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

_____	)	
In the Matter of:	)	
	)	
HORACE LOMAX,	)	
Employee	)	OEA Matter No. J-0057-17
	)	
v.	)	Date of Issuance: January 29, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
_____	)	Senior Administrative Judge

Horace Lomax, Employee *Pro-Se*  
Nicole C. Dillard, Esq., Agency Representative

**INITIAL DECISION**

On June 9, 2017, Horace Lomax (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting an alleged adverse action seemingly conducted by the District of Columbia Public Schools (“DCPS” or the “Agency”). According to the documents of record, Employee was previously employed by DCPS as a Custodian Foreman and his last duty station was Fletcher Johnson Education Campus. On September 26, 2017, the Undersigned issued an Order requiring Employee to establish whether the OEA may exercise jurisdiction over this matter. On July 10, 2017, Agency submitted its Answer in this matter. In it, DCPS contends that OEA does not have jurisdiction over this matter due to the length of time since the effective date of Employee’s removal as well as the crux of Employee’s removal – voluntary resignation, is an action that is not appealable or grievable to the OEA.

**JURISDICTION**

As will be explained below, the jurisdiction of this Office has not been established.

**ISSUE**

Whether the Office may exercise jurisdiction over this matter.

## BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states that:

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 629.2, *id.*, states that “the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.”

## FINDINGS OF FACT, ANALYSIS AND CONCLUSION

### ***Jurisdiction***

According to the Answer filed by DCPS on July 10, 2017, DCPS informed Employee in July 2004 that he was being transferred from Fletcher Johnson Education Center to Coolidge Senior High School.

Employee filed a grievance shortly thereafter objecting to the transfer and requesting to remain at Fletcher... Employee was informed that Labor Management Employee Relations was taking corrective action and that he should return to work, first orally on February 22, 2005 and subsequently in a letter dated March 2, 2005. Employee chose to remain out of work... As a consequence of his refusal to return to work, he was notified of his termination for abandonment effective March 11, 2005.<sup>1</sup>

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>2</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

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<sup>1</sup> DCPS Answer at 1 (July 10, 2017).

<sup>2</sup> *See also*, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

- (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>3</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>4</sup>

Employee contends that his pay was stopped in September 2004. He further contends that this should provide ready proof that the OEA may investigate this matter. I find that Employee contention amounts to mere conjecture. Employee did not provide any relevant evidence to buttress this claim. More importantly, what is conveniently missing from said contention is the fact that Employee did not report for duty after he was adequately instructed to do so in writing.<sup>5</sup> Employee was instructed as follows “this letter directs you to return to report to Mr. Anthony Peters, Housekeeping Supervisor, no later than Monday March 7, 2005...”<sup>6</sup> Employee ignored this instruction to his own financial detriment. As a result, Agency correctly notes that Employee did not endure an adverse action when he was terminated effective March 11, 2005.<sup>7</sup>

An employee that has standing to pursue an adverse action before the OEA must be in the Career or Educational service and must have been subjected to one of the adverse actions listed above. Of note, the impetus for all of the machinations that led to his removal started with Employee’s decision to cease reporting to work on his own counsel. Employee effectively abandoned his last position of record with DCPS. Pursuant to applicable law, abandonment of a position is treated akin to a voluntary resignation. The law is well settled with this Office, that there is a legal presumption that resignations and retirements are voluntary.<sup>8</sup> 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>9</sup> A resignation is considered involuntary “when the employee shows that resignation was obtained by agency misinformation or deception.”<sup>10</sup> The employee must prove that his resignation was involuntary by showing that it resulted from undue coercion or misrepresentation (mistaken

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<sup>3</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>4</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>5</sup> See DCPS Answer at Exhibits 3 and 4 (July 10, 2017).

<sup>6</sup> Id. at Attachment 3.

<sup>7</sup> Id. at Attachment 4.

<sup>8</sup> See *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975)

<sup>9</sup> Id. at 587.

<sup>10</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).

information) by Agency upon which he relied when making his decision to resign. He must also show “that a reasonable person would have been misled by the Agency’s statements.”<sup>11</sup>

According to the documents of record, I find that Employee opted to not report for duty after he was explicitly instructed to do so.<sup>12</sup> Employee’s miscalculation as to ramifications of his action is something that he must now endure. However, as was previously referenced herein, voluntary resignations are not appealable to the OEA. Despite his protestation to the contrary, I find that Employee herein was not subjected to any of the enumerated final agency decisions that would provide standing to pursue a claim at the OEA. The record is clear in denoting that Employee chose not to report for duty while his grievance was pending, despite explicit instruction otherwise. Accordingly, I find that OEA lacks jurisdiction over this matter. Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.<sup>13</sup> Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate his termination was improperly conducted and implemented. Employee’s numerous ancillary arguments are best characterized as grievances and outside of the OEA’s jurisdiction to adjudicate.

### ***Conclusion***

Taking into account the discussion above, I find that Employee has failed to meet his burden of proof regarding the OEA’s ability to exercise jurisdiction over the instant matter.<sup>1415</sup> Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction.

### **ORDER**

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.  
Senior Administrative Judge

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<sup>11</sup> *Id.*

<sup>12</sup> See DCPS Answer at Exhibits 3 and 4 (July 10, 2017).

<sup>13</sup> Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

<sup>14</sup> Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”).

<sup>15</sup> Since I have found that the OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee’s petition for appeal.