THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICHARD JACKSON,	)	
Employee	)	OEA Matter No. 1601-0088-09
	)	
v.	)	Date of Issuance: June 24, 2011
	)	
DEPARTMENT OF PARKS AND RECREATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Nakeasha L. Sanders, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 23, 2009, Richard Jackson ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Department of Parks and Recreation ("DPR" or "the Agency") action of removing him from service. The undersigned was assigned this matter on or about October 2, 2009. Employee was charged with Cause To Wit: "any on duty or employment related act or omission that interferes with the efficiency and integrity of government operation". In a nutshell, Agency alleged that Employee failed to properly submit himself for a mandatory random drug and alcohol test on December 2, 2008. Agency argues that D.C. Official Code §1-620.35 requires, *inter alia*, certain District government employees to submit themselves for random drug and alcohol testing. Employee's failure to submit for the aforementioned test resulted in him receiving an automatic positive test result. As a result, the Agency removed Employee from service.

I held several conferences in this matter in an attempt to properly ascertain whether the OEA may exercise jurisdiction over this matter due to Employee opting to retire from service. Under most circumstances, Employee's retirement would normally void the Office's jurisdiction in a matter such as this. However, as will be explained below, I have determined that the OEA may exercise jurisdiction over the instant matter. I then determined that an evidentiary hearing was required in order to properly make findings of fact and conclusions of law. However, this

matter was held in abeyance for a lengthy period of time due to the OEA's financial inability to hold evidentiary hearings in this and many other matters. Eventually, on December 6, 2010, an evidentiary hearing was held in this matter. Further, the parties have since submitted their closing briefs in this matter. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

1. Whether the OEA may exercise jurisdiction over the instant matter
2. Whether Agency's adverse action was taken for cause.
3. If so, whether the penalty was appropriate under the circumstances.

SUMMARY OF RELEVANT TESTIMONY

Agency's Case in Chief

Ellouise Johnson

Ellouise Johnson ("Johnson") testified in relevant part that: she is currently employed by DPR as a Support Service Manager. At the time of the incident in question, she was employed as a Facility Manager. On the morning of December 2, 2008, both Johnson and Employee were in a staff meeting. After this meeting, Johnson was instructed by her manager to transport

Employee to DPR's Human Resources headquarters ("HR") so that he may be given a random drug test. *See* Tr. at 11 – 12. She approached Employee and informed him that she had to transport him for the drug test. As they left for the drug test, Employee gathered his belongings and then started making some telephone calls on his cellular telephone. According to Johnson, Employee called his medical provider, Kaiser Pemanente, and was attempting to schedule an emergency medical appointment. Throughout their short road trip to HR, Employee was on the telephone with the Kaiser Permanente representative. Johnson indicated that she was able to hear both ends of the conversation. As they entered HR, Employee started filling out the paperwork to initiate the drug test. Johnson then heard the representative from Kaiser Permanente instruct Employee to immediately go to an Emergency Room. *See* Tr. at 14 – 16 and 27 – 28. Employee then informed Johnson that he was having chest pains. As they were driving back to their office, Johnson offered to take Employee directly to the Emergency Room. Employee declined her offer and told her he was going to drive himself. According to Johnson, he also left the vehicle before she finished her parking maneuver. *See* Tr. at 17 – 18. Johnson summarized this incident in a letter to Richelle Marshall dated December 2, 2008. This was admitted into evidence as Agency's Exhibit No. 1.

During cross examination, Johnson was unaware of Employee's medical condition. *See* Tr. at 23. Johnson indicated that once Employee filled out the paperwork at HR, he had one hour to complete the drug test. *See* Tr. at 29. Johnson clarified that when Employee departed the vehicle, while she was in the midst of the parking maneuver, that the brake pedal was depressed and the car was, at the moment he departed, motionless. *See* Tr. at 31 – 33. Johnson also indicated that Employee was not one of her direct subordinates.

Devone Williams

Devone Williams ("Williams") testified in relevant part that: she is a Human Resource Specialist with the DPR. *See* Tr. at 56 – 57. One of her job responsibilities includes helping DPR implement its mandatory drug and alcohol testing program. According to her testimony, buttressed by Agency's Exhibit No. 4, Williams was, in part, responsible for serving DPR employees with written notification that they are subject to mandatory drug testing. Regarding the incident in question, Williams stated the following:

> …So [Employee] was brought to the office and I served him with notification. And during that time, he stated that he didn't feel well and I asked him if he needed an ambulance and he was like, no, he was going to the doctor.
>
> So I wrote a memo and I informed [Employee] that if he didn't go for his random drug testing it would result to an automatic positive. Tr. at 59 – 60.

Williams further indicated that Employee signed Agency's Exhibit No. 4 which informed him that he was required to submit to the mandatory drug and alcohol test within an hour of signing. She also told Employee that a failure to test within that time-frame would result in an automatic positive result. *See* Tr. at 59 – 65. Williams testified that she offered to get Employee

medical attention after he expressed that he was not feeling well. Employee declined her offer and indicated that he would take himself to get medical assistance. *Id*. Employee sent a Medical Certificate to Williams showing that he presented himself to Washington Hospital Center for treatment on December 2, 2008. *See* Agency's Exhibit No. 5.

On cross examination, when asked if she was aware that that Employee underwent an invasive medical procedure the day before the incident in question, Williams answered that she could not recall. *See* Tr. at 79 – 80.

Employee's Case in Chief

Brenda Jackson

Brenda Jackson ("Jackson") testified in relevant part that: she and Employee have been married to each other for 38 years. Jackson disclosed that Employee suffers from several life threatening ailments that require constant medication and fastidious monitoring. *See* Tr. at 93 – 100. The ailments that Employee suffers from are debilitating and life threatening[1]. *Id*. Because of his ailments, Employee is strictly prohibited from taking medications not prescribed (including illicit drugs) or alcohol because of the potentially fatal interactions with the multitude of drugs that have already been prescribed as well as exacerbating his life threatening ailments. *Id*.

Jackson testified that she accompanied Employee to an invasive medical procedure that occurred at Washington Hospital Center during which Employee's pancreas was examined. This procedure occurred before the incident in question. Jackson was surprised that Employee opted to go to work the next day given the warnings that were given to him by the hospital staff. *See generally* Tr. at 100 – 108. Jackson disclosed that Employee had previously suffered through a mild heart attack during his liver transplant procedure. *See* Tr. at 108 – 109.

With respect to Employee's retirement, Jackson asserted that when Employee was terminated, his medical insurance ceased. Because of that, she sent several queries out to different council members. She received a favorable e-mail response from Councilmember Harry Thomas' ("CM Thomas") office. This e-mail advised Employee to retire, whereby Employee would retain his medical insurance and that he would be able to appeal his removal, in spite of retiring. *See* Tr. at 111 – 115, *See also* Employee Exhibit No. 2. Jackson testified that Employee relied on the advice tendered through CM Thomas' office when Employee opted to both retire and contest his removal through the OEA. *Id*.

Richard Jackson

Richard Jackson ("Employee") testified in relevant part that: he suffers from all of the ailments previously mentioned by his wife. These diseases are both debilitating and potentially fatal. Employee disclosed that he is a member of Kaiser Permanente's HMO program ("KP").

[1] In order to protect Employee's privacy, I have omitted naming the numerous debilitating and life threatening ailments that were revealed in this matter.

Employee confirmed that his diet is restricted. He further asserted that he is forbidden from taking alcohol or non-prescribed drugs because of the potentially fatal interactions with his conditions and the drugs that are prescribed. *See* Tr. at 126 – 137.

Employee testified that he had an invasive medical procedure done on December 1, 2008. This procedure required sedation. After the procedure was concluded, Jackson drove Employee home. Employee was given instructions to rest for at least 24 hours before returning to work, refrain from driving, and avoid making legally binding decisions. *See* Tr. at 142 – 144. Employee was further instructed to notify his doctor if he had a "fever above 100 and above (*sic*), chills, rectal bleeding, vomiting blood, weakness and dizziness, black tarry stools, chest pain, shortness of breath, hives, rash, difficult swallowing, unusual abdominal pains." Tr. at 143. On December 2, 2008, Employee decided to go to work. Employee started his workday at approximately 7:00 am by attending a meeting normally reserved for his manager, but since his manager was off, Employee filled in for him. After this meeting, Employee went to the office used by the Plumbing department and was using the computer when he was approached by Johnson who informed him that she was to transport him to the HR department. Johnson eventually informed Employee that he was to be taken to HR for a random drug and alcohol test. While he was being transported to HR, Employee started feeling palpitations, breathing problems, and sweating. *See* Tr. at 146 – 155. Employee then proceeded to contact KP in order to get an appointment with his Doctor per the instructions that he was given post procedure. During this telephone conversation, the advice nurse eventually told Employee that he did not need to make an appointment and that he should go directly to an Emergency Room. *Id*. Employee heeded this advice and proceeded to his vehicle. Employee asserted that he first submitted a leave slip before leaving for the Emergency Room because other employees had been reprimanded for leaving work without first procuring leave from the Agency. *Id*.

Employee asserted that neither Johnson nor Williams offered to call an ambulance nor did they offer any other assistance. *See* Tr. at 150 – 153. Employee explained that he was able to remain calm and transport himself to the Emergency Room because he has gone through similar situations in the past. *See* Tr. at 154.

Employee explained that he elected to retire because he was faced with the threat of losing his medical insurance. *See* Tr. at 157 – 162. Employee had contact with person(s) from CM Thomas' office, specifically Neil Rodgers, and based on that, his understanding was that he would be able to retire and appeal his termination, and if he won he would be able to "un-retire" and be reinstated. *Id*. Employee felt that his decision to retire was life or death in that he would not be able to afford his medical care and that without it he would die. *Id*.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

Retirement

The law is well settled with the OEA that there is a legal presumption that retirements are voluntary and would thus preclude the Office from exercising jurisdiction. *See Christie v. United States*, 518 F.2d584, 587 (Ct. Cl. 1975); *Charles M. Bagenstose v. D. C. PublicSchools,* OEA Matter No. 2401-1224-96 (October 23, 2001), _D.C. Reg. _ ( ). However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and is within the jurisdiction of the Office. *Id.* at 587. A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception." *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.2.d 937 (Fed. Cir. 1984). The Employee must prove that his retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he relied when making his decision to retire. He must also show "that a reasonable person would have been misled by the Agency's statements." *Id.*

Employee and his wife credibly testified that Employee was misinformed regarding the effect of retiring with respect to his ability to appeal his removal. Employee offered into evidence Employee's Exhibit No. 2, an email sent from Neil Rodgers to Jackson operating under the auspices of CM Thomas. This e-mail states in pertinent part as follows:

> For immediate relief, I spoke with the DC Office of Human Resources. Retirement is an immediate alternative for your husband. It will allow him to continue his insurance coverage at the same rate he has paid as an employee. He is eligible for retirement. **His decision, should he select retirement, will not hinder in any way his ability to pursue the matter of his dismissal. If he is successful in overturning the decision, he has the right to "un-retire."**
>
> I hope that this is helpful for an immediate solution to your concerns. Please know that [CM Thomas] is personally monitoring this concern and has met with and received the testimony of your husband. Emphasis Added.

The Agency contended that Employee did not rely on the misinformation because he retired before he received the above cited e-mail. However, Employee explained in his Supplemental Brief dated February 4, 2010, that prior to contacting CM Thomas' office; he had contact with Ms. Shernell Carter, an employee with the District of Columbia Office of Human Resources ("DCHR"). She initially informed Employee that he could retire, maintain his medical benefits, and appeal his removal. Relying on the information from DCHR, Employee filed for retirement on February 10, 2009. The effective date of his retirement was backdated seemingly in order to coincide with the date he was removed from service. Subsequently, Employee was informed by Ms. Carter that he would be ineligible for medical benefits. This caused Employee and his wife to reach out to, among others, CM Thomas who then had his staff research this matter culminating with the aforementioned e-mail from Neil Rodgers. *See* Supplemental Brief at 3 – 6.

The Court has previously held that "[a] resignation or retirement is involuntary if it is obtained by agency misinformation or deception." *Covington v. Department of Health and Human Servs.*, 750 F.2d 937, 942 (Fed.Cir.1984). "A decision made 'with blinders on,' based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." *Id*. at 943. I find that the office of CM Thomas and the DCHR *grossly* misinformed Employee with respect to the options that Employee had if he opted to retire. The misinformation that was given to Employee is particularly disconcerting given that DCHR's is in part responsible for the service delivery of the District's benefits program and policies for benefit eligible employees and retirees. This includes the plan management; contracting; and communication of all health, voluntary and retirement programs. All other things being equal, under these same circumstances, if CM Thomas and DHCR had not misinformed Employee, then the OEA would have lacked jurisdiction over this matter. Due to the misinformation provided to Employee and Jackson regarding the effect of his retirement, I find that that the OEA may exercise jurisdiction over the instant matter.

Removal

Agency contends that Employee was properly removed from service due to his failure to submit to a random drug and alcohol test at the time and place it appointed for this test – the morning of December 2, 2008. Agency cites that all employees of the DPR are required to submit to random drug tests given its unique mission which anticipated prolonged and continual contact with children. Because Employee did not submit for the test, it was deemed by DPR that he automatically tested positive for a banned substance and was subject to removal on these grounds. Despite Employee's mitigating circumstances, DPR believes that it properly established cause in this matter and that its removal action should be affirmed.

Employee counters that he had mitigating circumstances that DPR should have taken into consideration before removing him from service. Employee further asserts that these same circumstances would require the undersigned to reverse Agency's action and reinstate him to his former position of record. Most poignantly, Employee and his wife described in vivid detail the life threatening conditions that he has to manage on a day to day basis. I have no credible reason to doubt that Employee suffers from these terrible diseases. He has presented credible testimony and documentary evidence to substantiate that he suffers from several debilitating ailments. Based on the evidence adduced during the Evidentiary hearing in this matter, I make the following finding of facts:

1. Employee underwent an invasive medical procedure on December 1, 2008, the day before the incident in question.

2. Part of the post procedure instructions provided to Employee included getting medical assistance if any number of symptoms developed.

3. On December 2, 2008, while being transported to HR in order to submit to a random drug test, Employee started feeling discomfort, including but not limited to heart palpitations. This was one of the symptoms that

Employee was warned about as noted above.

4. Employee telephoned his HMO provider Kaiser Permanente and was eventually instructed by the advice nurse to proceed directly to an Emergency Room.

5. Employee heeded this advice and went to Washington Hospital Center's Emergency Room.

The District Personnel Manual ("DPM") provides in pertinent part as follows:

> **1242 SICK LEAVE—GRANTING**
>
> 1242.1 An agency head **shall** grant sick leave to an employee under any of the following circumstances:
>
> (a) When the employee requires personal medical, dental, or optical examination or treatment… (Emphasis Added).

All applicable District government employees must submit themselves for random mandatory drug and alcohol testing pursuant to D.C. Official Code §1-620.35. Employee is one of the persons that must adhere to this mandate. However, a person's health is paramount. The requirement to submit oneself for testing must, given the instant circumstances, be tempered with reason and with respect to Employee's overall health. DPM §1242.1 (a) recognizes this fact as it relates to how District government employees shall be treated by the District government when they are sick. In the instant matter, Employee was instructed by a medical provider to seek immediate medical assistance if he felt certain symptoms including heart palpitations/chest pains. If I allowed the Agency's removal action to stand, it would, in effect, remove Employee from service just because he decided to follow his Doctor's advice. Such an outcome cannot be tolerated. I find that Employee was very credible when describing and detailing his medical health and the need to seek swift medical assistance when certain symptoms appeared. Medical emergencies do not adhere to our appointment deadlines or daily schedule. DPR cannot expect Employee, nor any District government that he came into contact with on December 2, 2008, to give a proper medical assessment and treatment when Employee first felt heart palpitations. Given the instant circumstances, I find that whatever caused Employee's chest pains[2] or the timing of the chest pains[3] are irrelevant. I also find that Employee properly documented the circumstances that necessitated his seeking immediate medical attention. *See* Agency Exhibit No. 5, *See Also* Employee Exhibit No. 3.

Nothing that the DPR has presented during the pendency of this matter has swayed the undersigned to believe that Employee was doing nothing less than tending to his personal health by proceeding to an Emergency Room on the advice of a medical professional. There is no

[2] For example, the anxiety Employee may have felt regarding having to undergo a random drug test the day after he underwent an invasive medical procedure.

[3] Regardless of whether Employee's chest pains occurred while being transported to HR or even after he signed the document at HR authorizing the mandatory random drug test. Such distinction is of no moment.

credible evidence of deceit or chicanery by Employee in an attempt to avoid taking the test. I find that Employee had the right to seek immediate medical attention given the symptoms he was experiencing. Consequently, I further find that everything else that the Agency had scheduled for the Employee to do on December 2, 2008, including the aforementioned test, had to be put on hold. I also find that the DPR has failed to meet its burden of proof in this matter and that the Agency has failed to establish that it had cause to remove Employee from service.

Consequently, I further find that the DPR has violated Employee rights, namely DPM §1242.1 (a), by denying him the use of sick leave and by carrying out the instant adverse action. I further find that the automatic positive test result that Employee received due to his inability to submit to the random mandatory drug and alcohol test is nullified. Accordingly, I CONCLUDE that Agency's removal action should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing Employee from service is **REVERSED**; and

2. The automatic positive test result that Employee received due to his inability to submit to the random mandatory drug and alcohol test is deemed **NULL and VOID**; and

3. The Agency shall **REINSTATE** Employee to his last position of record; and

4. The Agency shall **REIMBURSE** Employee all back-pay and benefits lost as a result of his removal; and

5. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.
Administrative Judge