THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: J-0192-12
LISA FLEMING,	)	
Employee	)	
	)	Date of Issuance: December 13, 2012
v.	)	
	)	
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Lisa Fleming, Employee, Pro Se
Virginia Crisman, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 9, 2012, Lisa Fleming ("Employee') filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Office of the State Superintendent of Education's ("Agency") action of terminating her employment. On June 15, 2012, Agency issued a Proposed Notice of Termination to Employee, citing as cause "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction, specifically: making a false statement or representation knowing it to be false or knowingly failing to disclose a material fact to obtain or increase unemployment benefits as provided in D.C. Official Code § 51-119 (a) (2001).[1]

I was assigned this matter in August of 2012. On August 29, 2012, I issued an Order requiring the parties to submit briefs addressing the issue of whether Employee voluntarily resigned in lieu of being terminated. Both parties replied to the Order. After reviewing the documents of record, I determined that an Evidentiary Hearing was not warranted in this matter. The record is now closed.

[1] Notice of Proposed Termination, Agency Attachment A (June 15, 2012).

JURISDICTION

As will be discussed, jurisdiction in this matter has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) 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 a reduction in force [RIF]. . . .

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) provides that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean "that 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." OEA Rule 628.2 further states that the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[2]

According to Agency, OEA lacks jurisdiction over Employee's appeal because she elected to resign from her position as a Bus Attendant in lieu of being terminated after receiving the June 15, 2012 Notice of Proposed Termination.[3] Agency argues that no final Agency decision was issued because Employee resigned prior to receiving final notice of her termination.

This Office has no authority to review issues beyond its jurisdiction.[4] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[5] 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

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[2] *Id.*
[3] Agency's Motion to Dismiss (September 13, 2012).
[4] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[5] *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).

constructive discharge.[6] 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.[7]

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 held that employee resignations are presumed to be voluntary. 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."[8]

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[6] *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).

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

[8] *Christie, supra* at 587-588. (emphasis in original). (citations omitted).

It is incumbent on the employee; therefore, to present sufficient evidence to prove that his or her resignation or retirement was involuntary. Although plaintiff's election to retire in *Christie* was a result of being faced with a termination for cause, the end result in instant case is the same. Here, Employee had to choose between painful options, either to resign or to sustain her burden of proof on the issue of jurisdiction, and then successfully contest Agency's actions taken against her.

Employee's submission to this Office states in part the following:

> "When I was informed that I was going to be fired from my position as a Bus Attendant it threw me off guard. I knew that being fired would lessen the opportunity for me to get another job. So, rather than have that kind of action in my employment files, I decided to resign. When I was informed that I would be fired, it was not explained to me that I had the right to appeal that action. I found out about the right to appeal at a later date…."[9]

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. In response to Agency's notice, Employee submitted a letter on June 15, 2012 stating that "I desolately submit this letter of resignation from my position as a bus attendant for the State Superintendent of Education, effective today, June 15, 2012."[10] Employee's resignation letter does not indicate that her decision to resign was procured as the result of fraud, coercion, or misinformation. Likewise, Employee's September 11, 2012 brief to this Office does not claim that her decision to resign was involuntary.

Accordingly, I find that Employee's resignation was voluntary and effectuated before she was terminated for cause. Thus, I conclude that OEA lacks jurisdiction to hear the merits of her case. As such, Agency's motion to dismiss must be granted.

ORDER

It is hereby ORDERED that Employee's Petition for Appeal is DISMISSED.

FOR THE OFFICE:

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Sommer J. Murphy, Esq.
ADMINISTRATIVE JUDGE

[9] Employee Brief (September 11, 2012).
[10] Agency Brief, Attachment B (September 13, 2012).