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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOSEPH O'ROURKE,	)	
Employee	)	OEA Matter No. 1601-0310-10
	)	
v.	)	
	)	Date of Issuance: January 22, 2015
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Joseph O'Rourke ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency"). On March 19, 2010, Agency issued a final notice of adverse action removing Employee from his position for "willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing."[1] The effective date of removal was May 7, 2010, at 4:00 p.m.[2]

[1] Specifically, Employee was charged with offering a statement that he "did not know whether or not [he] had retired from the [New York Police Department] NYPD on a medical disability, knowing that to be untrue." *Petition for Appeal,* Attachment #2 (May 10, 2010).
[2] *Id.* at Attachment #1.

On May 10, 2010, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that Agency violated the 90-day rule; it failed to provide evidence to support the charge; and its findings were contradictory.[3] Accordingly, he requested that Agency's action be reversed; that he be reinstated to his position with back pay and benefits; and that he be awarded attorney's fees.[4]

Agency responded on May 27, 2010, by filing the entire record that it relied on to make its decision to remove Employee. Included in the filing was the Agency Trial Board transcript. Copies of Employee's employment application and documents from his time with the NYPD were also included.[5]

Before the OEA Administrative Judge ("AJ") issued his Initial Decision in this matter, the parties submitted Pre-hearing Statements and Briefs. Employee explained that prior to his termination, he was injured on July 1, 2007, while chasing a carjacking suspect. As a result of the injury, he was placed in a limited-duty, administrative position within Agency. On July 8, 2008, Agency referred Employee to the Police and Firefighter's Retirement Board for consideration of disability retirement benefits. However, before a decision was issued on Employee's disability retirement action, Agency issued its final decision to terminate him. Employee claimed that on August 26, 2010, the Retirement Board finally issued its decision denying him disability retirement as a result of his termination action on May 7, 2010. Employee subsequently appealed the Retirement Board's decision to the D.C. Court of Appeals which reversed the Retirement Board's decision and remanded it for further consideration.[6]

On February 14, 2013, Employee submitted a brief which provided that the Retirement

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[3] Employee was also charged with fraud. However, Agency found him not guilty of committing fraud and guilty of making a false statement. It is Employee's position that these findings contradict each other.
[4] *Petition for Appeal,* p. 3 (May 10, 2010).
[5] *Agency's Response to Employee's Petition for Appeal* (May 27, 2010).
[6] *Pre-hearing Statement of Employee,* p. 1-5 (August 29, 2012).

Board issued its final decision on his disability retirement. He asserted that in accordance with the final order, he was retroactively retired on May 7, 2010, thereby, nullifying his termination action which was effective on the same day. Employee contended that because Agency initiated the disability retirement process, then his retirement was involuntary. He provided that Agency unlawfully terminated him while his disability retirement action was pending. Therefore, the termination action was not in accordance with law or regulation, and there was harmful procedural error committed. As a result, Employee argued that he was the prevailing party in this matter and requested that OEA award him attorney's fees.[7]

The AJ issued an Order on March 4, 2013. He requested that both parties brief whether Employee voluntarily retired from his position based on the ruling in *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975), that for a retirement to be deemed involuntary, the employee must show that agency imposed undue coercion, misrepresentation, or mistaken information.[8] Employee filed his response on March 18, 2013, and explained that in accordance with D.C. Official Code § 5-710, his retirement was involuntary because it was the result of a disability action that Agency initiated. He submitted several Court of Appeals cases which provided that when a disability retirement action is initiated by Agency, the burden is on it to prove that Employee is unable to perform useful and efficient service. Employee argued that this is different than the standard provided in *Christie*.[9]

Agency issued its response on April 2, 2013. It claimed that Employee's disability retirement is presumed to be voluntary because Employee failed to show that it was the result of coercion or misrepresentation. Consequently, Agency argued that OEA lacked jurisdiction to

[7] *Notice of Filing and Motion for Issuance of Initial Decision,* p. 7-10 (February 14, 2013).
[8] *Order* (March 4, 2013).
[9] *Brief of Employee in Response to Order Issued on March 4, 2013* (March 18, 2013).

adjudicate Employee's appeal.[10]

On October 1, 2013, the AJ issued his Initial Decision on this matter. He ruled that Employee's disability retirement was voluntary because he failed to offer proof of coercion or misrepresentation. He further ruled that Employee went through great legal mechanisms to secure his disability retirement which voided OEA's jurisdiction. The AJ held that because OEA lacks jurisdiction over voluntary retirements, Employee's appeal must be dismissed for lack of jurisdiction.[11]

Employee filed a Petition for Review on October 25, 2013. He raised many of the same arguments that were raised in his March 18, 2013 brief. Additionally, he argues that the Initial Decision was based on inaccurate facts because the AJ inaccurately insisted that he "instigated" the disability retirement action. Moreover, Employee contends that the AJ misunderstood the disability retirement law and utilized an improper analogy to conclude that his retirement was voluntary. Further, he claims that OEA does have jurisdiction over Agency's termination action. Finally, he alleges that OEA has the ability to award attorney's fees in this matter. Accordingly, Employee is requesting back pay from the effective date of his disability retirement – May 7, 2010 – until February 6, 2013.[12]

On November 29, 2013, Agency filed its Response to Employee's Petition for Review. It argued that OEA lacked jurisdiction because Employee voluntarily retired. Agency also contends that the AJ properly relied on the employment law determination of voluntary versus involuntary retirement. It provides that OEA is not required to follow the Retirement Board's determination of an involuntary retirement. Additionally, Agency claims that the lawfulness of Employee's termination is moot. Finally, it asserts that Employee is not the prevailing party and

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[10] *Agency's Brief in Response to Order Issued on March 4, 2013* (April 2, 2013).
[11] *Initial Decision* (October 1, 2013).
[12] *Petition for Review* (October 25, 2013).

is, therefore, not entitled to attorney's fees.[13]

Substantial Evidence

According to OEA Rule 633.3(c) and (d), the Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence, or the initial decision did not address all material issues of law and fact properly raised in the appeal. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] After a review of the record, it does not appear that the AJ's decision is based on substantial evidence. Moreover, Employee raised an argument on appeal regarding the standard of review of disability retirement actions that the AJ failed to adequately address.

Disability Retirement Standard

Employee argued on appeal that a different standard is used to determine OEA's jurisdiction over disability retirement claims.[15] Without adequately considering Employee's

[13] *Agency's Brief in Opposition of Employee's Petition for Review* (November 29, 2013).
[14] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[15] Employee provides several D.C. Court of Appeals' decisions that establish that disability retirements are involuntary when initiated by an agency. Although this is accurate, it is not conclusively applicable in the current matter because the Court of Appeals' decisions cited apply only to the Police Retirement Board determining the outcome of a disability retirement action. These matters do not consider OEA's jurisdiction over disability retirement claims.

The cases cited by Employee offer insight to the Police Retirement Board from the D.C. Court of Appeals as it relates to disability retirement matters. The Court held in *Adgerson v. Police & Firefighters' Retirement and Relief Board*, 73 A.3d 985 (D.C. 2013), that as it related to disability retirements, the burden is on the police department to prove that a disability exists when the department recommends an employee's retirement. The Court (citing *Alexander v. District of Columbia Police & Firefighters' Retirement and Relief Board*, 783 A.2d 155, 158 (D.C.2001)) ruled that the department must not only show that the employee is disabled for useful and efficient service as a police officer, but it must also show that there were no other positions in the Department in the grade or class of position that employee last occupied for which he could provide useful and efficient service. However, there is no clear indication that the involuntary nature of disability retirement cases is applicable to OEA decisions on jurisdiction.

claims, the AJ ruled that OEA lacked jurisdiction over disability retirements because of the holding in *Christie*. However, as the Merit Systems Protection Board ("MSPB") provides, the ruling in *Christie* is not the proper standard to determine jurisdiction on disability retirement matters.

Jurisdiction and Disability Retirement

Before OEA can adjudicate any appeal, it must determine if it has jurisdiction to consider the matter. As the AJ provided, typically, OEA has relied on *Christie* and held that for a retirement to be considered involuntary, an employee must establish that the retirement was due to Agency's coercion or misinformation upon which they relied. OEA has held that the burden, therefore, rests on employees to show that they involuntarily retired. Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter.[16]

MSPB takes the same position on traditional retirement matters. In *Vaughan v. Department of Agriculture*, 116 M.S.P.R. 493 (2011), MSPB held that generally, "an appellant may overcome the presumption that a resignation or retirement is voluntary by showing that it resulted from misinformation or deception by the agency or was the product of coercion by the agency." It asserted that the touchstone of the voluntariness analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him of freedom of choice. Thus, in order to establish involuntariness on the basis of coercion, MSPB found that an appellant must show that the agency effectively imposed the

[16] *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).

terms of the retirement, that the appellant had no realistic alternative but to retire, and that the appellant's retirement was the result of improper acts by the agency.

However, as Employee contends on appeal, disability retirements are different and present a unique set of facts that the AJ failed to consider. MSPB ruled in *Vaughn* that a "different approach [must] be taken when addressing the question of voluntariness in the context of a disability retirement." Specifically, it held that "to invoke [its] jurisdiction in such a case, the appellant must raise non-frivolous allegations that, if proven, would show that an accommodation was available between the time the appellant's medical condition arose and the date of his separation that would have allowed him to continue his employment; [that] the appellant communicated to the agency his desire to continue working but that his medical limitations required a modification of his working conditions or duties; and [that] the agency failed to provide the appellant that accommodation (citing *Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415 (2001); *Nordhoff v. Department of the Navy*, 78 M.S.P.R. 88 (1998), aff'd, 185 F.3d 886 (Fed.Cir.1999), and clarified by *Rule v. Department of Veterans Affairs*, 85 M.S.P.R. 388 (2000)."[17] The MSPB's rationale for this approach is that "an appellant who meets the statutory requirements for disability retirement has no true choice between working (with or without accommodation) and not working . . . ." It further reasoned that "an employee who is unable to work because of a medical condition that cannot be accommodated simply does not have such a choice." As a result, retirement on the basis of a disability has to be analyzed differently than a typical retirement action, as Employee argued.

OEA has historically relied on MSPB for guidance on issues of first impression. MSPB clearly provides that there is an alternate standard which must be utilized when determining if it

[17] The MSPB also held this ruling in *Handy v. Department of the Army*, 82 M.S.P.R. 683 *and Lorenz v. U.S. Postal Service*, 84 M.S.P.R. 670 (2000).

has jurisdiction over an appeal which also involved a disability retirement action. Hence, the approach by the AJ to utilize the ruling in *Christie* was an error, as Employee contends. The Initial Decision did not consider the proper standard to determine jurisdiction in this case. Therefore, it is not based on substantial evidence and did not address all material issues of law or fact. Because there is more information required by the parties to make a decision on the voluntary nature of Employee's disability retirement, we must remand the matter to the AJ for the limited purpose of further consideration of this issue.[18]

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[18] As for Employee's position on being the prevailing party and his request for attorney's fees, this Board believes that such claims are misguided and not ripe for review. Despite Employee's contention to the contrary, OEA can only award attorney's fees for the work performed before OEA. It is not authorized to award attorney's fees for work conducted before the Police Retirement Board or the Court of Appeals. The D.C. Court of Appeals, in *Frazier v. Franklin Investment Company, Inc*., 468 A.2d 1338 (1983), held that the determination of the reasonableness of an award is within the sound discretion of the trial court. It reasoned that the trial court has a superior understanding of the litigation (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1941 (1983)). In this current matter, those decisions made by the Retirement Board and the Court of Appeals are within their discretion because only they have an understanding of the effort made during the course of litigation. OEA cannot, therefore, award an amount for attorney's fees based on another agency or court's litigation.

As for attorney's fees for the work performed before OEA, attorney's fees are only awarded after a determination has been made that Employee is the prevailing party in the matter. In accordance with D.C. Official Code §1-606.08, an Administrative Judge ". . . may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice." Similarly, OEA Rule 634.1 provides that "an employee shall be entitled to an award of reasonable attorney fees if: (a) he or she is a prevailing party; and (b) the award is warranted in the interest of justice." Because OEA is still trying to establish its jurisdiction over his appeal, it is too soon for Employee to be considered the prevailing party in this matter.

Additionally, Employee's argument that OEA can award back pay for a period that was determined by the Police Retirement Board is also misplaced. Back pay is awarded by OEA from the time an Employee was improperly terminated until a decision by OEA is made. Therefore, Employee cannot request that OEA award back pay for a period related to the Retirement Board's decision. As the AJ provided, because Employee's termination action was voided by the effective date of his disability retirement, then the termination action is nullified. Hence, there is no termination action to appeal to OEA and the merits of such action cannot be considered. Employee was provided disability benefits from May 7, 2010. OEA has held that an Employee is not entitled to back pay during the time they were receiving disability benefits. *See Velerie Jones-Coe v. Department of Human Services,* OEA Matter No. 1601-0088-99C09R11, *Opinion and Order on Petition for Review* (July 24, 2014). Therefore, the only issue that must be clarified for the record is the standard the AJ used to determine the voluntary nature of his disability retirement. Accordingly, this matter is remanded to the AJ for that limited basis.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is granted, and the matter is REMANDED to the Administrative Judge for further findings.

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

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A. Gilbert Douglass

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Patricia Hobson Wilson

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.