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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
REBECCA HERNDON,	)	
Employee	)	OEA Matter No. 1601-0125-13
	)	
v.	)	Date of Issuance: August 14, 2015
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
_____	)	
Walter T. Charlton, Esq., Employee Representative	)	
Carl K. Turpin,, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On July 30, 2013, Rebecca Herndon (“Employee”) filed a petition for appeal with the Office of Employee Appeals contesting the District of Columbia Public Schools’ (“DCPS” or the “Agency”) action of terminating her from her last position of record – Teacher at Garrison Elementary School. Employee’s termination was caused by a “Minimally Effective” rating as part of her IMPACT evaluation (a school based evaluation process and tool utilized by DCPS to evaluate all school based personnel). DCPS notes that two consecutive school years of being rated “Minimally Effective” subjects school-based personnel to immediate dismissal. Such was the case in this matter. Employee was rated minimally effective for school years 2011- 2012 and 2012-2013. According to the documents of record, the effective date of her removal from service was August 10, 2013. I was assigned this matter on or about May 14, 2014. On December 16, 2014, both parties were present for a Prehearing Conference in the above-captioned matter. During this conference, Employee admitted that she retired from service. I noted that Employee’s retirement calls into question whether the OEA may exercise jurisdiction over this matter. In order to properly ascertain the OEA’s authority to adjudicate this matter, I issued an order which required the parties to address whether the OEA may exercise jurisdiction over this matter since Employee elected to retire. The parties have since submitted their briefs in compliance with the aforementioned Order. Of note, Employee noted in her submission that she did indeed retired from service. After considering the parties arguments, along with the

documents of record, I have determined that no further proceedings are warranted. 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

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>1</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>2</sup> The issue

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<sup>1</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).

of an employee's voluntary or involuntary retirement has been adjudicated on numerous occasions by this Office. OEA has consistently held that, there is a legal presumption that retirements are voluntary.<sup>3</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>4</sup> A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."<sup>5</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>6</sup>

Here, Employee contends that her removal was "contrived, pretext and disingenuous."<sup>7</sup> Employee further notes that she would not have subsequently retired but for her removal. She further argues; sans attribution to supporting law, rule or regulation; that her subsequent retirement and enjoyment of her retirement annuity should have no bearing on whether the OEA may exercise jurisdiction over this matter. Agency denies these claims and asserts that Employee's IMPACT evaluation was properly implemented and carried out and that Employee, in addressing the jurisdiction of this Office, has not proffered any facts that would grant the OEA jurisdiction over this matter.

Despite Employee's arguments to the contrary, I find no *credible* evidence of misrepresentation or deceit on the part of the Agency in procuring the retirement of Employee. There is no evidence that Agency misinformed Employee about her option to retire. Employee's arguments regarding jurisdiction do not squarely cover the instant facts of this matter and fail to establish any legal precedent for allowing the OEA to proceed with further adjudication of this matter. The seminal case cited by Employee in her brief (*Love v. OEA*) has absolutely nothing to do with establishing jurisdiction over a matter when an employee retires subsequent to a removal.<sup>8</sup> I note that Employee readily admitted that she has retired from service. Moreover, her retirement was backdated, at her request, so that it coincided with her last day of service. To date, Employee has enjoyed the benefits of retirement including the pension payment that is in direct correlation to her years of service. If Employee felt that her termination was carried out in error, she could have foregone her retirement and fought her removal through administrative and legal channels.

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<sup>2</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>3</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>4</sup> *Id.* at 587.

<sup>5</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>6</sup> *Id.*

<sup>7</sup> Response to Administrative Law Judge's Order for Briefing on the Issues of Jurisdiction of Claims as Affected by Subsequent Retirement of Employee at 1 (March 3, 2015). (hereinafter "Employee's Jurisdiction Brief").

<sup>8</sup> *Id.* at 5 – 6. Of note, Employee cited to this case without providing proper citation to it.

It is regrettable that Employee was faced with this difficult financial decision. Notwithstanding Employee's arguments to the contrary, I find that given the instant circumstances, Employee's retirement was voluntary.<sup>9</sup> 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 her appeal.<sup>10</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>9</sup> The Court in *Christie* stated that “[w]hile it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports CSC’s finding that plaintiff chose to resign and accept discontinued service retirement rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the involuntariness of her resignation.” *Christie, supra* at 587-588. (citations omitted).

<sup>10</sup> Employee also requests that this body assert authority over this matter because the Office of Human Rights (“OHR”) allegedly has failed to act on this matter in separate proceeding with a shared fact pattern. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the OHR. Per this statute, the purpose of the OHR is to “secure an end to unlawful discrimination in employment...for any reason other than that of individual merit.” Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act. I find that Employee’s unlawful jurisdiction claim is outside of the OEA’s authority to adjudicate due to this Office lacking jurisdiction because of her retirement.