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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DANIEL WONG Employee	OEA Matter No. J-0005-06
v.	Date of Issuance: April 12, 2006
OFFICE OF THE INSPECTOR GENERAL	Sheryl Sears, Esq. Administrative Judge
Agency	

Daniel Wong, Employee, *Pro Se*
Pamela L. Smith, Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

The following facts are undisputed: Employee was a Senior Auditor. On September 16, 2005, Agency issued a notice of proposal to remove him upon the charge of incompetence effective on October 4, 2005. Employee was ordered, by agency officials, to surrender his credentials, badge, office keys and other work materials. Employee retired on September 30, 2005, in lieu of separation.

Employee filed an appeal on October 11, 2005. On February 13, 2006, this Judge ordered Employee to submit a written statement of the reasons why his appeal should not be dismissed for lack of jurisdiction. Employee made his submission on March 22, 2006. On April 3, 2006, Agency submitted a responsive brief. The details of their arguments are set forth in the "Analysis and Conclusion" section below.

JURISDICTION

The jurisdiction of this Office over this appeal has not been established.

ISSUES

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9297 (1999), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction . . ." The burden of proof is by a "preponderance of the evidence." In accordance with OEA Rule 629.1, a "preponderance of the evidence," is "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." In order to invoke the jurisdiction of this Office, Employee must show that it is more likely true than untrue that his retirement was involuntary.

ANALYSIS AND CONCLUSIONS

The Office of Employee Appeals was established by the D.C. Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979, D.C. Law 2-139, D.C. Code § 1-601.01 *et seq.*, and has only that jurisdiction conferred upon it by law. In accordance with applicable law, OEA Rule 604.3, 46 D.C. Reg. at 9313, provides that the Office shall exercise jurisdiction over appeals filed before October 21, 1998, by an employee appealing a final agency decision that "effects an adverse action against him or her. . . ." Employee claims that he was removed and seeks to invoke the jurisdiction of this Office.

There is a presumption in the law that a retirement is voluntarily. However, an involuntary retirement is treated as a constructive removal and is within the jurisdiction of this Office. *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975) and *Charles M. Bagenstose v. D.C. Public Schools,* OEA Matter No. 2401-0224-96 (October 23, 2001), ___ D.C. Reg. ___ ( ). A retirement is only considered involuntary when it has been "obtained by agency misinformation or deception" or an employee chooses it under duress. *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). To prove that a retirement was involuntary, an employee must present evidence that Agency officials coerced him or gave him misinformation upon which he relied in making the decision to retire.

Employee contends that his retirement was the "product of undue coercion imposed by the management and supervisors of the Office of the Inspector General." According to Employee, before a change in management in 2000, he received high performance ratings. Employee claims that Agency officials retaliated against him after he filed a complaint of discrimination based upon his Chinese ethnicity in approximately February, 2004 by "giving him unsatisfactory performance ratings using improper rating methodology," "canceling requested training designed to improve his allegedly deficient job performance," and "creating a hostile working environment to destroy his confidence, professionalism and morale, which caused massive depression requiring treatment from a psychiatrist and psychologist."

Agency responds that Employee's retirement was a voluntary choice that he made in the face of his proposed removal. Agency states, "The employee had a choice between retirement and being subjected to removal. "Simply stated, the fact that the employee was subject to removal does not make his retirement involuntary." In arguing that Employee's retirement was voluntary, Agency set forth the criteria relied upon by the Court in *Keyes v. District of Columbia*, 372 F.3d 434 (D.C. Cir. 2004). The Court stated that for a resignation to be found involuntary due to duress, these circumstances must exist: "(1) an agency imposes the terms of an employee's resignation, (2) the employee's circumstances permit no alternative but to accept, and (3) those circumstances were the result of improper acts of the agency." *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed Cir. 1987); see *Edgerton v. Merit Systems Protection Board*, 768 F.2d 1314, 1317 (Fed. Cir. 1985). The Court in *Shultz* noted that "where an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act." Id. At 1136.

Employee has alleged events that would surely the workplace uncomfortable. However, all of Employee's challenges, including the alleged use of improper rating methodology, the cancellation of job-related training, racial discrimination and the hostile work environment are outside of the jurisdiction of this Office. Moreover, none of these allegations, even if proven, are grounds for concluding that Employee was coerced into retiring. Agency does not deny proposing Employee's removal or requiring that he relinquish control of work materials. However, Employee has proffered no evidence that any agency official imposed terms upon him that called for his retirement.

Employee could have accepted the decision of Agency to separate him and challenged it head-on in an appeal before this Office. Although that would have been an emotionally and financially challenging choice to live out, it was one of the choices available to Employee. While this Judge looks with empathy at the dilemma that Employee faced, the law is clear. In an appeal where an Employee voluntarily chooses to retire, this Office has no jurisdiction.

In the instant matter, Employee chose to retire. This Office has no jurisdiction over his appeal. Therefore, it must be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE:

Sheryl Sears, Esq.
Administrative Judge