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

_____	)	
In the matter of:	)	
	)	
GERALD DA'VAGE	)	OEA Matter No. 1601-0032-18
Employee	)	
	)	Date of Issuance: March 19, 2019
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA	)	Administrative Judge
HOUSING AUTHORITY	)	
Agency	)	
_____	)	

Gerald Da'Vage, Employee *Pro Se*  
Anne Elliot, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 12, 2018, Gerald Da'Vage (Employee) filed a petition with the Office of Employee Appeals (OEA) appealing his termination from employment as a Housing Inspector with the District of Columbia Housing Authority (DCHA or Agency). On March 19, 2018, Agency filed its *Answer and Motion for Summary Judgment*. The Administrative Judge (AJ) was appointed to hear this matter on May 2, 2018.

By *Order* dated June 20, 2018, the parties were notified that the jurisdiction of this Office was at issue, and that Employee had the burden of proof on issues of jurisdiction. The parties were given the opportunity to supplement previous submissions on the issue of jurisdiction. The *Order* also addressed motions filed by the parties both before and immediately after her appointment.<sup>1</sup>

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<sup>1</sup> Employee filed four additional pleadings before the AJ's appointment: *Motion Asking for Sua Sponte Summary Disposition Per OEA Rules 615.1 and 615.2* on March 2, 2018; *Motion Asking for Permission to Respond to Agency Answer and Motion for Summary Disposition* on March 26, 2018; *Petitioner's Motion in Opposition of Agency Opposition to Petitioner's Motion for Summary Disposition* on April 12, 2018, and *Motion Asking Permission to Amend March 26, 2018 Response to Agency Answer Regarding Jurisdiction* on May 1, 2018. Agency filed a *Motion for Permission to File Out of Time* on April 6, 2018. Subsequent to the AJ's appointment, Agency filed a *Motion for Permission to File Out of Time* on May 29, 2018. Employee filed his opposition to the motion on June 1, 2018. In the *Order*, the AJ stated, in pertinent part, that since the parties were being allowed to supplement their pleadings, Agency's May 29 motion, Employee's June 1 response, and May 1 motion were dismissed as moot.

Oral argument took place on the jurisdictional issues on November 14, 2018.<sup>2</sup> The record is closed.

### JURISDICTION

The jurisdiction of this Office is at issue in this matter.

### ISSUES

Did Employee meet his burden of proof regarding this Office's jurisdiction to hear his appeal? If not, must this appeal be dismissed?

### FINDING OF FACTS, POSITIONS OF THE PARTIES, DISCUSSION, AND CONCLUSIONS

#### A. Undisputed Facts

1. Employee was hired as a Housing Inspector with Agency's Housing Choice Voucher Program (HCVP) on or about April 21, 2008.

2. Agency was established pursuant to the District of Columbia Housing Authority Act of 1999. *See*, D.C. Law 13-105, D.C. Official Code § 6-203 (2001). Agency is responsible for creating and administering housing for District of Columbia residents with low or moderate incomes. It is primarily funded with federal funds and is subject to Title 24 of the Code of Federal Regulations as well as Title 14 of the D.C. Municipal Regulations

3. Local 2725 of the American Federation of Government Employees, AFL-CIO (Union) is the "sole and exclusive representative for all employees in the bargaining unit." Agency and Union are parties to a Collective Bargaining Agreement (CBA). *See* Article 1, Section B. (Agency's *Answer and Motion for Summary Disposition, Attachment 2.*)

4. Employee was a member of the bargaining unit, and therefore governed by the CBA.

5. Employee submitted the following letter to Agency on December 21, 2017, resigning from his position, effective January 19, 2018.

I regret to inform you that I would like to tender my resignation as a Housing Inspector effective at the close of business on Friday, January 19, 2018. The purpose of this letter is to serve as notion of my intention to leave the D.C. Housing Authority (DCHA).

I made this decision, not because I am unhappy with the opportunities presented, but more as a strategic career move. It has been a great pleasure working for DCHA and I wish you continued success.

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<sup>2</sup> On November 26, 2018 Employee moved for the AJ to disqualify herself from this matter. In compliance with the December 27, 2018 *Order*, he supplemented his pleading to meet the requirements of OEA Rule 620.2. The Employee's motion was denied by *Order* dated February 1, 2019. A *Corrected Order* was issued on February 8, 2019. Since the *Corrected Order* provides a detailed discussion of the Employee's request and reasons for the denial, it is not included in this document.

If there is anything that I can do in aiding a smooth transition of responsibilities, please let me know. Thank you. (Agency's *Answer and Motion for Summary Disposition, Attachment 1.*)

6. Employee was placed on paid administrative leave until his resignation took effect on January 19, 2018.

#### B. Positions of the Parties

The authority of this Office to hear Employee's appeal is an issue of jurisdiction. OEA Rule 629.2 places the burden of proof on employees on all issues of jurisdiction. OEA Rule 629.1 requires employees to meet this burden by a "preponderance of the evidence," which is defined as 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." This Office has no authority to review issues beyond its jurisdiction. *See, e.g., Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90; *Opinion and Order on Petition for Review* (September 30, 1992).

Employee's position is that this Office has jurisdiction to hear his appeal because, although he submitted a letter of resignation, his action was involuntary, a result of coercion and duress. Relying on *Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008) and other cases utilizing the rationale used in *Stanley*, Employee contends that the duress and coercion imposed on him by Agency renders his resignation involuntary and establishes this Office's jurisdiction. This Office is often called upon to rule on this issue and does so based on the facts of the individual matter before it. If the determination is made that the resignation or retirement was a result of coercion or duress, then it will be deemed involuntary, and the separation from employment will be considered a constructive discharge. *See, e.g., Saunders v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0259-09 (March 25, 2011), and *Vega v. District of Columbia Public Schools*, OEA Matter No. J-0174-08 (January 23, 2009). In that event, the jurisdictional bar will be removed and this Office will have authority to take the appropriate action. However, if this Office lacks jurisdiction of the appeal *ab initio*, then even if Employee could establish coercion and duress rendering his resignation a constructive discharge, this Office would still be barred from hearing the appealing.

Agency raised three challenges to the jurisdiction of this Office to hear this appeal. Two of the arguments relate to the voluntariness of Employee's resignation. Agency maintains that the resignation was made voluntarily and was not a result of coercion or duress. It also contends that the appeal is premature since it had not yet determined if it would impose discipline in the matter involving Employee that was being investigated. As noted in the preceding paragraph, these two arguments, if resolved in Employee's favor, could allow the appeal to proceed. However, the first argument raised by Agency is that D.C. Official Code § 6-215(a) excludes Employee from the rights provided to D.C. Government employees pursuant to the Merit Personnel System to appeal adverse actions to this Office.

### C. Discussion, Findings and Conclusions

Agency argues that OEA lacks jurisdiction to hear Employee's appeal. It maintains that DCHA has autonomy with regard to personnel and disciplinary matters, with few exceptions not relevant here, for individuals like Employee hired after May 9, 2000. It asserts that D.C. Official Code § 6-215(a) excludes these DCHA employees from appealing adverse actions to this Office. Accordingly, if OEA lacks jurisdiction to hear appeals of DCHA employees, then it could not hear Employee's appeal, which focuses on the jurisdictional issue of the voluntariness of his resignation. *See, e.g., Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

Pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Official Code §1-601-01, *et seq.* (2001), as amended by the Omnibus Personnel Reform Amendment Act of 1998 D.C. Law 12-124, this Office is authorized to hear appeals of adverse actions of permanent employees with some exceptions not relevant here. However, the fact that an employee meets the definition of "employee" established by D.C. Official Code § 1-603.01 (7), as a person who "perform[s] a function for the District of Columbia government and [is] paid for those services," does not automatically establish jurisdiction. This Office's jurisdiction may be denied due to other factors, such as an employee's length of service,<sup>3</sup> the position the employee holds, or the authority given to the employing agency to maintain its own disciplinary system.<sup>4</sup> In this matter, Agency contends that it has such authority.

DCHA was established pursuant to D.C. Official Code § 6-202(a) as an "*independent authority* of the District Government [with] a *legal existence separate from District government.*" (emphasis added). DCHA administers federally-funded programs for District of Columbia residents with low or moderate incomes. It is, in large part, governed by federal provisions related to the programs. The Housing Choice Voucher Program, where Employee worked, is a federally funded program that administered by Agency.

Agency employees are explicitly excluded from most<sup>5</sup> of the protections provided by the Merit Personnel System contained in Title 6 of the D.C. Official Code, including appeal adverse actions to this Office, pursuant to D.C. Official Code §6-202.1(d) which states in pertinent part:

[E]mployees of the District of Columbia Housing Authority shall be exempt from the provisions of this chapter.

Agency's personnel authority is governed by D.C. Official Code §6-203. In relevant part, Agency is authorized to:

(13) Adopt and administer personnel policies and procedures, including grievance procedures, subject to collective bargaining for bargaining unit employees;

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<sup>3</sup> D.C. Official Code §1-617.1(b).

<sup>4</sup> D.C. Official Code § 1-608.56( c)

<sup>5</sup> There are exceptions to the exclusion contained in this provision, although none is relevant to this appeal. The exceptions include, for example, the authority of the Public Employee Relations Board to hear labor-management disputes and whistleblower provisions.

18) Negotiate collective bargaining agreements with labor organizations;

*(21) Develop, establish, adopt, and administer a personnel system, and publish rules and regulations setting forth minimum standards for all employees, including appointments, promotions, discipline, grievance, separation, compensation, employee disability and death benefits, leave, retirement, health and life insurance, and preferences. With regard to Authority employees who are covered by a collective bargaining agreement, all such personnel rules, regulations, and standards shall only be applicable to such employees by agreement between their collective bargaining representatives and the Authority (emphasis added).*

D.C. Official Code Section §6-215(d) stresses the importance of the CBA between Agency and Local 2725:

The Authority shall be bound by all existing collective bargaining agreements with labor organizations until successor agreements have been negotiated. Except as specifically provided in this chapter, the Authority shall be subject to all general laws applicable to public employers in the District of Columbia, including laws concerning human rights, wages and hours, and occupational safety and health.

The CBA recognizes the independent authority of Agency, stating in Article 1, Section A:

The DCHA is an independent authority of the District government and a corporate body which has a legal existence separate from the District Government [pursuant] to the District of Columbia Housing Authority Act of 1999.

Article 10 of the CBA contains the disciplinary system that was agreed upon by the parties. The system applies to “each bargaining unit employee of the DCHA,” excluding probationary and temporary employees. *See* Section A, Article 10. The disciplinary process is quite detailed, providing, *e.g.*, specific timeframes, and a table of penalties. Pursuant to this Article, an employee can challenge a proposed disciplinary action with or without Union assistance. There is no language within Article 10 or elsewhere in the CBA that references any right to appeal to this Office.

In sum, the AJ concludes that there is ample support in the provisions of D.C. Official Code §§6-202 and 6-203, cited above, to support findings that Agency has independent and exclusive authority to administer its disciplinary procedure consistent with the terms of the CBA for employees hired after May 9, 2000; that Employee is covered by these provisions since he was hired after May 9, 2000; and that these provisions do not include appealing adverse actions to this Office. As a result, OEA lacks jurisdiction to hear Employee’s appeal. Employee failed to meet his burden of proof on the threshold issue of jurisdiction, and as a result this appeal must be dismissed for lack of jurisdiction.<sup>6</sup>

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<sup>6</sup> Employee presented written and oral arguments on the jurisdictional issue related to the voluntariness of his resignation. He was articulate, focused, and well-versed in the cases he presented in support of his position on this issue and was commended by the AJ both on his presentation and his preparation. However, that issue cannot be

ORDER

It is hereby:

ORDERED: Employee's appeal is dismissed.<sup>7</sup>

FOR THE OFFICE:

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Lois Hochhauser, Esq.  
Administrative Judge

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addressed or resolved since OEA lacks jurisdiction to hear this appeal. Employee did not, however, focus on the threshold jurisdictional issue which is dispositive in this matter.

<sup>7</sup>To the extent that some rulings on motions identified in footnote 1 could not be resolved until this jurisdictional issue was resolved, the motions must now be dismissed as moot.