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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
DEBRA JOHNSON,)	
Employee)	OEA Matter No. 1601-0037-13
)	
v.)	
)	Date of Issuance: December 19, 2017
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Debra Johnson (“Employee”) worked as a Teacher for the District of Columbia Public Schools (“Agency”). On November 23, 2012, Agency issued a notice of voluntary resignation to Employee. The notice provided that under D.C. Municipal Regulations (“DCMR”), Title 5, Chapter 10, Section 1020.6, “failure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position. . . this voluntary resignation shall not be considered an adverse action.” Agency claimed that Employee failed to return to work or complete an Americans with Disabilities Act (“ADA”) Request Packet. Thus, according to Agency, she resigned from her position, effective November 23, 2012.¹

Employee filed a Petition for Appeal with the Office of Employee appeals (“OEA”) on December 21, 2012. She argued that her employment with Agency was terminated after a forced

¹ *Petition for Appeal*, p. 13 (December 21, 2012).

voluntary resignation. Employee claimed that she provided Agency with the requisite medical documentation it requested. Additionally, she contended that she was not afforded adequate time by Agency to provide the ADA packet. As a result, she requested that she be reinstated to her position with back pay; that she receive accommodations for her disabilities; and that she be transferred to another school within Agency.²

On January 31, 2013, Agency filed a response to Employee's Petition for Appeal. It provided that Employee voluntarily resigned from her position because she failed to return to work by November 23, 2012. According to Agency, it requested that Employee complete an ADA Request Packet and submit it by November 23, 2012. Agency explained that it informed Employee that failure to return to work or to submit the packet by November 23, 2012, would be treated as a voluntary resignation of employment. Agency asserted that Employee did not return the completed documents; therefore, it believed that she voluntarily resigned on November 23, 2012. Moreover, it asserted that because Employee's resignation was not an adverse action, OEA lacked jurisdiction over the matter. Therefore, Agency requested that Employee's Petition for Appeal be dismissed.³

Prior to a two-day evidentiary hearing, the parties submitted briefs on jurisdiction to the OEA Administrative Judge ("AJ"). Agency filed its brief on June 13, 2014. It claimed that Employee alleged that she was discriminated against on the basis of a disability and that Agency failed to accommodate her. Agency explained that Employee filed a discrimination charge with the Office of Human Rights ("OHR") involving her ADA issues. However, the OHR ruled that there was no substantial finding regarding Employee's discrimination charges. Further, Agency contended that OEA did not have jurisdiction over a voluntary resignation due to a disability or

² *Id.* at 2.

³ *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p.1-3 (January 31, 2013).

its alleged failure to accommodate an employee's disability. Thus, it requested that Employee's appeal be dismissed for lack of jurisdiction.⁴

On February 29, 2016, Employee argued in her Brief on Jurisdiction that she was subjected to a constructive discharge. Therefore, she contended that she was entitled to notice and due process under the DCMR. Employee claimed that her resignation was involuntary and was, therefore, a constructive discharge over which OEA does have jurisdiction. It was Employee's position that Agency imposed an unreasonable timeframe in which she could submit her ADA documentation. According to Employee, time pressure to make a resignation decision is the basis of involuntariness. Moreover, she alleged that although OEA does not have jurisdiction over discrimination claims, Agency's failure to afford reasonable accommodations resulted in a constructive discharge. According to Employee, OEA has the authority to grant relief for an unjustified or unwarranted personnel action. Therefore, she provided that OEA has jurisdiction to consider the merits of her appeal.⁵

The AJ issued her Initial Decision on January 19, 2017. She found that OEA did have jurisdiction over this appeal since the evidence supported the conclusion that Employee did not voluntarily resign from or abandon her position. The AJ stated that it was appropriate for Agency to invoke the provisions of 5 DCMR 1020.6 when an employee fails to communicate with Agency; fails to report to work with an accepted excuse; and/or fails to respond to requests from Agency for documentation or information. However, she provided that Employee always responded to Agency's communications and proved that she intended to retain her employment. Additionally, the AJ held that Agency's deadline, by which Employee was to return the ADA packet from her physician, was unreasonable given the holiday, weekend, and its denial of

⁴ *District of Columbia Public Schools' Motion to Dismiss Employee's Appeal Based on Office of Employee Appeal's Lack of Jurisdiction*, p. 1-4 (June 13, 2014).

⁵ *Employee's Brief in Support of Establishing Jurisdiction* (February 29, 2016).

Employee's request for an extension.⁶

The AJ opined that Employee was always explicit in stating her intention to retain her employment. The AJ provided that Employee met all imposed deadlines by Agency over which she had control and sought extensions for those she did not. Therefore, she ruled that Agency improperly invoked 5 DCMR 1020.6 and that Employee did not abandon or resign from her position. As a result, the AJ determined that Employee's separation was considered a constructive removal which is considered an adverse action, over which OEA has jurisdiction.⁷

Accordingly, she reversed Agency's removal action and ordered that Employee be reinstated to her position. Thus, the remedy was to restore Employee's benefits which were lost as a result of Agency's improper action. However, the AJ noted that on November 23, 2012, Employee had exhausted all of her leave and was in a non-paid status. Moreover, she held that there is no evidence that Employee was entitled to be placed on ADA leave or any other leave that would have provided payments to her. Moreover, because Employee consistently maintained that she was unable to return to work from October 2012 through 2015, the AJ determined that it would be speculative of her to award back pay under the circumstances. Therefore, she ordered Agency to restore benefits that Employee was receiving at the time of her separation and to notify OEA of its compliance with her decision.⁸

On February 23, 2017, Agency filed its Petition for Review. It states that the AJ's findings were not based on substantial evidence and that the Initial Decision failed to address all material issues of law and fact raised on appeal. Agency maintains that Employee was not

⁶ The AJ noted that Agency failed to include a deadline in its letter to Employee's physician, Dr. Smith, and neglected to advise the doctor of the consequences to Employee if she did not comply by a certain date. Further, she explained that previous attempts to secure medical documents from Employee's treating physicians took one month from the date of the request. Finally, the AJ found Agency's deadline to be unduly harsh because it was informed by Employee's physician that she would need to remain out of work until December 7, 2012, which was after Agency's November 23, 2012 deadline.

⁷ *Initial Decision*, p. 11-18 (January 19, 2017).

⁸ *Id.*

entitled to relief because she voluntarily resigned from her position when she failed to provide medical support for her request for extended leave. Additionally, it objected to restoring any benefits after December 19, 2014, because Employee was arrested for Felony Child Endangerment.⁹ Agency argues that because Employee was convicted of a crime that bore a relationship to her position, pursuant to Title 6 DCMR § 1617.3, she would have been terminated. Therefore, it requests that the Board reverse the Initial Decision or remand the case to the AJ for clarification on the proposed remedy.¹⁰

On February 23, 2017, Employee also filed a Petition for Review. She contends the AJ's finding that she was not entitled to back pay is not supported by substantial evidence. Employee states that an award of back pay is governed by 6 DCMR § 1149 and that she is entitled to back pay as part of her damages. Additionally, she provides that back pay is an appropriate relief as she was the prevailing party in this matter. Furthermore, Employee explains that the issue of relief was never addressed, and the AJ's decision requires more information to make a determination on the issue of relief. Employee argues that the AJ should have awarded her back pay from 2012 to when she is reinstated. Therefore, she requests that her petition be granted and that the Board remand the matter for a thorough evaluation and determination on her entitlement to back pay and damages.¹¹

On March 9, 2017, Agency filed a Statement of Compliance. In its statement, it provides a chart outlining Employee's benefits and illustrating the cost to restore benefits. Agency explains that some insurance carriers were unwilling to provide costs for the period of restoration because Employee was not enrolled and coverage could not be backdated for these benefits. It

⁹ According to Agency, Employee was arrested for Felony Child Endangerment on December 19, 2014, and pled guilty on March 9, 2015. She was sentenced to 180 days and served 60 days in jail. Subsequently, she was given a one-year probation. *District of Columbia Public Schools' Petition for Review*, p.2 (February 23, 2017).

¹⁰ *Id.* at 1-8.

¹¹ *Employee's Petition for Review*, p. 1, 7-11 (February 23, 2017).

also provides that in order for Employee's health, vision, and dental insurance to be restored, Agency and Employee would have to make contributions to the insurance plans. Agency asserts that it consulted with Employee's counsel who conveyed that Employee does not have the funds to contribute to restoring her health insurance for the past four years. Accordingly, Agency contends that it is unable to restore any of Employee's benefits for that period. However, Agency attests that it did advise Employee of the necessary steps to reinstate employment.¹²

On August 4, 2017, Agency issued a second Statement of Compliance. It states that Employee submitted all documents required for Agency to reinstate her. However, Agency explains that Employee was notified on June 21, 2017, that she was not eligible for reinstatement due to information provided by the Federal Bureau of Investigation ("FBI") that Employee was convicted of a crime. It was determined that Employee posed a present danger to children and/or youth. Accordingly, Agency asserts that Employee is ineligible to hold employment at its schools.¹³

¹² *District of Columbia Public Schools' Statement of Compliance*, p. 1-2 (March 9, 2017). Employee filed a Response to Agency's Petition for Review on March 30, 2017. She states that the Initial Decision is clear that Agency is to restore any benefits that Employee was receiving on November 23, 2012. Employee argues that the directive is not contingent on her contributions. Further, she contends that Agency's argument that it would have stopped paying premiums because of her arrest is premised on a theory that she requested indefinite leave as a reasonable accommodation. Employee claims that Agency's argument related to her 2012 back injury is irrelevant and does not address if she voluntarily resigned on November 23, 2014. Therefore, Employee requests that Agency's Petition for Review be denied. *Employee's Response to Agency's Petition for Review*, p. 1-2 and 6 (March 30, 2017).

Agency filed a Response to Employee's Petition for Review on March 30, 2017. It argues that Employee is not entitled to a separate hearing on relief because the record was clear that Employee was not working at the time and was on a leave without pay status. Additionally, Agency states that Employee had no intention of returning to work, even with accommodations. Moreover, it contends that Employee never provided any documentation that she was required to remain out of work or any documentation providing when she was cleared to return to work. Moreover, it explains that it supports the AJ's notion that Employee was unable to return to work at least through 2015. Agency posits that a separate hearing and relief in the form of back pay is unwarranted because Employee was not earning any income at the time she voluntarily resigned. Accordingly, it requests that the petition be denied, that the AJ's grant of limited relief be sustained, and that Employee's request for a hearing on back pay and damages be denied. *District of Columbia Public Schools' Response to Employee's Petition for Review*, p. 1-8 (March 30, 2017).

¹³ *District of Columbia Public Schools' Statement of Compliance* (August 4, 2017).

On October 11, 2017, Agency issued a Notice of Supplemental Authority. It stated that Employee filed a disability and discrimination suit against Agency alleging that it discriminated against her and that it failed to provide

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. Therefore, if there is substantial evidence to support the AJ's decision that Employee did not voluntarily resign, then this Board must accept it. Based on our review of the record, the AJ's decision was based on substantial evidence.

Resignation

In accordance with 5 DCMR § 1020.6, failure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position, and it shall not be considered an adverse action. However, according to the AJ, Agency's unreasonable deadline; its unwillingness to provide an extension; and its failure to provide Employee's physician with a deadline and the consequences of failing to adhere to the deadline, amounted to Agency improperly invoking 5 DCMR § 1020.6. Thus, she ruled that Employee did not abandon or resign from her position. This Board agrees with the AJ's assessment. Moreover, there is substantial evidence in the record that a reasonable mind would support this conclusion.

reasonable accommodations. Agency explains the District Court concluded in its Memorandum Opinion that Agency followed the process, properly required medical documentation, and terminated Employee when she failed to provide the required information by the set deadline. It held that Employee's separation from Agency was lawful. Additionally, Agency argued that in another matter decided by the District Court, it reasoned that a long-term leave of absence cannot be a reasonable accommodation under the ADA. Further, the court provided that an employee who needs long-term medical leave cannot work and is not a "qualified individual" under the ADA. Accordingly, Agency requests that this Board consider the decision by the District Court that its decision to voluntarily separate Employee from her position was lawful. *District of Columbia Public Schools' Notice of Supplemental Authority* (October 11, 2017).

This OEA Board in *Catherine Duvic v. Department of Behavioral Health*, OEA Matter Number J-0012-15, *Opinion and Order on Petition for Review* (September 13, 2016), addressed the issue of involuntary resignation. It relied on *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (D.C. 2008), where the D.C. Court of Appeals held that the test to determine voluntariness is an objective one that, where considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. The Court reasoned that 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 choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information."

As the AJ held in the current case, Agency imposed an unreasonable deadline for Employee to submit ADA medical documentation. Considering the holding in *Stanley*, Agency's imposition resulted in time pressure to or duress of Employee. Thus, the AJ's decision was based on substantial evidence.

Reinstatement

The Initial Decision ordered Agency to reinstate Employee. Although Agency filed a Petition for Review contesting the Initial Decision, it attempted to comply with the terms outlined in the order. A review of the record shows that on February 21, 2017, Agency provided Employee with a conditional offer of reinstatement letter. The offer provided that Employee would receive an official offer letter after submitting the requisite documents; clearing a criminal

background check; submitting to a mandatory drug test; and testing negative for tuberculosis.¹⁴ Agency provided that in accordance with D.C. Official Code § 4-1501.03, it is required to perform criminal background checks on applicants for employment, current employees, and unsupervised volunteers. Employee completed the required documents and submitted to the background check and testing. However, on June 21, 2017, Agency informed Employee that due to an FBI report, the Office of Compliance determined that she was ineligible for employment. According to Agency, Employee's criminal background check revealed a criminal conviction of Attempted Second Degree Cruelty to Children. As a result of the nature of the offense, it was determined that Employee posed a danger to children.

It is this Board's position that but for Employee's conviction, Agency would have satisfactorily complied with the order for reinstatement. The Office of Compliance's determination was reasonable given the charges levied against Employee to which she pled guilty and was imprisoned. Thus, the Board must rule that Agency complied with the AJ's order as it relates to reinstating Employee.

Restoration of Benefits

The AJ also ordered Agency to restore any benefits that Employee was receiving at the time she was separated. Similarly to its reinstatement efforts, Agency attempted to comply with this portion of the order. According to Agency, Employee was enrolled in medical, dental, vision, short- and long-term disability, and life insurance at the time she was removed. However, it asserted that it was unable to restore her benefits because at least one insurance company provided that insurance coverage could not be backdated for benefits. Additionally, Agency provided that for the other benefits to be restored, Employee would have to make contributions. In a non-paid status, Employee was not making the requisite financial

¹⁴ *District of Columbia Public Schools' Statement of Compliance*, Exhibit #1 (March 9, 2017).

contributions to any of the above-mentioned insurance plans. Agency explained that it consulted with Employee's attorney and was informed that she did not have the funds to cover her benefits for the restoration period. Thus, it is Agency's position that it was unable to restore any of Employee's benefits.

The AJ did note that at the time of removal, Employee had exhausted all of her available leave and was in a non-paid status. Therefore, this Board is unclear on what benefits the AJ wanted Agency to actually restore. Additionally, other than Agency's claims, there is no documentation in the record providing the policy as it relates to the restoration of benefits when an Employee is in a non-paid status. The AJ did not thoroughly address this issue in her decision. She also did not specifically address a back pay award.¹⁵ Therefore, we must remand this matter to the AJ for further consideration and clarification on the restoration of benefits and back pay in this matter.

¹⁵ As it relates to back pay, the AJ provided that "it would be speculative at best to award back pay as of any particular day, based on these circumstances." This Board is unsure if the AJ ruled that back pay should not be awarded, or if she is unsure of how to calculate the award given the timing issues presented in the case. Because there was no true resolution regarding an award for back pay, we must remand the matter.

ORDER

Accordingly, it is hereby **ORDERED** that the matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.