THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
DEBORAH GRAY-AVENT	) OEA Matter No. 2401-0145-08
Employee	)
	)
v	) Date of Issuance: July 27, 2009
	)
DEPARTMENT OF HUMAN RESOURCES	) Muriel A. Aikens-Arnold) Administrative Judge
	)

Stewart Fried, Esq., Employee Representative
Stephanie B. Ferguson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 8, 2008, Employee, a Human Resources Specialist, filed a Petition for Appeal (PFA) with this Office regarding Agency's final decision separating her from Government service pursuant to a modified Reduction-in-Force effective July 11, 2009. On August 20, 2008, Agency was notified regarding this matter and required to file an answer within thirty (30) days, which was received as instructed.

This matter was assigned to this Judge on January 9, 2009. On March 3, 2009, an Order to Convene a Prehearing Conference was issued, scheduling said meeting on March 17, 2009. During that conference, the parties were advised that a review of the record reflected that there was a question regarding this Office's jurisdictional authority to consider the arguments presented by Employee. Following discussion of those arguments, the Judge advised that various issues must be clarified for further evaluation of this matter. On March 19, 2009, an Order was issued directing the parties to separately file specific documents for consideration. Both parties complied. Based on review of the written record, this Judge determined that this matter could be decided based thereon, and that no further proceedings were necessary. Accordingly, the record is closed.

JURISDICTION

This jurisdiction of this Office has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) reads:

> 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:
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> > 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 629.2, Id., reads:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness.

POSITIONS OF THE PARTIES

Employee's Position.

Employee's appeal primarily contests the Mayor's authority to delegate personnel functions to, with the exception of Agency, twenty-three (23) other District of Columbia (D.C.) government departments; and cites the Mayor's failure to follow D.C. Code, §§ 1-315.01, *et seq.* requirements related to agency reorganization. Although Employee cites various requirements of Chapter 24 of the D.C. Personnel Regulations in conducting RIF's, no specific allegations were made relative to the limited review of RIF's by this Office. During the prehearing conference, the Judge cited several other issues raised by Employee: that other employees were transferred to avoid the RIF; others were protected from the RIF in violation of law and regulations; and that the RIF had an invalid purpose. Based on a Standard Form (SF) 50 (included with Employee's PFA) which indicated that Employee's separation was due to a discontinued service retirement in lieu of the RIF, Employee was questioned, by this Judge, regarding whether or not she voluntarily retired. Her response was negative. However, Employee stated that she applied for discontinued service benefits when she was terminated. Following

the prehearing conference, Employee filed a Motion to Amend Petition For Appeal alleging Agency's violation of D.C. Code § 1-624.08(d), § 1-624.08(l) and §1-315.01, *et seq.* [1]

Agency's Position.

Agency contends that Employee was properly terminated in compliance with D.C. Code § 1-624.08 (d) and (e). Agency counseled Employee on the Priority Placement Referral Program and offered to refer and assist her in obtaining other positions. Specifically, Agency referred and interviewed Employee for another Agency position, but she frustrated the process by refusing to take the skills proficiency test required for said position. Nevertheless, Employee applied for discontinued service retirement in lieu of the RIF.

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FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

D.C. Official Code, Subchapter XXIV, Reduction in Force, §1-606.03 (2001) bestows upon this Office the authority to review, *inter alia,* appeals from separations as a result of a reduction-in-force (RIF). Pursuant to §1-624.08 of the Code, this Office is not authorized to determine broadly whether the RIF violated any law. Rather, this Office is limited by law to determining: 1) whether an agency afforded an employee, who is entitled to compete for retention, one round of lateral competition pursuant to Chapter 24 of the District Personnel Manual; and 2) that employee was given written notice at least 30 days prior to the effective date of his or her separation.

D.C. Official Code § 1-624.08, Abolishment of positions for fiscal year 2000 and subsequent years, states in pertinent part:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
>
> (f) Neither the establishment of a competitive area smaller than an agency,

[1] See Petitioner's Motion to Amend PFA, Exhibit A, (filed 3/24/09) where Employee alleges: 1) that Agency failed to afford her one round of lateral competition in her competitive level based on its preparation of an incorrect retention register; 2) the RIF was not conducted in accordance with Agency's Management Reform Plan; and 3) the purported reason for the RIF (Agency realignment) was beyond the authority of the Mayor or Agency. Agency filed its opposition on 3/31/09; and Employee filed a Reply Memorandum on 4/17/09.

> nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> > (1) An employee may file a complaint contesting a determination or a separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
> >
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied.[2]

In a RIF appeal, this Office cannot address any arguments pertaining to the necessity of the RIF, the creation of a competitive area smaller than the entire agency, the selection of a specific position to be abolished, any pre-RIF transfers, reassignments, promotions, demotions, or any claimed violation of post-RIF employment rights.[3] Thus, Employee's amendment of the PFA, but for, the entitlement to one round of competition, contains arguments which are beyond the scope of this Office's jurisdiction. In fact, Employee, in the PFA, did not initially challenge the sufficiency of the notice or the entitlement to one round of lateral competition within her competitive level.[4] Indeed, it appears, to this Judge, that the latter argument was only added after the prior discussions were held regarding the jurisdiction issues. In any event, as will be explained below, said issue is otherwise moot and will not be addressed.

The record reflects that Employee retired effective July 11, 2009.[5] There is a presumption that an employee's decision to retire is voluntary unless the employee presents evidence to prove otherwise. *See Christie v. United States*, 518 F.2d 584 (Cl. Ct. 1975). In cases where an employee voluntarily retires, this Office lacks jurisdiction to consider that employee's appeal.[6]

However, where an employee can prove that an agency coerced him or her into retiring or

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[2] During the prehearing conference, the parties were advised regarding the jurisdictional limitations of this Office to address RIF issues.

[3] *See Levitt v. D.C. Office of Personnel*, OEA Matter No. 2401-0001-00, *Opinion and Order on Petition for Review* (Nov. 21, 2002), D.C. Reg. __ ( ). Employee's remaining procedural claims (eg., incorrect and unsigned Form 50, transfer of less senior employees to avoid RIF) are more appropriately addressed internally within the agency.

[4] Rather, Employee made bare assertions, in Items #13 and #21, that she was not offered other positions with this or any other agency and could not be placed in the displaced persons program.

[5] See Employee's PFA, Exhibit A, SF-50, Notification of Personnel Action which shows, in Item 5B "Retirement-ILIA" [In lieu of involuntary action] and in Item 4, Effective Date "07-11-2008."

[6] This Office was established by the D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Code Ann. § 1-606.01 et seq. (2001) and has only that jurisdiction conferred upon it by law. The types of actions that employees of the District of Columbia government may appeal to this Office are stated in D.C. Code Ann. § 1-606.03. Those actions include, inter alia, removals and reductions-in-force

that an agency provided him or her with misleading information on which the employee relied to his or her detriment, the resulting retirement will be considered involuntary. Under these circumstances, the employee's decision to retire will be treated as a constructive removal and may be appealed to this Office. *See Bagenstose v. D.C. Public Schools,* OEA Matter No. 2401-0224-96, *Opinion and Order On Petition For Review,* (June 23, 2003).

Here, Employee does not claim that she was coerced into retiring or that Agency gave her misinformation on which she based her decision. Rather, she stated (at the prehearing conference) that she did not retire, but applied for discontinued service benefits when she was terminated. In an effort to clarify any apparent misunderstanding, this Judge directed the parties to provide specific documents for further evaluation of the circumstances surrounding Employee's separation from service. Employee subsequently submitted guidelines regarding discontinued service retirement, which reflected that an involuntary separation, such as a reduction-in-force, may qualify an employee for a discontinued service retirement.[7]

Agency's submission, through the following documents, reflected that Agency, prior to the effective date of the RIF, provided Employee information regarding her employment options, and that she elected to retire: 1) On July 1, 2008, Employee received Reduction-in-Force Counseling, which included, *inter alia,* information regarding retirement options; and 2) an application for Immediate Retirement, Standard Form 2801, dated July 10, 2008, signed by Employee. Although a retirement could be viewed as involuntary for purposes of establishing discontinued service retirement, that fact does not amount to an allegation that the retirement decision was wrongfully extracted by deception or coercive agency action which would render Employee's retirement involuntary for purposes of establishing jurisdiction of this Office. Nor did Employee raise such allegations.

Based on the totality of circumstances, this Judge concludes that Employee did not meet the burden of proof regarding jurisdiction and therefore, this matter should be dismissed.

ORDER

It is hereby ORDERED that Agency's Motion to Dismiss is GRANTED; and this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE: _____
MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

[7] See Petitioner's Notice of Compliance With Order to Provide Documents filed 3/24/09, Exhibit A, CSRS and FERS Handbook, Subchapter 44A, Discontinued Service Retirement (DSR), §44A1.1-2, Definitions (April, 1998); Exhibit B reflects a 12/11/08 letter, from the Office of Personnel Management (OPM), advising Employee, *inter alia,* that her application for immediate retirement had been finalized.