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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
CHARLOTTE CLIPPER,	)	OEA Matter No. 1601-0125-11
Employee	)	
v.	)	Date of Issuance: December 10, 2014
D.C. NATIONAL GUARD,	)	
Agency	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Charlotte Clipper (“Employee”) worked as a Supervisory Human Resources Specialist with the D.C. National Guard (“Agency”). On May 17, 2011, Employee received a notice of final decision from Agency providing that she would be removed from her position as the result of malfeasance,<sup>1</sup> insubordination,<sup>2</sup> and neglect of duty.<sup>3</sup> On June 28, 2011, Employee filed a

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<sup>1</sup> Employee was charged with misrepresenting Agency as a sponsor on her former supervisor’s application to extend his VISA with the U.S. Department of Immigration and Nationalization and the U.S. Department of Labor. It was Agency’s position that it did not sponsor Employee’s former supervisor nor did it assign, direct, or instruct Employee to serve in that capacity. Employee was also accused of providing false information on her former supervisor’s application to the United Nations International Civilian Police. Furthermore, Agency alleged that she allocated \$20,000 in salary increases for herself over a period of three years. Accordingly, she was charged with malfeasance for violating District Personnel Regulation (“DPR”) §1619.9 by threatening the integrity and security of Agency and D.C. government operations. *Agency’s Answer to Employee’s Petition for Appeal*, Tab B2 (August 24, 2011).

<sup>2</sup> Agency claimed that Employee failed to provide status reports requested by her supervisor. According to Agency, her responses were evasive, repetitive, and non-responsive. Thus, Employee was charged with insubordination in accordance with DPR §1619.6. *Id.*

<sup>3</sup> Finally, Employee was charged with neglect of duty for failing to properly categorize leave requests for other employees, which resulted in a break of service to the detriment of those employees. Agency also claimed that Employee incorrectly posted time and attendance for shift differential pay during the 2009 Presidential Inauguration, resulting in a loss of pay to employees. Moreover, Agency accused Employee of exposing District government employees’ personal information to unauthorized federal government employees. According to Agency, all three instances violated DPR §1619.6. *Id.*

Petition for Appeal with the Office of Employee Appeals (“OEA”). She argued that she was not aware that completing the forms for her former supervisor was a violation of any rules. Further, she provided that the claims regarding the \$20,000 in salary increases were false. She explained that no personnel changes could have occurred without the knowledge and approval from the Interim Director. As for the insubordination and neglect of duty charges, Employee similarly provided that those accusations were unfounded and without merit.<sup>4</sup>

Agency filed its Answer to Employee’s Petition for Appeal on August 24, 2011. It made many of the same arguments provided in its notice to remove Employee. Agency reasoned that because Employee was properly removed, OEA should dispose of the case on its merits.<sup>5</sup>

After reviewing the record, the OEA Administrative Judge (“AJ”) issued an order to Employee requesting that she submit a written statement regarding OEA’s jurisdiction. The AJ explained in the order that OEA may not have jurisdiction over her appeal because it was untimely filed. Employee had until September 12, 2011, to comply with the AJ’s order.<sup>6</sup>

On September 16, 2011, the AJ issued her Initial Decision in this matter. She explained that Employee did not submit the jurisdictional brief, as ordered. Moreover, she held that Employee filed her appeal more than thirty days after her effective date of her termination. Because the time limit for filings is mandatory, the AJ dismissed the case for lack of jurisdiction.<sup>7</sup>

Employee filed a Petition for Review of the Initial Decision on October 14, 2011. She asserted that she mailed her appeal to OEA on June 11, 2011, via certified mail.<sup>8</sup> Having not received the return receipt, Employee later learned that OEA moved to a new location, and she

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<sup>4</sup> *Petition for Appeal*, Attachment, p. 1-4 (June 28, 2011).

<sup>5</sup> *Agency’s Answer to Employee’s Petition for Appeal*, p. 1-4 (August 24, 2011).

<sup>6</sup> *Order Requiring Employee to Submit Written Statement Regarding OEA’s Jurisdiction* (September 2, 2011).

<sup>7</sup> *Initial Decision* (September 16, 2011).

<sup>8</sup> According to Employee, the receipt provided an expected delivery date of June 13, 2011.

was provided with the new address. She re-submitted her appeal and provided a letter outlining what occurred, along with the tracking receipt for the original filing.<sup>9</sup> Employee further argued that she responded to the AJ's jurisdiction order on September 7, 2011. She provided proof that her response was delivered on September 8, 2011. However, the document was not retrieved from the post office by OEA.<sup>10</sup>

In the Opinion and Order issued on February 5, 2013, the OEA Board conceded that when it relocated, it experienced some challenges receiving its mail. It held that Employee provided adequate proof that her appeal was mailed and should have been received by OEA within a timely manner. She also provided proof that she responded to the AJ's jurisdictional order in a timely manner. Thus, the Board vacated the Administrative Judge's Initial Decision and remanded the matter to her for a consideration of the case on its merits.<sup>11</sup>

The AJ requested briefs from both parties on the merits of the adverse action claims against Employee. However, before submitting its brief, Agency filed a Motion to Dismiss Employee's appeal. It provided that it was informed by the Federal Office of Personnel Management that Employee had been receiving retirement annuities since June 1, 2011. It was Agency's position that because Employee voluntarily retired, then OEA lacked jurisdiction to consider her appeal.<sup>12</sup>

Subsequently, the AJ requested that Agency file a copy of Employee's full personnel record and that Employee respond to the jurisdictional issue regarding her retirement.<sup>13</sup> Agency submitted Employee's personnel record on July 26, 2013. On August 5, 2013, Employee

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<sup>9</sup> *Petition for Review*, p. 1-2 (October 14, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Charlotte Clipper v. D.C. National Guard*, OEA Matter No. 1601-0125-11, *Opinion and Order on Petition for Review* (February 5, 2013).

<sup>12</sup> *Agency's Motion to Dismiss for Lack of Jurisdiction* (July 3, 2013).

<sup>13</sup> *Order Requiring Employee to Submit Written Statement Regarding OEA's Jurisdiction* (July 17, 2013).

responded to the jurisdictional issue by arguing that the effective date of her termination was May 20, 2011. She explained that she was in a paid status with Agency through the pay period ending on May 21, 2011. Employee contended that her retirement application was dated May 22, 2011, and she was not informed until July 8, 2011, that her retirement application was received.<sup>14</sup>

The AJ issued her Initial Decision on August 26, 2013. She held that Employee's personnel record included a copy of her retirement application and a letter from Employee dated May 22, 2011. However, the AJ found that the effective date of Employee's retirement was May 20, 2011. She reasoned that Employee's retirement was voluntary as evidenced by an Employee submission of an application for immediate retirement. Therefore, the AJ dismissed Employee's Petition for Appeal for lack of jurisdiction.<sup>15</sup>

On September 9, 2013, Employee filed a Petition for Review with the OEA Board. In her petition, she alleges that she did not apply for or receive approval for retirement prior to her termination. Additionally, Employee provided an overview of the procedural history of her case. It is her contention that the procedural history highlights Agency's violation of her employment rights.<sup>16</sup>

Employee does not present any arguments that contradict Agency's claim that she retired. It appears that the only argument presented before this Board to be addressed is Employee's claim that her retirement was not approved prior to her termination. When reviewing matters, this Board is tasked with determining if there is substantial evidence to support the AJ's ruling. After a review of the record, this Board has determined that there was substantial evidence to support the AJ's decision that Employee retired and that her retirement was voluntary. As will

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<sup>14</sup> *Employee's Response to Jurisdictional Order* (August 5, 2013).

<sup>15</sup> *Initial Decision*, p. 4-5 (August 26, 2013).

<sup>16</sup> *Petition for Review* (September 9, 2013).

be discussed below, the timing of the retirement should be less of a concern to Employee under the circumstance.

### Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. 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.<sup>17</sup>

### Retirement

As the AJ determined, Agency provided a copy of Employee's Application for Immediate Retirement along with a letter from Employee which requested that her application be processed immediately so there would be no interruption to her benefits.<sup>18</sup> Additionally, Agency provided a Certified Summary of Federal Service, Civil Service Retirement System. This form indicated that Employee's service computation date for retirement started on April 1, 1971, and her official service ended on May 20, 2011. The document further provides that the "information on this form accurately reflects verified information contained in official personnel and/or payroll records . . . ." It is signed by the Interim Director and Employee.<sup>19</sup> Finally, Agency provided a letter from the D.C. Department of Human Resources written to the Office of Personnel Management Retirement Systems. This document states that Employee would be transferred to the retirement system due to her retirement on May 20, 2011. The effective date

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<sup>17</sup>*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).

<sup>18</sup>*Agency Submission of Written Statement Regarding OEA's Jurisdiction*, p. 4 and 9-12 (July 26, 2013).

<sup>19</sup>*Id.*, 13-14.

of the letter is May 21, 2011.<sup>20</sup> Therefore, Agency adequately proved the Employee indeed retired.

### Voluntary Retirement

As the AJ ruled in the Initial Decision, OEA does not have jurisdiction over voluntary retirements. According to the ruling in *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 they relied. OEA has held that the burden, therefore, rests on employees to show that they involuntarily retired.<sup>21</sup> Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter. However, in the current matter, Employee did not present sufficient evidence to establish that her retirement was involuntary. She raised no claims of coercion or misinformation by Agency. Therefore, the AJ properly held that Employee's retirement was voluntary.

### Effective Date of Retirement

On Petition for Review, Employee argues that she did not retire before her termination date. This Board views this argument as extremely short-sighted. If Employee did not retire before the effective date of her termination, then she would not have been eligible for retirement

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<sup>20</sup> *Id.* at 5.

<sup>21</sup> *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).

benefits. It is clear from Agency's termination notice that the effective date of the removal action was May 20, 2011.<sup>22</sup> As provided above, Agency offered evidence that Employee's retirement began on May 20, 2011.<sup>23</sup> Thus, on its face, it would appear that Employee retired on day upon which the removal action was to have taken effect.<sup>24</sup>

If Employee's retirement occurred after the effective date of the removal action, then the holding provided in *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155 (D.C. 2005) would be applicable to this case. The employee in *Bagenstose* offered the same argument as that presented in the current case -- that he retired after the RIF action. The D.C. Court of Appeals held that "had he already been terminated from his employment via the RIF, he would have been ineligible to retire because he would no longer have been a government employee."<sup>25</sup> The same would apply in the current case. If Employee was terminated on May 20, 2011, she would not have been eligible to retire after that date as she contends. Following the reasoning in *Bagenstose*, Employee would have ceased being employed by the District government when the removal was effectuated – May 20<sup>th</sup>.<sup>26</sup>

### Conclusion

In the end, the date of Employee's retirement has no bearing on the fact that she voluntarily retired. The AJ properly ruled that OEA lacked jurisdiction to consider the merits of her case because of her retirement. 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

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<sup>22</sup> Agency's Answer to Employee's Petition for Appeal, Tab C (August 24, 2011).

<sup>23</sup> Agency Submission of Written Statement Regarding OEA's Jurisdiction, p. 5-13 (July 26, 2013).

<sup>24</sup> This would be consistent with Employee's request that her application for retirement be immediately considered by Agency so that there is no interruption to her benefits. *Id.* at 4.

<sup>25</sup> *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1158 (2005).

<sup>26</sup> Assuming arguendo that Agency decided to allow Employee to retire after her RIF date, then this Board will defer to Agency's discretion in allowing her to retire. In this scenario, we can only assume that Agency rescinded the RIF action against Employee to allow her to retire after the RIF date.

validity of the removal. 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. Moreover, Employee failed to establish that Agency coerced her or gave her misleading information. Therefore, we must deny her Petition for Review.

**ORDER**

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

FOR THE BOARD:

\_\_\_\_\_  
William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

\_\_\_\_\_  
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.