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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. 1601-0310-10R15
	)	
v.	)	
	)	Date of Issuance: January 24, 2017
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON REMAND

This matter has been before this Board previously. Joseph O’Rourke (“Employee”) worked as a Police Officer with the Metropolitan Police Department (“Agency”). The effective date of Employee’s removal was May 7, 2010.<sup>1</sup> On May 10, 2010, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”).<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> *Petition for Appeal*, Attachment #1 (May 10, 2010).  
<sup>2</sup> *Id.*, at 3.  
<sup>3</sup> *Agency’s Response to Employee’s Petition for Appeal* (May 27, 2010).

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 the disability case for further consideration.<sup>4</sup>

On February 14, 2013, Employee submitted a brief which provided that the Retirement 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.<sup>5</sup>

The AJ issued an Order on March 4, 2013 requesting 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

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<sup>4</sup> *Pre-hearing Statement of Employee*, p. 1-5 (August 29, 2012).

<sup>5</sup> *Notice of Filing and Motion for Issuance of Initial Decision*, p. 7-10 (February 14, 2013).

must show that agency imposed undue coercion, misrepresentation, or mistaken information.<sup>6</sup> 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.<sup>7</sup>

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, Employee contended that the AJ misunderstood the disability retirement law and utilized an improper analogy to conclude that his retirement was voluntary. Further, he claimed that OEA did have jurisdiction over Agency's termination action. Accordingly, he requested back pay from the effective date of his disability retirement – May 7, 2010 – until February 6, 2013.<sup>8</sup>

On November 29, 2013, Agency filed its Response to Employee's Petition for Review. It argued that OEA lacked jurisdiction because Employee voluntarily retired. It provided that OEA was not required to follow the Retirement Board's determination of an involuntary retirement. Additionally, Agency claimed that the lawfulness of Employee's termination is moot.<sup>9</sup>

The OEA Board issued its Opinion and Order on January 22, 2015. It provided that

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<sup>6</sup> *Order* (March 4, 2013). 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. Brief of Employee in Response to Order Issued on March 4, 2013* (March 18, 2013).

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 adjudicate Employee's appeal. *Agency's Brief in Response to Order Issued on March 4, 2013* (April 2, 2013).

<sup>7</sup> *Initial Decision* (October 1, 2013).

<sup>8</sup> *Petition for Review* (October 25, 2013).

<sup>9</sup> *Agency's Brief in Opposition of Employee's Petition for Review* (November 29, 2013).

typically OEA 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. However, the Board stated that disability retirements are different and present a unique set of facts that the AJ failed to consider. The Board relied on the Merit Systems Protection Board's ("MSPB") ruling in *Vaughan v. Department of Agriculture*, 116 M.S.P.R. 493 (2011) and reasoned that a "different approach [must] be taken when addressing the question of voluntariness in the context of a disability retirement."

MSPB's rationale in *Vaughn* was 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. Hence, the Board held that the approach by the AJ to utilize the ruling in *Christie* was an error and that the Initial Decision did not consider the proper standard to determine jurisdiction in this case. Therefore, the matter was remanded to the AJ for further consideration of this issue.<sup>10</sup>

On June 22, 2015, the AJ issued his Initial Decision on Remand. He highlighted that Employee's position changed from contesting his retirement to contesting his removal, which he alleged was done in concert with Agency and the Retirement Board. The AJ held that OEA was unable to provide Employee any relief in this matter. He reasoned that because Employee was placed on disability retirement on the same day of his removal, OEA's enabling statute does not allow for Employee to recover anything under the circumstances. The AJ also noted that

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<sup>10</sup> *Joseph O'Rourke v. Metropolitan Police Department*, OEA Matter No. 1601-0310-10, *Opinion and Order on Petition for Review* (January 22, 2015).

Employee did not believe that the *Vaughn* case was applicable. Accordingly, he ordered that the matter be dismissed for lack of jurisdiction.<sup>11</sup>

On Petition for Review, Employee argues that the Board's reliance on *Vaughn* was inapplicable. He argues that once the disability retirement process started, Agency had an obligation to complete it. Therefore, he contends that Agency violated the process by removing him before the disability retirement procedure was complete. Employee asserts that he only received forty percent of his pay from May 2010 until February 2013. It is his position that he would have received his entire pay if he was not wrongfully removed by Agency.<sup>12</sup> Therefore, he requested that OEA award back pay for that time period.<sup>13</sup>

On August 26, 2015, Agency filed its response to Employee's Petition for Review. It argues that OEA is not the proper forum to adjudicate Employee's claims. Moreover, it provides that Employee's retirement was effective the same day as his termination action. Finally, Agency notes that Employee's retirement did not occur until after his disciplinary investigation was complete. Therefore, it requests that his Petition for Review be denied.<sup>14</sup>

Even if this Board assumes that Employee's retirement was involuntary, we still cannot address the merits of the action against him because according to the record, his disability retirement was back-dated to the effective date of the removal action. Employee does not dispute that he did retire from Agency. In Agency's original removal action, Employee was terminated effective May 7, 2010. However, after an order from the D.C. Court of Appeals, Agency made Employee's disability retirement effective on May 7, 2010, which was the

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<sup>11</sup> *Initial Decision on Remand* (June 22, 2015).

<sup>12</sup> In a subsequent filing, Employee explains that if Agency maintained him in a limited duty status pending his disability retirement, then he would have received full pay and benefits. *Employee's Reply Brief*, p. 3 (October 19, 2015).

<sup>13</sup> *Petition for Review* (July 22, 2015).

<sup>14</sup> *Agency's Brief in Opposition of Petition for Review* (August 26, 2015).

effective date of his removal action. OEA has previously held that retirements that occur after a removal action are valid.<sup>15</sup> In *Ella Cuff v. Department of General Services*, OEA Matter No. 1601-0009-12, *Opinion and Order on Petition for Review* (March 29, 2016), this Board reasoned that when a retirement action is back-dated to the effective date of Employee's termination action, it essentially nullifies the termination. As a result, OEA no longer has jurisdiction over the appeal because there is no adverse action.

Additionally, as Agency contends, OEA cannot award retirement pay as it relates to the Retirement Board's decision. Employee argues that he only received forty percent of his retirement pay from May 2010 through February 2013. Moreover, he contends that he should have remained in a limited duty status to receive his full retirement pay and benefits. However, as Agency contends, OEA is not the proper forum to address this issue. OEA lacks jurisdiction over the percent of retirement pay awarded to employees or their employment status while they progress through the disability retirement process.

The removal matter, over which OEA had jurisdiction, was nullified. Moreover, OEA lacks the authority to adjust retirement awards handled by the Retirement Board. Therefore, we must uphold the AJ's decision and deny Employee's Petition for Review.

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<sup>15</sup> *Hsiao Zen Lu v. Department of General Services*, OEA Matter No. J-0153-13 (November 25, 2013).

**ORDER**

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

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.