THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDA EICHELBERGER,	)	
Employee	)	OEA Matter No. 2401-0217-10
	)	
v.	)	Date of Issuance: June 28, 2012
	)	
D.C. PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	

Daniel A. Katz, Esq., Employee's Representative
W. Iris Barber, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 1, 2009, Brenda Eichelberger ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Public Schools' ("Agency" or "DCPS") action of abolishing her position through a Reduction-In-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was a Counselor at Woodson Business and Finance ("Woodson"). Employee was serving in Educational Service status at the time her position was abolished. On January 7, 2010, Agency filed an Answer to Employee's appeal.

I was assigned this matter on February 8, 2012. Thereafter, on February 10, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Employee was also required to address the issue of whether she retired in lieu of being RIFed. Agency timely filed its brief. However, On March 7, 2012, Employee through her then Counsel, submitted a Motion for Enlargement of Time to File Brief pertaining to Jurisdiction, along with a Designation of Employee Representative form.[1] On March 9, 2012, the undersigned granted Employee's Motion, which extended Employee's deadline to March 23, 2012. Again on March 21, 2012,

[1] Attorney John F. Mercer was listed as Employee's representative.

Employee, through Counsel, submitted a Consent Motion for Extension of Time to File Brief.[2] On March 22, 2012, the undersigned again granted Employee's extension request. Employee had until April 6, 2012, to submit her brief. Employee complied. Thereafter, I issued another Order, dated April 24, 2012, requesting the parties to submit briefs addressing the issues of whether the competitive area used by Agency in conducting the instant RIF was a valid and clearly identifiable competitive area. Both parties complied. On June 4, 2012, Employee submitted an email reply to Agency's response to the April 24, 2012, Order.[3] On the same day, Agency submitted an email reply to Employee's response. Upon further review of the file, the undersigned noticed that Employee had not addressed the jurisdiction question involving Employee's retirement as stated in the February 10, 2012, Order. Subsequently, on June 8, 2012, via email, the undersigned requested that Employee address the issue of whether this Office has jurisdiction over her appeal since she stated in her petition for appeal that she retired after being RIFed. Employee's brief on jurisdiction was due on June 11, 2012. However, Employee via email submitted a request for more time to submit her brief on jurisdiction. Employee's request for an extension of time to file her brief on jurisdiction was granted in an email dated June 8, 2012. Employee's brief on jurisdiction was due on June 19, 2012, and Agency's optional reply brief was due June 26, 2012. Both parties have complied. The record is now closed.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office may exercise jurisdiction over this matter.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools.[4]

Employee alleges that by placing her in a single-person competitive level, Agency denied her the competitive level rights under 15 DCMR § 1503.[5] She also contends that she involuntarily retired on November 2, 2009, after receiving the RIF notice. She explains that she filed for involuntary retirement on November 2, 2009, the last day she was on the DCPS payroll because she was told by DCPS personnel that if she did not apply for retirement by November 2,

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[2] Attorney Daniel Katz submitted this Motion, along with another Designation of Employee's Representative form listing Attorney Katz as Employee's attorney, and a declaration from Employee noting that she is no longer being represented by Attorney Mercer, and that she has now retained Attorney Katz to represent her in this appeal.
[3] A hard copy of Employee's June 4, 2012, email response was received in this Office on June 7, 2012.
[4] See *Agency's Answer*, Tab 1 (January 7, 2010); *Agency's Brief* (February 27, 2012).
[5] Employee's brief (April 4, 2012). Employee did not address the issue of her retirement following the RIF as requested in the February 10, 2012, Order.

2009, she would lose her health benefits.[6] Employee further explains that she had no intention of retiring, and that she had to apply for involuntary retirement because she was subject to the 2009 RIF.[7] Agency submits that because Employee voluntarily retired, this Office lacks jurisdiction in this matter.[8] Agency maintains that the RIF Notice dated October 2, 2009, gave Employee an option to retire if she met certain criteria. Agency also maintains that, Employee was informed of the consequences of retiring in lieu of being RIFed. Specifically, Employee was informed that if she chose to retire, upon receiving the RIF notice, she may not have the option of appealing her RIF with OEA.[9] Additionally, Agency asserts that Employee also had the option to speak with Human Resources in the event she had questions about retirement. Agency also submits that Employee had sufficient time – thirty (30) days, to perform due diligence regarding any questions or concerns she may have had regarding her retirement.

There is a question as to whether OEA has jurisdiction over this appeal. Employee stated that her retirement from Agency after being RIFed was involuntary because prior to the RIF, she had no intentions of retiring. She also maintains that she was informed by DCPS personnel that she would lose her health benefits if she did not retire by November 2, 2009. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting 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 [RIF]. . . .

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Pursuant to OEA Rule 628.1, *id.*, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat 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."

This Office has no authority to review issues beyond its jurisdiction.[10] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[11] The issue of an Employee's voluntary or involuntary retirement has been adjudicated on numerous

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[6] Employee's Brief regarding her Involuntary Retirement (June 19, 2012). The signed pdf copy of the brief was received on June 19, 2012. As of the date of this decision, this Office has not received the hardcopy copy of the brief that Employee allegedly mailed to this Office.
[7] *Id*.
[8] *Agency's response to Employee's Brief on Jurisdiction* (June 25, 2012). Exhibit A of the brief is Employee's Standard Form 50 – Notification of Personnel Action.
[9] *Id.*
[10] *See Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[11] *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

occasions by this Office, and the law is well settled with this Office that, there is a legal presumption that retirements are voluntary.[12] Furthermore, I find that this Office lacks jurisdiction to adjudicate a voluntary retirement. However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.[13] A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception."[14] The Employee must prove that her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which she relied when making her decision to retire. She must also show "that a reasonable person would have been misled by the Agency's statements."[15]

Here, Employee contends that her retirement was not voluntary because she had no intention of retiring; she only retired after being subjected to the RIF and after she was informed by DCPS personnel that she would lose her health benefits. While faced with the difficult choice of either retiring and keeping her health insurance, or being RIFed and losing her health insurance, I disagree with Employee's contention that her retirement was involuntary. The RIF Notice informed Employee and all the other employees affected by the RIF of their options to either appeal the RIF or retire if they qualify. This was not a mandate to retire. The RIF Notice also provided Employee with appeal and retirement information. Simply writing the words 'involuntary retirement' on a retirement application without any proof of undue coercion, misrepresentation, or deception does not by itself make the retirement involuntary. Nothing within the record corroborates that Employee was threatened, or given a mandate to retire by Agency. Moreover, Employee has not provided any credible evidence to prove that any DCPS agent provided her with misinformation, or that she was coerced into applying for retirement.

Regardless of Employee's protestations, the fact that she chose to retire instead of continuing to litigate her claims voids OEA's jurisdiction over her appeals. Employee's choice to retire in the face of a seemingly unpleasant situation – fear of losing her health benefits, does not make Employee's retirement involuntary. And the facts and circumstances surrounding Employee's retirement was Employee's own choice and Employee has enjoyed the benefits of retiring. Furthermore, I find no *credible* evidence of misrepresentation or deceit on the part of Agency in procuring the retirement of Employee. Simply choosing to retire over being RIFed does not make an employee's retirement involuntary. Additionally, I concur with Agency's contention that thirty (30) days was sufficient time for Employee to perform due diligence regarding her retirement decision. I find that thirty (30) days is a reasonable time to get information, seek counsel and make an informed decision about retirement.

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[12] *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Charles M. Bagenstose v. D.C. Public Schools,* OEA Matter No. 2401-1224-96 (October 23, 2001).
[13] *Id*. at 587.
[14] *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).
[15] *Id*.

Based on the foregoing, I find that Employee's retirement was voluntary.[16] Consequently, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this matter.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

[16] The Court in *Christie* stated that "[w]hile it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports CSC's finding that plaintiff chose to resign and accept discontinued service retirement rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the involuntariness of her resignation." *Christie, supra* at 587-588. (citations omitted).