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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: October 1, 2013
	)	
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
_____	)	

Robert Deso, Esq., Employee Representative  
Frank McDougald, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On May 10, 2010, Joseph O’Rourke (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the Metropolitan Police Department’s (“MPD” or the “Agency”) action of removing him from service. At the time of his removal, Employee was an Officer Grade 1, Step 9 with the MPD. On February 19, 2013, Employee submitted a Notice of Filing Motion for Issuance of Final Decision. In this motion, Employee informed the undersigned that pursuant to an order from the District of Columbia Retirement Board (“Retirement Board”) dated February 6, 2013; he has been placed on disability retirement effective May 7, 2010. Employee’s retirement calls into question whether the OEA may exercise jurisdiction over this matter. Thereafter, on March 4, 2013, I ordered the parties to submit briefs regarding whether the OEA may now exercise jurisdiction over this matter due to Employee’s retirement. The parties have since submitted their respective briefs. Moreover, I urged the parties to pursue settlement of this matter and afforded them additional time in which to undertake negotiations. However, after reviewing their positions at considerable length, the parties opted not to mediate their concerns. The record is now closed.

**JURISDICTION**

As will be explained below, the jurisdiction of this Office has not been established.

### ISSUE

Whether this Office may exercise jurisdiction over this matter.

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

### FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On February 14, 2013, Employee, through counsel, submitted a Notice of Filing and Motion for Issuance of Initial Decision ("Motion for Issuance"). It states in pertinent part as follows:

On March 24, 2010 Employee appealed to OEA the Final Notice of Adverse Action dated March 19, 2010 which terminated Employee's employment from MPD effective May 7, 2010. The relief sought by Employee was reversal of the MPD termination action, reinstatement with retroactive pay and benefits and payment of attorney fees. In Employee's Prehearing Statement filed on August 29, 2012, Employee noted that on July 1, 2007 while on patrol in the Third District he fell while chasing an armed carjacking suspect, sustaining injuries to his head, both hands and left forearm, which injuries were determined by MPD to be incurred in the performance of duty ("POD").

Employee noted that on July 8, 2008 he was referred by the MPD Medical Director of the Police and Fire Clinic to the Police & Firefighters' Retirement Relief Board for consideration for mandatory disability retirement pursuant to D.C. Code § 5-710 (e-1).

Employee noted that the Retirement Board conducted a hearing regarding Employee's POD disability on February 19, 2009. Employee noted that the Police and Fire Clinic physician called by the Board as an expert witness testified that Employee was disabled for the performance of his

police duties due to the July 1, 2007 POD injuries. Notwithstanding the undisputed evidence that Employee was disabled in the performance of duty, the Retirement Board did not issue a decision in Employee's case, as it was required to do by D.C. Code ' 5-710 (e-1).

In his Prehearing Statement Employee noted that six months after the Retirement Board hearing MPD, which had referred Employee for disability retirement, issued a Notice of Proposed Removal for alleged misconduct that allegedly occurred in 2001. The Final Notice of Removal was not issued until March 19, 2010, more than a year after the Retirement Board hearing and almost three years after Employee sustained the disabling performance of duty injuries. Employee asserted in his Prehearing Statement that MPD and the Retirement Board acted in conjunction to unlawfully deny Employee the disability retirement benefits to which he was entitled by statute, by intentionally delaying the Retirement Board decision until after MPD terminated Employee. Employee noted that not only was there an MPD official on the Retirement Board Panel which heard his case, the same Assistant Attorney General (AAG Buchholz) was (1) a member of Employee's Retirement Board panel in February 2009; (2) prosecuted the MPD termination action against Employee in 2010 and (3) represented MPD in the OEA appeal proceedings. In response to the Superior Court filing, the Retirement Board finally issued an Order on August 26, 2010, in which [it] ... determined that Employee was not entitled to disability retirement benefits because he was no longer a member of the MPD because he had been terminated by MPD in May 2010.

Pursuant to the D.C. Administrative Procedures Act, Employee appealed the Retirement Board's decision to the D.C. Court of Appeals. On June 21, 2012 the Court of Appeals issued its decision. As stated in Employee's Prehearing Statement, the Court of Appeals found that it was unlawful for the Retirement Board to deny Employee a disability retirement on the grounds that he had been terminated by MPD while the Board held his case until MPD terminated him. The Court of Appeals stated that the Retirement Board could not function as a disciplinary arm of MPD. The Court of Appeals reversed the decision of the Retirement Board and remanded the case for further proceedings consistent with the Court's remand Order. A copy of the Court of Appeals decision was submitted as Exhibit 4 to Employee's Prehearing Statement.

Notwithstanding the remand Order from the Court of Appeals, the Retirement Board still did not issue an Order retiring Employee for disability. Accordingly, Employee's counsel wrote to the Retirement Board and requested that the Board implement the Court's remand Order. A copy of this letter was submitted as Exhibit 5 to Employee's Prehearing Statement.

When the Retirement Board still failed to issue a decision in compliance with the Court of Appeals' Remand Order, Employee's counsel wrote the Retirement Board again. When still no Order was issued, Employee's counsel filed a Petition for Mandamus with the Court of Appeals. Finally, in January 2013 the [Retirement] Board issued a Decision and Order. However, the Board inserted an incorrect retirement date in the Order. An Amended Order with the correct retirement date was finally issued on February 6, 2013. **The [Retirement Board's] Amended Final Order retires Employee effective May 7, 2010, thus nullifying the MPD termination action effective that same date. Emphasis Added.**<sup>1</sup>

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

(a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . .

This Office has no authority to review issues beyond its jurisdiction.<sup>2</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>3</sup> The issue of an Employee's voluntary or involuntary retirement has been adjudicated on numerous occasions by this Office. The OEA does not have jurisdiction over disability retirements. Employee, in his brief dated March 18, 2013, tries to draw a distinction between a voluntary retirement and the disability retirement he procured through the Retirement Board when it determined that he was injured on duty and was otherwise unable to perform his duties. However, Employee neglects the simple fact that he instigated all of the legal proceedings before the Retirement Board and the District of Columbia Court of Appeals in what was ultimately a successful attempt to gain his disability retirement. Given the instant circumstances, if Employee had not continually pressed his claim in various tribunals, he would not have been awarded disability retirement by the Retirement Board.

The OEA has consistently held that there is a legal presumption that retirements are voluntary.<sup>4</sup> Furthermore, I find that this Office lacks jurisdiction to adjudicate a voluntary retirement. However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.<sup>5</sup> A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation

<sup>1</sup> Motion for Issuance at 2 – 7.

<sup>2</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>3</sup> See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

<sup>4</sup> See *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Charles M. Bagenstose v. D.C. Public Schools*, OEA Matter No. 2401-1224-96 (October 23, 2001).

<sup>5</sup> *Id.* at 587.

or deception.”<sup>6</sup> The employee must prove that his/her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he/she relied when making his/her decision to retire. He/she must also show “that a reasonable person would have been misled by the Agency’s statements.”<sup>7</sup>

Despite Employee’s argument to the contrary, I find no *credible* evidence of misrepresentation or deceit on the part of the Agency in procuring the retirement of Employee. In fact, Employee herein had to undergo protracted legal machinations before the OEA, the Retirement Board and the District of Columbia Court of Appeals just so that he could procure his disability retirement. Seemingly, Employee’s legal strategy was to procure his retirement because he believed he was entitled to it given his age and the fact that he was injured while on duty. Moreover, Employee admitted that the granting of his retirement through the Retirement Board nullified the Agency’s removal action.<sup>8</sup> Accordingly, I find that when the Retirement Board granted Employee’s retirement it voided MPD’s removal action, which in effect also voided OEA’s jurisdiction over this matter. I further find that given the instant circumstances, Employee’s retirement was voluntary. As such, I further find that this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this appeal.<sup>9</sup>

#### ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
SENIOR ADMINISTRATIVE JUDGE

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<sup>6</sup> 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.2d 937 (Fed. Cir. 1984).

<sup>7</sup> *Id.*

<sup>8</sup> See Motion for issuance at 7.

<sup>9</sup> In his Motion for Issuance, Employee contends that he is the prevailing party before the OEA and considering as much he is entitled to file a motion for attorney’s fees. I disagree. D.C. Official Code § 1-606.08 provides that “[An Administrative Judge of this Office] 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.” See also OEA Rule 634 *et al.* I find that Employee is not the prevailing party before the OEA because Employee’s removal action was retroactively negated by the Amended Order of the Retirement Board dated February 6, 2013. Accordingly, Employee’s motion for attorney fees before the OEA is hereby denied.