

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

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

_____)	
In the Matter of:)	
)	
BARBARA DENKINS,)	
Employee)	
)	OEA Matter No. J-0009-16
v.)	
)	Date of Issuance: January 27, 2016
D.C. DEPARTMENT OF)	
BEHAVIORAL HEALTH,)	
Agency)	MICHELLE R. HARRIS, Esq.
_____)	Administrative Judge
Barbara Denkins, Employee <i>Pro Se</i>		
Andrea Comentale, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 19, 2015, Barbara Denkins (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Department of Behavioral Health’s (“Agency” or “DBH”) decision to terminate her.

I was assigned this matter on November 6, 2015. On November 18, 2015, Agency filed its Response to Employee’s Petition for Appeal. Agency noted in its response that OEA does not have jurisdiction over this appeal because Employee was in probationary status at the time of termination. On December 2, 2015, I issued an Order directing Employee to submit a brief addressing the jurisdiction issue raised by Agency in its response. Additionally, Agency had the option to submit a response to Employee’s brief. Employee’s brief was due on or before December 14, 2015. Employee submitted a response on December 14, 2015. After considering the parties’ arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

The jurisdiction of this Office has not been established in this matter.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked for Agency as a Nurse Practitioner, DS-0610, Step 10, for approximately five (5) weeks commencing August 24, 2015.¹ In a Final Agency Decision dated September 30, 2015, Agency presented Employee with a notice indicating that she would be terminated during her probationary period, effective October 9, 2015. At the time of this meeting, Employee elected not to sign the Final Agency Notice, and instead elected to resign from her position. Employee submitted a handwritten notice of resignation with an effective date of September 30, 2015.

Employee's Position

Employee asserts that she was forced to resign following a meeting whereby she thought her credentials would be discussed. Employee asserts that she submitted a resignation under duress "to protect her future possibilities to work in the District of Columbia and her nurse practitioner career."² Employee highlights that she was informed on September 18, 2015, that her orientation was placed on hold because the "medical executive board had questions" about her credentials.³ Employee asserts that on September 30, 2015, she was called into a meeting, which she presumed was related to the question regarding her credentials, but instead was read a letter and told that she would be terminated. At that time, Employee submitted a letter of resignation and did not sign the termination notice.

Agency's Position

Agency asserts in its Motion to Dismiss 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. Further, Agency argues that Employee was in probationary status at the time of her termination, which "assuming *arguendo* that [sic] Employee's departure could be deemed an involuntary resignation, it occurred within the one year probationary period, and therefore OEA lacks jurisdiction in either instance."⁴ Agency highlights that Employee was hired as a Nurse Practitioner and this Career Service appointment was subject to the completion of a one-year probationary period pursuant to Chapter 8, Section 813.2 of the District Personnel Manual ("DPM") which states in pertinent part that:

"A person hired to serve under a Career Service Appointment (Probational), including initial appointment with the District government in a supervisory position in the Career Service, shall be required to serve a probationary period of one (1) year, except in the case of individuals appointed on or after the effective date of this provision to the positions listed in paragraphs (a) through (d) of this subsection below, who shall serve a probationary period of eighteen (18) months:

- (a) Individuals hired into entry-level police officer positions in the Metropolitan Police Department;
- (b) Individuals hired into entry-level Correctional Officer positions in the Department of Corrections, or entry-level Youth Development Representative positions in the Department of Youth Rehabilitation Services;

¹ Agency' Response to Employee's Petition for Appeal at Exhibit 2 (November 18, 2015).

² Employee's Petition for Appeal (October 19, 2015).

³ *Id.* at Page 4.

⁴ Agency's Answer to Employee's Petition for Appeal at Page 3. (November 4, 2015).

- (c) Individuals hired into entry-level Firefighter/Emergency Medical Technician (EMT) and entry-level Firefighter/ Paramedic positions in the Fire and Emergency Medical Services Department; and
- (d) Individuals hired into emergency or non-emergency operations positions in the Office of Unified Communications.”

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”) § 604.1⁵, 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.⁶ Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁷

Resignation (Voluntary or Involuntary)

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, arguing that their resignation was the result of coercion, duress or constructive discharge.⁸ 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*.⁹

“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

⁵ See also, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

⁶ See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

⁷ 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).

⁸ 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).

⁹ *Christie v. United States*, 518 F.2d. 584 (Ct. Cl. 1975).

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."¹⁰ The Court 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.”¹¹

“It is incumbent on the employee; therefore, to present sufficient evidence to prove that his or her resignation was involuntary.”¹² In the instant matter, Employee asserts that she submitted a resignation under duress due to the “pressure presented to her when a “termination letter was presented, when she was told she would be meeting with the Agency's Medical Executive Board to answer their concerns about her credentials.”¹³ Additionally, Employee indicates that her resignation was done in haste to prevent a termination on her record that may be professionally damaging. While I am sympathetic to Employee's concern for a termination on her professional record, it does not amount to a measure of duress or coerced resignation as outlined by the *Christie* case. “Duress is not measured by the employee's subjective evaluation of the situation. Rather, the test is an objective

¹⁰ *Alston v. D.C. Office of Department of Contracting and Procurement*, OEA Matter No. 1601-0010-09 Initial Decision (May 5, 2009).

¹¹ *Christie v. United States*, 518 F.2d. 584, 587-588 (Ct. Cl. 1975). (Emphasis in original). (Citations omitted).

¹² *Moore v. Office of the State Superintendent of Education*, OEA Matter No. J-0114-14 Initial Decision (September 25, 2014).

¹³ Employee's Response to Jurisdiction Order (December 14, 2015).

one.”¹⁴ The fact that Employee was concerned about the negative impact a termination may have on her record, does not constitute objective duress that would make her resignation involuntary.

Though it is understandable that Employee may have been acutely concerned about the impact that a termination may have on her professional record, the evidence as presented does not reflect any coercion or other factors by which it can be concluded that Employee’s resignation was involuntary. Employee’s final SF-50 reflects a resignation, and Employee submitted a copy of her letter of resignation dated September 30, 2015, which states that “this is my official notice of resignation from my position as Nurse Practitioner effective today.”¹⁵ Employees have the burden to present evidence to prove that their resignations were involuntary.¹⁶ In this matter, I find that Employee has failed to meet this burden. This Office has no jurisdiction over voluntary resignations, and for this reason I find that this matter must be dismissed for lack of jurisdiction.

Employee’s Probationary Status

The undersigned also agrees with Agency’s assertion that OEA does not have jurisdiction over this matter due to Employee’s probationary status at the time of her termination. The September 30, 2015, Final Agency Decision made Employee’s termination effective on October 9, 2015. Based on this timeline, Employee was still in her probationary term at the time of termination. Moreover, the September 30, 2015, Notice included a statement notifying Employee that “a termination during probationary period is not appealable or grievable.” Assuming *arguendo* that it was determined that Employee’s resignation was determined to be involuntary; Employee’s probationary status would still preclude this Office from reviewing this matter. Chapter 8, Section 814.3 of the District Personnel Manual provides in pertinent part, “that a termination during a probationary period is not appealable or grievable.” Thus, an appeal to this Office by an employee who is classified in probationary status at the time of termination must be dismissed for lack of jurisdiction.¹⁷ Accordingly, I find that Employee’s probationary status at the time of her termination would also preclude OEA from reviewing the case on its merits, as this Office lacks the jurisdiction to do so. For these reasons, I find that OEA lacks the jurisdiction to adjudicate this matter.

ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

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

¹⁵ Employee’s Petition for Appeal (October 19, 2015).

¹⁶ *Alston v. D.C. Office of Contracting and Procurement*, OEA Matter No. 1601-0010-09 Initial Decision (May 5, 2009).

¹⁷ *Day v. Office of the People’s Counsel*, OEA Matter No. J-0009-94, Opinion and Order on Petition for Review (August 19, 1991).