

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
Valerie Cunningham	)	OEA Matter No. 1601-0358-10
Employee	)	
	)	Date of Issuance: January 31, 2013
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Public Schools	)	Senior Administrative Judge
Agency	)	

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Valerie Cunningham, Employee *pro se*  
Sara White, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On August 10, 2010, Valerie Cunningham (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency”) final decision to remove her from her position as a Special Education Teacher due to poor IMPACT ratings.<sup>1</sup> Employee’s termination was to be effective on August 13, 2010.

This matter was assigned to me on July 17, 2012. On September 28, 2012, I held a Prehearing Conference for the purpose of assessing the parties’ positions regarding this matter. After the conference, I ordered the parties to submit post-conference briefs after Agency made a motion to dismiss Employee’s appeal for lack of jurisdiction based on the fact 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.

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<sup>1</sup> IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2009-2010 school year to rate the performance of school-based personnel.

## FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

In its 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 *Adele LaFranque v. DCPS*<sup>2</sup>, wherein the OEA dismissed the employee's petition for appeal based on lack of jurisdiction. In *LaFranque*, 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 August 13, 2010.

Employee never denied that she had retired. To date, she has also failed to respond to my December 6, 2012 Order to submit a brief on the issue of jurisdiction.

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

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 voluntary retires in lieu of being terminated.

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<sup>2</sup> OEA Matter No. 2401-0032-10 (February 8, 2011).

<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. \_\_\_ ( ).

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:

Joseph E. Lim, Esq.  
Senior Administrative Judge

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<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.2.d 937 (Fed. Cir. 1984).

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