIF notice dated October 15, 2010, addressed to Employee and signed by HSEMA Director Millicent West, the effective date of the instant RIF was November 19, 2010.

The undersigned was assigned this matter on or about July 26, 2012. Thereafter, pursuant to an Order dated September 7, 2012, I required the parties to address, in writing, whether the instant RIF was properly conducted by affording Employee herein one round of

lateral competition and thirty (30) days written notice prior to the effective date of the RIF. Moreover, this order also required the parties to address whether the OEA may exercise jurisdiction over this matter if Employee elected to retire or resign. The parties have since submitted their briefs in compliance with the aforementioned Order. Employee noted in her brief that "she retired on November 19, 2010, believing it was the only way to financially survive the RIF."[1] After considering the parties arguments along with the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

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

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]. . . .

[1] Employee's Brief at 2 (November 21, 2012).

This Office has no authority to review issues beyond its jurisdiction.[2] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[3] The issue of an Employee's voluntary or involuntary retirement has been adjudicated on numerous occasions by this Office. OEA has consistently held that, there is a legal presumption that retirements are voluntary.[4] Furthermore, I find that 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.[5] A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[6] The employee must prove that his/her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he/she relied when making his/her decision to retire. He/she must also show "that a reasonable person would have been misled by the Agency's statements."[7]

Employee contends that her retirement was not voluntary because HSEMA did not give her prior warning as to the consequence of depriving herself of the opportunity of having her matter adjudicated by the OEA. Employee also notes that she only retired because the RIF took away her sole source of income.[8]

Despite Employee's argument to the contrary, I find no *credible* evidence of misrepresentation or deceit on the part of the Agency in procuring the retirement of Employee. There is no evidence that Agency misinformed Employee about her option to retire. Employee's misinterpretation of the options in the RIF Notice is of her own doing and not the Agency's. Based on the foregoing, I find that Employee's retirement was voluntary.[9] Moreover, Employee's admits that her last position of record was her sole source of income and that she did not want to jeopardize that by allowing the RIF to take place without her first retiring from service. It is regrettable that Employee was faced with this difficult financial decision. However, I find that given the instant circumstances, Employee's retirement was voluntary. As such, I further find that this Office lacks jurisdiction over this matter, and for this reason, I am

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[2] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[3] *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).
[4] *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).
[5] *Id*. at 587.
[6] *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).
[7] *Id.*
[8] Employee's Brief at 3 (November 21, 2012).
[9] 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).

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:

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ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE