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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
MICHAEL WILLIS,)	
Employee)	
)	OEA Matter No.: J-0043-15
v.)	
)	Date of Issuance: September 13, 2016
DISTRICT OF COLUMBIA FIRE AND)	
EMERGENCY MEDICAL SERVICES,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Willis (“Employee”) worked as a Deputy Fire Chief with the District of Columbia Fire and Emergency Medical Services (“Agency”). On December 10, 2014, Employee submitted an Optional Retirement application to Agency. He requested that his retirement become effective on January 10, 2015. Agency’s Interim Fire Chief, Eugene Jones, granted his request by letter dated December 22, 2014. Employee subsequently asked to rescind his retirement application on January 5, 2015. The request was denied by Agency on January 9, 2015.¹

¹ *Agency’s Motion to Dismiss Employee’s Petition for Appeal*, Exhibit 5 (March 23, 2015).

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on February 18, 2015, arguing that he retired involuntarily.² He stated that Agency forced him to retire by denying his request to rescind the Optional Retirement application.³ Employee, therefore, requested that OEA reconcile the matter and “hold individuals accountable for violating the public trust.”⁴

The matter was assigned to an OEA Administrative Judge (“AJ”) on February 23, 2015. On March 23, 2015, Agency submitted a Motion to Dismiss Employee’s Petition for Appeal, arguing that OEA lacked jurisdiction over voluntary retirements.⁵ In addition, it stated that it had the discretion to deny Employee’s request to withdraw his retirement application because it had a valid reason for doing so.⁶ On March 30, 2015, the AJ issued an order, directing Employee to submit a written brief that addressed the jurisdictional issue. In his submission, he provided that his appeal should not be dismissed because the Fire Chief’s refusal to accept his request to withdraw his retirement application was tantamount to an adverse action.⁷

Agency submitted a Reply to Employee’s Brief on Jurisdiction on April 27, 2015. In response, it argued that its refusal to allow Employee to withdraw his retirement did not constitute an adverse action.⁸ Moreover, Agency opined that even if Employee’s optional retirement application was wrongfully disapproved (which it expressly denied), the decision was still not an appealable action to OEA. Therefore, it requested that the AJ dismiss the Petition for Appeal for lack of jurisdiction.⁹

² *Petition for Appeal* (February 18, 2015).

³ *Id.*

⁴ *Id.*

⁵ *Agency’s Motion to Dismiss Employee’s Petition for Appeal* (March 23, 2015).

⁶ *Id.*

⁷ *Employee Brief* (April 9, 2015).

⁸ *Agency’s Reply to Employee’s Brief on Jurisdiction* (April 27, 2015).

⁹ *Id.*

An Initial Decision was issued on May 20, 2015. The AJ stated that OEA has consistently held that there is a legal presumption that retirements are voluntary.¹⁰ In addition, she cited to *Watson v. District of Columbia Water and Sewer Authority*, 923 A.2d 903 (2007), wherein the D.C. Court of Appeals held that once an employee resigns from his or her job, the employer's decision not to accept a subsequent withdrawal or the resignation does not change the employee's act into an involuntary one. The AJ also highlighted District Personnel Manual ("DPM") Instruction No. 8-53, 9-25, 36-3, and 38-12, which authorizes an employee to withdraw his or her retirement application before the effective date of separation.¹¹ However, such request to withdraw a retirement application may be disapproved when an agency has a valid reason for doing so and explains the reason in writing to the employee.¹² According to the AJ, Agency had a valid reason for denying Employee's request to withdraw his retirement application because it already made a commitment to hire and promote another Fire Chief to fill his position. She, therefore, determined that Employee's decision to retire was voluntary and that Agency properly denied his subsequent attempt to withdraw his retirement application. As a result, the matter was dismissed for lack of jurisdiction.¹³

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on June 22, 2015. He argues that Agency coerced him into completing and submitting the Optional Retirement application; thus, rendering his retirement involuntary.¹⁴ Employee also states that he did not technically apply for retirement until January 12, 2015, because his application was not considered complete until it was forwarded to the D.C. Retirement Board for

¹⁰ See *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975), and *Charles M. Bagenstose v. D.C. Public Schools*, OEA Matter No. 2401-1224-96 (October 23, 2001).

¹¹ *Initial Decision* at 5 (May 20, 2015).

¹² *Id.*

¹³ *Id.* at 7.

¹⁴ *Petition for Review* (June 22, 2015).

approval.¹⁵ He further asserts that he clearly communicated to Agency his intent not to retire in writing, as required by DC FEMS policy. Consequently, Employee asks this Board to reverse the Initial Decision and find that his retirement was involuntary.¹⁶

Agency filed an Answer to Employee's Petition for Review on July 24, 2015. It reiterates that OEA lacks jurisdiction over Employee's appeal because he voluntarily retired from his position as a Fire Chief.¹⁷ In addition, Agency provides that it was irrelevant that Employee did not complete all of the paperwork necessary to process his retirement application because it was within its discretion to rely upon his initial request to retire.¹⁸ It argues that the AJ correctly determined that OEA lacks jurisdiction over Employee's appeal. Therefore, Agency requests that his Petition for Review be denied.¹⁹

Voluntary Retirement

Employee first argues that he was coerced into retiring because Agency ordered him to complete the Optional Retirement application. In support thereof, he states that the DC FEMS Director, Shaun Laster, told him "Chief Willis, they are not going to let you stay; you need to report to this office and complete your retirement application and paperwork."²⁰ However, in *Jenson v. Merit Systems Protection Board*, 47 F.2d 1183 (Fed. Cir. 1995), the U.S. Court of

¹⁵ *Id.*

¹⁶ Employee filed a *Supplement to Petition for Review* on August 1, 2016. As will be discussed herein, this Board will not consider the new arguments contained therein, as they were not previously raised in any pleadings before the AJ. He also filed a *Second Supplement to Petition for Review* on August 31, 2016. The new submission includes a copy of a discrimination complaint that was filed with D.C. Office of Human Rights ("OHR"). In it, Employee alleged that Agency created a hostile work environment on the basis of his race and personal appearance. On August 18, 2016, OHR issue a Letter of Determination on No Probable Cause Finding. The notice provided that Employee filed to make a *prima facie* claim of retaliation, disparate treatment or discrimination. His recent submission that has been provided to the Board presents arguments based on OHR's findings. However OHR's findings have no bearing on OEA's jurisdiction or its ability to adjudicate the arguments that Employee submitted in his Petition for Appeal or Petition for Review. Moreover, Employee's second supplemental submission was filed with this Office more than one year after he filed a Petition for Review with this Board. Accordingly, we will not address these newly-presented arguments.

¹⁷ *Agency's Reply to Employee's Petition for Review* (July 24, 2015).

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 7.

²⁰ *Petition for Review*, p. 4 (June 22, 2015).

Appeals for the Federal Circuit held that an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. The Court reasoned that for a retirement to be considered involuntary, an employee must establish that the retirement was due to the agency's coercion or misinformation upon which they relied. OEA has held that the burden, therefore, rests on employees to show that they involuntarily retired.²¹ Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's matter.

Here, Employee submitted a memorandum to Interim Chief Jones on December 10, 2014.

The letter was titled "Optional Retirement" and stated the following:

"I am respectfully requesting Optional Retirement effective January 10, 2015. I am aware this request is less than sixty days as required, however it [is] also understood that the Mayor of the District of Columbia can waive such requirement. If not approved otherwise, I am requesting approval from the Mayor of the District of Columbia. I am also requesting to waive the retirement physical at the Medical Services Office. I request that this report be 'Expedited.'"²²

On December 22, 2014, Jones issued a letter to Employee stating that he was in receipt of the application. The letter further stated that his "request for optional retirement effective January 10, 2015 is hereby approved. The request to waive the retirement physical is also approved."²³ However, Employee requested that his Optional Retirement application be rescinded in a January 5, 2015 memorandum to Jones. The request was denied in writing on January 9, 2015.

²¹ *Esther Dickerson v. Department of Mental Health*, OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006); *Georgia Mae Green v. District of Columbia Department of Corrections*, OEA Matter No. 2401-0079-02, *Opinion and Order on Petition for Review* (March 15, 2006); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05, *Opinion and Order on Petition for Review* (July 24, 2008); *Larry Battle, et al. v. D.C. Department of Mental Health*, OEA Matter Nos. 2401-0076-03, 2401-0067-03, 2401-0077-03, 2401-0068-03, 2401-0073-03, *Opinion and Orders on Petition for Review* (May 23, 2008); and *Michael Brown, et al. v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09, 1601-0013-09, 1601-0014-09, 1601-0015-09, 1601-0016-09, 1601-0017-09, 1601-0018-09, 1601-0019-019, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09, 1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

²² *Agency's Motion to Dismiss*, Exhibit 1 (March 23, 2015).

²³ *Id.* at Exhibit 2.

In light of the above, this Board finds that Employee unilaterally and voluntarily submitted an Optional Retirement application to Agency on December 10, 2014. There is no evidence in the record to indicate that anyone forced him to submit his application. Employee had freedom of choice and could have consulted with an attorney, representative, or an advisor prior to submitting his retirement application. His decision to retire was of his own violation and there is no evidence in the record to prove any coercion, deception, or misleading information on Agency's part. Therefore, the AJ correctly determined that Employee's Optional Retirement application was submitted voluntarily.

Rescinding Retirement

Employee contends that Agency wrongfully denied his request to rescind his Optional Retirement application. He believes that it was expressly clear that he did not want to retire, as evidenced by his January 5, 2015 memorandum to Agency. The D.C. Court of Appeals has addressed this issue in numerous cases. As previously mentioned, the Court in *Watson v. District of Columbia Water and Sewer Authority* provided that "once an employee voluntarily resigns from her job, the employer's decision not to accept a subsequent withdrawal of that resignation does not transform the employee's act into an involuntary one."²⁴ The facts of the current case are also similar with those in *Wright v. District of Columbia Department of Employment Services*, 560 A.2d 509 (1989). In *Wright*, the agency accepted the employee's resignation letter on the date it was tendered. Days prior to the effective resignation date, the employee in *Wright* attempted to withdraw her resignation. However, the agency refused to accept the withdrawal.

The Court in *Wright* (citing *Guy Gannett Publishing Co. v. Maine Employment Security Commission*, 317 A.2d 183, 187 (1974)), reasoned that:

²⁴ 923 A.2d 903, 907 (2007).

“[a] resignation, when voluntary, is essentially an unconditional event the legal significance and finality of which cannot be altered by the measure of time between the employee’s notice and the actual date of departure from the job. An employer who accepts an unequivocal notice of resignation from an employee is entitled to rely upon it . . . unless, of course, the employer chooses to return to status quo by rehiring the employee, or accepting a retraction of the notice.”

The Court went on to provide that “requir[ing] an employer to accept a withdrawal of a resignation at any time prior to its effective date would severely hamper the employer’s ability to function efficiently.”²⁵ Therefore, Agency was not required to accept Employee’s withdrawal of her resignation. As noted in *Wright*, Employee should have been sure of what he was doing before deciding to take such drastic action to resign from his position. In *Wright*, the D.C. Court of Appeals ruled that the “burden should rest with the employee who initiated the action by giving the initial notice and who in every real and practical sense is the moving party[;] . . . it would be a distortion of reason and common sense to hold under these circumstances that the employer is the moving party and that the severance of the employment was involuntary.”²⁶

Moreover, DPM Instruction No. 8-53, 9-25, 36-3 & 38-12 addresses an employee’s ability to withdraw a retirement request. The section titled “Can a Retirement Be Withdrawn?” states the following:

“Generally, the employing agency may permit an employee to withdraw his or her retirement application before the effective date of separation, except that: A request to withdraw a retirement application before the effective date of separation may be disapproved when the employing agency

²⁵ The Court offered reasoning that the employer would be “unable to hire and train a replacement for the vacated position, or otherwise adjust his work force to prepare for the employee’s absence, except at his peril; the employee might at any time, at his whim, decide to rescind his resignation, thereby wasting both the time and financial resources expended in training his replacement.” *Wright v. District of Columbia Department of Employment Services*, 560 A.2d 509, 512 (1989).

²⁶ *Id.* at 513. See also *LaGrand v. Metropolitan Police Department*, OEA Matter No. J-0194-12 (June 10, 2014).

has a valid reason and explains the reason in writing to the employee.”

Contrary to Employee’s arguments, the record is clear that he voluntarily submitted an Optional Retirement application on January 5, 2015. While he is correct that a retirement and a resignation are not the same, the premise presented in *Waston* and *Wright* is analogous to that of a retirement. Similar to the employee’s in *Waston* and *Wright*, Employee communicated an unequivocal desire to leave Agency’s employ. In addition, by accepting his application for retirement, Agency was entitled to rely and act upon such notice.

For reasons unknown to this Board, Employee requested to withdraw his retirement application prior to the effective date that he chose. When his request to withdraw was denied, Agency provided a written explanation regarding its reasons for doing so. Specifically, Interim Chief Jones stated that “As you are aware, I have made a commitment to hire and promote BFC Sherrod Thomas to fill your position and issued a Special Order to that effect...”²⁷ Thus, it was communicated to Employee that the request to withdraw his application for retirement was denied. He was also provided with a written explanation that detailed the reason for the denial.

Accordingly, this Board finds that the D.C. Court of Appeals, in addition to DPM Instruction No. 8-53, 9-25, 36-3 & 38-12, authorized Agency to deny Employee’s request to rescind his retirement application. Consequently, the AJ correctly concluded that Agency was not under a duty to accept the withdrawal of his application.

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.²⁸ The Court in *Baumgartner v. Police and Firemen’s*

²⁷ *Agency’s Motion to Dismiss*, Exhibit 4 (April 27, 2015).

²⁸ *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Retirement and Relief Board, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. This Board believes that the AJ's findings pertinent to Employee's retirement were based on an in-depth review of the arguments presented. In addition, her conclusions of law flowed rationally from the evidence submitted by both parties. The Board, therefore, concludes that the Initial Decision was based on substantial evidence.

Waiver of Arguments

It should be noted that Employee's Petition for Review contains several arguments concerning whether his application should have been considered complete prior to January 12, 2015. Employee also submits in his Supplement to Petition for Review that his successor, Battalion Fire Chief Thomas, was improperly hired and promoted after Agency forced him to retire.²⁹

In accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." The D.C. Court of Appeals held in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008) that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." Additionally, the Courts ruled in *Brown v. Watts*, 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals*, 886 A.2d 70 (D.C. 2005) that any arguments are waived when a party never attempted to reopen the record to introduce any evidence supporting their argument before the

²⁹ *Supplement to Petition for Review* (August 1, 2016).

issuance of an OEA Initial Decision. Moreover, this Board has consistently held that an argument is waived if it was not raised on appeal before the AJ.³⁰

In this case, Employee had numerous opportunities to present his arguments to the AJ in his Petition for Appeal or through the submission of oral or documentary evidence, but he did not. Thus, pursuant to OEA Rule 633.4, any argument that Employee failed to present to the AJ may not be raised at this time. Accordingly, the Board will not address the merits of his newly-presented arguments.

Conclusion

This Board finds that the AJ correctly concluded that Employee's retirement was voluntary. Additionally, the D.C. Court of Appeals has ruled that Agency was not under an obligation to accept his request to rescind his retirement application. Finally, the Initial Decision was based on substantial evidence in the record. Therefore, Employee's Petition for Review must be denied.

³⁰ *Sharon Jeffries v. D.C. Retirement Board*, OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014); *Latonya Lewis v. D.C. Public Schools*, OEA Matter No. 1601-0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Ilbay Ozbay v. Department of Transportation*, OEA Matter No. 1601-0073-09R11, *Opinion and Order on Petition for Review* (October 28, 2014); and *Yordanos Sium v. Office of State Superintendent of Education*, OEA Matter No. 1601-0135-13, *Opinion and Order on Petition for Review* (May 10, 2016).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.