Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JOYCE FREEMAN Employee	
v.	OEA Matter No.: J-0018-07
	Date of Issuance: February 25, 2009
D.C. DEPARTMENT OF YOUTH AND REHABILITATION SERVICES Agency	

OPINION AND ORDER

ON

PETITION FOR REVIEW

Joyce Freeman ("Employee") worked as a Youth Treatment Unit Manager with the Department of Youth and Rehabilitation Services ("Agency"). On October 19, 2006, Employee received a notice terminating her employment. The notice stated that Employee's termination would be effective November 3, 2006. Employee was placed on administrative leave during the fifteen (15) day notice period. Agency's notice also

stated that her Management Supervisory Service ("MSS") position was "terminable at will."

On November 17, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). In her appeal, Employee identified her status as serving in a "Management Supervisory Service/Civil Service" position.[1] Employee argued, however, that her status changed to Career Service when she was reassigned to a Juvenile Justice Institutional Counselor ("JJIC") position approximately one year prior to being terminated. She contended that Agency's termination was improper because she was deprived of the notice and procedural rights afforded to Career Service employees. Specifically, Employee stated that Agency's Notification of Personnel Action identified the nature of the action as being a "Separation-RIF."[2] Employee also submitted documents from Augustine Onyemenem, Deputy Superintendent of Treatment of Treatment, regarding the reassignment. The documents informed Employee that she was being reassigned to a JJIC position.[3] The documents also specified the location of Employee's new office, instructions for bringing her current case file up to date and thanked her for being a "team player."

Before the Administrative Judge ("AJ") issued her opinion, she concluded that this Office's jurisdiction was at issue. The AJ ordered Employee to submit proof in support of her argument that OEA had jurisdiction over the matter.[4] In response, Employee offered a copy of Agency's September 5, 2003 Position Vacancy Announcement for a Juvenile Justice Institutional Counselor. Employee did not submit

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[1] *Petition for Appeal*, p. 2.
[2] Agency Personnel Action Form, Employee's Amended Petition for Appeal.
[3] *Id.*
[4] *Order Regarding Proof of Jurisdiction*, December 14, 2006.

any other evidence to support the assertion that her status as an MSS employee changed as a result of the reassignment.

On March 17, 2007, the AJ issued an Initial Decision ("ID") dismissing Employee's case for lack of jurisdiction. She held that Employee had not met her burden of proof in establishing this Office's jurisdiction over the matter.[5] The AJ stated that Employee was "at-will" at the time she was terminated. She also held that Employee remained an MSS employee at the time of her termination and did not have job tenure or protection from removal. In addition, the AJ stated that Employee voluntarily retired from her position in lieu of being terminated.

Employee then filed a Petition for Review with this Office on April 18, 2007. Employee asks us to reverse the Initial Decision on the grounds that the AJ erred in making the determination that Employee was an MSS employee at the time she was terminated. Employee argues that this Office should hold a hearing to determine whether her reassignment to a JJIC position altered her MSS status to Career Service status. She reasons that when Agency reassigned her to another position, her status was changed to Career Service. Employee contends that the record clearly establishes that she was not an MSS employee when she was terminated. Agency did not file a response to the Petition for Review .

According to D.C. Official Code §1-609.54(a):

> "an appointment to a position in the Management Supervisory Service shall be an at-will appointment. Management Supervisory Service employees shall be given a 15-day notice prior to termination. Upon termination, a person with Career or Educational Service status, or with Excepted Service status due to appointment as an attorney pursuant to §1-609.09, may retreat, at the discretion of the

[5] *Initial Decision* at 3.

> personnel authority, within 3 months of the effective date of the termination, to a vacant position within the agency to which he or she was promoted for which he or she is qualified."

OEA has consistently held that it lacks jurisdiction over at-will employees.[6] The District Court in *Evans v. District of Columbia*, 391 F.Supp. 2d 160 (2005), reasoned that because MSS employees serve at-will, they have no property interest in their employment because there is no objective basis for believing that they will continue to be employed indefinitely. The Court provided that the only rights enjoyed by MSS employees are the "right to 15 days' notice before termination; a separate notice in the event of termination for disciplinary reasons describing the reason for termination; and if the employee requests in writing, a final administrative decision on the issue of severance pay by the Personnel authority."[7]

Application of this reasoning to the present case clearly shows that Agency fulfilled its obligation by providing Employee with a written notice of her impending termination.[8] Agency identified Employee as having MSS status in her termination letter.[9] Employee also listed herself as an MSS employee in her Petition for Appeal.[10] Moreover, Employee was given the chance to provide supporting legal and/or factual arguments to support her argument that the reassignment to a JJIC position altered her status. Employee has not offered any documentation or legal arguments to prove that she

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[6] *Hodge v. Department of Human Services,* OEA Matter No. J-0114-03 (January 30, 2004); *Clark v. Department of Corrections*, OEA Matter No. J-0033-02, Opinion and Order on Petition for Review (February 10, 2004).
[7] *Evans v. District of Columbia*, p. 166 (2005).
[8] *Employee's Amended Petition for Appeal*, December 1, 2006.
[9] *Id.*
[10] *Petition for Appeal*, p. 2.

was not an MSS employee after she was reassigned to a different position. Employee therefore remained an "at-will" employee and received sufficient notice of termination.

Although we could deny Employee's Petition for Review on the grounds listed above, it should be noted that Employee submitted documentation that she voluntarily retired from her position with Agency in lieu of separation. According to *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 the employee relied. The burden rests on Employee to show that she involuntarily retired. Such a showing would constitute a constructive removal and allow OEA to adjudicate her matter.

Employee's personnel record states that she elected to retire on Discontinued Service Retirement.[11] After reviewing the record, we do not find that Employee was constructively discharged as she has failed to offer evidence that her retirement was coerced or was the result of Agency's misleading information. Furthermore, OEA Rule 634.4 states that any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the judge. Employee did not raise this argument in her Petition for Appeal, therefore, it is waived and her retirement is deemed to be voluntary.

Based on the foregoing we are compelled to deny Employee's Petition for Review and uphold the Initial Decision.

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[11] Notification of Personnel Action, Employee's Amended Petition for Appeal.

ORDER

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

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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 the formal notice of the decision or order sought to be reviewed.