Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ESTHER DICKERSON Employee	OEA Matter No. 2401-0039-03
	Date of Issuance: May 17, 2006
DEPARTMENT OF MENTAL HEALTH Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Esther Dickerson ("Employee") worked as a Health Systems Administrator at the Department of Mental Health ("Agency"). On February 28, 2003, Agency sent Employee written notification that she would be removed from her position because of a reduction-in-force ("RIF"). The separation was to become effective on April 4, 2003. On March 17, 2003, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). In her petition, she alleged that Agency did not justify the competitive area when determining which employees would be RIFed. She also argued that the majority of the employees who were RIFed were under the federal civil service retirement program, and they were being forced to involuntarily retire because of their

ineligibility to receive severance pay. At some point before the RIF was to become effective, Employee retired.[1]

This matter was assigned to an Administrative Judge ("AJ") on February 19, 2004. Because it appeared that Employee retired from her position before the effective RIF date, the AJ issued an Order requesting that she show that the Office had jurisdiction to hear her case.[2] Employee's response provided that she was forced to retire to avoid financial hardship. She also contended that before the RIF action, she had no plans to retire. Therefore, her retirement was involuntary and OEA had the authority to adjudicate this matter. Employee also requested to participate in OEA's mediation program to resolve any jurisdictional issues.[3]

On June 10, 2004, the AJ issued an Initial Decision. She relied on *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975) in rendering her decision. According to the Initial Decision, *Christie* held that an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. Additionally, for a retirement to be considered involuntary, an employee must establish that the retirement was due to agency's coercion or misinformation upon which the employee relied. The AJ ruled that Employee did not prove that she retired as the result of coercion or misleading information. Therefore, OEA could not adjudicate this matter.[4]

On July 15, 2004, Employee filed a Petition for Review. She argued that Agency failed to provide the requisite 30-day written notice and did not provide her with one

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[1] *Petition for Review*, Exhibit #3 (July 15, 2004).
[2] *Administrative Judge's Order*, p. 1 (February 26, 2004).
[3] *Letter to Administrative Judge Hochhauser*, p. 1-2 (March 16, 2004).
[4] *Initial Decision*, p. 2 (June 10, 2004). It should be noted that OEA does not have jurisdiction to hear cases involving voluntary retirements.

round of lateral competition. She also provided that the AJ erred when she failed to address her request for mediation of this matter. Finally, Employee asserts that Agency misinformed her by neglecting to tell her that by accepting the involuntary retirement, she would forfeit her rights to appeal the RIF action.[5]

Agency responded to Employee's Petition for Review on August 17, 2004. The response provided that Employee did not establish any requirements outlined in OEA Rule 634.3 for her petition to be granted.[6] It also provided that Employee cannot raise the legal argument that Agency gave her misleading information because it was not previously raised before the AJ. According to Agency, Employee chose to retire to avoid financial hardship. Therefore, her retirement was voluntary.[7]

Addressing the jurisdictional issue, OEA was given statutory authority to hear RIF cases. According to D.C. Official Code §1-606.03(a):

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIIII-A of this chapter), an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

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[5] *Petition for Review* (July 15, 2004) and *Employee's Appeal Brief Concerning Jurisdiction* (July 15, 2004).
[6] OEA Rule 634.3 provides that " . . . . The Board may grant a petition for review when the petition establishes that: (a) new and material evidence is available that, despite due diligence, was not available when the record closed; (b) the decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy; (c) the findings of the Administrative Judge are not based on substantial evidence; or (d) the initial decision did not address all material issues of law and fact properly raised in the appeal."
[7] *Employer's Response to Petition for Review*, p. 2-3 (August 17, 2004).

In an attempt to define in more detail the OEA's authority, D.C. Official Code § 1-624.08(d), (e), and (f) clearly establish the circumstances under which the OEA may hear RIFs on appeal.

> "(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to position in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.
>
> (f) Neither the establishment of a competitive area smaller than an agency, nor the determination that a specific position is to be abolished, nor separation pursuant to this section shall be subject to review except that:
>
> > (1) An employee may file a complaint contesting a determination or separation pursuant to subchapter XV of this chapter or § 2-1403.03; and
> >
> > (2) An employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied."

Hence, OEA is only authorized to review RIF cases where an employee claims the agency did not provide one round of lateral competition, or where an employee was not given 30-days written notice prior to their separation. Employee did not advance either of these arguments until she filed her Petition for Review. Her failure to make these arguments in her Petition for Appeal or in her response to the AJ's order regarding jurisdiction, limits the Board's ability to respond to them.

Similar to the employee in *Christie v. United States*, 518 F.2d 584 (1973), Ms. Dickerson had the option of retiring or challenging the removal action taken against her

by Agency. Employee claims that she had no choice but to retire. However, she did have the difficult choice of retiring or standing firm against the RIF action.

Based on Employee's own admission, she retired to avoid financial hardship.[8] Being faced with financial hardship is a difficult position for most people. However, merely being faced with a difficult situation does not obviate the voluntariness of Employee's retirement. OEA has held that financial hardship is not sufficient to make a retirement rise to the level of involuntariness.[9]

As the AJ held in her Initial Decision, the burden rests on Employee to prove that her retirement was not voluntary. Such a showing would constitute a constructive removal and allow OEA to adjudicate her matter. However, Employee failed to meet her burden. She neglected to show that Agency's representatives coerced her or gave her misleading information. Because Employee was unable to establish jurisdiction, the AJ could not submit the case to OEA's mediation program. Accordingly, we hereby deny Employee's Petition for Review.

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[8] *Letter to Administrative Judge Hochhauser*, p. 1-2 (March 16, 2004).
[9] *Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96, August 20, 1998.

ORDER

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

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Jeffrey J. Stewart

Barbara D. Morgan

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.