

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Theresa Fraley)	OEA Matter No. J-0048-08R10
Employee)	
)	Date of Issuance: March 21, 2011
v.)	
)	Senior Administrative Judge
D.C. Public Schools (Division of Transportation))	Joseph E. Lim, Esq.
Agency)	

Michael Kovalcik, Transportation Administrator
Theresa Fraley, Employee *pro se*

INITIAL DECISION

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

On February 19, 2008, Employee, a Bus Attendant, filed a petition for appeal with this Office from Agency's action terminating her employment service effective January 30, 2008. The matter was assigned to Judge Muriel Aikens-Arnold on April 21, 2008. On May 19, 2008, Judge Muriel Aikens-Arnold ordered Employee to submit additional information after she discovered that Employee's unsigned appeal was incomplete. Specifically, Judge Aikens-Arnold asked Employee to "provide more information in order to determine how to proceed in this matter."¹ Judge Aikens-Arnold dismissed Employee's appeal when she received no reply. Employee appealed, claiming that she never received "the two letter[s] that [were] sent to [her]."² On December 6, 2010, the Office of Employee Appeals Board (OEA) remanded the case for further proceedings.³

Since Judge Aikens-Arnold had left the employ of this Office, this matter was reassigned to me on December 17, 2010. On the same day, I called Employee to verify her address of record. I then issued an Order directing Employee to address Judge Aikens-Arnold's concerns. When Employee failed to respond, I issued a Show Cause Order. Employee came in the Office and corrected her appeal form. I scheduled a prehearing conference, but the Agency representative failed to appear. The U.S. Post Office returned the scheduling order indicating that the address was erroneous. Subsequently, I received Employee's letter regarding her resignation agreement. Since

¹ *Initial Decision* dated June 17, 2008, at 1.

² *Petition for Review*.

³ *Opinion and Order on Petition for Review* dated December 6, 2010.

the matter could be decided on the basis of the documents of record, no further proceedings were held. The record is closed.

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

The following facts are uncontested:

1. On January 30, 2008, Employee, a Bus Attendant, Grade 12/10, signed an agreement with David Gilmore, the Transportation Administrator for Agency at that time. (Employee's submission)
2. The agreement states, "By mutual agreement your employment with the Division of Transportation is hereby terminated immediately. You have agreed to voluntarily waive any grievance and appeal rights and so indicate by your signature below. You are advised that should you apply for unemployment compensation the Division of Transportation will not oppose your claim.
3. Employee does not deny that she signed the agreement. Nor does she allege that she was given any misleading information by Agency prior to signing the agreement.
4. During her appeal, Employee submitted an undated letter that states, "On this day, I was under a lot of stress. I took my medicine and feel (sic) to sleep on the job. Only thing I really want is to get my job back, to be reinstated and all of my sorority (sic). Also while I was working they were suppose (sic) to investigate on my route but they didn't. I want all my leave back, also my sick leave. The driver shouldn't (sic) have let out the yard without me and it's was suppose to be two attendants not just one.
5. Employee also submitted a doctor's note from Gerald Family Care dated March 8, 2008, which states that Employee suffered from severe hypertension, possibly stress induced.

ANALYSIS AND CONCLUSION

The Comprehensive Merit Personnel Act (CMPA), D.C. Official Code Sec. 1-606.01 *et seq.* (2001) limits this Office's jurisdiction. Section 1-606.03 states in pertinent part:

An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee...an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more...or reduction in force...

This is an issue of jurisdiction. This Office's jurisdiction is not plenary. Rather, it is limited to those matters over which it has jurisdiction. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9 (Fed. Cir. 1985). As a general rule, this Office will not take jurisdiction of an appeal from an employee who submitted a resignation. There is a presumption that retirements are voluntary.⁴ However, the presumption is rebuttable. This presumption can be rebutted if the employee establishes that his retirement was a result of duress or coercion brought on by government action, or of misleading or deceptive information, or if the employee was mentally incompetent.⁵ If an employee can establish that the resignation was involuntary, it may be considered a constructive discharge. Since this Office has jurisdiction over removals, it will have jurisdiction to hear such an appeal. *Massey v. Department of Public Works*, OEA Matter No. 1602-0076-90 (June 29, 1992), ___D.C. Reg. ____; and *Jefferson v. Department of Human Services*, OEA Matter No. J-0043 (November 8, 1995), ____ D.C. Reg. ____.

It is incumbent upon employees to first prove that their retirements were involuntary, that is, were the product of undue coercion on Agency's part, or the product of mistaken information provided to them by Agency and upon which they relied in making their decision to retire. Where an employee resigns or retires to avoid being removed for cause, the resignation or retirement is voluntary if the proposed removal is precipitated by good cause. See *Christie v. United States*, 518 F.2d 584 (1975) in analyzing whether a resignation is voluntary where an adverse action has been threatened.

Here, Employee does not argue that there was duress or misinformation nor does she allege that she is mentally incompetent. She does, however, argue that her resignation was involuntary because she was "under stress" at the time. In her letter, Employee admits that she slept on the job and that she failed to board the bus in her job as a bus attendant. Failure to perform one's job is good cause for adverse action.

Employees have the burden of proof in all matters involving jurisdiction. OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). According to OEA Rule 629.1, the burden must be met 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." Based on a careful review of the documentary evidence, and

⁴ *Christie v. United States*, *supra*.

⁵ See *Contreras v. Department of the Navy*, 78 M.S.P.R. 281, 285 (1998).

pursuant to the discussion herein, the Administrative Judge concludes that Employee has not met the burden of proof in this matter.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge