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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

|                                            |   |                                    |
|--------------------------------------------|---|------------------------------------|
| _____                                      | ) |                                    |
| In the Matter of:                          | ) |                                    |
|                                            | ) |                                    |
| APRILLE WASHINGTON                         | ) | OEA Matter No. 1601-0021-08        |
| Employee                                   | ) |                                    |
|                                            | ) | Date of Issuance: October 22, 2008 |
|                                            | ) |                                    |
|                                            | ) | Lois Hochhauser, Esq.              |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS        | ) | Administrative Judge               |
| Agency                                     | ) |                                    |
| _____                                      | ) |                                    |
| Aprille Washington, Employee               | ) |                                    |
| Harriet Segar, Esq., Agency Representative | ) |                                    |

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on December 5, 2007, appealing Agency’s final decision to characterize her absence from work as a “voluntary resignation”. At the time of Agency’s decision, Employee was in permanent educational status.

This matter was assigned to me on or about January 25, 2008. Following the prehearing conference on February 20, 2008, the parties entered into mediation. When those efforts did not prove successful, a hearing was scheduled. The matter was heard on July, 1, 2008 and August 5, 2008.<sup>1</sup> Following the submission of written closing arguments, the record closed on October 6, 2008.

JURISDICTION

The jurisdiction of this Office is at issue.

ISSUE

Did Employee voluntarily resign from her position?

<sup>1</sup> Witnesses testified under oath. The transcript is cited as “Tr” followed by the page number. Exhibits are cited as “A” if introduced by Agency and “E” if introduced by Employee, followed by exhibit number.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On November 5, 2007, Agency issued a "Notice of Voluntary Resignation" to Employee. The letter stated, in pertinent part:

From October 18, 2007 through October 23, 2007, you were absent without leave (AWOL) from Douglas Transitional Academy. Your absences from work were all unauthorized.

In a memorandum dated October 18, 2007, Special Assistant to the Chancellor, Richard Nyankori, directed you to report for duty by October 23, 2007. You failed to report for duty as directed.

Therefore, in accordance with the RULES of the D.C. Board of Education, Section 1020.6...which provides in material part that your "Failure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position," you are considered to have voluntarily resigned your position. Section 1020.6 further states that "this voluntary resignation shall not be considered an adverse action."

You will be treated as having resigned with effect from November 5, 2007. (Emphasis in original omitted).

The letter ended by notifying Employee of her appeal rights with OEA and pursuant to a collective bargaining agreement. (Ex A-8).

In August 2007, Employee, an Educational Aide, returned to work after being on maternity leave for an extended period of time. Prior to taking maternity leave, Employee had been assigned to Lafayette Elementary School. Upon her return, she was assigned to Jefferson Junior High School. She reported to Jefferson on August 27 and worked there through August 31. (Tr, 10). She was directed to obtain a tuberculosis (TB) test and not to return to work until she had the results. She brought the test results to DCPS Human Resources (HR) office on September 10. She continued to work at Jefferson until on or about October 9, 2007. DCPS realized there was no funding at Jefferson for a 70 hour aide, the position Employee encumbered, and transferred her to Douglas Transitional Academy. (Exs A-1 A-2). The action was considered an "involuntary transfer" by DCPS. (Ex A-5). Employee did not report to Douglas. She met with Margery Yeager, Alexandra Williamson and Richard Nyankori, all members of the Chancellor's Critical Response Team, several times, although the reason for the contacts is in dispute. Upon Employee's return to work in August 2007, she was not placed on pay status and her health benefits were terminated.

DCPS's position was that Employee refused to report to Douglas because she was dissatisfied with the assignment and wanted the matter investigated by the Mayor's Office. It contends that her

meeting with DCPS personnel focused primarily on her unhappiness with the placement. DCPS maintains that it notified Employee that her failure to report would be deemed a voluntary resignation. In his letter to Employee of October 18, 2007, Richard Nyankori of the Chancellor's Office wrote:

This letter serves as your notice to return to work at 8:00 AM effective October 23, 2007 to Douglass Transitional Academy. You are to report directly to Principal Eric Bradford. If you are unable to do so and are physically incapacitated, you are to notify Mr. Bradford via telephone at least one hour prior to your reporting time and you must make arrangements to present original documentation from your physician stating you are unfit for duty.

Failure to report for duty may result in your immediate separation from employment under the provisions of the Board Rules for abandonment of position, i.e., voluntary resignation. (Emphasis in original omitted) (Ex A-7).

Margery Yeager, Chancellor's Critical Response Team leader, testified that Employee told her when she met with her on October 16 that she was not being paid or receiving benefits. She said Alexandra Williams of her staff initially met with Employee and "began to work on" those issues. (Tr, 31). At the meeting, Ms. Yeager told Employee that she was being transferred to Douglas because of the funding issue. She said Employee was "upset during that meeting and expressed that she did not want that position". (Tr, 40). The witness testified that Employee never told her that she was not reporting to Douglas because of illness but rather told her she would not report to Douglas until the Mayor's office completed its investigation of the matter. (Tr, 45-46).

Richard Nyankori, Special Assistant to the Chancellor, testified he met with Employee on October 18 or 19 about the pay and benefits issues and her dissatisfaction with the Douglas assignment. He testified that Employee told him she would not report to Douglas so he issued her a letter directing her to do so. He said the meeting lasted "about two or three minutes" and the only purpose of it was to hand her the letter. (Ex A-7, Tr, 79). He did not recall asking Employee why she did not report to Douglas or whether she had contacted anyone at Douglas. (Tr, 102).

Employee asserts that she did not report to Douglas because she was ill during that period, although she maintains that the transfer was the result of retaliation against her for complaining about not being paid. (Ex A-2). She stated that she first learned that she no longer had health benefits on or about September 5, when she became ill and was not permitted to schedule a doctor's appointment with her provider, Kaiser-Permanente. She said she met with Alexandra Williamson of DCPS about the pay and benefits issue on October 9.

Employee stated she became aware of the transfer to Douglas on October 15, when the business manager at Jefferson gave her a letter dated October 11, regarding the transfer. After she received the letter, she met with Claudia Lujan of the Deputy Mayor's Office to file a complaint. Employee stated that while she was at Ms. Lujan's office, she telephoned Douglas and left a message that she was "at

the Deputy Mayor of Education's Office because [she] was ill and [was] unable to schedule [a] doctor's appointment at [that] time". (Tr, 20).

According to Employee, Ms. Lujan telephoned her at home that evening and told her to contact Ms. Yeager in the morning and gave her Ms. Yeager's telephone number. Employee stated Ms. Lujan told her that Ms. Yeager was busy in the morning but that she was aware Employee would be coming and to wait for her. She said she met with Ms. Yeager on October 16. She testified that Ms. Yeager took her complaint and telephoned her that evening to tell her she had spoken with Thelma Monk, HR Director, and that Dr. Monk "would be willing to...look into [her] health benefits and resolve all the issues if [she] would come and meet with her the following morning". (Tr, 21). Employee stated she went to meet with Dr. Monk on the 17<sup>th</sup>, but Dr. Monk refused to meet with her and that someone from her staff gave her another copy of the October 11 letter. Employee said she then met with Ms. Yeager and told her that Dr. Monk would not meet with her. (Tr, 22).

On October 19, Employee said she met with Richard Nyankori and was given a copy of the October 18 letter. She said she did not report to Douglas after receiving the letter because she was still ill. She said she telephoned Douglas on October 18, 22, 23 and 25. She said she called twice on the last two dates because she spoke with Dr. Monk on the telephone who told her to call again. Employee stated she told Dr. Monk that two of her calls to Douglas had been returned. (Tr, 23, 24).

Employee stated she continued to telephone Dr. Monk and others regarding her inability to get medical care because of problems with her health insurance coverage in October 2007. (Tr, 142). She stated she telephoned Mr. Bradford. (Tr, 143, 176). On October 30, 2007 Employee emailed Ms. Monk authorizing her sister to pick up her check because she was "too ill". (Ex E-2). She was seen at Kaiser Permanente on that date. (Ex E-3).

Geraldine Washington, Employee's sister, testified that she lived with Employee and that Mr. Bradford returned Employee's calls during this period. She stated she witnessed Employee returning Mr. Bradford's telephone calls, (Tr, 115, 117). She said she spoke with Mr. Bradford once when he told her he was returning Employee's call. (Tr, 119). She testified she also witnessed Employee having telephone conversations with Dr. Monk. The witness stated that Employee was ill in late September and early October, and that she delivered a medical excuse for Employee when she went to pick up Employee's check. (Tr, 120, Ex A-3).

Jackie Pinkney-Hackett, Employee's sister, testified she was present when Employee contacted Kaiser Permanente to make an appointment because Employee was ill, and was told she was "inactive" and could not be seen. She testified that Employee was ill on October 19, the day Employee met with Mr. Nyankori. (Tr, 136).

Agency relies on 5 DCMR 1020.6 to support its position that Employee voluntarily resigned from her position. That provision states:

Failure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position. This voluntary resignation shall not be considered an adverse action.

Employee was notified of that position and warned that she was required to report to Douglas by letter dated October 18, 2007. That letter, however, provided:

You are to report directly to Principal Eric Bradford. If you are unable to do so and are physically incapacitated, you are to notify Mr. Bradford via telephone at least one hour prior to your reporting time and you must make arrangements to present original documentation from your physician stating you are unfit for duty. (Ex A-7).

OEA does not have jurisdiction of appeals involving voluntary resignations. If Employee in fact resigned from her position, OEA would not have jurisdiction. Therefore, jurisdiction must first be established. OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that employees" shall have the burden of proof as to issues of jurisdiction". OEA Rule 629.1 provides that the burden must be met by a "preponderance of the evidence" which is defined that 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".

It is Employee's position that she complied with the provision that required her to contact Mr. Bradford if she was going to be absent. If she did, then she did not abandon her position. Employee's testimony was supported by both of her witnesses. However, given the fact that these witnesses were her sisters, and that Employee and her sisters had strong motivation to maintain this position, the Administrative Judge assessed the credibility of these witnesses very carefully. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985). Although Mr. Bradford did not testify, DCPS took the position that Mr. Bradford had not reported contact from Employee to any of its witnesses. While DCPS seems to imply that this means Employee did not in fact call in, the Administrative Judge does not reach this conclusion. The record does not contain any written or verbal statement from Mr. Bradford on whether or not Employee telephoned him regarding her absences. This is a critical issue. In resolving issues of credibility, the Administrative Judge considered the demeanor of the witness, the character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). These "first-hand" observations are critical in cases, such as this, where removal is at issue. This Administrative Judge has many years of experience observing and assessing witnesses. Based on these criteria, the Administrative Judge concluded that Employee and her sisters to be credible witnesses. She further concluded that Employee did telephone Mr. Bradford, as directed, to advise him of her absences due to illness.

There is no evidence that Employee resigned from her position, voluntarily or involuntarily.<sup>2</sup> Employee met her burden of proof that she complied with the requirement of the letter October 18, 2007 that she advise Mr. Bradford of her absences. She also met her burden of proof that she was in

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<sup>2</sup> Since Employee did not challenge 5 DCMR 1020.6 and given the outcome of this matter, the Administrative Judge did not address that provision and this Decision should not be interpreted as acceptance of that provision.

ill health during the pertinent time period. Since Employee did not resign from her position, Agency's action must be deemed a constructive discharge. *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg 1587 (2000). If Agency decides to remove Employee from her position, it must initiate an adverse action and comply applicable laws, rules and regulations in so doing.

ORDER

It is hereby

ORDERED:

1. Agency's removal of Employee from her position is reversed.
2. Agency is directed to reinstate Employee, issue her the back pay to which she is entitled and restore any benefits she lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Initial Decision.
3. Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Initial Decision.

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge