Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

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| In the Matter of: | |
| EMPLOYEE,[1] Employee | OEA Matter No. J-0045-22 |
| v. | Date of Issuance: June 29, 2022 |
| D.C. DEPARTMENT OF TRANSPORTATION, Agency | MICHELLE R. HARRIS, ESQ. Administrative Judge |

Employee, *Pro Se*
Kathleen R. Miskovsky, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On March 22, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the end of his service at the D.C. Department of Transportation ("Agency or DDOT"). Employee's service ended effective June 6, 2019, following Employee's resignation from his position. Agency filed its Answer to Employee's Petition on April 13, 2022, following a letter from OEA dated March 14, 2022, requesting an Answer. Agency asserted in its Answer that OEA lacked jurisdiction over Employee's appeal. This matter was assigned to the undersigned on April 14, 2022. On April 21, 2022, I issued an Order requiring the parties to submit briefs addressing the jurisdiction issued raised by Agency. Employee's brief was due on or before May 13, 2022, and Agency's response was due on or before May 27, 2022. Employee did not submit his brief as required. As a result, on May 19, 2022, I issued an Order for Statement of Good Cause to Employee. Employee's brief and statement were due on or before May 31, 2022. Employee filed his response on May 23, 2022. On June 2, 2022, I issued an Order requesting Agency's response on or before June 13, 2022. Agency filed its response on June 13, 2022. Considering the parties' arguments as presented in their submissions to this Office, it has been determined that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

For the reasons explained below, the jurisdiction of this Office has not been established in this matter.

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 631.1, 6B DCMR Ch. 600, 631.1 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "

OEA Rule 631.2 *id.* states:

> 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked for Agency as a Street Sign Installer (MVO). On June 6, 2019, Employee submitted a written resignation following the receipt of a Final Notice of Separation for a Positive Drug Test dated June 2, 2019. The effective date of the separation was June 7, 2019. Employee submitted a written notice of resignation on June 6, 2019, effective that same day.

**Employee's Position**

Employee asserts that OEA has jurisdiction over this matter. Employee avers that at the time of his resignation, he made reasonable and good faith efforts to contact DCHR following the notices regarding his separation for the positive drug test. Employee asserts that he resigned on the advice of his union representative.[2] Employee cites that he was "dealing with a lot [sic] the passing of my mother, family members, closest coworkers the ones I worked side by side with and friends." As a result, Employee argues that OEA has jurisdiction over his appeal.

**Agency's Position**

Agency asserts in its Answer and June 13, 2022 Response, that this Office lacks the jurisdiction to adjudicate this appeal. Agency argues that Employee resigned from his position, and therefore OEA has no jurisdiction over this matter. Further, Agency avers that Employee's resignation was effective June 6, 2019, and that his appeal to OEA in March 2022 is untimely. Agency notes that on February 27, 2019, Employee submitted a urine sample which subsequently tested positive for the presence of cocaine. A Final Notice of Separation dated June 2, 2019 included an effective date of June 7, 2019. Employee submitted a written notice of resignation on June 6, 2019. Agency asserts that DCHR recorded Employee's separation as a resignation and not a termination.[3]

Agency explains that OEA only has jurisdiction over a resignation if it has been determined that the resignation was involuntary. Agency avers that Employee has not provided any evidence to exhibit that his resignation was involuntary, but only argues that he was unable to ascertain union support and

[2] Employee's Brief (May 23, 2022).
[3] Agency's Response at Page 2 (June 13, 2022). *See also*. Agency's Answer at Exhibit 7 (April 13, 2022).

that he contacted DCHR. As a result, Agency avers that this matter should be dismissed for lack of jurisdiction. Further, Agency argues that Employee's appeal is untimely. Agency avers that "any appeal filed with OEA shall be filed within 30 days of the effective date of the appealed agency action. D.C. Official Code §1-606.03(a); 6 DPM §604.2." Agency asserts that Employee received notice of OEA rules with the Final Decision. Thus, Agency maintains that even if Employee's resignation was deemed to be involuntary (which it does not concede), that Employee's appeal would fail because it is untimely.[4]

**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") § 604.1[5], 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 631.1, 6B DCMR Ch. 600, 631.1 (December 27, 2021), 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***

In the instant matter, Employee does not deny that he resigned from his position.[8] However, Employee argues that he tried to make reasonable efforts to contact personnel in DCHR as an attempt to retain his employment. Ultimately, Employee noted that he resigned based on the advice he received from his union representative. Although the question of whether a resignation is voluntary or involuntary has been considered in several cases before this Office, in this matter there is no evidence in the record that suggests Employee's resignation was involuntary. A typical matter before this Office concerning whether a resignation was voluntary or involuntary, usually involves an employee who resigns and then appeals to OEA, arguing that their resignation was the result of coercion, duress or constructive discharge.[9] When

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[4] Agency's Response at Page 4 (June 13, 2022).
[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] Employee's Response (May 23, 2022).
[9] *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).

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*.[10]

In the instant matter, Employee asserted that he was challenged by his personal issues that he faced at the time, including loss of family members and loved ones. While the undersigned is sympathetic to the challenges Employee faced, the undersigned would note that the record does not reflect any evidence to suggest that the resignation was involuntary. Employee does not make any arguments that his resignation was coerced or was a result of duress that lend itself to the *Christie* standard to deem it involuntary in nature. Here, Employee submitted an email on June 6, 2019, noting his resignation.[11] Employee reiterated his resignation in his May 23, 2022 brief to this Office, wherein he noted that he resigned based on the advice of his union representative. Employees have the burden of proof for issues regarding jurisdiction and must meet this burden by a "preponderance of evidence. I have determined that Employee did not meet this burden. This Office has consistently held that it lacks jurisdiction over voluntary resignations.[12] Because OEA does not have jurisdiction to hear this matter, the undersigned is precluded from any further review of the arguments proffered by Employee. Accordingly, I find that OEA lacks jurisdiction to adjudicate this matter.

***Untimely Filing of Petition for Appeal***

Agency also asserted that Employee's appeal was filed untimely. Pursuant to OEA Rule 604.2 (6-B DCMR Ch. 600, 604.2)[13], an appeal filed with this Office must be filed within thirty (30) calendar days of the effective date of the appealed agency action. The District of Columbia Court of Appeals ("D.C. Court of Appeals) had previously held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.[14] More recently however, the Court has found that filing deadlines are not jurisdictional, but are claim processing rules. The Court held in *Kevin Baldwin v DC Office of Employee Appeals and DC Department of Youth Rehabilitation Services*[15], that timeline considerations have been deemed not to be jurisdictional in nature. As a result, recent OEA matters regarding filing deadlines have been considered pursuant to the ruling in *Baldwin*. Because I find that OEA lacks jurisdiction to adjudicate this matter because of Employee's resignation from his position, I will not address the merits of the timeliness issue raised by Agency. However, the undersigned would note that Employee's Petition in this matter comes nearly three (3) years after the 30-day filing deadline that would have been applicable in 2019. Thus, I find that even upon

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[10] *Christie v. United States,* 518 F.2d. 584 (Ct. Cl. 1975). In *Christie*, the following was determined:

> "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] *See*. Agency's Answer at Exhibit 6 (April 13, 2022).

[12] *Evans v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-11, *Opinion and Order on Petition for Review* (December 10, 2014).

[13] December 27, 2021.

[14] *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).

[15] *Kevin Baldwin v DC Office of Employee Appeals and DC Department of Youth Rehabilitation Services* DC Court of Appeals No. 18-CV-1134 (May 7, 2020).

consideration of the Court's findings in *Baldwin,* Employee's Petition is untimely as it was filed almost three (3) years after the effective date of the adverse action.

Employee asserts that he was challenged by various personal issues that he faced at the time. While the undersigned is sympathetic to the challenges Employee faced at the time of his resignation, the record does not reflect any defects in notice or otherwise that would explain the extended delay in filing at OEA. For these reasons, I find that OEA has no jurisdiction to adjudicate this matter and this matter must be dismissed.

ORDER

It is hereby **ORDERED** that Employee's Petition in this matter is **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

**/s/ Michelle R. Harris**
MICHELLE R. HARRIS, Esq.
Administrative Judge