THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HELEN MULKEEN,	)	OEA Matter No. 2401-0063-10
Employee	)	
	)	Date of Issuance: May 31, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Helen Mulkeen ("Employee") worked as a Librarian with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 23, 2009. She asserted that Agency violated D.C. Official Code 1-624.08 and that she was not provided with a written copy of the documents used to abolish her position. She further submitted that she was forced to involuntarily retire. Therefore, she believed that she should not have been separated.[2]

In its answer to Employee's Petition for Appeal, Agency explained that it conducted the

[1] *Petition for Appeal*, p. 7 (October 23, 2009).
[2] *Id.* at 5.

RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It argued that pursuant to 5 DCMR § 1501, Prospect Learning Center ("Prospect") was determined to be a competitive area, and under 5 DCMR § 1502, the Librarian position was determined to be the competitive level subject to the RIF. However, because Employee was the only Librarian at Prospect, she was in a single-person competitive level and was not provided one round of lateral competition.[3] Moreover, Agency provided Employee a thirty-day notice that her position was being eliminated. As a result, it believed the RIF action was proper.[4]

Prior to issuing the Initial Decision, the OEA Administrative Judge ("AJ") held a Pre-Hearing Conference on February 14, 2012.[5] He discovered during the conference that Employee's retirement was effective on November 3, 2009. For this reason, he ordered Employee to submit a legal brief addressing whether her retirement precluded her from filing an appeal with OEA.[6]

In Employee's brief she argued, *inter alia*, that Agency forced her to retire. She explained that she had to find a way to continue her health insurance coverage; she did not choose her effective retirement date, nor was she able to negotiate its terms; and she was placed on administrative leave until the effective date of the RIF. Employee provided that she interpreted the RIF notice to mean that unless she retired prior to the effective date of the RIF, she would lose all her benefits.[7] Therefore, she believed that her retirement was involuntary and

[3] Pursuant to 5 DCMR § 1503.3, Agency did not consider the competitive factors defined in 5 DCMR § 1503.2 which provides an employee with one round of lateral competition.
[4] *Agency's Answer to Employee's Petition for Appeal* (December 16, 2009).
[5] Thereafter, Agency submitted a Pre-hearing statement that reiterated its position and requested that the appeal be dismissed for failure to state a claim in which relief could be granted and for lack of prosecution due to Employee's retirement.
[6] *Order on Jurisdiction* (February 16, 2012).
[7] Employee further provided that her freedom of choice was undermined by the unlikely probability of finding employment and the negative public information distributed by Agency; the lack of information available regarding

requested that the AJ rule that OEA had jurisdiction over her appeal.

The Initial Decision was issued on March 20, 2012. The AJ disagreed with Employee's contentions, holding that neither the RIF notice nor Agency's actions gave her a mandate to retire. He ruled that a retirement is considered involuntary when an employee shows that the retirement was obtained through misinformation or deception by the agency.[8] The AJ found no credible evidence to prove that Agency misrepresented facts or was deceitful in procuring Employee's retirement. Thus, he held that Employee's retirement was voluntary and her decision to retire voided OEA's jurisdiction over the appeal. Accordingly, the matter was dismissed for lack of jurisdiction.[9]

On April 25, 2012, Employee filed a Petition for Review with the OEA Board. She disagrees with the AJ's ruling that there was no credible evidence to prove that Agency misrepresented facts or was deceitful in procuring her retirement. Employee opines that her involuntary retirement was supported by undisputed facts. She reiterates her position that she was coerced to retire.[10] Therefore, Employee requests that the OEA Board reverse the Initial Decision or remand the matter to the AJ for a hearing to consider the arguments and facts presented in her brief.[11]

In Agency's response to Employee's Petition for Review, it asserts that the petition was

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her recent performance; the hostile actions by Agency during the removal process; and her union's recommendation to involuntary retire without providing her with the information necessary for her to understand her appeal rights with OEA. *Employee's Brief Pertaining to Jurisdiction,* p. 4-6 and 11 (March 19, 2012).

[8] The AJ cited *Cecil E. Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995) and *Elias Covington v. Department of Health & Human Services*, 750 F.2d 937 (Fed. Cir. 1984) and explained that an employee must prove that her retirement was involuntary by showing that the retirement resulted from undue coercion or misrepresentation. The employee is also required to show that a reasonable person would have been misled by the statements.

[9] *Initial Decision*, p. 3-5 (March 20, 2012).

[10] Employee cites *District of Columbia Metropolitan Police Department v. Winfred L. Stanley, et al.*, 942 A.2d 1172, 1176 (2008) and explains that retirement or resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation of or withholding of material information.

[11] *Employee's Petition for Review of Initial Decision,* p. 6-9 (April 25, 2012).

untimely filed and should be dismissed.[12] However, even if the appeal is deemed timely, it argues that the petition failed to state permissible grounds for review by the Board. Additionally, it avers that Employee's retirement was voluntary, and it did not impose the terms of her retirement on her, misinform her, or withhold material information regarding the RIF.[13] Thus, Agency requests that the Board dismiss the Petition for Review and affirm the Initial Decision.[14]

The Initial Decision was issued on March 20, 2012. In accordance with OEA Rule 632.1, "the initial decision *shall* become final thirty-five (35) calendar days after issuance." Further, OEA Rule 632.2 provides the conditions upon which an Initial Decision cannot become final. It states that "the initial decision *shall not* become final if any party files a petition for review or if the Board reopens the case on its own motion within thirty-five (35) calendar days after issuance of the initial decision (emphasis added)." Because neither party filed a Petition for Review within 35 calendar days, the Initial Decision became final on April 24, 2012. Therefore, Employee's Petition for Review filed on April 25, 2012, was untimely.

OEA and the D.C. Court of Appeals have consistently held that time limits for filing appeals are mandatory in nature.[15] Specifically, the D.C. Court of Appeals reasoned that because the time limits for filing appeals with administrative adjudicative agencies are mandatory and

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[12] It explains that pursuant to OEA's rules, the Petition for Review needed to be filed within thirty-five calendar days of the issuance date of the Initial Decision.
[13] Agency explained that in Employee's RIF notice it informed her that if she chose to voluntarily retire, she may not have the option to appeal her termination to OEA.
[14] *District of Columbia Public Schools' Response to Employee's Petition for Review*, p. 2-5 (May 30, 2012).
[15] *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *Alfred Gurley v. D.C. Public Schools,* OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008); *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); and *Annie Keitt v. D.C. Public Schools, Division of Transportation*, OEA Matter No. J-0082-09, *Opinion and Order on Petition for Review* (January 26, 2011).

jurisdictional, it obviates any need for a showing of prejudice.[16] In accordance with OEA Rule 628.2, Employee has the burden of proving issues of jurisdiction including the timeliness of her filing. Because Employee failed to prove that her appeal was timely filed with OEA, we must DENY her petition.

[16] *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *Zollicoffer v. D.C. Public Schools,* 735 A.2d 944, 945-946 (D.C. 1999); and *Gibson v. Public Employee Relations Board,* 785 A.2d 1238, 1241 (D.C. 2001).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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Necola Y. Shaw

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A. Gilbert Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.