THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Steven Dickerson	)	OEA Matter No. J-0090-07
Employees	)	
	)	Date of Issuance: July 9, 2008
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Public Schools	)	Senior Administrative Judge
Agency	)	
	)	

Harriet Segar, Esq., Agency Representative
Gary T. Brown, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On June 28, 2007, Employee appealed from Agency's impending adverse action which he claimed caused him to involuntarily retire. I held a prehearing conference on September 28, 2007. After several postponements requested by the parties, I held a hearing on June 6, 2008. The record is closed.

JURISDICTION

Jurisdiction in this matter has not been established.

ISSUE

Whether Employee's retirement was voluntary, and if so,
whether this matter should be dismissed for lack of jurisdiction.

EVIDENCE

a. Shelia Reid testified as follows: (Transcript Pgs. 9 – 57)

Sheila Reid testified that she was employed with DC Public Schools as a Human Resource Specialist in the Office of Human Resources. Her responsibilities include counseling people regarding retirements and determining if an employee is eligible for retirement, based on age and service. Reid testified that two requirements to be eligible for retirement are being 55 years or older with 30 or more years of service or 60 years old with 20 or more years of service. These requirements are for both teachers and non-teachers. She also described two more categories of

retirement. The first is Disability Retirement in which an employee who becomes disabled can retire at any age, so long as he or she has five or more years of service. The review process for medical disability is conducted by a medical board. The second is Involuntary Retirement which results from a Reduction-in-Force or being separated from service. In that instance, you have to be at least 50 years of age with 20 or more years of service, or any age with 25 or more years of service.

When asked about the conversion she first had with Employee when he initially came to her office for retirement counseling, Reid vaguely recalled that Employee made a comment that he either had been warned, or had received, or would be receiving notice that he would be losing his job. Employee wanted to know what his retirement options were at that time.

Reid testified that during a subsequent conversation with Employee, Employee asked, "If I take retirement, what impact would it have on my appeal?" Reid testified that she told Employee she could not answer that question and referred him to his union. She usually tells all employees that same answer, when asked that question, as she was not trained to give an answer regarding appeals and retirement.

When asked if it was clear by June 13 that Employee wanted to retire or needed to retire, Reid responded she could not say whether he needed to retire or not, but could say his application for retirement was dated June 17. They also discussed Employee being paid for his leave. Reid denied telling Employee anything about her daughter, or that he could repay his retirement money if he won his appeal.

Reid testified that at some point Employee may have mentioned being terminated, but she may have tuned it out because her job was not to hear the nature of his circumstance but to determine his eligibility for retirement.

b. Employee testified as follows. (Transcript Pgs. 58 – 100)

Employee began working in 1969 for Agency as a janitor, left after two years and returned in 1987. Because of allegations of inexcusable absence without leave (AWOL) from April 10, to May 8, 2007, he lost his job on June 11, 2007.

Employee testified that on April 10th, he informed his supervisor that he would be out for awhile due to the death of his mother. He believed that he automatically got three to four days for bereavement and that he had both sick leave and annual leave built up. Employee did not indicate whether he asked for leave or followed Agency procedures in obtaining leave for the month-long period that he was out.

Employee buried his mother on April 17, 2007, and at his mother's funeral, he informed the principal where he was and that he was still grieving. The next day, an administrative aide for the principal called him to ask for his address.

He received the AWOL letter on May 3, 2007. On May 8th, he talked to the principal by phone and told him he was not ready to retire. The principal told him he could not stop him from coming back to work. When the principal told him he could come back to work he thought the situation had been resolved. On May 9th, he returned to work for five weeks without any absences or tardiness. He did not receive his May 9th letter of termination until June 11, 2007. (Agency Exhibit 1). Employee insisted that although he did retire, he was also terminated at the same time, and that he also received unemployment checks.

Employee testified that he talked to Ms. Shelia Reid about his possible retirement, and did ask her if the retirement would affect his appeal. She mentioned something about seeking other help. Ms. Reid also told him if he won his case, he could replace the retirement money. She gave him an example of how she had done it with her daughter. No one told him that he could not retire and appeal.

Employee admitted that Ms. Reid was the only person he asked about the effect retirement would have on his appeal, and that he never asked his union rep or Labor Relations regarding this matter. Employee admitted that he never asked his lawyer about the affect that filing for retirement would have on his appeal.

When asked to explain the direct contradiction of testimony between himself and Ms. Reid, Employee insisted she knew of his appeal and had told her that if he won his case he could replace the money back into the retirement account.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Pursuant to OEA Rule 629.1, *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."

Here, Employee retired in lieu of being separated. This Office does not have the statutory authority to adjudicate an appeal in connection with a voluntary retirement. However, a retirement wherein the decision to retire was involuntary is treated as a constructive removal and may be appealed to this Office.[1]

The issue of whether a resignation (or retirement) is voluntary or involuntary has been addressed in several cases before this Office. Typically, the issue arises as a jurisdictional question, where, for example, an employee is appealing a reduction in force (RIF) and s/he accepts an early

[1] *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

retirement instead of being released in the RIF.[2] Other cases involve employees who resign or retire and then appeal to this Office contending that their resignation or retirement was coerced or was a constructive discharge.[3]

There is a presumption that retirements are voluntary.[4] This presumption can be rebutted if the employee establishes that his retirement was a result of duress or coercion brought on by government action, or of misleading or deceptive information, or if the employee was mentally incompetent.[5] It is incumbent upon employees to first prove that their retirements were involuntary, that is, were the product of undue coercion on Agency's part, or the product of mistaken information provided to them by Agency and upon which they relied in making their decision to retire. Where an employee resigns or retires to avoid being removed for cause, the resignation or retirement is voluntary if the proposed removal is precipitated by good cause.

Here, Employee does not argue that there was duress nor does he allege that he is mentally incompetent. He does, however, instead argue that his retirement was involuntary because he was lulled into that decision when Agency provided misleading or mistaken information regarding his ability to appeal. Specifically, Employee asserts that Agency's counselor for retirement had told him that he could retire and still file an appeal on his pending removal.

The crucial aspect that must be determined was whether Agency misinformed Employee about the effect his retirement would have on his appeal. If Agency had misled Employee by stating that he could still appeal the loss of his job despite retiring, then his retirement would have been involuntary. Agency's sole witness, Ms. Reid, denied ever misinforming Employee. Employee's own testimony essentially reaffirms Ms. Reid, in that her response to his question as to what effect his retirement would have on his appeal, he admitted that she advised him to ask his union. Despite Ms. Reid's advice to seek other counsel, Employee did not bother to ask his union representative, any other Agency superior, or even his own attorney.

Even in Employee's own version, Ms. Reid's alleged statement that he could replace his retirement money if he won his appeal was not really an answer to his question. Instead, Employee *assumed* he could retire and still file an appeal for his job.

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[2] *See, e.g., Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96 (August 20, 1998), ___ D.C. Reg. ___ ( ).

[3] *See, e.g., Jefferson v. Department of Human Services,* OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

[4] *Christie v. United States*, *supra.*

[5] See *Contreras v. Department of the Navy*, 78 M.S.P.R. 281, 285 (1998).

The following findings of fact are based on the witnesses' demeanor during testimony and the documentary evidence of record. I find the Agency witness to be more credible and forthright in her testimony than Employee. I hereby make the following findings of fact:

1. At some point before the effective date of his removal, Employee learned that he was being terminated for being inexcusably absent without leave for almost a month. There is no evidence that he ever formally submitted a leave request. Other than calling his supervisor to let him know that he was at his mother's funeral, Employee never submitted a leave request nor did he ever indicate how long he was going to be absent from work. Employee just assumed that because he had informed his supervisor that he was grieving his loss, his absence would automatically be excused.

2. Employee made at least two appointments with Ms. Reid to discuss his plan to retire.

3. Ms. Reid made some calculations based on the information Employee gave her as well as on Employee's personnel record, and then informed him about his retirement options.

4. Employee asked Ms. Reid if the retirement would affect his appeal.

5. Reid told Employee she could not answer that question and advised him to ask his union.

6. Employee never asked anyone else about the affect filing for retirement would have on his appeal. Employee simply assumed he could retire and still file an appeal for his job.

7. Agency allowed Employee to retire before the effective date of the proposed adverse action. Employee began receiving his retirement pension.

8. Employees filed his appeal with this Office on June 28, 2007.

I further find that no one had misled Employee regarding his ability to file an appeal if he retired. I have also found that Employee chose not to consult anyone who could advise him, and simply assumed that he could still file an appeal regarding Agency's proposed termination of his employment. However, because he retired, the adverse action was never effected, and thus there is nothing to appeal. Voluntary retirement does not constitute adverse action by an agency. *Bertha Dunham v. D.C. Public Schools*, OEA Matter No. 2401-0291-96 (March 9, 2000) affirmed by *Opinion and Order on Petition for Review* (September 28, 2000).

Employee's only other argument is that he would not have retired were it not for Agency's proposed termination of his employment due to AWOL, in effect arguing that his retirement was coerced or was a constructive discharge. *See, e.g., Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000). In these cases, this Office has looked to the seminal case in the federal sector on the issue of whether a resignation or retirement is voluntary or involuntary, *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975).

In *Christie*, the plaintiff claimed that she was wrongfully separated from the government by means of a coerced resignation. The U.S. Court of Claims held that, as a matter of law, the plaintiff's resignation was voluntary. Christie was a veteran's preference employee of the U.S. Navy Department. She was issued an advance notice of proposed removal for attempting to inflict bodily injury on her supervisor. She denied the charge. The agency issued a final decision to remove Christie but allowed her an opportunity to accept a discontinued service retirement instead of being fired. Christie resigned and accepted the retirement benefit. Then, she filed an appeal with the U.S. Civil Service Commission ("CSC"). The CSC dismissed the appeal for lack of jurisdiction and the plaintiff appealed to the U.S. Court of Claims.

In finding that the resignation was voluntary, the Court of Claims stated:

> Employee resignations are presumed to be voluntary. This presumption will prevail unless plaintiff comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. Plaintiff had the opportunity to rebut this presumption before the CSC. . . .
>
> Upon review of the facts as they appear in the record before the CSC, it is clear the plaintiff has failed to show that her resignation was obtained by external coercion or duress. Duress is not measured by the employee's subjective evaluation of the situation. Rather, the test is an objective one. While 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.
>
> This Court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. But this good cause requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated.

Christie, supra at 587-588. (emphasis in original). (citations omitted).

The plaintiff in *Christie* admitted that an incident took place, but claimed that she only inadvertently touched her supervisor. This admission was fatal to the plaintiff's argument. The Court of Claims stated that "[w]hether this charge could have been sustained had plaintiff chosen to appeal her discharge for cause is irrelevant. What is relevant is that the admission of this incident is prima facie evidence that an arguable basis for discharge existed." Thus, the Court of Claims found that the plaintiff's resignation was voluntary.

Relying on *Christie*, prior decisions of this Office have held that there is a presumption that an employee's resignation or retirement is voluntary. It is incumbent on the employee to present sufficient evidence to prove that the retirement was involuntary. Where an employee resigns or retires to avoid being removed for cause, the resignation or retirement is voluntary if the proposed removal is precipitated by good cause. Furthermore, good cause exists unless the employee presents sufficient evidence to establish that the agency "knew or believed that the proposed termination could not be substantiated." *See Pitt v. United States,* 420 F.2d 1028, 1032 (Ct. Cl. 1970) and *Jefferson, supra.*

Good cause exists unless a plaintiff presents sufficient evidence to establish that the agency "knew or believed that the proposed termination could not be substantiated." *See Pitt, supra.* Here, Agency had good cause to terminate Employee by virtue of the fact that Employee never followed the proper procedure for requesting leave, especially an absence that lasted almost a month. Like his assumption that he could still file an appeal even after he had retired, Employee also assumed that his failure to follow official leave procedures would be excused because he lost his mother.

Whether or not the good cause requirement will survive a hearing is not pertinent. The only requirement is that Agency had objective grounds to believe it had good cause for adverse action. That is clearly present here.

In *Christie*, supra, the Court of Claims stated that

> Duress is not measured by the employee's subjective evaluation of a situation. Rather the test is an objective one. (Citations omitted) While it is possible [Employee] . . . perceived no viable alternative but to tender [his] resignation, the record evidence supports . . . that [Employee] chose to resign and accept . . . retirement rather than challenge the validity of [his] proposed discharge for cause. The fact remains, [Employee] had a choice. [He] could stand pat and fight. [He] chose not to. Merely because [Employee] was faced with an inherently unpleasant situation in that [his] choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of [his] resignation.

As it was with Ms. Christie, here Employee had the option to "stand pat and fight" his proposed removal, but voluntarily chose not to do so. Thus, I find that Employee voluntarily retired and that this Office has no jurisdiction over his appeal.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge