THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CAROLYN WILLIAMS,	)	OEA Matter No. 2401-0124-10
Employee	)	
	)	Date of Issuance: September 18, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Carolyn Williams ("Employee") worked as a teacher with the D.C. Public Schools ("Agency").[1] On October 2, 2009, Agency notified Employee that she was separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[2]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 2, 2009. In it, she argued that Agency failed to follow its internal procedures and requirements when conducting the RIF.[3] She explained that Agency did

[1] There are contradictory arguments made about what subject Employee taught. Agency contended that she was a Hospitality teacher. However, Employee provided that her position of record was Social Studies Teacher. It appears from language in the Initial Decision that the OEA Administrative Judge ("AJ") found that Employee's position was Hospitality Teacher. This point will be addressed in greater detail in this decision.
[2] *Petition for Appeal*, p. 14 (November 2, 2009).
[3] Employee also asserted that the RIF undermined Equal Employment Opportunity Commission laws and regulations.

not consult with the Local School Restructuring Team and that a Competitive Level Documentation Form ("CLDF") was not completed for her. Therefore, she requested that she be reinstated to her position.[4]

In its answer to Employee's Petition for Appeal, Agency explained that it conducted the RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It argued that pursuant to 5 DCMR § 1501, Roosevelt Senior High School was determined to be the competitive area, and under 5 DCMR § 1502, the Hospitality Teacher position was determined to be the competitive level subject to the RIF. However, because Employee was the only Hospitality Teacher, she was in a single-person competitive level and was not provided one round of lateral competition.[5] Agency claimed that it provided Employee a written, thirty-day notice that her position was being eliminated. As a result, it believed the RIF action was proper.[6]

Prior to issuing the Initial Decision, the AJ ordered the parties to submit legal briefs addressing whether Agency followed the District's statutes, regulations, and laws when it conducted the RIF.[7] Agency's brief reiterated its position and provided that OEA is limited to determining whether it followed D.C. Official Code § 1-624.02, 5 DCMR §§ 1503 and 1506.[8] Employee argued in her brief that Agency failed to assign her to the correct competitive level. She explained that her position of record was Social Studies Teacher, and therefore, she should have competed against other Social Studies Teachers.[9] As a result, she claims that she was not afforded one round of lateral competition. Employee asserted that Agency's error prejudiced

[4] *Id.*, 3-5.
[5] Pursuant to 5 DCMR § 1503.3, Agency did not consider the competitive factors defined in 5 DCMR § 1503.2 which provides an employee with one round of lateral competition.
[6] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (December 9, 2009).
[7] *Order Requesting Briefs* (February 15, 2012).
[8] *District of Columbia Public Schools' Brief,* p. 5 (February 29, 2012).
[9] Employee provides that in accordance with District Personnel Manual § 2410.2, assignments to a competitive level shall be based on the employee's position of record.

her rights and caused her to involuntarily retire. Therefore, she requested that OEA overturn Agency's RIF action and reinstate her with back pay and benefits.[10]

The Initial Decision was issued on May 7, 2012. The AJ disagreed with Employee's contention that she was forced into retirement and held that neither the RIF notice nor Agency's actions gave her a mandate to retire. She ruled that a retirement is only considered involuntary when an employee shows that the retirement was obtained through misinformation or deception by Agency.[11] The AJ found no credible evidence to prove that Agency made misrepresentations, was deceitful, or misinformed Employee in procuring her retirement. Thus, she found that Employee's retirement was voluntary and that her decision to retire voided OEA's jurisdiction over the appeal. Accordingly, the matter was dismissed for lack of jurisdiction.[12]

Employee filed a Petition for Review with the OEA Board on June 25, 2012. She submits that she did not voluntarily retire in lieu of separation. Employee contends that the AJ incorrectly assumed that if an employee receives retirement benefits after being separated pursuant to a RIF, then they voluntarily retired in lieu of separation.[13] She states that Agency acknowledged her retirement as involuntary when it noted "Involuntary Retirement" on her Notification of Personnel Action Form ("Standard Form 50"). Therefore, Employee believes that the AJ's decision is not supported by substantial evidence and that OEA has jurisdiction over her appeal. Accordingly, she requests that the Initial Decision be reversed and remanded to

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[10] *Response Brief of Carolyn Williams,* p. 3-13 (April 11, 2012).

[11] The AJ cited *Cecil E. Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995) and *Elias Covington v. Department of Health & Human Services*, 750 F.2d 937 (Fed. Cir. 1984) and explained that Employee needed to prove that her retirement was involuntary by showing that the retirement resulted from undue coercion or misrepresentation. Employee also needed to show that a reasonable person would have been misled by the statements.

[12] *Initial Decision,* p. 2-4 (May 7, 2012).

[13] Employee cites *Elias Covington v. Department of Health & Human Services,* 750 F.2d 93, 939 (Fed. Cir. 1984) and provides that the events of involuntary retirement and separation pursuant to a RIF are not necessarily mutually exclusive. She further argues that under *Ruth Christie v. U. S.*, 518 F.2d 584 (Ct. Cl. 1975), a retirement voids jurisdiction only if it occurs instead of an appealable separation. Finally, she states that separation pursuant to a RIF is an involuntary separation and is a prerequisite for involuntary retirement benefits. *Petition for Review by Carolyn Williams,* p. 6-11 (June 25, 2012).

determine whether Agency failed to comply with D.C. Official Code § 1-624.08(d) when it separated her and to determine if she retired in lieu of separation.[14]

Agency argues in its Response to the Petition for Review that Employee chose to retire instead of being terminated. With regard to its notation of "Involuntary Retirement" on her Standard Form 50, Agency submits that its definition of involuntary retirement is entirely different from OEA's definition of involuntary retirement.[15] It contends that it conducted the RIF in accordance with the regulations provided in D.C. Official Code § 1-624.02. Therefore, Agency believes that Employee has not met her burden of proving that OEA has jurisdiction over her appeal.[16]

In reply, Employee avers that Agency's response does not address her argument that the events of involuntary retirement and separation pursuant to a RIF are not necessarily mutually exclusive. She further states that Agency introduced new evidence in the record in violation of OEA's rules, and as a result, it supported the conclusion that the Initial Decision was not supported by substantial evidence.[17] She believes that Agency's response fails to establish that it complied with the applicable rules and regulations when it separated her. Therefore, Employee reiterates her requests to the OEA Board.[18]

Jurisdiction

OEA Rule 628.2 provides that employees have the burden of proving issues of jurisdiction, including the timeliness of their filing.[19] Moreover, the D.C. Official Code has

[14] *Id.*
[15] Agency provides that Employee was eligible for involuntary retirement because she met the requirements for the Involuntary Retirement Benefit category which is defined in its Summary Plan Description for Teachers.
[16] *District of Columbia Public Schools' Response to Employee's Petition for Review* (July 30, 2012).
[17] Employee explains that Agency introduced a Standard Form 50 as new evidence that is unpersuasive because it does not support Agency's contention that she was a Hospitality Teacher at the time of separation. *Reply Memorandum by Carolyn Williams in Support of her Petition for Review,* p. 3-9 (August 24, 2012).
[18] *Id.*
[19] Employee provides that Agency consented to an extension of two weeks to file her Petition for Review. Agency

established those matters over which OEA has jurisdiction to consider. D.C. Official Code § 1-606.03 provides that

> an employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

Although this case does involve a RIF, Agency claims that OEA lacks jurisdiction to consider the action because Employee voluntarily retired. Contrary to Agency's claim, Employee asserts that the retirement was involuntary and offered her Standard Form 50 as evidence.

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 they relied. OEA has held that the burden, therefore, rests on employees to show that they involuntarily retired. Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter.[20] Thus, if Employee could adequately prove that she

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did not object to this claim. *Petition for Review by Carolyn Williams*, p. 2 (June 25, 2012).

[20]*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).

involuntarily retired, then OEA could adjudicate her RIF matter.

Involuntary Retirement

This case is different from most other matters where an employee claims that they involuntarily retired. In the current case, Employee not only made arguments regarding her involuntary retirement, but she also offered documentation as proof of the involuntary nature of her retirement. In her Response Brief before the AJ, Employee provided that she received a signed and dated Standard Form 50 from Agency.[21] The document is titled "Notification of Personnel Action." In the field designating the nature of the action, it clearly states "Involuntary Retirement – Retire w/ Pay." The document is signed by Peter Weber, Interim Director of Human Resources, and it is dated November 22, 2009.[22]

Agency does not dispute the validity of the document. Instead, it concedes that Employee involuntarily retired, but it contends that "she was eligible for involuntary retirement solely because she met the requirements for involuntary retirement as defined by the Agency's Summary Plan Description for Teachers ("SPD")." Agency went on to explain that the definition for involuntary retirement in the SPD "is entirely different from the definition of involuntary retirement as defined by OEA and the courts."[23] Agency claimed it could offer proof by providing a copy of the SPD.[24] However, it never submitted such proof of the SPD's definition of involuntary retirement to this Board.

It is Employee's position that by processing the Standard Form 50, Agency acknowledged that she involuntarily retired.[25] She contends that Agency drafted the Standard Form 50. Moreover, Agency provided in its RIF notice to Employee that she had "a limited right

[21] *Response Brief of Carolyn Williams*, Exhibit A, p. 3 (April 11, 2012).
[22] *Id.*, Exhibit A10.
[23] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 3 (July 30, 2012).
[24] *Id.* at footnote 1.
[25] *Petition for Review by Carolyn Williams*, p. 7-8 (June 25, 2012).

to appeal this reduction in force. If you voluntarily retire, however, then you may not be able to appeal this determination before the Office of Employee Appeals (OEA)."[26] The use of the term "involuntary retirement" on the Standard Form 50 and the language from the RIF notice led to misinformation and misrepresentation by Agency.[27] Because of it, Employee reasonably believed that she was retiring not by her own volition.[28] In light of the evidence presented, we conclude that Employee adequately proved that she involuntarily retired. Therefore, OEA maintained jurisdiction over her case to consider the merits of the RIF action.

Position of Record

Before the AJ can address the merits of the RIF case, she must determine Employee's position of record. District Personnel Manual ("DPM") § 2410.2 provides that an "assignment to a competitive level shall be based upon the employee's position of record." DPM § 2410.3 goes on to provide that "an employee's position of record is the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary or term basis." Therefore, Employee's position of record is extremely important to decide. It was a contested material issue of fact in this matter.[29] Agency claimed

[26] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* Tab #3 (December 9, 2009).

[27] Agency is requesting that the Board accept its SPD definition of involuntary retirement instead of the legal definition used by OEA and the courts. This is an unreasonable request. If the Board granted Agency's request, then there would be no limit to various agencies creating their own definition for legal terms to suit the facts of their cases.

Assuming arguendo that Agency's definition of involuntary retirement is different than the legal definition provided by OEA and the courts, this Board still holds that Employee adequately proved why she believed her retirement was involuntary. Not only is there the official personnel action which indicates that Employee involuntarily retired, but Employee also highlights the language from her RIF notice. Agency's notice specifically provided that if Employee voluntarily retired, then she may not be able to appeal to OEA. Because the Personnel Action Form indicates that she involuntarily retired, it is reasonable for Employee to believe that she did still maintain her right to appeal to OEA.

[28] There is no evidence in the record to prove that Agency communicated its definition of involuntary retirement to Employee. Thus, it is reasonable for her to believe that involuntary retirement meant that she retired not as the result of her own volition. This was misinformation on Agency's behalf.

[29] In accordance with OEA Rule 633.3(d) ". . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal." Furthermore, the D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 831-832

that Employee was a Hospitality Teacher; while Employee contends that she was a Social Studies Teacher. In her Initial Decision, the AJ simply provided that Employee's position of record was a Hospitality Teacher.[30] However, she offered no analysis on this point.

It is clear from the record that there is a material issue with Employee's true position of record. One month before the Initial Decision was issued, Employee went through great lengths in her Response Brief to offer documented evidence that she was still classified as a Social Studies Teacher by Agency. Employee claimed that although she developed her school's Academy of Hospitality and Tourism and was assigned to teach hospitality courses, her position of record was always Social Studies Teacher.[31] To prove this point, Employee offered her certification licenses from 2001-2006 that provided she was a Social Studies Teacher for Agency.[32] Additionally, she provided performance evaluations from 2000-2004 that identified her position as a Social Studies Teacher.[33] Further, she provided a 2004 CLDF which provided that she was a Social Studies Teacher.[34] Finally, she provided Personnel Action forms from 1993-1997 which listed her position title as "Teacher Social Studies."[35] Similarly, Agency

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(D.C. 2011), that when the AJ is made aware of material issues in an employee's notice of appeal and there is the absence of any discussion of the employee's arguments in the OEA's Initial Decision, the determination cannot be made that all the issues were fully considered. Additionally, the court held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801 A.2d 975, 979 (D.C.2002)), that it could not assume that "[an] issue has been considered sub silentio when there is no discernible evidence that it has." The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C. 2002)) further reasoned that "to pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings." This Board cannot find that the AJ addressed Employee's position of record in her Initial Decision.

[30] *Initial Decision*, p. 1 (May 7, 2012).

[31] Employee presented that although Agency sought to promote her to the Coordinator of Travel & Tourism, it did not complete the personnel action because she declined the promotion. Thus, she held the position of Social Studies Teacher from April 24, 1997 until the effective date of the RIF action. Agency's documentation seems to support Employee's contention because it provides her position of record as Social Studies Teacher well after 1997.

[32] *Response Brief of Carolyn Williams*, Exhibits # 4, 5, and 6 (April 11, 2012).

[33] *Id.*, Exhibits #7 and 8.

[34] *Id.*, Exhibit #2. Employee also provided a 2003 CLDF which listed her position as "Social Studies/Travel and Tourism." *Id.*, Exhibit #9.

[35] *Id.*, Exhibits #1, 11, and 14. Employee claims that there were no Personnel Action forms completed for her after

provided Employee's personnel record which indicate that from 1991-2004, she was a Social Studies Teacher.[36]

However, Agency contends that although "Employee's Personnel Action Standard Form 50 classifies her as a Teacher, Senior High, the Chancellor further defined the competitive levels . . . [to] include[e] the subject taught by employee." Agency argues that at the time of the RIF action Employee was a Hospitality Teacher and was in a single-person competitive level.[37] However, there is not substantial evidence in the record to support that conclusion.[38]

If Agency is relying on the 1997 Request for Personnel Action form which provided that Employee was a Hospitality Teacher, it must prove that the action was actually processed. Employee claims that she declined the promotion and offered a litany of Agency documents which provide that she remained a Social Studies Teacher after 1997. However, Agency does provide a Retroactive Payment document which lists Employee as a "Teacher, Travel and Tourism."[39] Additionally, there are 1997-1999 performance evaluations which describe her as a Teacher of Travel and Tourism.[40] Finally, there is a performance evaluation for 2005-2006 which provides that Employee is a Teacher of the Academy of Hospitality and Tourism.[41] Hence, there are many discrepancies surrounding Employee's position of record that must be addressed in accordance with DPM § 2410.3.

Conclusion

In the Initial Decision, the AJ dismissed Employee's case after determining she

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1997. The personnel record provided by Agency supports that claim.
[36] *Carolynn Williams Personnel File*, p. 12, 14, 54, 111, 113, 115, 117, 255, 351, 352, 366, 367, 368, 369, 376, 400, 401, 403, 405, 407, 408, 410, 418, 420, 423, and 451 (February 29, 2012).
[37] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 4 (July 30, 2012).
[38] It should be noted that even the Personnel Action form which provides Employee's involuntary retirement status, lists her position title as "Teacher, Senior High," not Hospitality Teacher as Agency contends.
[39] *Carolynn Williams Personnel File*, p. 430-431 (February 29, 2012).
[40] *Id.* at 448 and 452. There is also an evaluation for 2002-2003 which lists Employee as a Travel and Tourism Teacher. *Id.* at 411.
[41] *Id.* at 412.

voluntarily retired. Therefore, she did not address the merits of the appeal, including Employee's position of record and how that impacted the one round of lateral competition. Based on a thorough review of the record, we believe there is not substantial evidence in the record to support the AJ's findings that Employee's retirement was voluntary, and as a result, OEA lacked jurisdiction to consider the merits of her appeal.[42] Thus, this Board is remanding this matter for the AJ to determine Employee's true position of record. After such determination is made, then the AJ can address the merits of the RIF action taken against Employee. Accordingly, this matter is REMANDED to the Administrative Judge.

[42] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Black's Law Dictionary*, Eighth Edition; *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). 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.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**; the matter is **REMANDED** to the Administrative Judge to address the merits of the RIF action.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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.