DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LINICE ALSTON	)	OEA Matter No. 1601-0010-09
Employee	)	
	)	Date of Issuance: May 5, 2009
v.	)	
	)	Rohulamin Quander, Esq.
DISTRICT OF COLUMBIA OFFICE OF CONTRACTING AND PROCUREMENT	)	Senior Administrative Judge
Agency	)	
	)	

Linice Alston, *pro se,* Employee
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On October 22, 2008, Linice Alston ("Employee"), a DS 6, Step 7 Motor Vehicle Operator for the D.C. Office of Contracting and Procurement ("Agency"), filed a petition for appeal with the Office of Employee Appeals (the "Office"), appealing Agency's final decision, effective September 30, 2008, which would have terminated Employee for cause. Previously, on August 25, 2008, Agency served a 30-day advanced written notice of proposed removal upon Employee, citing as the bases: a) malfeasance (submission of falsified medical certification; and b) on duty or employment-related acts or omission that interfered with the efficiency and integrity of government operations (excessive tardiness and absences).

The record reflects that at the time of issuance of the 30-day advanced notice of proposed removal, Agency likewise advised Employee of her right to have an administrative review or hearing, or to provide a written response to the Agency-based designated hearing officer. However, Employee took no responsive action and did not communicate with the designated administrative review officer at the Agency level. Subsequently, on September 25, 2008, Agency issued a final notice letter of termination, based upon the hearing officer's recommendations, which incorporated the two above-noted items as the underlying reasons for Employee's termination. In lieu of termination, Employee resigned her position, also on September 30, 2008, the same date that the

termination would have taken effect.

Employee had a change of heart and filed a Petition for Appeal with this Office on October 22, 2008. Agency filed its Answer on November 8, 2008, asserting that, but for Employee's sudden resignation, Employee was scheduled to be properly and appropriately terminated for cause, i.e., misconduct. Further, because of Employee's voluntary resignation in lieu of and to avoid termination, Office lacked jurisdiction to consider and decide the matter any further. Agency requested that the petition be dismissed by the Office.

This matter was assigned to me on March 9, 2009. On April 10, 2009, I convened a Prehearing Conference. Both Employee and Agency proffered their respective positions, including addressing the jurisdictional posture of this case, as presented by Employee's admitted resignation in lieu of being terminated. Prior to the Prehearing Conference, Agency submitted a Prehearing Statement as directed, on April 3, 2009, which enumerated the tenets of Agency's legal arguments. Once again, Agency underscored that Employee's action of resigning, despite the circumstances, was voluntary, thus effectively removing the jurisdiction of the Office to consider the matter further.

Employee submitted a series of e mail documents and a character reference letter. However, nothing in her submission addressed the legal issue of whether the Office retained jurisdiction to consider her petition, given her resignation just before the effective date of her being terminated. Employee's key issue was that she was quite stressed, due to the work load at her job (including heavy lifting) and personal and family issues, i.e., trying to regain family custody of her grandchildren from the courts. Employee asserted that she was not thinking clearly, both when she committed the actions which generated her termination, and later, when she made the impromptu gesture of tending her resignation, instead of seeking to oppose Agency's actions against her. She also maintained that Agency had an obligation to extend to her the services and facilities that are available for troubled employees who were facing personal problems, and that such offers of assistance not having been forthcoming, including advice as to her available options, Agency should share some of the responsibility of wrongdoing, because Employee was not given pre-termination advice and options, which might have helped her save her job.

BURDEN OF PROOF

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Pursuant to OEA Rule 629.1, *id.*, 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."

JURISDICTION

As will be discussed, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS

Having restated Agency's position that Employee voluntarily resigned before the termination became effective, Agency's counsel renewed Agency's Motion to Dismiss, on the basis of a lack of jurisdiction. Employee, on the other hand, sought to use the Prehearing Conference as an opportunity to reiterate a list of alleged wrongful acts committed by Agency prior to instituting the termination, the effect of which placed her into a position where she felt that she had no option other than to resign in lieu of being fired. Although she never alleged that her voluntary resignation was the result of coercion or erroneous information provided to her by Agency, she questioned the propriety of Agency's actions, which included alleged inaction, by not offering to help her work through her problems, or at least giving her a chance to improve, rather than being terminated.

Agency countered Employee, noting that in the memorandum of direction, issued to Employee on May 16, 2008 by Wilbur Giles, Chief of Staff, there is a reference to numerous prior discussions with Employee addressing both her tardiness and frequent absences, and although leave restrictions were imposed, directing her to improve the situation promptly. *See Agency Exhibit No. 2.* Further, once it became necessary to consider whether Employee should be terminated, Agency implemented the *Douglas Factors*[1], to evaluate Employee's contributions to the work environment and her rehabilitative potential, if Employee was retained. The decision was then made that the negatives outweighed the potential positives, and conclusion to terminate her employment was then effectuated. *See Agency's Exhibit No. 6*

When I questioned Employee at the Prehearing Conference regarding the voluntariness of her resignation, she replied that she elected to resign, to avoid being fired for misconduct. Further, she did not want to create a long term, permanent, and adverse impact upon her ability to return to government service at some time in the future. Since the matter could be decided on the basis of the documents of record, no further proceedings were held. The record is now closed.

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[1] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Since this case was decided based upon the issue of jurisdiction, and not with the incorporation of the Douglas Factors, I have elected not to list and discuss the 12 major considerations that are incorporated as a part of the evaluation of whether a troubled employee should be retained or dismissed.

The issue of whether a resignation (or retirement) is voluntary or involuntary has been addressed in several cases before this Office. The typical case involves an employee who resigns or retires and then appeals to this Office, contending that their resignation or retirement was coerced or was a constructive discharge. *See, e.g., Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000). In these cases, this Office has looked to the seminal case in the federal sector on the issue of whether a resignation or retirement is voluntary or involuntary, *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975).

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 stated:

> Employee resignations are presumed to be voluntary. 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.

Christie, supra at 587-588. (emphasis in original). (citations omitted).

If Employee herein could have established that her decision to resign was a result of coercion or erroneous information provided by her former Agency, perhaps her sudden decision to resign would be viewed as having been involuntarily obtained, and this Office might have treated her resignation as a constructive removal, over which this Office has jurisdiction. See *Dunham v. District of Columbia Public Schools,* OEA Matter No. 2401-0291-96, *Opinion and Order on Petition for Review* (September 28, 2000), ___ D.C. Reg. ___ ( ); *Siblo v. Department of Human Service,* OEA Matter No. 2401-0382-96, *Opinion and Order on Petition for Review* (September 16, 2002), ___ D.C. Reg. ___ ( ).

Relying on *Christie,* prior decisions of this Office have held that there is a presumption that an employee's resignation or retirement is voluntary. It is incumbent on the employee, therefore, to present sufficient evidence to prove that the resignation or retirement was involuntary. Although plaintiff's election to retire in *Christie* was generated by being faced with a termination for cause, the end result in the case at bar is the same. The Employee herein had to elect between painful options, either to voluntarily resign on very short notice, or to sustain her burden of proof on the issue of jurisdiction, and then successfully contest Agency's actions taken against her.

Employee maintains that she was in duress due to the scope of the personal problems that she was facing. But as in the court stated in *Christie*, I find that duress is inherent in the choice presented. Employee's circumstance is exactly the inherently unpleasant situation or alternatives envisioned by *Christie*, wherein the Employee's choice is limited to two unpleasant alternatives. As the Court found in *Christie*, such a situation "does not obviate the involuntariness of [the] resignation." As it was with Ms. Christie, I find that Employee had the option to stand pat and contest Agency's action to terminate her. If she sustained her burden of proof, she might have been successful in proving her legal positions. Instead, she chose another option, and submitted her resignation on the same date that the termination for cause was to take effect.

I find that Employee's resignation was voluntary and effectuated before termination for cause became a matter of her personnel record. Thus, I conclude that the Office is without jurisdiction to hear and decide her case. As well, Agency's motion to dismiss must be granted.

ORDER

It is hereby ORDERED that:

1. Agency's Motion to Dismiss is GRANTED; and

2. This matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE: _____

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge