THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
CATHERINE DUVIC, Employee	
v.	OEA Matter No.: J-0012-15
DEPARTMENT OF BEHAVIORAL HEALTH, Agency	Date of Issuance: September 13, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Catherine Duvic ("Employee") worked as Psychiatric Nurse at Saint Elizabeths Hospital ("Agency") from 2011 until 2014. On February 9, 2014, Employee was involved in an incident wherein she failed to adhere to the hospital's procedure as it relates to "privilege hour."[1] Her failure to comply with Agency's policy resulted in a patient escaping from the hospital. On February 14, 2014, the patient was found deceased, approximately two miles away from Saint Elizabeths.[2] As a result, Employee was suspended for three days without pay and was charged with neglect of duty.[3]

[1] *Agency Answer to Petition for Appeal*, Exhibit 10 (December 9, 2014). According to Agency, patients who have "privilege hour" are allowed to freely move around a portion of the hospital.
[2] *Id*. at p. 2.
[3] *Id* at Exhibit 5.

On August 30, 2014, Employee was suspended for fifteen days after she was observed sleeping while on duty.[4] Agency subsequently placed her on a Performance Improvement Plan ("PIP") from August 5, 2014 through August 26, 2014.[5] On September 16, 2014, Employee submitted a letter of resignation.[6] She requested that her resignation become effective on October 4, 2014.[7] The letter was accepted in writing by St. Elizabeths' Chief Nursing Executive, Dr. Vidoni-Clark.[8] Employee was placed on paid administrative leave from September 16, 2014 until October 4, 2014.[9]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 3, 2014. In her appeal, she argued that she was constructively discharged as a result of Agency's campaign to make her the "scapegoat" for its flawed policies regarding patient escapes.[10] Employee also stated that Dr. Vidoni-Clark acted out of spite when she placed her on administrative leave and revoked her access to the hospital on September 16, 2014. Therefore, she requested that OEA reinstate her with back pay and benefits. She also demanded that Agency remove from her official personnel file all disciplinary actions taken against her after February 9, 2014.[11]

Thereafter, Agency filed an Answer to Employee's Petition for Appeal. In it, Agency contended that that OEA lacked jurisdiction over her appeal because she voluntarily resigned from her position as a Psychiatric Nurse.[12] It also noted that there was no pending removal action

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[4] *Id*. at Exhibit 6.
[5] *Id*. at Exhibit 4. As will be discussed *infra*, Employee's supervisor recommended that she be terminated at the end of the PIP period. However, Agency did not propose a termination action against Employee prior to the submission of her resignation letter.
[6] *Id*. at Exhibit 7.
[7] *Id*.
[8] *Id*. at Exhibit 8.
[9] *Id*.
[10] *Petition for Appeal*, Attachment A (November 3, 2014).
[11] *Id*., 4.
[12] *Agency Answer to Petition for Appeal* (December 9, 2014).

in place at the time Employee submitted her letter of resignation; thus, she was not constructively removed from her position.[13] Accordingly, it requested that the matter be dismissed because there was no evidence to prove that her resignation was involuntary.[14]

The matter was assigned to an OEA Administrative Judge ("AJ") on November 19, 2014. On December 15, 2014, the AJ ordered Employee to submit a written brief that addressed the jurisdictional issue. In her submission, she argued that Agency procured her resignation as a result of duress and coercion.[15] In addition, she contended that the hospital forced her to resign in order to "deflect negative attention from its own failed policies and procedures."[16] As a result, Employee submitted that OEA had jurisdiction to adjudicate her appeal.

An Initial Decision was issued on February 27, 2015. The AJ held that Employee failed to meet her burden of proof in establishing jurisdiction before this Office.[17] Specifically, he determined that her decision to resign was voluntary. He also provided that there was no credible evidence to suggest that Agency coerced her into making the decision to leave her position.[18] In addition, the AJ noted that Employee's placement on administrative leave after submitting her letter of resignation had no bearing on her job status or her right to accrue pay and benefits.[19] He, therefore, dismissed her appeal for lack of jurisdiction.[20]

Employee disagreed with the AJ's decision and filed a Petition for Review with OEA's Board on April 3, 2015. In her petition, she argues that the AJ ignored applicable case law and evidence to support her argument that she resigned involuntarily as a result of objectively

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[13] *Id*. at 7.
[14] *Id*.
[15] *Employee Brief on Jurisdiction*, p. 7 (December 30, 2014).
[16] *Id.* at 2.
[17] *Initial Decision* (February 27, 2015).
[18] *Id*. at 3.
[19] *Id*.
[20] *Id*. at 4.

intolerable working conditions.[21] In addition, she reiterates that the AJ erred in determining that Agency did not procure her resignation by the use of coercion or duress. Consequently, Employee asks that the Initial Decision be overturned.

Agency filed it Answer to Employee's Petition for Review on May 6, 2015. It argues that the AJ's finding that she resigned voluntarily is supported by substantial evidence.[22] Moreover, Agency contends that the Initial Decision did not disregard any applicable case law in finding that OEA lacks jurisdiction over the instant matter.[23] It maintains that Employee's Petition for Review should be denied, and the Initial Decision should be upheld.[24]

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), held 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.[25] Therefore, if there is substantial evidence to support the AJ's decision that Employee resigned voluntarily, then this Board must accept it.

Involuntary Resignation

In *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (D.C. 2008), the D.C. Court of Appeals held that "the fact that an employee is faced

[21] *Petition for Review* (April 3, 2015).
[22] *Agency Answer to Petition for Review* (May 6, 2015).
[23] *Id*. at 4.
[24] *Id*. at 5.
[25] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives is not enough by itself to render the employee's choice involuntary." It held that the test to determine voluntariness is an objective one that, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. The Court further held 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."[26]

Employee argues that the Initial Decision disregarded applicable case law to support her position that her resignation was involuntary. In support thereof, she highlights *D.C. Metropolitan Police Department v. Stanley*, 942 A.2d. 1172 (D.C. 2008). In *Stanley*, the D.C. Court of Appeals held that an involuntary resignation may exist when an employee faces a "quit-or-be-fired" ultimatum, or when an employer coerces resignation by threatening a personnel action.[27] Likewise, Employee claims that the holding in *Washington Chapter of the American Institution of Architects v. District of Columbia Department of Employment Services*, 594 A.2d 83 (D.C. 1991) should apply to the instant matter. In this case, the Court determined that the aggrieved employee's resignation was involuntarily when she was told to "quit or stay and be miserable, with an implied threat of being fired if she, in some further undefined way, stepped out of line."

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[26] *Id*.
[27] *Also see Thomas v. District of Colombia Department of Labor*, 409 A.2d. 164, 171 (D.C. 1979).

However, this Board finds that the cases provided by Employee are not directly on point with the facts in the instant case. In *Stanley,* two police commanders were informed that their employment would be terminated immediately unless they retired that very day. A third commander was given the same choice, unless he agreed to a demotion. All three employees in *Stanley* chose to retire under protest after being given only hours to make a decision.[28] In *Washington Chapter of the American Institution of Architects*, the employee was given a draft of her resignation letter following an Executive Committee meeting at work. The letter contained extensive legal waivers that absolved the employer of any liability attributable to the employee leaving her job.[29] The employees in both *Stanley* and *Washington Chapter of the American Institution of Architects* were unquestionably subject to coercion and duress by their employers. Their resignations were, therefore, deemed to be involuntary.

Here, Employee voluntarily submitted a letter to the Chief Nursing Advisor on September 16, 2014. It provided that "[t]his letter serves to inform you and the nursing staff of my intent to resign from St. Elizabeth[s] Hospital. I am providing two weeks' notice as of today. Regards, Catherine A. Duvic RN, B-C."[30] The document contains Employee's signature, and a copy of the letter was sent to her union representative.[31] Her resignation letter was accepted in writing by Agency on September 16, 2014. A Notification of Personnel Action Form ("Form50") was subsequently generated to reflect that Employee resigned with an effective date of October 4, 2014.

In light of the above, the Board finds that there is no evidence in the record to prove that Employee's decision to resign was anything but voluntary. It was Employee who set the

[28] *Stanley*, 942 A.2d at 1776
[29] *Washington*, 594 A.2d at 84.
[30] *Agency Answer to Petition for Appeal, Tab 7 (December 9, 2014).*
[31] *Id.*

effective resignation date, as evidenced in her notice to Agency. She had freedom of choice and could have consulted with an attorney, union representative, or an advisor prior to submitting a letter of resignation. Employee was not provided with a "quit or be fired" ultimatum. She was also not subject to any time pressure, unlike the employees in *Stanley* and *Washington Chapter of the American Institution of Architects*. Accordingly, we conclude that Employee was not coerced into resigning.

Moreover, Employee fails to cite to any statute, case law, or regulation to show that Agency was not authorized to place her on administrative leave after accepting her letter of resignation on September 16, 2014. District Personnel Manual, Chapter 16, Section 1699.1 defines administrative leave as an excused absence with full pay and benefits that is not charged to annual leave, sick leave, or leave without pay. Thus, Employee did not suffer a loss of salary or benefits from the time she submitted her letter through the effective date of her resignation.

Performance Improvement Plan

Employee argues that her working conditions were very severe and that her PIP requirements far exceeded what was expected of any other psychiatric nurse at Saint Elizabeths.[32] A PIP is a performance management tool designed to offer an employee the opportunity to demonstrate improvement in his or her work performance.[33] Under D.C. Municipal Regulation ("DCMR") § 1410.4, a supervisor or other reviewer is required to complete a PIP when an employee's "performance has been observed by the supervisor as being deficient." A PIP must last at least thirty (30) days but cannot exceed ninety (90) days.[34] DCMR § 1410.3 further provides that a PIP must: 1) identify specific performance areas in which an

[32] *Petition for Review*, p. 4 (April 3, 2015).
[33] DCMR § 1410.2.
[34] DCMR § 1410.3.

employee is deficient and 2) provide concrete, measurable actions steps which the employee needs to take to improve the identified areas of deficiency.

Within ten (10) calendar days of the completion of the PIP period, the employee's supervisor must make a determination as to whether he or she has met the requirements of the PIP.[35] If the employee has failed to meet the requirements, § 1410.5(a) allows the supervisor or reviewer the option of extending the PIP by thirty (30) days. In the alternative, § 1410.5(b) states that the affected employee may be reassigned, reduced in grade, or removed. DCMR § 1410.6 provides that the failure of the supervisor or reviewer to issue a written decision within the specified time period "will result in the employee's performance having met the PIP requirements."

Employee's manager, Timothy Lingle, initially placed her on a PIP from June 28, 2014 through July 27, 2014. However, it was held in abeyance because she went on medical leave.[36] The PIP was reactivated from August 5, 2014 through August 26, 2014. At the end of the PIP period, Lingle recommended that Employee be terminated because she failed to "demonstrate the basic knowledge, skills [and] abilities to perform the duties of her position."[37]

In this case, Agency properly outlined the core competencies in which Employee was deficient in accordance with DCMR § 1410.3. At the expiration of the thirty-day PIP period, Employee's supervisor recommended that she be terminated because she failed to improve in the performance of her duties. Therefore, Agency adhered to the PIP regulations.

Conclusion

This Board finds that there is substantial evidence in the record to support the AJ's conclusion that Employee's resignation was voluntary. Furthermore, he correctly held that this

[35] DCMR § 1410.5.
[36] *Agency Exhibit 4*.
[37] *Id*.

Office lacks jurisdiction over voluntary resignations. We are, therefore, unable to address the substantive arguments raised by Employee. Accordingly, her Petition for Review must be denied.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD**:**

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.