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**DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

\_\_\_\_\_  
In the Matter of: )  
)  
DEBORAH MCKENNY, ) OEA Matter No. 1601-0276-09  
Employee )  
) Date of Issuance: December 7, 2011  
v. )  
) Sommer J. Murphy, Esq.  
DISTRICT OF COLUMBIA ) Administrative Judge  
PUBLIC SCHOOLS (DOT), )  
Agency )  
\_\_\_\_\_)

Deborah McKenney, *Pro Se*  
Frank McDougald, Esq., *Agency Representative*

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 5, 2009, Deborah McKinney (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools Division of Transportation’s (“Agency”) final decision to remove her from her position as Deputy Terminal Manager. Employee’s termination was effective on September 24, 2009.

This matter was assigned to me on or around January of 2011. On April 4, 2011, I held a Status Conference for the purpose of assessing the parties’ positions regarding this matter. At the conference, I ordered the parties to submit post-status conference briefs. After reviewing the briefs, I held a second Status Conference on August 1, 2011, for the purpose of further assessing whether Agency’s action of terminating Employee was within the range of allowable penalties under District law. The parties subsequently submitted briefs on the issue of the appropriateness of Employee’s penalty. On August 11, 2011, Agency submitted a motion to dismiss Employee’s appeal for lack of jurisdiction based on their discovery that Employee had voluntarily retired in lieu of being terminated. After reviewing the record, I determined that there are no material facts in dispute and therefore a hearing is not warranted.

## JURISDICTION

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

### ISSUE

Whether this Office has jurisdiction over Employee's Appeal.

### FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

In its August 11, 2011 Motion to Dismiss for Lack of Jurisdiction, Agency states that Employee submitted an application for retirement under the Civil Service Retirement System. Agency further contends that Employee's retirement was voluntary. In support of their position, Agency cited to *Daniel Wong v. Office of the Inspector General*<sup>1</sup>, wherein the OEA dismissed the employee's petition for appeal based on lack of jurisdiction. In *Wong*, this Office held it lacks jurisdiction over cases wherein an employee voluntarily retires in lieu of being terminated. According to Agency, Employee voluntarily retired with an effective date of September 15, 2009.

Employee responded to Agency's claim that she voluntarily retired by stating the following:

"I felt I was left no choice. My voicemails, phone calls, letters and visits warranted no response. I was not given the opportunity of a hearing. I was in a position where I would have relinquished all of my 26 years and benefits had I reached or surpassed the termination date."<sup>2</sup>

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1, states that 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: "[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."

Effective October 21, 1998, and except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, DC Code 1 601.1 et seq. or Rule 604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- a. A performance rating which results in removal of the employee;
- b. An adverse action for cause that results in removal, reduction in grade, or suspension for ten (10) days or more;  
or
- c. A reduction-in-force

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<sup>1</sup> OEA Matter No. J-0005-06 (April 12, 2006).

<sup>2</sup> Employee's Response Brief on the Appropriateness of Penalty (September 23, 2011).

This Office has no authority to review issues beyond its jurisdiction.<sup>3</sup> Thus, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>4</sup> The law is well settled with this Office, that there is a legal presumption that retirements are voluntary.<sup>5</sup> OEA therefore lacks jurisdiction to adjudicate appeals where an employee voluntarily retires in lieu of being terminated.

However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.<sup>6</sup> A retirement is considered involuntary “when the employee shows that retirement was obtained by agency misinformation or deception.”<sup>7</sup> The Employee must prove that his or her retirement was involuntary by showing that: 1) the retirement resulted from undue coercion or misrepresentation by Agency; 2) the employee relied upon such information when making their decision to retire; and 3) a reasonable person would have been misled by the agency’s statements.<sup>8</sup>

In the instant case, I find that Employee elected to voluntarily retire in lieu of being terminated. Agency submitted Employee’s Personnel Action Form (form 50), which reflects that Employee chose to retire. Furthermore, Employee has not offered any evidence to indicate that her retirement was a result of misinformation or deception on Agency’s part. Because Employee voluntarily retired prior to being terminated, I am unable to address the merits of her appeal before this Office. Accordingly, Employee’s petition for appeal must be dismissed.

ORDER

It is hereby ORDERED that Employee’s appeal is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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SOMMER JOY MURPHY, ESQ.  
Administrative Judge

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<sup>3</sup> See *Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), \_\_\_ D.C. Reg. \_\_\_ ( ).

<sup>4</sup> See *Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), \_\_\_ D.C. Reg. \_\_\_ ( );

<sup>5</sup> 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), \_\_\_ D.C. Reg. \_\_\_ ( ).

<sup>6</sup> See *Saunders v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0259-09 (March 25, 2011).

<sup>7</sup> 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.2d 937 (Fed. Cir. 1984).

<sup>8</sup> *Id.*