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**THE DISTRICT OF COLUMBIA  
BEFORE  
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
KATHLEEN ASH,	)	
Employee	)	OEA Matter No. J-0022-16
	)	
v.	)	Date of Issuance: March 30, 2016
	)	
DEPARTMENT OF BEHAVIORAL HEALTH,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	

Kathleen Ash, Employee, *Pro Se*  
Andrea Comentale, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On January 19, 2016, Kathleen Ash (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Behavioral Health’s (“Agency”) decision to allow her to resign in lieu of being terminated from her position as a Recovery Assistant, effective December 9, 2015.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on January 27, 2016. On February 17, 2016, Agency submitted its Answer to the Petition for Appeal. Thereafter, on February 19, 2016, I issued an Order requiring Employee to address the jurisdiction issue in this matter. Employee’s brief on jurisdiction was due on or before March 4, 2016. Additionally, Agency had the option to file a reply brief by March 14, 2016. Because Employee did not submit her brief by the required deadline, on March 8, 2016, I issued a Statement of Good Cause Order to Employee. Employee was ordered to submit a statement of good cause based on her failure to provide a response to my February 19, 2016, Order. Employee timely submitted a response to the Good Cause Order. Because this matter could be decided on the basis of the documents of record, no proceedings were conducted. The record is now closed.

**JURISDICTION**

The jurisdiction of this Office has not been established.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was a Recovery Assistant at St. Elizabeth Hospital, effective May 19, 2014. On September 26, 2015, Employee was involved in an incident. Thereafter, on November 4, 2015, Agency issued a notice of Proposed Discipline – Removal to Employee for Neglect of duty.<sup>1</sup> Following an administrative review, the Hearing Officer upheld Agency’s proposed termination action.<sup>2</sup> On December 9, 2015, Employee submitted a notice of resignation, with an effective date of December 9, 2015, which Agency accepted.<sup>3</sup> Employee filed a Petition for Appeal with this Office on January 19, 2016.

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.<sup>4</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>5</sup> 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]. . . . , or placement on enforced leave for ten (10) days or more.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to this rule, 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.”

***Employee’s position***

In this case, Employee does not assert that her resignation was involuntary; she however states that she was informed by the union president that she had to resign or be terminated. She explains that she was never given the opportunity to submit a statement to rebut the allegations

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<sup>1</sup> Agency’s Response to Petition for Appeal at Exhibit 7 (February 17, 2016).

<sup>2</sup> *Id.* at Exhibit 8.

<sup>3</sup> *Id.* at Exhibit 9; See also Exhibit 10.

<sup>4</sup> See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>5</sup> See *Brown v. District of Columbia Public. School*, 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).

made against her.<sup>6</sup> In her March 22, 2016, response, Employee notes that OEA has jurisdiction because “[Agency] failed to answer OEA’s requests or proof of abuse by employee, as a result of not [sic] answering the request case Matter No J-0022-16 in this matter, because [Agency] did not respond in a timely matter [sic] it fell to your office jurisdiction.”<sup>7</sup>

### ***Agency’s position***

Agency asserts that, Employee’s Petition for Appeal is untimely. It explains that, Employee had thirty (30) days from the date her resignation became effective, to file an appeal with OEA, and she failed to do so. Agency further argues that Employee resigned from her position, and she has failed to prove that her resignation was not voluntary.<sup>8</sup>

### ***Resignation***

Employee argues that she was informed by the union president that she had to resign or be terminated. Agency on the other hand asserts that Employee’s resignation was voluntary. The issue of an employee’s voluntary or involuntary resignation has been adjudicated on numerous occasions by this Office, and the law is well settled with this Office that, there is a legal presumption that retirements/resignations are voluntary.<sup>9</sup> Furthermore, I find that this Office lacks jurisdiction to adjudicate a voluntary resignation. However, a resignation where the decision to resign was involuntary, is treated as a constructive removal and may be appealed to this Office.<sup>10</sup> A resignation is considered involuntary “when the employee shows that [resignation] was obtained by agency misinformation or deception.”<sup>11</sup> The employee must prove that his/her retirement/resignation was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken information) by Agency upon which he/she relied on when making a decision to resign. An employee must also show “that a reasonable person would have been misled by the Agency’s statements.”<sup>12</sup> In *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (2008), the D.C. Court of Appeals provided that the test to determine voluntariness is an objective one that, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. As a general principle, an employee’s decision to resign is considered voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his/her choice, and is permitted to set the effective date. OEA has consistently held that a mere assertion of force or coercion is not enough to prove that Employee involuntarily resigned.<sup>13</sup>

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<sup>6</sup> Petition for Appeal (January 19, 2016).

<sup>7</sup> Employee’s brief on jurisdiction (March 22, 2016).

<sup>8</sup> Agency’s response, *supra*, at Exhibit 12.

<sup>9</sup> See *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Bagenstose v. District of Columbia Public Schools*, OEA Matter No. 2401-1224-96 (October 23, 2001).

<sup>10</sup> *Id.* at 587.

<sup>11</sup> 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.2d 937 (Fed. Cir. 1984).

<sup>12</sup> *Id.*

<sup>13</sup> *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);

In the current case, Employee does not assert that her resignation was involuntary. She however, stated that she was informed by the union president that she had to resign or be terminated. The union president is not employed by Agency. Additionally, Employee has not provided any evidence in support of her assertion that she was informed by the union president that she had to resign or be terminated. Employee voluntarily submitted a letter to Agency informing them of her decision to resign from her position as a Recovery Assistant effective December 9, 2015. Her Standard Form (“SF”) 50 highlights her resignation effective date of December 9, 2015.<sup>14</sup> *Assuming arguendo*, that the union president informed Employee that she could either resign or be termination, Employee’s choice to resign in the face of a seemingly unpleasant situation, does not make her resignation involuntary.

At no time does Employee allege that Agency procured her resignation through deceit, misrepresentation or undue coercion. Accordingly, I find no *credible* evidence of misrepresentation, misinformation or deceit on the part of Agency in procuring Employee’s resignation. Further, Employee has failed to provide any evidence to prove that Agency deceived her or gave her misleading information with regards to her resignation. Regardless of Employee’s protestations, I find that the facts and circumstances surrounding Employee’s resignation was Employee’s own choice. Based on the documents on record, Employee’s resignation can only be deemed voluntary.

### ***Timeliness***

Agency asserted that, Employee’s Petition for Appeal is untimely because it was filed more than thirty (30) days from the date her resignation became effective. Employee resigned from Agency effective December 9, 2015, and she filed her Petition for Appeal with OEA on January 19, 2016.

A “[d]istrict government employee shall initiate an appeal by filing a Petition for Appeal with the OEA. The Petition for Appeal must be filed within thirty (30) calendar days of the effective date of the action being appealed.”<sup>15</sup> The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.<sup>16</sup> Also, while this Office has held that the statutory thirty (30) day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature,<sup>17</sup> there is an exception whereby, a late filing will be excused if an agency

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*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, 1601-0019-09, 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).

<sup>14</sup> Agency’s Response at Exhibits 9 & 10.

<sup>15</sup> DC Official Code §1-606.03.

<sup>16</sup> *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985).

<sup>17</sup> *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).

fails to provide the employee with “adequate notice of its decision and the right to contest the decision through an appeal.”<sup>18</sup>

In this matter, Employee’s resignation was effective on December 9, 2015. Therefore, Employee would have had thirty (30) days from December 9, 2015, to file an appeal with OEA. However, because of Employee’s resignation, Agency did not issue a Final Agency decision to Employee notifying her of her appeal rights to this Office. Accordingly, I find that Agency did not comply with OEA Rule 605.1, and as such, Employee’s untimely Petition for Appeal falls within the exception to the thirty (30) days mandatory filing requirement.

Although I find that Employee’s Petition for Appeal is considered timely based on the above-referenced exception to the mandatory thirty (30) days filing requirement, in accordance with District laws, rules and regulation, I further find that Employee’s decision to resign was voluntary and for this reason, I am unable to address the factual merits, if any, of this appeal.

### ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Senior Administrative Judge

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<sup>18</sup> OEA Rule 605.1, 59 DCR 2129 (March 16, 2012); See also *Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, Opinion and Order on Petition for Review (June 27, 2008) citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0077-09, Opinion and Order on Petition for Review (May 23, 2011).