THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JOHN WHARTON Employee	OEA Matter No. J-0111-02
v.	Date of Issuance: September 26, 2005
DISTRICT OF COLUMBIA PUBLIC SCHOOLS Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

John Wharton ("Employee") worked as a structural maintenance manager with the D.C. Public Schools ("Agency"). On June 24, 2002, Employee received a notice of reduction-in-force ("RIF") which detailed his effective date of termination as July 31, 2002. The notice issued by Agency described several optional or regular retirement choices, one of which Employee accepted. On August 29, 2002, Employee filed a petition for appeal with this Office claiming that the Agency utilized the pretext of a RIF to rid themselves of Employee. The Agency filed a response to Employee's Appeal on

February 25, 2003, alleging that Employee was not subjected to the RIF because he decided to retire on July 31, 2002 instead. Based on the Administrative Judge's Initial Decision, Employee's Representative confirmed that Employee retired at a Pre-hearing Conference.[1]

The Administrative Judge rendered a decision on March 3, 2003, where she found that the Office of Employee Appeals ("OEA") lacked jurisdiction to hear cases involving voluntary retirement, however, if Employee could prove that his retirement was the result of undue coercion or was the basis of misleading or mistaken information, then OEA could hear the appeal. According to the Administrative Judge, Employee failed to prove that his retirement fell under either of the two categories outlined. Moreover, the Judge found that Employee failed to prove that either of the requirements needed to reverse a RIF was applicable to his case. Consequently, his appeal was dismissed.

Employee filed a petition for review on April 7, 2003. In it he argued that the Administrative Judge erred in her interpretation of D.C. Code 1-624.08(f)(2). Employee claims that OEA has "traditionally considered allegations that various reductions-in-force were based upon pre-textual grounds or were motivated by improper purposes." Employee also argued that the Administrative Judge failed to properly consider Civil Rule 12(b)(6) because she did not construe the case in a light most favorable to Employee. Additionally, on May 9, 2005, a supplemental petition for review was filed by Employee. The supplemental petition cites *Levitt v. District of Columbia Office of*

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[1] *Initial Decision*, p. 2 (March 3, 2003).

Employee Appeals, No. 03-CV-1249 (D.C. 2005), as a basis for a remand to the Administrative Judge to hear the merits of Employee's claims as set out in his Notice of Appeal.

Addressing the jurisdictional issue, the OEA was given statutory authority to address RIF cases. According to D.C. Code Ann. §1-606.3(a):

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-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."

In an attempt to define in more detail the OEA's authority, D.C. 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."

As a result, this Office 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 written notice 30 days prior to their separation. Employee makes neither of these arguments, therefore, the OEA does not have jurisdiction to hear his case.

Furthermore, the cases cited by Employee are not applicable to his case and lend no help in proving that his retirement was involuntary, the result of coercion, or the result of misleading information provided by the Agency. In *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883, 1998 D.C. App. LEXIS 256, the employee could not show that his RIF action violated either of the requirements provided in D.C. Code § 1-624.08. Therefore, the D.C. Court of Appeals upheld the OEA's decision that it could not act outside of its scope of authority to consider that the RIF was a pretext to retaliating against the employee.

Similarly, *Hoage v. Board of Trustees of the University of the District of Columbia*, 714 A.2d 776, 1998 D.C. App. LEXIS 120, does not help to bolster Employee's claims. Like in *Anjuwan,* employee failed to show that the RIF was a pretext to retaliation against him by the agency. Although both cases address issues involving a pretext to retaliation, in neither case was the employee able to prove that they were RIFed as the result of pre-textual retaliation.

Moreover, Employee argues that *Levitt* is applicable to the present case. It is our opinion that Employee's case does not rise to the level of *Levitt*. The employee in *Levitt* provides a series of events that may reasonably question if his RIF was a pretext to retaliation. Mr. Wharton does not provide the factual details that rise to the level of detail provided in *Levitt*. Employee only provides that he was RIFed as a means of diverting attention from the Agency Superintendent and Chief Operating Officer's own mal- or nonfeasance.[2] Additionally, this case differs from *Levitt* in the post-RIF action taken by Employee. Although there was not a finding of guilt according to Agency's investigation, Mr. Wharton still voluntarily retired. The employee in *Levitt* did not opt to retire. Moreover, in addition to the fact that OEA does not have jurisdiction over cases of voluntary retirement, Employee has not provided any evidence to show that his retirement was not of his own volition.

As for his argument regarding Civil Rule 12(b)(6), Employee has the burden to prove that the Agency violated either of the requirements laid out in D.C. Code § 1-624.08. If an employee appealing a RIF matter is unable to prove either of the requirements that the OEA is statutorily authorized to address, then the OEA has to render a decision accordingly. In this case, Employee was unable to prove either of the requirements. As a result of Employee's failure to meet his burden, the Judge found in favor of the Agency. Accordingly, we uphold the Judge's decision that Employee has not presented a basis upon which relief can be granted. Therefore, Employee's Petition for Review is denied.

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[2] *Employee Petition for Review*, p. 3 (August 29, 2002).

ORDER

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

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Jeffrey J. Stewart

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 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.