THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FRANCES SIMMONS,	)	OEA Matter No. 2401-0030-10
Employee	)	
	)	Date of Issuance: April 30, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Frances Simmons ("Employee") worked as a Special Education Teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 8, 2009. She argued that she was more qualified, had more seniority, and experience than those who were not subjected to the RIF. Employee also provided that she participated in after-school activities. As a result, she requested to be reinstated to her position.[2]

In its answer to Employee's Petition for Appeal, Agency explained that it conducted the

[1] *Petition for Appeal*, p. 6 (October 8, 2009).
[2] *Id.* at 3-5.

RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It argued that pursuant to 5 DCMR § 1501, Eastern Senior High School ("Eastern") was determined to be a competitive area, and under 5 DCMR § 1502, the Special Education Teacher position was the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principle of Eastern rated each employee through the use of Competitive Level Documentation Forms ("CLDF"), utilizing the weight of each competitive factor, as defined in 5 DCMR § 1503.2. After discovering that Employee was one of the lowest ranked employees in her competitive level, Agency provided her a written thirty-day notice that her position was being eliminated. Therefore, Agency believed the RIF action was proper.[3]

Before the OEA Administrative Judge ("AJ") issued her Initial Decision, she held a Pre-hearing Conference on December 19, 2011. Employee revealed during this conference that she retired from her position in lieu of being RIFed. As a result, the AJ subsequently ordered her to submit a legal brief addressing whether her appeal should be dismissed for lack of jurisdiction, but Employee did not respond to the AJ's order.[4]

Thereafter, an Initial Decision was issued on January 20, 2012. The AJ considered Employee's contention during the Pre-hearing Conference that her retirement was involuntary, but she found that no credible evidence was submitted to support her claim. The AJ held that a retirement is considered involuntary when an employee shows that the retirement was obtained through misinformation or deception by the agency.[5] Since Employee presented no evidence of

[3] *Agency's Answer to Employee's Petition for Appeal* (December 17, 2009).
[4] *Order on Jurisdiction* (December 19, 2011).
[5] The AJ cited to *Cecil E. Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995) and *Elias Covington v. Department of Health & Human Services*, 750 F.2d 937 (Fed. Cir. 1984) and explained that Employee needed to prove that her retirement was involuntary by showing that the retirement resulted from undue coercion or misrepresentation. Further, Employee needed to show that a reasonable person would have been misled by the statements.

misrepresentation or deceit, the AJ held that her retirement was voluntary, and her decision to retire voided OEA's jurisdiction over the appeal. Additionally, the AJ held that Employee's failure to respond to the Order to submit legal briefs was cause for her appeal to be dismissed. Accordingly, the matter was dismissed for lack of jurisdiction and Employee's failure to prosecute her appeal.[6]

On February 24, 2012, Employee filed a Petition for Review with the OEA Board. She asks for the record to be reopened so that she can respond to the AJ's December 19, 2011 Order.[7] She argues that the retirement was not voluntary but a necessity because she had no other reasonable alternative. Employee believes that she was coerced into retirement.[8] Therefore, she argues that her retirement should be considered involuntary. [9]

In Agency's response to Employee's Petition for Review, it asserted that the Petition failed to state permissible grounds for review by the Board. Agency argues that Employee's failure to respond to the AJ's order is not a permissible ground for review.[10] Additionally, it states that Employee's request for reinstatement must be denied because OEA lacks jurisdiction over her appeal. It contends that Employee's retirement was voluntary, and it did not coerce, mislead, or deceive Employee.[11] Thus, Agency requests that the Board affirm the Initial Decision; dismiss Employee's Petition for Review; rule that OEA lacks jurisdiction to hear her

[6] *Initial Decision,* p. 2-3 (January 20, 2012).
[7] Employee's counsel explains that her failure to respond to the order was not intentional. Employee requests to reopen the matter to present facts that would have been available had her evidence and arguments been timely submitted.
[8] Employee explains that the one round of lateral competition was non-competitive and the low rating on her CLDF was based on biased and unsupported allegations. Further, Employee states that the principle who gave her the low rating had previously rated her performance as "satisfactory." She believes that she was unable to rebut the information provided on the CLDF and that the information was career destroying. Consequently, because she suffered financially and emotionally, Employee believes that she had no recourse but to retire.
[9] *Petition for Review and Request for Reinstatement* (February 24, 2012).
[10] It explained that under OEA rules, Employee's petition must set forth specific objections to the Initial Decision.
[11] Agency provided that in Employee's RIF notice, it informed her that if she chose to retire, she may not have the option to appeal her termination to OEA. Furthermore, it provided that if she had any questions regarding retirement, she could contact the Human Resources Help Line.

appeal because she retired in lieu of the RIF action; and declare that its RIF action was proper.[12]

In accordance with OEA Rule 629.2, Employee has the burden of proving issues of jurisdiction, including the timeliness of her filing. Moreover, the D.C. Official Code has established those matters over which OEA has jurisdiction to consider. D.C. Official Code § 1-606.03 provides that

> an employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which 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.

Although this case does involve a RIF action, Employee concedes that she chose to retire in lieu of the RIF. However, she provided several reasons during the Pre-hearing Conference and in her Petition for Review why her retirement should be deemed involuntary.

According to *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995), 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. OEA has consistently held that the burden, therefore, rests on employees to show that they involuntarily retired.[13] Such a showing would constitute a constructive removal

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[12] *District of Columbia Public Schools' Response to Employee's Petition for Review and Request for Reinstatement* (March 29, 2012).

[13] *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-

and allow OEA to adjudicate Employee's matter.

Employee argued that she had no other reasonable alternative and believed that she was coerced into retirement.[14] However, a mere assertion of coercion is not enough to prove that Employee involuntarily retired.[15] As the AJ held, Employee failed to establish that Agency deceived her or gave her misleading information.

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 her by Agency. She chose to retire instead of standing firm and questioning the validity of the RIF. As for Employee's claim that she would suffer financially as a result of the RIF, OEA has held that financial hardship is not sufficient to make a retirement rise to the level of involuntariness.[16]

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 Employee's retirement. Employee failed to establish that Agency coerced her or gave her misleading information. Similar to the employees in *Jenson* and *Christie*, Employee had the option to retire or stand pat and challenge the action taken against her by Agency. Because she failed to prove that she involuntarily retired from Agency, Employee's Petition for Review is DENIED.

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, 1601-0019-019, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09, 1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

[14] *Petition for Review and Request for Reinstatement*, p. 4 (February 24, 2012).

[15] *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, 1601-0019-019, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09, 1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

[16] *Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96, August 20, 1998.

ORDER

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

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
Necola Y. Shaw

_____
Alvin Douglass

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.