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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EDWARD SMALLS,)	
Employee)	OEA Matter No. 2401-0195-04
)	
v.)	Date of Issuance: December 21, 2005
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	Eric T. Robinson, Esq.
Agency)	Administrative Judge
)	

Lathal Ponder Jr., Esq., Employee Representative
Sara Moskowitz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION, FINDINGS OF FACT, AND PROCEDURAL HISTORY

Pursuant to a Reduction in Force (hereinafter "RIF") Notice dated May 27, 2004, Employee's position as a Teacher, Vocational Education at Eastern Senior High School was abolished. The effective date of the RIF was June 30, 2004. Consequently, the Employee timely filed a Petition for Appeal with the Office of Employee Appeals (hereinafter "Office") on July 30, 2004.

This matter was assigned to me on June 14, 2005. I sent out an Order Convening a Prehearing Conference on June 24, 2005. A Prehearing Conference was held on August 9, 2005. Because of unforeseen scheduling conflicts, this Prehearing Conference was held telephonically. At the conclusion of the Prehearing Conference, I sent out an Order Convening a Status Conference set to occur on October 6, 2005. During this Status Conference, both parties asked for a continuance in order to pursue possible settlement of this matter. I granted the requested continuance.

Settlement talks between the parties proved unsuccessful, so I convened a second

Status Conference on November 10, 2005. During the second Status Conference, Employee's counsel admitted that the Employee had retired since being RIFFED. During the status conference, both parties presented oral arguments regarding the jurisdiction of this Office. I then ordered both parties to submit final legal briefs focusing on the jurisdiction of this Office. Lastly, I informed both parties that depending on what was submitted; I would either hold a third Status Conference so that we could plan for an Evidentiary Hearing, or I would issue an Initial Decision in this matter.

Based on the parties positions as stated during the various Conferences and on the documents of record, I decided an Evidentiary Hearing was unnecessary. The record is now closed.

JURISDICTION

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

ISSUES

Whether this Office has jurisdiction over this matter.

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..." 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."

The Employee in his Opposition to Motion to Dismiss for Lack Jurisdiction (hereinafter "Opposition Motion") cites the U.S. Merit Systems Protection Board (hereinafter "MSPB") case of *William J. Riccio v. Department of Navy*, M.S.P.B. Docket No. PH-0351-04-0029-I-1, *Opinion and Order on Petition for Review* (March 29, 2005). This case addresses the issue of involuntary retirement. The Employee correctly notes that this Office has looked to the MSPB for guidance. The practice of referring to the MSPB generally extends to unique circumstances where the issue(s) presented have not previously been addressed by this Office. However, this Office is not bound to any legal precedent arising from the MSPB. The issue of an Employee's voluntary or involuntary retirement has been adjudicated on numerous occasions by this Office. The law is well settled with this Office, that there is a legal presumption that retirements are voluntary. *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. ___ (). 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. *Id.* at 587. A retirement is considered involuntary "when the employee shows that retirement was obtained by agency misinformation or deception." *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). The Employee must prove that his retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he relied when making his decision to retire. He must also show “that a reasonable person would have been misled by the Agency’s statements.” *Id.*

During the Prehearing Conference, the Employee’s counsel was asked whether or not the Employee had retired from his position with the Agency. He answered in the affirmative. The Employee’s counsel was then asked whether the Employee was currently receiving a retirement check. Again, he answered in the affirmative. Additionally, according to the RIF Notice sent by the Agency to the Employee it states in pertinent part: “[y]ou have a limited right to appeal this determination. However, if you voluntarily retire then you may not be able to appeal the determination to abolish your position before the Office of Employee Appeals (OEA).” RIF Notice at 2. Further, the Employee, in his Opposition Motion, argues that this Office should view his retirement as involuntary in light of the following statement “[e]mployee meets the criteria for Involuntary Retirement as of 06/30/04.” Employee’s Personnel Action Form dated 6/30/04.

The Agency argues that the “involuntary retirement” as noted in Employee’s Personnel Action Form dated 6/30/04 was “...solely because he met the requirements for involuntary retirement as defined by the Agency’s Summary Plan Description for Teachers (“SPD”). Involuntary Retirement as defined by the SPD is entirely different from the definition of involuntary retirement as defined by the OEA and the Court.” District of Columbia Public Schools Response to Employee’ Opposition to Dismiss for Lack of Jurisdiction p. 5. (footnote omitted). I find that the usage of the term “involuntary retirement” in Employee’s Personnel Action Form dated 6/30/04 refers exclusively to the definition of “Involuntary Retirement Benefit” as stated in the District of Columbia Teachers’ Retirement Plan, Summary Plan Description.¹

From the Employee’s position as stated during the last Status Conference, the Employee applied for and received retirement benefits after the effective date of his position being RIFFED. I find that the Employee was duly warned of the possible cessation of appeal rights with this Office if he retired, yet he chose to retire anyway.

The Employee also argues that he was constructively discharged from his position when faced with the undesirable choice of either retiring or being RIFFED. I find no

¹ The District of Columbia Teachers’ Retirement Plan, Summary Plan Description states in pertinent part:

Involuntary Retirement Benefit: Employee may qualify for an involuntary retirement benefit if they are involuntarily separated from service (unless the separation is for cause on charges of misconduct or delinquency). Employees are eligible for an involuntary retirement if they have 25 years of service, including at least five years as a DCPS teacher; or 20 years of service if they are at least age 50, with a minimum of five years service as a DCPS teacher.

evidence of misrepresentation or deceit on the part of the Agency regarding the retirement of the Employee. Based on Employee's position, as stated in the various proceedings and documents of record, I find that the Employee's retirement, while although a difficult financial decision was nevertheless voluntary.² Consequently, this Office lacks jurisdiction over this matter.

ORDER

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

FOR THE OFFICE:



ERIC T. ROBINSON, ESQ.
Administrative Judge

² 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).