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

_____	)	
In the Matter of:	)	
	)	
EMPLOYEE, <sup>1</sup>	)	
Employee	)	OEA Matter No. J-0011-22
	)	
v.	)	Date of Issuance: May 25, 2022
	)	
D.C. DEPARTMENT OF BEHAVIORAL	)	MICHELLE R. HARRIS, ESQ.
HEALTH,	)	Administrative Judge
Agency	)	
	)	
_____	)	
David A. Branch, Esq., Employee Representative	)	
Jeremy Greenberg, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On November 30, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the end of her service at the D.C. Department of Behavioral Health (“Agency or DBH”). Employee’s service ended effective November 5, 2021, following Agency’s declination of her request to rescind a resignation that was submitted on October 21, 2021. Following a letter dated November 30, 2021, from OEA requesting an Answer in this matter, Agency filed an Answer and Request for Dismissal on December 21, 2021.

I was assigned this matter on January 6, 2022. On January 11, 2022, I issued an Order Convening a Prehearing Conference in this matter for February 8, 2022. Prehearing Statements were due on or before January 25, 2022. Agency filed its Prehearing Statement on January 25, 2022. Employee, by and through counsel, filed an Unopposed Motion for Leave to File Out of Time and subsequently filed a Prehearing Statement on February 1, 2022.<sup>2</sup> Both parties appeared for the Prehearing Conference as scheduled. During the conference, the undersigned permitted an extension for discovery and ordered briefs be submitted in this matter. An Order was issued February 8, 2022, requiring discovery be complete by March 14, 2022. Further, this Order noted that there was an outstanding jurisdiction issued raised by Agency in both its Answer and Prehearing Statement. Accordingly, Employee’s brief on jurisdiction was due on or before March 28, 2022, and Agency’s response was due on or before April 18, 2022. Following an Unopposed Motion for a One-Day Extension to File<sup>3</sup>, Employee’s brief was submitted on March 30, 2022. Agency’s brief was submitted on April 18, 2022. After considering the parties’ arguments as

<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> Employee’s Motion for Leave to File out of Time is hereby GRANTED.

<sup>3</sup> Employee’s Motion is hereby GRANTED.

presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

### ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

### 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.

### JURISDICTION

For the reasons explained below, the jurisdiction of this Office has not been established in this matter.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked for Agency as a Strategic Planning and Policy Engagement Officer since March 2016. On October 21, 2021, Employee submitted a written resignation following the receipt of a job offer. The effective date of the resignation was November 5, 2021. On October 26, 2021, Employee verbally requested to rescind her resignation and later submitted the request in writing. Agency declined Employee’s request to rescind her resignation. Employee’s tenure at Agency ended on November 5, 2021.

#### **Employee’s Position**

Employee asserts that OEA has jurisdiction over this matter. Employee avers that on October 21, 2021, she submitted a written notice of resignation to her immediate supervisor, Jelani Murrain (“Murrain”). The effective date of her resignation was November 5, 2021. Employee notes that she submitted this resignation following the receipt of a job offer from the U.S. Department of Health and Human Services, Center for Substance Abuse Treatment (“SAMHSA”). Employee stated that she met with Agency’s Executive Director, Dr. Barbara Bazron (“Bazron”), on October 22, 2021 and that Bazron noted Employee’s departure.<sup>4</sup> On October 25, 2021, SAMHSA rescinded Employee’s offer of employment, with no reason was provided. On October 26, 2021, Employee contacted Murrain and

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<sup>4</sup> Agency’s brief denotes that a matter regarding tortious interference is currently pending before D.C. Superior Court (DCSC).

verbally noted her wish to rescind her resignation. Employee avers that Murrain verbally accepted her rescission. Employee cites that she called Human Resources and that Cynthia Hawkins advised her to submit the rescission request in writing. Employee avers that she did so and copied Murrain, Tijuana Beyman, Cathy Hawkins and Frankie Wheeler on this communication.<sup>5</sup> Ultimately, Agency did not accept Employee's resignation rescission.

Employee argues that Agency failed to act in accordance with DPM Instruction Nos. 8-53, 9-25, 36-3 and 38-12, and that Agency's decision not to accept her resignation rescission effectually resulted in her termination from Agency, which is an appealable action to OEA. Employee avers that this provision gives employees the right to rescind their resignation at any time before the effective date. Further, Employee argues that the language in this guidance is mandatory in nature, and that an Agency cannot refuse to accept a rescission without providing a valid reason.<sup>6</sup> Specifically, Employee notes that the DPM provides that valid reasons to refuse a rescission request include administrative disruption, hiring or commitment to hiring a replacement. Employee asserts that Agency had not undergone hiring a replacement nor would it cause administrative disruption, and that Murrain communicated as much to Employee. Employee also avers that she was discriminated against in the refusal to accept the rescission because she was pregnant at the time. Accordingly, Employee avers that Agency's refusal to accept her rescission constituted a termination for which this Office has jurisdiction.

### **Agency's Position**

Agency asserts in its Jurisdiction Brief and Request for Summary Disposition that this Office lacks the jurisdiction to adjudicate this appeal. Agency argues that Employee resigned from her position, and therefore OEA has no jurisdiction over this matter. Agency does not dispute the timeline for which Employee submitted her resignation and subsequent rescission. However, Agency avers that the DPM instructions that Employee relies upon are not mandatory in nature. Further, Agency avers that while it acted in accordance with the DPM; that as an independent agency not under the Mayor's authority, it would not be bound to adopt the DPM instruction. Specifically, Agency asserts that the note of the issuance specifies that "*DPM instructions that are strictly procedural in nature have direct applicability only to agencies and employees under the personnel authority of the Mayor. Other personnel authorities or independent agencies may adopt any or all of these procedures or guidance materials for agencies and employees under their respective jurisdictions [See. DPM Chapter 2, Part II, Subpart 1 & 1.3].*" That said, Agency argues that it did act in accordance with the DPM. Namely, Agency avers that "within an hour of receiving the resignation letter, Agency management forwarded the document to their human resources personnel to schedule an exit interview to facilitate the outboarding process."<sup>7</sup> As such, Agency asserts that its decision to decline Employee's resignation rescission was because it had started the recruitment efforts for Employee's position.

Agency asserts that OEA only has jurisdiction over a resignation if it has been determined that the resignation was involuntary. Agency avers that Employee has not provided any evidence to exhibit that her resignation was involuntary, but only argues that Agency improperly refused to accept her resignation rescission. Agency argues that Employee has not demonstrated that she was coerced, deliberately misled or threatened for the submission of a resignation and cannot meet a burden of showing her resignation was involuntary. Further, Agency asserts that OEA does not have jurisdiction over Employee's discrimination claims. As a result, Agency avers that this matter should be dismissed for lack of jurisdiction.

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<sup>5</sup> Employee's Brief at Page 6. (March 30, 2022).

<sup>6</sup> Employee's Brief at Pages 4 -6. (March 30, 2022).

<sup>7</sup> Agency's Brief at Page 2 (April 18, 2022).

## **Jurisdiction**

This Office's jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1<sup>8</sup>, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A 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." This Office has no authority to review issues beyond its jurisdiction.<sup>9</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>10</sup>

## **Resignation**

In accordance with DPM Instruction Nos. 8-53, 9-25, 36-3 and 38-12, resignations are considered to be "voluntary separations." These separations are "initiated by the employee, not the employing agency or personal authority." Further, these instructions provide that a separation is deemed to be voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his or her choice and is allowed to set the effective date of the action.<sup>11</sup> Further, in accordance with the D.C. Court of Appeals, the OEA Board has held 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."<sup>12</sup> In the instant matter, Employee concedes that she resigned from her position following an offer for a job outside of Agency. This notice provided an effective date of her resignation and was submitted in writing to her immediate supervisor, Jelani Murrain. Following the notification that her other job offer had been rescinded, Employee verbally notified Murrain of her intention to rescind her resignation. Later, Employee submitted this intention in writing. Ultimately, Employee's request to rescind her resignation was denied by Agency's Executive Director.

The question of whether a resignation is voluntary or involuntary has been considered in several cases before this Office. A typical matter concerns an employee who resigns and then appeals to OEA,

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<sup>8</sup> See also, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

<sup>9</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>10</sup> 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).

<sup>11</sup> See. DPM Instructions Nos. 8-53, 9-25, 36-3 and 38-12 (March 26, 2008).

<sup>12</sup> *Morris Yarborough v. Department of Public Works*, OEA Matter No. J-0022-19, *Opinion and Order on Petition for Review* (January 14, 2020).

arguing that their resignation was the result of coercion, duress or constructive discharge.<sup>13</sup> When determining whether a resignation was voluntary or involuntary, this Office aligns with the seminal case in the federal sector on this issue, *Christie v. United States*.<sup>14</sup> “In *Christie*, the plaintiff claimed that she was wrongfully separated from the government by means of a coerced resignation. The U.S. Court of Claims held that, as a matter of law, the plaintiff’s resignation was voluntary. Christie was a Veteran’s preference employee of the U.S. Navy Department. She was issued an advance notice of proposed removal for cause for attempting to inflict bodily injury on her supervisor. She denied the charge. The agency issued a final decision to remove Christie but allowed her an opportunity to accept a discontinued service retirement instead of being fired. Christie resigned and accepted the retirement benefit. Then, she filed an appeal with the U.S. Civil Service Commission (“CSC”). The CSC dismissed the appeal for lack of jurisdiction and the plaintiff appealed to the U.S. Court of Claims. In finding that the resignation was voluntary, the Court of Claims held that employee resignations are presumed to be voluntary.”<sup>15</sup> “It is incumbent on the employee; therefore, to present sufficient evidence to prove that his or her resignation was involuntary.”<sup>16</sup>

In accordance with this holding, OEA would only retain jurisdiction over a resignation if the aforementioned issues regarding coercion, duress or constructive discharge had occurred. In the instant matter, Employee asserts that Agency wrongfully denied her request to rescind her resignation. Employee has also raised an issue regarding actions of interference from Agency personnel related to her other job offer. However, Employee has not otherwise asserted or provided evidence that her resignation was coerced or a result of duress or constructive discharge. As a result, I find that Employee’s resignation was voluntary. This Office has consistently held that it lacks jurisdiction over voluntary resignations.<sup>17</sup>

### ***Request to Rescind Resignation***

As was previously noted, following a revocation of a job offer, Employee requested to rescind her resignation. Employee avers that this rescission was accepted by her immediate supervisor, Jelani Murrain. Further, Employee argues that Agency’s decision ultimately to deny her request was without cause and was not done in accordance with provisions in the DPM Instruction Nos. 8-53, 9-25, 36-3 and

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<sup>13</sup> See, e.g., *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000); *Alston v. D.C. Office of Department of Contracting and Procurement*, OEA Matter No. 1601-0010-09 (May 5, 2009); *Moore v. Office of the State Superintendent of Education*, OEA Matter No. J-0114-14 Initial Decision (September 25, 2014).

<sup>14</sup> *Christie v. United States*, 518 F.2d. 584 (Ct. Cl. 1975).

<sup>15</sup> *Alston v. D.C. Office of Department of Contracting and Procurement*, OEA Matter No. 1601-0010-09 Initial Decision (May 5, 2009). See also *Christie v. United States*, 518 F.2d. 584, 587-588 (Ct. Cl. 1975). The Court in *Christie* further stated:

“This presumption will prevail unless plaintiff comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. Plaintiff had the opportunity to rebut this presumption before the CSC. . . . Upon review of the facts as they appear in the record before the CSC, it is clear the plaintiff has failed to show that her resignation was obtained by *external coercion or duress*. Duress is not measured by the employee’s subjective evaluation of the situation. Rather, the test is an objective one. While 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. This Court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. But this “good cause” requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated.”

<sup>16</sup> *Moore v. Office of the State Superintendent of Education*, OEA Matter No. J-0114-14 Initial Decision (September 25, 2014).

<sup>17</sup> *Evans v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-11, *Opinion and Order on Petition for Review* (December 10, 2014).

38-12.<sup>18</sup> Specifically, Employee asserts that Agency had not undertaken recruitment and that there would not have been any administrative disruption by accepting her request to rescind. Further, Employee argues that the language in the DPM instruction is mandatory in nature and that Agency was required to accept her resignation. Agency avers that it had undergone recruitment in that it had forwarded information regarding a “TAPER” assignment for this position. Further, Agency asserts that Murrain did not accept Employee’s resignation, nor did he have the authority to do so. Agency avers that Executive Director Bazron made the decision and that the decision was made in accordance with the DPM.<sup>19</sup> Agency further notes that while it did follow the DPM, that it was not bound to do so because it is an independent agency and not under the authority of the Mayor.

DPM Instruction Nos. 8-53, 9-25, 36-3 and 38-12 addresses whether a resignation can be withdrawn. It notes the following:

“An agency may allow an employee to withdraw his or her *resignation at anytime before it becomes effective*. An agency may decline the request to withdraw a resignation before its effective date only when the agency has a valid reason, and explains that reason to employee. A “valid reason” includes but is not limited to: administrative disruption; or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason to deny the request to withdraw the *resignation*.” (Emphasis was included in the instruction.)

Additionally, there is note which cites the following: “DPM instructions that are strictly procedural in nature have direct applicability only to agencies and employees under the personnel authority of the Mayor. Other personnel authorities or independent agencies may adopt any or all of these procedures or guidance materials for agencies and employees under their respective jurisdictions [Se. DPM Chapter 2, Part II, Subpart 1 & 1.3].”

Employee avers that this provision is mandatory in nature and that Agency’s declination of her request to rescind her resignation was improper. Agency avers that this language is discretionary in nature and that it was not mandated to accept Employee’s rescission. The undersigned agrees with Agency. Here, the DPM instruction clearly uses the language of “may”. It is further noted that this word is emphasized (through use of underline) in this provision. This instruction does not make use of directory or mandatory language like “shall or must.” Further, this provision has no consequence if an agency fails to abide by this instruction. It merely directs that if it does decide to decline a request to rescind a resignation, that it be for a valid reason and explain that to the requesting employee.

Employee avers that Agency did not have a valid reason to decline her request to rescind her resignation. Further, Employee argued that her immediate supervisor, Jelani Murrain, had verbally accepted her recession. However, the record reflects that Murrain did not have the authority to accept or decline the rescission. Further, Director Bazron denied the rescission and Agency noted that the

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<sup>18</sup> It should also be noted that Employee’s submissions to this Office provide details regarding claims of interference with a job offer. In summary, Employee suggests that Director Bazron interfered with her offer from SAMHSA. Agency cited in its brief that those matters are currently pending before the Superior Court of the District of Columbia. The undersigned notes that while Employee has provided evidence regarding the claims of interference, that those matters are not under OEA jurisdiction. Thus, the undersigned notes that those issues were presented in the briefs before this Office, however, there is no jurisdictional authority for which it can be addressed at this time.

<sup>19</sup> Agency cites that Murrain indicated that Director Bazron did not tell him the reason for her decision for declining to accept Employee’s resignation. *See*. Agency Brief at Page 8. (April 18, 2022).

recruitment process for Employee's position had already begun.<sup>20</sup> Here, I find that while the circumstances regarding the declination of Employee's resignation lack convincing evidence regarding why it could not have been accepted; I further find that Agency still had the discretion whether to accept Employee's resignation rescission request.<sup>21</sup> Additionally, as Agency noted, it is an independent agency and not subordinate to the personnel authority of the Mayor and has independent personnel authority under D.C. Code §§ 7-113.04(14) and 7-1141.06(13). Accordingly, I find that Agency would not have been required to adopt this DPM provision.<sup>22</sup> The note associated with this instruction explicitly advises of such.<sup>23</sup> Thus, *assuming arguendo* that Agency had not followed this DPM instruction, I find that it was not bound to do so.

Consequently, I find that Employee has not met the burden of proof that OEA has jurisdiction over this matter. Employee's resignation was voluntary in nature. This Office has consistently held that it lacks jurisdiction over voluntary resignations.<sup>24</sup> Because OEA does not have jurisdiction to hear this matter, the undersigned is precluded from any further review of the arguments proffered by Employee.<sup>25</sup> Therefore, Employee's Petition must be dismissed for lack of jurisdiction.

### ORDER

It is hereby **ORDERED** that Agency's Motion for Summary Disposition is **GRANTED** and the Petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

/s/ Michelle R. Harris  
MICHELLE R. HARRIS, Esq.  
Administrative Judge

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<sup>20</sup> Agency avers that once Employee notified Murrain of her resignation, that he "communicated with a TAPER candidate and received a revised resume." Agency asserts that Murrain submitted a recruitment request for the TAPER candidate the day following receipt of Employee's official written resignation. *See*. Agency Brief at Page 8. (April 18, 2022).

<sup>21</sup> The undersigned notes that there was no one hired for Employee's position at the time of the declination of Employee's rescission request.

<sup>22</sup> Agency further noted that the DPM is not promulgated under the Administrative Procedures Act to have the force of law under D.C. Code § 2-501 *et seq.* *See*. Agency Brief at Page 7. (April 18, 2022).

<sup>23</sup> The instruction specifies that: "DPM instructions that are strictly procedural in nature have direct applicability only to agencies and employees under the personnel authority of the Mayor. Other personnel authorities or independent agencies may adopt any or all of these procedures or guidance materials for agencies and employees under their respective jurisdictions [See. DPM Chapter 2, Part II, Subpart 1 & 1.3]."

<sup>24</sup> *Evans v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-11, *Opinion and Order on Petition for Review* (December 10, 2014).

<sup>25</sup> Employee raises claims of discrimination in her Prehearing Statement.<sup>25</sup> D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.<sup>25</sup> Wherefore, I find that these arguments are outside of the jurisdiction of this Office. This is not to say that Employee may not press these claims elsewhere<sup>25</sup>, but rather that OEA lacks the jurisdiction to address these issues at this time.