THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EVELYN L. PRIMAS	)	OEA Matter No. J-0009-08
Employee	)	
	)	Date of Issuance: September 3, 2009
v.	)	
	)	Rohulamin Quander, Esq.
DISTRICT OF COLUMBIA	)	Senior Administrative Judge
METROPOLITAN POLICE DEPARTMENT	)	
Agency	)	
	)	

Theresa Quon Hyden, Esq., Agency Representative
Ted Williams, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On October 29, 2007, Employee, a former Commander in the Metropolitan Police Department ("MPD" or the "Agency"), filed a petition for appeal with the Office of Employee Appeals (the "Office" or "OEA"), contesting Agency's alleged action of demoting her to the position of Captain. Prior to the imposition of this action, Employee served as Director of Court Liaison, and was intended to retain that same title and position, but at a two grade reduction. Employee elected to retire, effective September 29, 2007. This matter was assigned to me on November 23, 2007. Because the issue of whether Employee's decision to leave Agency employment was voluntary or forced, there was a question of whether the Office had jurisdiction to consider this matter. On December 14, 2007, I issued an Order directing Employee to establish jurisdiction. A series of extensions were granted to Employee, but in the interim, on April 8, 2008, Agency filed a Motion to Dismiss, or in the alternative, to stay the proceedings while an appeal on a similar issue in *Robin Hoey v. Metropolitan Police Department*, OEA Matter No. 1601-0074, was under consideration by the OEA Board.

In response to Employee's petition for appeal, Agency contended that: 1) the Chief of Police acted within her lawful discretion and authority in proposing to reduce the staff position that

Employee encumbered from the rank of Inspector to that of Captain without cause as a component of an Agency-wide reorganization; and 2) the facts demonstrate that Employee, with a full knowledge of what was occurring, elected to voluntarily retire. As a result of either scenario, and certainly because of both of them, the Office does not have subject matter jurisdiction to review Employee's appeal, and it should be dismissed. Because there were no relevant facts in dispute, no hearing was held. The record is now closed.

JURISDICTION

The jurisdiction of the Office in this matter, pursuant to *D.C. Official Code* § 1-606.03 (2001), and pursuant to an Agency-wide reorganization plan has not been established.

ISSUES

The issues to be decided are:

1. Does the record reflect that Employee elected to voluntarily retire?
2. Should Agency's demotion action be upheld?

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9297 (1999) states that "[t]he employee shall have the burden of proof as to issues of jurisdiction . . ." Employee has the burden of proving that this Office has jurisdiction over his appeal.

FINDINGS OF FACT

The following facts are undisputed:

1. Beginning on September 25, 1978, Employee served Agency as a police officer for 29 years. Her Form 1 reflects that she was a Career Service employee. *Exhibit "A"* [1]

2. Employee held several positions with Agency, and at the time she left employment, she was serving as Director of Court Liaison and held the rank of Commander. Her most recent personnel record DC Form 1 (Personnel Form), dated February 4, 2004, indicated that, effective that date, Employee was reassigned and designated to serve as Director, Court Liaison Division. Her then existing title, Commander, was retained, as was the indication that at all times she remained in the Career Service. *Exhibit "C"*

[1] All exhibits refer to documents submitted by Agency as attachments to *Metropolitan Police Department's Motion to Dismiss or in the Alternative, for Stay of the Proceedings*, filed with the Office on April 7, 2008.

3. Mayor-elect Adrian Fenty appointed Cathy Lanier as Chief of Police. On or about September 13, 2007, Chief Lanier convened a meeting with Employee, and at that time informed Employee that, as a component of the Chief's staff reorganization plan, the position of Director of Court Liaison was being downgraded two grades from the rank of Commander to that of Captain. Initially, Employee was advised that she could remain in her Court Liaison position, but at the lower grade.

4. With almost 29 years of distinguished and valuable service, the option of Employee electing to retire was mentioned in the meeting, although there is no documented evidence in this record to support Employee's general assertion that she was informed by the Chief or other MPD staff that she world be terminated if she did not either accept the demotion or retire.

5. Chief Lanier called Employee to her office on September 18th, five days after the initial meeting, and inquired about which option Employee was electing. Employee advised the Chief that she would elect to retire at the staff level of Commander, rather than to continue working at a two grade level reduction in rank, salary, and benefits. *Exhibit "D"*

6. On September 24, 2007, Chief Lanier announced Agency's major reorganization plan, including a stated purpose of reducing the top heavy command structure, and aiming to improve the level of police service to the residents of the District of Columbia.. *Exhibit "E"* Although it was initially stated that the director of the Court Liaison Division would be a Captain in rank, on September 23, 2007, the day before the new reorganization was announced, it was decided that the director should serve at the higher rank of Inspector in the position of commanding officer of the Court Liaison Division. The rationale was that the director would have to routinely interact with judges, attorneys, and other federal and District agencies, and should be accorded a rank higher than Captain. *Exhibit "D"*

7. None of the written or verbal communications from Agency to Employee during the unfolding of this matter indicated that Employee was being demoted for cause, or that the demotion was directed towards her person. Rather, everything presented for this record reflects that the realignment of the position drove Agency's determination that the position should be downgraded from Commander to a lower grade level.

8. On September 24, 2007, the same date on which the reorganization was formally announced, Employee submitted her Request for Optional Retirement papers. On the form, the word, "Optional" was crossed out, and the word "Forced" inserted in its place. September 29, 2007, was listed as the effective date of Employee's retirement. *Exhibit. "G"*

9. The next day, September 25, 2007, Employee submitted a letter to Chief Lanier, referencing "retirement under duress." In the letter Employee stated, *inter alia,* that she was retiring under duress and with the understanding that her only options at that point were to retire, to accept a demotion, or be terminated. Further, Employee stated that the Chief advised her that if Employee accepted the demotion to Captain, she would be performing the same duties as

present, but would be compensated at the Captain salary level. Employee concluded her letter by asserting that the Chief's actions were discriminatory and a violation of the law, unacceptable and not tolerable, given Employee's 29 years of service. *Exhibit "H"*

10. On September 27, 2007, Employee submitted her official letter of resignation, effective close of business Saturday, September 29, 2007. *Exhibit "I"* On that same date, she was contacted by Assistant Chief Durham and verbally offered a recently vacated position at the rank of Inspector, with assignment to a police substation location. Employee declined the offer and position and still elected to retire. *Exhibit "J"*

11. On September 28, 2007, the Chief responded to Employee's letter of September 25th, challenging Employee's characterization of the circumstances of her retirement as a mischaracterization of the Chief's plans to reorganize MPD, and Employee's place in those plans. The Chief denied that she ever threatened to terminate Employee, but that the initial objective was to downgrade the position of Director of Court Liaison from the rank of Commander to Captain, with Employee being given the option of remaining in place, but at the newly assigned grade of Captain.

12. The letter further recited that instead of electing to accept the offer to remain in place at the lower rank, Employee elected to retire. Further, before the effective date of the retirement, MPD offered Employee another position, Inspector, as a reassigned location, which Employee likewise declined, in favor of retirement. *Exhibit "J"*

13. On October 4, 2007, the Police and Firefighters Retirement and Relief Board convened and ordered that Employee's request and option to retire be granted, effective September 29, 2007. *Exhibit "K"*

LEGAL ANALYSIS AND CONCLUSIONS

Motion for Summary Disposition

Agency has filed a Motion for Summary Disposition of this appeal. OEA Rule 616.1 provides as follows:

> If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be granted, the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.

A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified. *See Walker v. Washington,* 627 F.2d 541, 545 (D.C.Cir.), *cert. denied,* 449 U.S. 994, 101 S.Ct. 532, 66 L.Ed.2d 292 (1980). As the presiding AJ, I must conclude that no benefit will be gained from further briefing and argument of the issues presented. *Sills v. Bureau of Prisons,* 761 F.2d 792, 793-94 (D.C.Cir.1985). In addition, the Office is obligated to view the record and the inferences to be drawn there from "in the light most favorable to [taxpayers]." *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). Therefore, before I can rule in Agency's favor and grant the above-noted motion, I must evaluate the established facts as posed by Employee's appeal and supporting documents, and Agency's concomitant replies, and then find and conclude that there are no genuine factual disputes at issue. If I so find and conclude, then Agency is entitled to a decision in its favor, as a matter of law

In reviewing the sequence of events that occurred between September 13, and September 24, 2007, and as amply supported by the documents in the record, I find that under Agency's proposed reorganization plan, which included conversations between the Chief and Employee, the latter's position of Commander was to be downgraded two grades to the position of Captain, but that before the reorganization was finalized and the plan made public, it was decided to only downgrade one grade, from Commander to Inspector.

I further find that Employee was the incumbent, and that she was initially offered the option of remaining in the position of Director of Court Liaison, but at the planned newly designed rank of Captain. She declined to accept this option. Therefore, the directorship positing was offered to someone else. As well, prior to announcing the reorganization plan, Agency determined that there were sound administrative reasons why the director should serve at the rank of Inspector, the effect of which resulted in there only being a one level downgrade. As there is nothing in the record to imply that Employee, as the then incumbent, would not have been allowed to remain in the position, but at the Inspector level, I conclude that there are no material or genuine issues of fact over whether she could have retained her position.

Voluntary verses involuntary retirement

Employee asserts that her separation from Agency was involuntary, and that she left the Agency under a combination of duress, coercion (forced out of Agency) with only two options, i.e., either to accept a two grade demotion or be fired, both based upon Agency misinformation. She requested that this AJ vacate Agency's action, and reinstate her to the prior employment position of Commander, plus all back wages and relevant benefits incidental to that position. In her Petition for Appeal, she stated, "I was told that the position I was holding was going to be downsized and that I could remain in that assignment only at the rank of Captain (two grade reduction). The other option was to retire."[2] Employee asserts that the Office has jurisdiction, because of long established holdings by both the courts and the Office that an agency's misinformation at the time of an

[2] See original Petition for Appeal, Section "C", Item # 17, filed on October 29, 2007.

employee's retirement, can lead to a finding of involuntariness based on coercion. Employee cites the same above components as the elements that she faced at the time of retirement.

She maintained further that in her particular case, Agency's plan of action and Employee's subsequent reaction, i.e., her election to retire, was solely the result of Agency-imposed misinformation. Citing *Covington v. Dept. of Health and Human Services,* 750 F.2d 937, 943 (Fed. Cir. 1984), as an underlying basis of her legal theory, she noted that the court held that where a decision is made "with blinders on," based upon misinformation or a lack of information, an employee's being unceremoniously separated from Agency cannot be binding as a matter of fundamental fairness and due process.

A review of the details of Employee's separation is enlightening. Employee asserts that, with little to no prior notice on September 13, 2007, she was called into the Chief's office for a meeting and told of the anticipated two grade demotion as a component of a planned Agency-wide reorganization. Suddenly faced with the most stressful and undesirable choices, she felt placed under duress, and coercion, including a realization that if she did not ultimately elect to leave Agency employment by means of an "involuntary" retirement, she would be demoted two full grade levels. Further, although she knew that Agency lacked any cause for demotion, such an action would still represent a loss of professional prestige, a major diminution of her salary level, and a significant reduction in long-term retirement benefits. Feeling threatened with one of two very undesirable alternatives, either to accept a two grade reduction, while remaining in the position of Director and with the same duties, or retire, she believed that if she did not immediately elect one option or the other, Agency would initiate an improper termination, despite the lack of cause.

From Employee's perspective, the ultimate insult, and further "evidence" of Agency misinformation occurred when, after Employee verbally announced on or about September 18, 2007, her intention to retire, some days later Agency subsequently reassigned a Captain to become Director of Court Liaison, Employee's exact position, but announced that this new person would serve at the staff level of Inspector, a grade higher than was indicated to Employee during her September 13, 2007, meeting with the Chief. By this date Employee had initiated her retirement documents and moved towards the effective date of her retirement, September 29, 2007.

Agency countered Employee's argument, urging that the record demonstrates that Employee's decision to retire was entirely voluntary, arrived at only after she had had more than ample time to deliberate and evaluate all of the available options, before ultimately making the decision to retire. Further, since the decision was voluntary, consistent with the law on the subject and the Office's prior rulings in matters similarly situated, OEA lacked jurisdiction to even consider the matter further.

Agency filed a Motion to Dismiss the appeal. Subscribing essentially to the same fact pattern and sequence of events as outlined by Employee, Agency saw the purpose and how the matter unfolded quite differently. Staking its initial position that there is a presumption that an employee's decision to retire is voluntary, unless the affected employee can present evidence to prove otherwise,

Agency held firmly to that tenet. See *Toliver v. D.C. Public Schools,* OEA Matter No. 2401-0290-96, 47 D.C. Reg. 9963 (2000); *Dunham v. D.C. Public Schools,* OEA Matter No., 47 D.C. Reg. 9970 (2000); *Bagenstose v. District of Columbia Office of Employee Appeals,* 888 A.2d 1155, 1156 (D.C. 2005).

Citing *Staats v. U.S. Postal Service,* 99 F.3rd 1120, 1124 (Fed. Cir.1996), Agency argued that in order for Employee to overcome the presumption of voluntariness and demonstrate that a retirement is involuntary, the employee must satisfy a demanding legal standard. In *D.C. Metropolitan Police Dep't v. Stanley,* 2008, D.C. App LEXIS 86 (D.C. 2008), the court stated, "The fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to unpleasant alternatives is not enough by itself to render the employee's choice involuntary."

In *Stanley,* the D.C. Court of Appeals articulated the standard for measuring voluntariness in a retirement situation. It stated that:

> The test, an objective one, is whether, considering all the circumstances, the employee was prevented from exercising a reasonably "free and informed choice." As a "general principle" in this context, an employee's decision to retire or resign is said to be voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his decision, and is permitted to set the effective date." With meaningful freedom of choice as the touchstone, courts have recognized that an employee's retirement or resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or misrepresentation or withholding of material information.

After enunciating and comparing the standards for both voluntary and involuntary, the court then found that Officer Stanley's retirement was involuntarily obtained, because he was given an extremely short time to elect between retirement and demotion or termination; he was unable to obtain from Agency relevant information about the financial consequence of making an election between the options; and it had been misrepresented to him that the Chief of Police would summarily terminate his employment, which was not correct.

After citing the *Stanley* case an example of evaluating the voluntariness standard, Agency then proceeded to distinguish that matter from the case at hand on several basis. First and foremost, Agency asserted that at all times Employee was able to exercise a free and informed choice before making her final decision. "Free and informed choice" was expanded with the following enumeration:

1. Employee was not required to make a decision immediately;
2. She was not given a deadline for her decision;
3. She neither requested nor was denied additional time to make her decision;
4. She was able to set her own retirement date;
5. She was encouraged to discuss her options with the Agency's Office of Human Services;

6. She had the time and opportunity to discuss her options and the financial consequences of each option with the Office of Human Services or others, if she desired;
7. She had the opportunity and did speak with her family regarding her options;
8. She was sufficiently informed that she could evaluate and determine how she could afford the decease in pay as a result of the demotion;
9. She was not threatened with termination;[3] and
10. She was offered and rejected an Inspector position at another location prior to electing to still proceed towards retirement.

Agency steadfastly denied Employee's claim that the Chief of Police misled her in initially stating that the position of Director of Court Liaison was to be downgraded to Captain, but was later staffed by someone who was promoted from Captain to Inspector. Agency replied by noting, first, that on the occasion of the initial meeting of September 13th, Employee was told that she could retain the directorship that she currently held, although the position was to be officially downgraded according to the reorganization plan. Second, on September 13, 2007, the reorganization plan was still in flux, and the intent at that moment was to staff the directorship with someone who was a Captain in rank.

Third, incensed at the prospect of being demoted, Employee made the voluntary decision to retire, even rejecting a subsequent offer of an Inspector position at another location. Fourth, it was not until September 23rd, five days after the Chief and Employee last met, and likewise five days after Employee had orally advised the Chief that she would retire, that Agency decided that, due to the nature of some of the duties of the director, the position should be staffed by an Inspector, and the decision was made that the directorship was to be increased by one grade. The reorganization plan was publicly announced on September 24, 2007, reflecting that the initial proposal to have a Captain serve as Director Court Liaison, would now have an Inspector serve in that capacity.

Having reviewed all of the evidence before me, and considering both Employee's arguments to the effect that she suffered duress, coercion, and was the victim of intentional misinformation, I find otherwise. Of primary consideration is that, had she elected not to say, "I am retiring!," and let the reorganization plan take its final shape, by her own admission, she was accorded the opportunity to remain as director. Once it was later decided that the proposed two grade demotion would only be a one grade demotion, Employee would have likewise enjoyed the fortuitousness of being demoted but one grade, but still encumbering and enjoying the position of being the director. However, by the time the reorganization plan was finalized and publicly announced, Employee had already stated her intention to retire, was in the process of submitting her intentions in writing, and had been offered and rejected the position of Inspector in another location.

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[3] Agency noted that although Employee claimed in her letter of September 25, 2007, that she was given a "third option" of termination, this allegation was denied by Chief Lanier in her reply letter of September 27, 2007.

I note curiously that no where in Employee's initial Petition for Appeal does she claim that she was facing or threatened with a possible termination if she declined to either accept a two grade demotion or to retire. Rather, she stated in her appeal that she was given the option of being demoted, or, "the other option was to retire." I further find that Employee found herself in a very distasteful situation, having to select between two uncomfortable choices, i.e., accept a two grade demotion, or elect to retire. She chose the latter, voluntarily, thus avoiding any possible embarrassment, loss of prestige, and potential loss of salary, benefits, and reduced retirement income. With 29 years of distinguished and valued law enforcement service, she continued to hold her head up, and announced that she had made a decision to retire. I conclude that, having given the situation careful consideration before electing which option to pursue, she made an entirely voluntary decision to retire. I further conclude that there was no evidence of Agency imposed duress, coercion, or misinformation, and I must dismiss Employee's appeal for lack of subject matter jurisdiction.

Should Agency's action demoting Employee be upheld?

Having determined that Employee's decision to retire was purely voluntary, as the allegations of duress, coercion, and Agency misinformation have each been discounted, the question now is whether Agency's intended action, which would have demoted Employee, had she not retired, should be upheld. At this point, the matter is largely an academic exercise, as once the Office has determined that the retirement was voluntary, the Office no longer has jurisdiction to consider the matter. Still a brief review is helpful.

In *Robin Hoey v. D.C. Metropolitan Police Department*, OEA Matter No.: 1601-0074-07, *Opinion and Order on Petition for Review* (June 25, 2008), __ D.C. Reg. __ ( ), the OEA Board held that the plain meaning of the governing statutes makes it clear that all Assistant Chiefs, Deputy Chiefs and inspectors must be selected from among the captains of the police force. It is also clear that the Chief of Police has the authority to take an Assistant Chief, Deputy Chief, or inspector out of that position. Furthermore, if the Chief exercises her discretion in this regard, it is clear that she must return any Assistant Chief, Deputy Chief, or inspector to the rank of captain.[4] Even though *D.C. Official Code* §§ 1-608.01(d-1) and 5-105.01(a) do not specifically mention Commanders, MPD General Order 101.9 clarifies that Commanders are equivalent to Deputy Chiefs. Therefore, these sections apply equally to Commanders.

The Board went on to hold that because *D.C. Official Code* §§ 1-608.01(d-1) and 5-105(a) explicitly permit the Mayor, who has delegated personnel authority to the Chief of Police, to return a Commander to the rank of captain at his or her discretion, such action should not be considered an adverse action for which there must be cause. Rather, "this is more appropriately viewed as nothing more than a type of personnel action for which the Chief, notwithstanding any other law or regulation, has specific legal authority to exercise."[5] However, Employee's Career Service status

[4] The Mayor delegated all personnel authority vested in the Mayor to the Chief of Police pursuant to Mayor's Order 9-88, May 8, 1997. That order remains in effect.

[5] See *Hoey*, P 4.

would have given her certain legal rights had the Chief chosen to terminate or demote her to a rank below that of captain.[6] Such an action, if taken, would be considered adverse action, and "cause" would have to be established before such personnel action(s) could be implemented.

Employee, in this matter, is similarly situated to the appellant in *Hoey*. Over time, and because of her distinguished service, she was promoted through the lawful discretion of the Chief of Police to the rank of Commander. Later, the Chief exercised the same lawful discretion to return her to the position of Captain during an Agency-wide reorganization. Still, she was to remain in her same position as director of Court Liaison, but at a reduced rank. The applicable law does not require that Agency state cause for electing to take such an action. Further, nothing in the record before me reflects any possible indication of a cause or is indicative of any adverse action.

I find that, with reference to the proposed two grade demotion, there are no material and genuine issues of fact in this matter. I further find that Agency, having acted lawfully, is entitled to a decision as a matter of law. Employee has failed to state any claim upon which relief can be granted. This Office does not have jurisdiction to review or grant relief for Agency's lawful exercise of discretion to demote Employee. Therefore, I conclude that Agency's motion for summary disposition must be granted, and that Employee's appeal should be dismissed for lack of subject matter jurisdiction.

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[6] This appeal is distinguishable from the case of *D.C. Metropolitan Police Dep't v. Stanley*, 942 A.2d 1172 (D.C. 2008). In *Stanley*, Winfred Stanley, Reginald Smith, and John Daniels were all Commanders with the Metropolitan Police Department. The newly appointed then-Chief gave Stanley and Smith the ultimatum of being terminated unless they retired on the spot. Daniels' ultimatum was to accept termination, retire, or accept a vaguely described demotion. Each chose to retire. The court ruled that given the circumstances surrounding the retirements, the retirements were involuntary. Ultimately the court affirmed the Superior Court ruling which ordered that the three commanders be reinstated to their positions. In the present appeal, the Chief has not sought to terminate Employee nor did she give her an ultimatum to force her into retirement. To the contrary, the Chief has sought to exercise her legally given discretion and return Employee to the rank of captain. For these reasons, this appeal is distinguishable from *Stanley*.

ORDER

The foregoing having been considered, it is hereby,

ORDERED that Agency Motion for Summary Disposition is GRANTED; and it is

FURTHER ORDERED that this matter is also dismissed due to Employee's failure to establish that the Office has subject matter jurisdiction to consider this appeal.

FOR THE OFFICE: / s /
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge