THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
VEDA GILES, Employee	OEA Matter No. 2401-0022-05
v.	Date of Issuance: December 13, 2005
DEPARTMENT OF EMPLOYMENT SERVICES, Agency	ERIC T. ROBINSON, Esq. Administrative Judge

Veda Giles, Employee Pro-Se
Pamela L. Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to a Reduction in Force (hereinafter "RIF") Notice dated January 3, 2005, Employee's position as a Secretary (Office Automation) was abolished. The effective date of the RIF was February 11, 2005. Consequently, the Employee filed a Petition for Appeal with this Office on February 8, 2005. This matter was assigned to me on September 1, 2005. On September 2, 2005, I issued an Order Convening a Prehearing Conference.

Pursuant to an agreement between the parties, the Prehearing Conference was rescheduled for December 6, 2005. During the Prehearing Conference, the Employee admitted that she had retired before the effective date of the RIF. I ordered the parties to submit legal briefs on the jurisdiction of this Office in light of Employee's retirement. Based on the parties positions as stated during the Prehearing Conference and 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 matter must be dismissed for lack of jurisdiction.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

From the documents of record and the parties' positions as stated during the Prehearing Conference the following facts are not subject to genuine dispute:

- The Employee received her RIF Notice on or about January 3, 2005.[1]
- The RIF Effective date was February 11, 2005.
- Employee's Notification of Personnel Action Form (Form 52) states in the Remarks section "[e]mployee elected to retire on Discontinued Service Retirement." According to this form, February 11, 2005 was the effective date of Employee's discontinued service retirement.

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."

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. *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Charles M. Bagenstose v. D.C. Public Schools,* OEA Matter No.

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[1] As part of her final brief, the Employee argues that she was entitled to 60 days notice before the effective date of the RIF. The Employee cites in her defense, regulations as stated on www.opm.gov which states in pertinent part "[a]n agency must give an employee at least 60 days specific written notice before the employee is released from the competitive level by a RIF action." The Employee's argument is without merit. The OPM statement is true for Federal Government employees who are subject to a RIF action. However, District of Columbia Government employees are entitled to only 30 days notice before being separated from service as a result of a RIF action. *See Sheryl Watson v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter No. 2401-0152-99 (September 20, 2004), __ D.C. Reg. __. Furthermore, the Employee's RIF notice states that "[t]his letter serves as official notice of at least thirty (30) calendar days that you will be separated from District government service effective 2/11/05." I find that the Employee was duly informed at least 30 days in advance of her position being abolished.

2401-1224-96 (October 23, 2001), ___ D.C. Reg. ___ ( ). There is a legal presumption that retirements are voluntary. *Id.*

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). Employee must prove that her retirement was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which she relied when making her decision to retire. She must also show "that a reasonable person would have been misled by the Agency's statements." *Id.*

During the Prehearing Conference, the Employee was asked whether or not she had retired from her position with the Agency. She answered in the affirmative. The Employee was then asked whether she was currently receiving a retirement check. Again, she answered in the affirmative. In her brief, the Employee argues that she was pressured to retire. In a March 9, 2005 letter, the Employee describes the events that led to her retirement. The letter states in pertinent part:

> "During the week of July 11, 2005,[2] I was contacted by Marilyn Williams from the Director's office, whereas, she wanted to set-up an appointment for what she described as "counseling."... I did not commit because I had not decided to retire... I set-up an appointment the day before the RIF notice was to take effect. I met with Ms. West on the last day of the RIF and when I sat down with her, she had already prepared the retirement papers and that was all that was discussed and no options were presented or mentioned until I brought up questions about severance. She appeared eager to get the papers signed. When Ms. West completed her calculations of my service time, it was recorded as 29 years, 11months and 10 days. These papers were prepared before all of the sick leave was accrued. I asked Ms. West if they were going to give me the 30 years, she replied "no." I went ahead and signed the papers. I felt the pressure was on and I did not want to lose my benefits if I was not hired by another agency."

Based on the record as a whole, I find that the Employee's retirement, while although a very difficult financial decision, was nevertheless voluntary.[3] I find no

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[2] I interpret the actual date to be January 11, 2005, if for no other fact than this letter was dated March 9, 2005.

[3] 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).

evidence of misrepresentation or deceit on the part of the Agency in procuring the retirement of the Employee. From the Employee's own account, she did not want to run the risk of losing her retirement benefits if she were not hired by another agency. 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