THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROYAL A. WALKER Employee	
v.	OEA Matter No. 2401-0280-96P02
DISTRICT OF COLUMBIA PUBLIC SCHOOLS Agency	Date of Issuance: October 15, 2003

OPINION AND ORDER
ON
PETITION FOR REVIEW

Agency notified Employee, an Industrial Arts Teacher at Terrell Junior High School, that he would be separated from District government service pursuant to a reduction-in-force (RIF) that was scheduled to take effect on July 15, 1996. The same day that his separation was to be effected, however, Employee took a discontinued service retirement. He then filed with the Office of Employee Appeals (OEA) a timely Petition for Appeal claiming that he should not have been affected by the RIF.

The Administrative Judge informed the parties that this Office does not have jurisdiction over an appeal in which an employee voluntarily retires. However, where an employee can prove that an agency provided him or her with misleading information and that the employee relied on this misinformation to his or her detriment, the resulting retirement will be considered involuntary. Under those circumstances, this Office will treat the employee's involuntary decision to retire as a constructive removal that may be appealed here. *See, e.g.*, *Dunham v. District of Columbia Pub. Schs.*, OEA Matter No. 2401-0291-96, *Opinion and Order on Petition for Review* (Sept. 28, 2000), __ D.C. Reg. __ ( ). Therefore, the threshold issue before the Administrative Judge was whether Employee's decision to retire was voluntary. The Administrative Judge concluded that Employee's retirement was not voluntary in that it was the product of incorrect information supplied by Agency regarding his monthly retirement income upon which Employee relied to his detriment. Therefore, the Administrative Judge determined that the Office's jurisdiction had been established.[1]

Because Employee would have been separated from service pursuant to the RIF had he not retired that same day, the Administrative Judge then went on to consider the merits of Employee's RIF challenges. Under the regulations that governed RIF's at the time (43 D.C. Reg. 5264 *et seq.* (1996)), Agency employees were grouped into competitive areas and levels. Each individual school was designated a separate competitive area. Within each school,

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[1] Agency has not challenged the Administrative Judge's determination regarding jurisdiction.

employees were then placed into competitive levels within which they could compete for employment retention. A competitive level consisted of positions in the same grade or occupational level that were sufficiently alike in numerous characteristics. If a decision had to be made between employees in the same competitive area and level, then the school principal was charged with ranking the employees to determine who would be retained. The ranking factors were as follows: (a) significant relevant contributions, accomplishments, or performance; (b) relevant supplemental professional experiences as demonstrated on the job; (c) office or school needs, including: curriculum, specialized education, degrees, licenses, and/or areas of expertise; and (d) length of service.

In order to assess each employee in the above areas, Agency devised a form known as the Competitive Level Documentation Form (CLDF). The CLDF was divided into four (4) categories that mirrored the above mentioned regulatory ranking factors. The maximum number of points attainable in each category was 25. In addition, five (5) points could be awarded for District residency. Thus, the maximum number of points an employee could receive was 105. After the CLDF's were completed and tallied, each employee was ranked within his or her competitive level. Positions were then eliminated in inverse order of each employee's ranking within the competitive level.

In this case, the competitive area in which Employee competed for retention was Terrell Junior High School (Terrell). His competitive level was "Industrial Arts Teacher." At the time of the RIF, the Industrial Arts Department at Terrell consisted of two (2) teachers, including

Employee. By memorandum dated May 28, 1996, Robert Graves, the principal of Terrell, advised both employees that it was necessary to eliminate one (1) position in their department for School Year 1996-1997.

Mr. Graves gave both employees a blank CLDF to complete and return by May 30, 1996. They were advised that all claims on their CLDF's had to be supported by documentation. Both Employee and his competitor completed their respective form and submitted additional written information for consideration by Mr. Graves.

Mr. Graves then took the information the teachers submitted and transferred it to a worksheet that he created. The worksheet mirrored the CLDF categories and was further broken down into subcategories. Mr. Graves awarded each individual points when either the teacher supported his claim with documentation or Mr. Graves and/or the assistant principal, Dr. Bevadine Terrell, had independent knowledge of the contribution.

After Mr. Graves completed the CLDF worksheets, he transferred the point totals therein to each employee's official CLDF. Employee's competitor received a total of 77.5 points on his CLDF and was ranked first. Employee received a total of 60 points on his CLDF and was ranked second. Thus, Agency determined that Employee would be separated from service pursuant to the RIF.

Employee argued before the Administrative Judge that there were miscalculations in his and/or his competitor's CLDF scores, and that the miscalculations, if corrected, would have resulted in Employee's ranking first and being retained. The Administrative Judge concluded

that Agency had not properly scored the CLDF of either Employee or his competitor. The Administrative Judge determined that the competitor's CLDF score should have been 75 points rather than 77.5, while Employee's CLDF score should have been 70 points rather than 60. However, because Employee also ranked second once the miscalculations were corrected, the Administrative Judge found that Employee still would have properly been separated from service as a result of the RIF.

On August 20, 2002, Employee filed with this Board a timely Petition for Review of the Initial Decision. Employee's Petition sets forth the following objections to the Initial Decision: (1) the Administrative Judge's findings regarding membership in a professional organization are not based on substantial evidence; (2) the Administrative Judge's finding regarding certification is not based on substantial evidence; and (3) the Administrative Judge's finding regarding District residency is based on an erroneous interpretation of law and is not based on substantial evidence.

Employee's first claim of error is that the Administrative Judge's findings regarding membership in a professional organization are not based on substantial evidence. Employee did not receive any points for "Membership in Professional Organizations," which was a subcategory of the ranking factor "Relevant Professional Experience as Demonstrated on the Job." Employee's competitor received the maximum of five (5) points in the subcategory. Employee argued before the Administrative Judge that he should have received five (5) points for his membership in the National Vocational Education Association.

The Administrative Judge determined that Employee was not entitled to any points in this subcategory because Mr. Graves testified credibly that he had no knowledge that Employee belonged to a professional organization and there was no evidence that the assistant principal had such knowledge. In addition, he noted that Employee had not submitted any document attesting to such membership, either when he completed his blank CLDF or at the Hearing, and he found Employee's testimony that he "thought" Mr. Graves kept a copy of his membership certificate in his personnel file "flimsy."

In his Petition for Review, Employee argues that, based on the similarity in the circumstances surrounding each employee's membership in a professional organization, the Administrative Judge's finding that Employee was not entitled to points in this subcategory while his competitor was entitled to such points is not supported by substantial evidence. Employee claims that either he should receive an additional five (5) points or his competitor should have five (5) points deducted from his score.

Neither Employee nor his competitor listed his membership in a professional organization on his respective CLDF submission. The competitor's CLDF worksheet (prepared together by Mr. Graves and the assistant principal) contained a handwritten note in this subcategory that read "Owner of own business." Similarly, the competitor's official CLDF contained a handwritten note in the corresponding category that read "Member of a Professional Organization." At the hearing, Mr. Graves explained why he awarded Employee's competitor points in this subcategory, testifying that "[h]e has his own business and he was a member of the National Printing Association, I believe." Tr., Vol. I, pp. 26-27. There were

no similar annotations in this subcategory on either Employee's worksheet or his official CLDF. At the hearing, Mr. Graves testified that he could not recall whether he knew when he completed the CLDF's that Employee was a member of a professional organization.

Employee contends that the difference between these two situations is only that Mr. Graves believed that his competitor was a member of a professional organization, while he could not recall whether he knew at the time of the RIF that Employee was also a member of a professional organization. Even if that were the only difference between their situations, Employee's argument that he should have received points in the subcategory because his competitor did would still fail. Employee underestimates the difference in Mr. Graves' testimony. Nearly five (5) years after ranking the teachers, Mr. Graves believed that Employee's competitor was a member of a professional organization. He did not testify that he believed Employee was also a member of a professional organization, but rather that he could not recall whether he knew that many years earlier about Employee's membership. As noted, however, that was not the only difference between their situations. When the CLDF worksheets and the official CLDF's were being prepared, Mr. Graves and/or the assistant principal noted his or her belief that Employee's competitor owned his own business and was a member of a professional organization. There were no similar annotations for Employee. Therefore, despite Employee's contention to the contrary, we find that there is substantial evidence in the record to support the Administrative Judge's determination that Employee was not entitled to points in the subcategory of membership in a professional organization even though his competitor received such points.

With respect to Employee's alternative argument that his competitor should have five (5) points deducted from his score, we note that he did not raise this argument before the Administrative Judge. Employee's closing statement contained a section entitled "[Competitor] Received Points on his CLDF that were not Merited," in which he argued that his competitor erroneously received points in two (2) other categories. He did not mention the subcategory of membership in a professional organization. Employee's closing statement also contained a section describing the additional points to which he believed he was entitled, which included argument regarding membership in a professional organization, but which did not include an alternative argument that his competitor should have points deducted in that subcategory. Should Employee have wanted to argue that his competitor was not entitled to points for membership in a professional organization, he easily could have done so in his closing statement because the exhibits of record and transcript, upon which he relies to support his position, were available to him at the time he prepared his statement and were in fact referenced by him therein in other contexts. Pursuant to OEA Rule 634.4, 46 D.C. Reg. 9320 (1999), the Board may consider waived any legal argument that could have been raised before the Administrative Judge, but was not. Inasmuch as this argument is being raised on appeal for the first time but could have been argued before the Administrative Judge, we deem the argument waived.

Employee's second claim of error is that the Administrative Judge's finding regarding certification is not based on substantial evidence. As noted, one of the CLDF categories was "Office or School Needs." That category was further broken down on the CLDF worksheet

into a number of subcategories, including certification in field. Employee received the maximum of five (5) points in the subcategory. At the hearing, however, Agency introduced an exhibit indicating that Employee's certification expired on August 31, 1995, approximately one (1) year before the RIF. The Administrative Judge concluded that, at the time of the RIF, Employee was not certified in his subject area and reduced his CLDF score by five (5) points.

In his Petition for Review, Employee admits that his certification expired on August 31, 1995. He contends, however, that he should not have lost points for certification in his field because he was certified during the 1993/1994 and 1994/1995 School Years, and arguably for a portion of the 1995/1996 School Year. According to Employee, Mr. Graves testified that he awarded points based on his knowledge of teacher involvement during his personal time period at Terrell, starting in 1994, and he did not testify that he limited the award of points to participation in the 1995/1996 School Year.

What Mr. Graves testified to was that he could not recall nearly five (5) years later whether he had limited his consideration and the award of points to contributions made by the teachers during the 1995/1996 School Year. With respect to certification, he testified that Employee received credit for being certified but he later found out that Employee was not certified. The inference from this testimony is that Employee received credit for certification because Mr. Graves thought that he was certified at the time of the RIF. Further, we note that, despite having the opportunity to do so, Employee has not brought to our attention a single example of an instance in which Mr. Graves awarded points for participation or contributions made during a prior school year. In light of the above, we conclude that the Administrative

Judge's finding that Employee was not entitled to points for certification in his field is supported by substantial evidence.

Employee's third claim of error is that the Administrative Judge's finding regarding District residency is based on an erroneous interpretation of law and is not based on substantial evidence. Mr. Graves awarded Employee's competitor five (5) points for District residency. Employee questioned the validity of those points.

The Administrative Judge concluded that Employee had not met his burden of proving that his competitor was not entitled to credit for District residency. The Administrative Judge noted that Employee introduced into evidence as his Exhibit 11 an undated list of names and addresses for those Agency employees who participated in the "Middle School Endorsement II Program" during the 1995/1996 School Year, which was sponsored by National-Louis University's Center for Systemic Educational Change. The competitor's address is listed as being in District Heights, MD. The Administrative Judge found that the competitor once lived at that address, and that his taxes were paid in Maryland; however, around the time of the RIF, he was separated from his wife and was living in the District.

In his Petition for Review, Employee contends that he proved by a preponderance of the evidence that his competitor was not a District resident during the 1995/1996 School Year. Some of the evidence to which he refers does support his position. First, Employee's competitor confirmed during his testimony that his Maryland address was listed on his official personnel action form for the 1995/1996 School Year. The record does not, however, include a copy of that document or any explanation as to its purpose or by whom and when it was

prepared. Therefore, the significance of that admission is unclear beyond the fact that an Agency form for the 1995/1996 School Year listed the competitor's Maryland address. Second, the competitor admitted that he paid Maryland, and not District of Columbia, taxes during the relevant time period. Lastly, Employee's Exhibit 11, which as noted was an undated list of names and addresses for those Agency employees who participated in the "Middle School Endorsement II Program" sponsored by National-Louis University's Center for Systemic Educational Change during the 1995/1996 School Year, lists the competitor's Maryland address.

Other evidence to which Employee refers does not support his position. He claims that his competitor did not change his address on any of the Agency documents submitted into evidence at trial. His statement is misleading because a review of the record reveals that no exhibit other than Employee's Exhibit 11 discussed above lists any address for Employee's competitor. Further, Employee avers that his competitor did not testify that his separation occurred at the time of the RIF nor did he specify a time frame during which he had a District address. Though he was not questioned regarding a specific range of dates during which he lived in the District, critically, he did testify that he received residency credit because he was living in the District. Specifically, Agency's representative asked the competitor the following question regarding residency: "Is there any particular reason why the D.C. residency is stated there, according to the best of your recollection?" The competitor responded "Living in D.C. because of separation." Tr.,Vol. II, pp. 298-99. The inference from this testimony is that he was living in the District at the time the residency determination was made.

Accordingly, the only evidence in the record that supports Employee's position is that the competitor's Maryland address was listed on his official personnel action form for the 1995/1996 School Year, though as mentioned the nature of that document is not clear from the record, his Maryland address was also listed for a program sponsored by National-Louis University's Center for Systemic Educational Change during the 1995/1996 School Year and he paid Maryland, not the District of Columbia, taxes. The question that remains is whether that evidence is enough to meet his burden of proof on this issue.

Employee relies on two (2) cases outside of the employment context to support his position that he has proven that his competitor was not a District resident. He cites *Lawrence v. District of Columbia Board of Elections and Ethics*, 611 A.2d 529 (D.C. 1992), for the proposition that an important test of District residency is whether an individual pays taxes in the District and *D'Elia & Marks Co. v. Lyon*, 31 A.2d 647 (D.C. Mun. App. 1943), for the proposition that one does not become a resident of the District of Columbia merely by sleeping in the District.

In *Lawrence v. District of Columbia Board of Elections and Ethics*, the District of Columbia Court of Appeals held that there was no ground to set aside the decision of the District of Columbia Board of Elections and Ethics that Marion Barry, Jr. was not disqualified to hold the office of a member of the Council of the District of Columbia even though the District of Columbia Self Government & Governmental Reorganization Act required a prospective candidate to reside in the District for a one-year period before the election date and Mr. Barry was absent from the District during part of that time due to his serving a six-month federal

sentence in Virginia and Pennsylvania. In reaching its decision, the Court did not specifically state that payment of taxes is an important test of residency. Rather, the Court considered a number of factors, which included the lack of evidence that Mr. Barry failed to pay District of Columbia taxes, but which also included the lack of evidence that he changed his voter registration or expressed any intent not to return to the District after his period of involuntary physical absence from the area. In addition, the Court noted that Mr. Barry maintained a residence in the District, paid for the residence in the District and maintained a valid District driver's license. 611 A.2d at 533.

In *D'Elia & Marks Co. v. Lyon*, the District of Columbia Municipal Appeals Court upheld an order granting a motion to quash an attachment based on a finding that the defendant was a resident of the District of Columbia even though he also had residential property in Maryland to which he probably intended to return at some indefinite time. 31 A.2d at 648-49. In determining residency, the Court stated that it was "guided by the ordinary and obvious indicia of such . . . ." *Id.* at 648. Specifically, the Court looked at evidence that the defendant was actually living in the District at the time and had been doing so for several months prior to the attachment, he took a year's lease on an expensive apartment, moved furniture from his residential property in Maryland to his apartment in the District and placed in storage the remainder of his Maryland furniture. *Id.* at 648-49.

The cases cited by Employee refer to and consider obvious indicia of residency. Other than the non-payment of District of Columbia taxes, Employee has not addressed any of the other indicia mentioned by those courts. Therefore, Employee has fallen short of meeting his

burden of proof even under the standard he proposes for determining District residency. As such, we agree with the Administrative Judge that Employee has not proven that his competitor was not entitled to District residency credit.

Employee has not established any grounds that permit this Board to grant his Petition for Review. *See* OEA Rule 634.3, 46 D.C. Reg. 9319 (1999). Therefore, his Petition must be denied.

ORDER

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

FOR THE BOARD:

Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance 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.