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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CONCHITA RUSSELL,)	
Employee)	OEA Matter No.: 2401-0201-10
)	
v.)	Date of Issuance: April 27, 2012
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	STEPHANIE N. HARRIS, Esq.
Agency)	Administrative Judge
)	
Jacqueline P. Byrd-Tillman, Esq., Employee Representative		
W. Iris Barber, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Conchita Russell (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public School’s (“Agency” or “DCPS”) action of terminating her employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time her position was abolished was an Elementary Teacher at Smothers Elementary School (“Smothers”). Employee was serving in Educational Service status at the time her position was abolished. On December 31, 2009, Agency filed an Answer to Employee’s appeal.

I was assigned this matter on February 6, 2012. On February 15, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations (“February 15th Order”). Employee’s brief was originally due on March 28, 2012. On March 29, 2012, Employee through Counsel, requested an extension of time to respond to the February 15th Order. On March 30, 2012, I issued an Order wherein I granted Employee’s request for an extension of time, with a revised deadline of April 11, 2012. Both parties have timely submitted their briefs in response to the February 15th Order. After reviewing the record, I determined that there are no material facts in dispute and therefore a hearing is not warranted. The record is now closed.

JURISDICTION

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

ISSUE

Whether this Office may exercise jurisdiction over this matter.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

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:

That 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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Employee asserts in her brief that she “involuntarily retired after being threatened with the RIF and having no other source of income.”¹ Employee’s assertion that she involuntarily retired raises a question as to whether OEA has jurisdiction over this appeal.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 (“Appeal procedures”) reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . .

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to OEA Rule 621.1, *id.*, the burden of proof is by a preponderance of the evidence which is defined as “[t]hat degree of relevant

¹ Employee’s Brief at p. 1 (April 11, 2012).

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 has no authority to review issues beyond its jurisdiction.² Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.³ 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.⁴ Furthermore, OEA has consistently held that it lacks jurisdiction to adjudicate a voluntary retirement.⁵ However, a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office.⁶ A retirement is considered involuntary “when the employee shows that retirement was obtained by agency misinformation or deception.”⁷ The Employee must prove that her retirement was involuntary by showing that (1) the retirement resulted from undue coercion or misrepresentation by Agency; (2) Employee relied upon such information when making her decision to retire; and (3) a reasonable person would have been misled by Agency’s statements.⁸

Here, Employee contends that she involuntarily retired “after being threatened with the RIF and having no other source of income.”⁹ I disagree with Employee’s contentions. While Employee may have found the RIF action threatening, there is no evidence of coercion by Agency. Here, the record shows that Agency provided Employee with a RIF notice on October 2, 2009, with an effective date of November 2, 2009.¹⁰ Agency’s RIF notice simply informed Employee of her options – appeal the RIF or retire if you qualify. Nothing in the RIF notice, nor any of DCPS’ actions, threatened Employee or gave a *mandate to retire*. I find that Employee elected to voluntarily retire in lieu of being terminated. Also, I find that Employee was given thirty (30) days notice of the RIF, which is sufficient time to get information, seek counsel, and make an informed decision. Regardless of Employee’s protestations, the fact that she chose to retire instead of continuing to litigate her claims voids the Office’s jurisdiction over her appeal. Employee’s choice to retire in the face of a seemingly unpleasant situation – financial hardship,

² See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

³ See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

⁴ 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).

⁵ See *Deborah Gray-Avent v. D.C. Department of Human Resources*, OEA Matter No. 2401-0145-08, *Opinion and Order on Petition for Review* (July 30, 2008); *Adele LaFranque v. D.C. Public Schools*, OEA Matter No. 2401-0032-10 (February 8, 2011); *Curtis Woodward v. D.C. Public Schools*, OEA Matter No. 2401-0029-10 (February 8, 2011).

⁶ *Christie*, 518 F.2d at 587.

⁷ See *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed. Cir. 1984); *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995).

⁸ *Covington*, 750 F.2d. at 942.

⁹ Employee’s Brief at p. 1 (April 11, 2012).

¹⁰ Agency Answer, Tab 4 (December 31, 2009).

instead of being RIFed does not make Employee's retirement involuntary.¹¹

Furthermore, I find no *credible* evidence of misrepresentation or deceit on the part of Agency in procuring the retirement of Employee. There is no evidence that Agency misinformed Employee about her option to retire. Based on the foregoing, I find that Employee's retirement was voluntary.¹² As such, this Office lacks jurisdiction over this matter, and for this reason, I am unable to address the factual merits, if any, of this appeal.

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

STEPHANIE N. HARRIS, ESQ.
ADMINISTRATIVE JUDGE

¹¹ The court in *Covington* held that “[t]he fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives does not make an employee's decision any less voluntary.” *Covington*, 750 F.2d at 942.

¹² 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*, 518 F.2d at 587-588. (citations omitted).