THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0122-08
LINDA GRAY Employee	Date of Issuance: October 23, 2009
v.	Sheryl Sears, Esq. Administrative Judge
DISTRICT OF COLUMBIA PUBLIC SCHOOLS Agency	

H. David Kelly, Jr., Esq., Employee Representative
Harriet E. Segar, Esq., Agency Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Linda Gray ("Employee") was the Principal of Roosevelt Stay High School. By letter dated May 5, 2008, Michelle A. Rhee, Chancellor of the D.C. Public Schools ("Agency" or "DCPS"), notified Employee that she would not be reappointed for the next school year. This amounted to a termination that would have been effective on June 30, 2008. Instead, Employee retired on that date. On July 24, 2008, Employee filed an appeal with the Office of Employee Appeals ("the Office").

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 her appeal.

ISSUE

I. Whether Employee served at the will of the Superintendent and was subject to removal at any time without a showing of cause.

II. Whether Employee had retreat rights. If, so, from what law, rule or regulation did they originate? What specific protections, if any, did they afford her?

III. Whether Employee retired involuntarily. If this Employee had retreat rights and Agency failed to honor them, was that a "misinformation" and/or "deception" that renders her retirement involuntary?

FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

Employee recited the following employment history. She was first employed as a high school biology teacher in October of 1978. By 1987, she became a Department Chairperson and began to perform administrative functions for DCPS. In 1996, she received a promotion to serve as an Assistant Principal at Roosevelt Senior High School where she served until appointed as Principal of Roosevelt Senior High School in July of 2005.

By letter dated May 5, 2008, Michelle A. Rhee, Chancellor of the D.C. Public Schools, notified Employee as follows:

> I am writing to provide you with notice of my decision not to reappoint you to the position of principal with the District of Columbia Public Schools (DCPS) for the 2008-2009 school year. This action is effective at the close of business on June 30, 2008 . . .
>
> DCPS will honor any valid retreat rights that you possess. If you believe you have these rights and wish to exercise them, you must provide written notification by May 19, 2008 to Richard Shackell, Director of School Staffing, 825 N. Capitol Street, N.E., 6th Floor, Washington, DC 20002. We recommend that you obtain a receipt indicating that your written notification was in fact delivered. Mr. Shackell may also be reached at (202) 442-4090. However, you may only exercise your retreat rights by providing written notification to Mr. Shackell by May 19, 2008. If you do not provide written notification by May 19, 2008, your employment with DCPS will terminate on June 30, 2008.

Employee retired on the would-be effective date of the removal, June 30, 2008, with a reduced pension because she was two (2) years away from full eligibility.

D.C. Official Code § 1-606.03 (2001) lists those actions that employees of the District of Columbia government may appeal to this Office. Section 101(d) of OPRAA amended § 1-606.03 of the Code to provide for jurisdiction as follows:

> (a) An employee may appeal a final agency decision effecting 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. Emphasis added.

Agency maintains that Employee was lawfully removed when the Chancellor elected not to renew her appointment. Agency characterizes the appellant as an at-will employee subject to separation at any time. As such, she would have no right to appeal to this Office.

On her appeal form, Employee acknowledges that "principals do serve at the pleasure of the superintendent" but she posits that "the choice of non-appointment should be based on performance." Employee maintains that she was a former career service employee who was entitled to a reappointment. She characterizes her retirement as involuntary. An involuntary retirement is tantamount to a removal and subject to review and, where warranted, reversal by this Office. Employee asked that this Office reverse her retirement and restore her to the position of Principal of Roosevelt Stay High School or, in the alternative, grant her full retirement benefits.

This appeal presents a threshold question of jurisdiction. On January 12, 2009, this Judge convened a conference to hear oral arguments from the parties on the question of jurisdiction. After that, the parties tried to negotiate a settlement but were unable to agree upon terms. The parties supplemented the record with several written briefs on the issues set forth below. No hearing was convened as there were no factual issues of decisional significance that required one. This decision is based upon the evidence and argument of record.

I. Whether Employee served at the will of the Superintendent and was subject to removal at any time without a showing of cause.

Agency submitted into the record the provision of the D.C. Municipal Regulations (DCMR) that provides for the appointment of principals and assistant principals. Title 5, Board of Education, Chapter 5, Administration and Management, Section 5-520, One Year Appointments of Principals and Assistant Principals, Subsection 520.1 provides as follows: "Persons appointed to a position as Principal or Assistant Principal shall serve one (1) year, without tenure in the position." Subsection 520.2 provides that "[r]etention and reappointment shall be at the discretion of the Superintendent." Agency contends that, in accordance with this language, the appellant was an "at-will"employee.

As noted, Employee acknowledged that "principals do serve at the pleasure of the superintendent." However, in arguments presented by Employee through her attorney in the proceedings before this Office, Employee maintained that she was not an at-will Employee.

Due to her tenure, which predates the adoption of the current D.C. Comprehensive Merit Protection Act (CMPA) D.C. Code § 1-601.01 *et. seq.*, Employee claims that she was entitled to notice of cause before any removal. She claims that her appointment to the position of Principal did not convert her status from that of a career service employee to that of at-will because she did not specifically sign any document waiving her right to tenure. Nor was she presented with any notice that Agency was declaring her an at-will employee. However, it is my finding that, when Employee accepted the appointment to the position of Principal, she relinquished the rights of her former appointment. Thus, in accordance with the operations of law, the appellant became an at-will employee serving at the pleasure of the Superintendent.

Section 1601.1 of the District Personnel Manual (DPM) distinguishes career service employees from at will employees. It states that "[e]xcept as otherwise required by law, an employee not covered by §1600.1 is an *at will employee* and may be subjected to any or all of the foregoing measures at the sole discretion of the appointing personnel authority." (Emphasis added). An at will employee may be terminated at any time and "for any reason at all." *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition for Review* (July 10, 1995), ___ D.C. Reg. ___ ( ). This Judge concludes that Employee was subject to removal at any time.

Employee has argued that, even if that is so, Agency should have chosen a performance-based mechanism for determining which Principals would not be renewed. In an at-will position, there is no such entitlement. It is the conclusion of this Judge that Employee, as a Principal, served at the will of the Chancellor. It was proper for the Chancellor to issue notice to Employee upon the determination that her appointment would not be renewed. However, it is of great significance that the removal did not become effective. Employee retired on the exact date set for her separation. Employee's contention that her decision to retire was involuntary and, therefore, the equivalent of a removal, will be addressed below.

II. Whether Employee had retreat rights. If, so, from what law, rule or regulation did they originate. What specific protections, if any, did they afford her?

Subsection 5203 of the DCMR Title 5, Section 520 provides that "[a] person who is not retained in the position of Principal or Assistant Principal and who holds permanent status in another position in the D.C. Public Schools shall *revert* to the highest permanent level of employment upon his or her removal from the position of Principal or Assistant Principal; provided that this right shall not include the right to any particular position or office previously held." Emphasis added.

In an email to Richard W. Shackell, Office of Human Resources School Staffing Supervisor, on May 13, 2009, Employee stated:

> Last week I submitted my request to exercise my retreat rights. However what retreat rights are has not been made very clear. The union has stated that as well that there is no clearity [sic] on what that actually means. My question is this: Now that I have made the request can I pursue another position with the system and can I start searching for the position now?

Shackell responded on the same date saying:

> You can exercise your retreat rights AND pursue another position. Your retreat rights entitle you to a position as a teacher with DCPS. In that regard, you would be treated like an excess teacher whom we are obligated to find a placement for. However, that by no means limits what you can apply for. If you want to apply for other positions, that is entirely possible, however just keep in mind that once we have solidified a placement for you that satisfies your retreat rights, if you refuse the position at that time you will lose your retreat rights. Does that make sense? Let me know if you have any questions?

Agency ackowledges this exchange, stating, "Clearly, by the email exchange between Mr. Shackell and [Employee], DCPS intended to place [Employee] in a teaching position, thus agreeing that she should revert to her previously held permanent position." Employee clearly had retreat rights and inquired of Agency, through Shackell, how she could invoke them. However, Agency did not act before the effective date of Employee's separation.

Employee has urged, throughout this appeal, that she relied, to her detriment, upon Agency's "promise" to appoint her to a teaching position. However, she did not. In fact, Employee protected herself against the risk of relying upon that representation by initiating the retirement process in time to prevent the removal from becoming effective. Also, in her appeal, Employee acknowledged that "she could not retreat back to a classroom teacher because [she] was a licensed administrator and not a licensed teacher." However, she argued that, once Shackell advised her of retreat rights, she was entitled to an appointment to the position of teacher. There is nothing that any Agency official could have said or done to confer entitlement upon Employee to appointment to a position for which she was not properly licensed. Therefore, while Employee had retreat rights, she was not in a position to exercise them. Agency committed no legal wrong by not appointing Employee to a teaching position.

III. Whether Employee retired involuntarily. If this Employee had retreat rights and Agency failed to honor them, was that a "misinformation" and/or "deception" that renders her retirement involuntary?

This Office, relying upon *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), has held that, even when elected under difficult circumstances, a voluntary resignation does not constitute an adverse action by an agency. A retirement is presumed to be voluntary unless it is proven otherwise. A retirement is considered to be involuntary when an employee chooses it in reliance upon "misinformation" and "deception" by an agency. Employee claims that Agency misinformed and deceived her by representating that she would be appointed to another position and then denying her request for that appointment. An involuntary retirement is considered a constructive removal and is within the judirisdiction of this Office.

Employee contends that, by violating a promise that it would "honor all retreat rights" once she claimed them, Agency misinformed and deceived her, leaving her with no choice but to retire. As noted above, a retirement is considered to be involuntary when an employee chooses it in reliance upon "misinformation" and "deception" by an agency. Agency asserts that Employee did not wait for her placement but, instead, inquired of Agency's Office of Human Resources about her eligibility and the process for retirement. A "Request for Retirement Calculation" completed by Employee and dated June 18, 2008, is a part of the record in this matter. Agency maintains that Employee, by initiating the retirement process, made herself unavailable for appointment to a position.

Employee acted reasonably in her efforts to protect her stream of income. It was logical, and even sound, for her to initiate the retirement process as she waited for Agency to effect her appointment to another position. At any moment before the date June 30, 2008, arrived, Agency could have effected that appointment. As it happened, Agency did not. However, Employee's claim for relief for Agency's failure to act fails because, by her own admission, she was not licensed to teach at the time of the removal action. Therefore, she was ineligible for an appointment to the teaching position that she was seeking.

Under the circumstances, Employee's choices were to suffer the removal from her position or to retire. In the matter of *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed Cir. 1987), the Court noted that "where an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act." *Id*. At 1136. The employee in the instant appeal was not being removed for cause. However, her options were similarly limited. But they were limited by her circumstances, not the agency's actions.

Employee asked that this Office reverse her retirement and restore her to the position of Principal of Roosevelt Stay High School or, in the alternative, grant her full retirement benefits. Only if Employee's retirement was deemed involuntary and tantamount to a removal would she be entitled to a review by this Office. Instead,

Employee was served with notice of removal from an at-will position. As discussed above, this Office does not have jurisdiction over an appeal from an at-will employee.

In addition, this Judge has found that Employee's retirement was voluntary. As previously set forth, this Office does not have jurisdiction over an appeal from an employee who retires voluntarily.

The Office of Employee appeals does not have jurisdiction over the appeal of this employee who served at-will and retired voluntarily. Therefore, it must be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE: _____

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE