

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ALFRED GURLEY)	OEA Matter No. 1601-0008-05R11
Employee)	
)	Date of Issuance: March 20, 2012
v.)	
)	Joseph E. Lim, Esq.
)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS)	
Agency)	
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Harriet Segar, Esq., Agency Representative		
Barbara Hutchinson, Esq., Employee Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 24, 2004, Employee, an Investigator with the District of Columbia Public Schools, filed a petition for appeal from Agency’s final decision separating him from Government service due to inexcusable neglect of duty, insubordination, and absence without leave.

Despite a January 14, 2005 letter to Agency’s Superintendent from this Office of Employee Appeals’ (OEA) Executive Director asking Agency to reply to Employee’s petition pursuant to OEA Rule 608.2, 46 D.C. Reg. 9297, 9302 (1999), Agency did not submit its Answer by the February 15, 2005 deadline. In a March 21, 2005, Initial Decision (I.D.), I held that Agency’s failure to submit its Answer constitutes a failure to defend its action separating Employee. Thus I reversed Agency’s action and ordered Agency to restore Employee to his position of record or a comparable position with all back pay and benefits due him. Agency appealed the decision but the Board upheld the I.D. in *Gurley v. District of Columbia Public Schools*, OEA Matter No. 1601-0008-05R11, *Opinion and Order on Petition for Review*, (April 14, 2008). The decision became final five business days after issuance as per OEA Rule 633.3.

On August 22, 2008, Employee filed a motion for compliance, complaining that Agency had not reversed its removal action nor given him his back pay and benefits. In its October 13, 2008 response to my Show Cause Order, Agency admitted that it had not complied with the ID but that they were working on it. On December 2, 2008, I received Employee’s 2nd Motion to Enforce Decision, complaining that Agency still has not complied with the ID within its own requested deadline. In its December 31, 2008, response, Agency stated that Employee had resigned from his former position effective July 30, 2008, but admitted that they still had not yet paid Employee’s backpay. I then issued an Addendum Decision on Compliance on December

31, 2008, certifying the compliance matter to this Office's General Counsel.

On June 11, 2009, Employee applied to the Superior Court of the District of Columbia for enforcement of this Office's final decision. On May 16, 2011, the Court remanded the matter back to this Office to make factual findings on the issues of whether Employee voluntarily resigned his position and the extent to which overtime should be factored into any backpay owed.

The matter was reassigned to me on November 4, 2011. I held a status conference on November 14, 2011, and ordered the parties to submit a legal brief on the issues. The record is closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUES

1. Whether Employee resigned his position.
2. If so, what, if any, should be his backpay.

FINDINGS OF FACT

The following relevant facts are uncontroverted:

1. Employee was an Investigator, EG 11, with the Agency's Division of Security.
2. On October 12, 2004, a Notice of Termination was hand delivered to Employee informing him that his position was being terminated effective October 26, 2004, for 5 DCMR §1401.2 (d) Willful nonperformance, or inexcusable neglect of duty; (e) Insubordination, and (s) Other failure of good behavior during duty hours which is of such a nature that it causes discredit to the employee's agency or employment.
3. In a March 21, 2005, Initial Decision, I reversed Agency's action for failure to defend and ordered Agency to restore Employee to his position of record or a comparable position with all back pay and benefits due him.
4. After the I.D. was upheld by the OEA Board on April 14, 2008, Employee submitted a Motion for Compliance on August 22, 2008. I certified the compliance matter to this Office's General Counsel on December 31, 2008.
5. On June 11, 2009, Employee applied to the Superior Court of the District of Columbia for enforcement of this Office's final decision.
6. On July 27, 2009, Agency issued a check for Employee's backpay calculated pursuant to District Personnel Manual (DPM) 1149.14.
7. Sometime around July 29, 2009, Employee rejected the check, asserting that it was insufficient.
8. On July 30, 2008, Employee resigned effective July 25, 2008. (See Employee's signed voluntary resignation letter dated July 30, 2008.)
9. On September 8, 2008, Employee attempted to rescind his July 30, 2008 letter of resignation. (See Employee's letter to Harriet Segar dated September 8, 2008.)

10. Based on Employee's resignation letter, Agency processed Employee's resignation effective July 25, 2008. (See Employee's personnel action form dated September 9, 2008.
11. On March 9, 2010, this Office issued a General Counsel's Order Closing Matter. In it, the then-General Counsel Sheila Barfield concluded that as Agency has paid Employee the amount of back pay and benefits due to Employee based on calculations performed by the District of Columbia Office of Pay and Retirement Services, the matter of compliance is now closed. The Counsel concluded that Agency has indeed reimbursed Employee for the time period from October 26, 2004, (the date of Employee's termination) to the effective date of Employee's resignation on July 25, 2008.

Positions of the Parties

Agency asserts that it has fully complied with this Office's compliance order when it properly calculated and paid out the backpay due Employee based on District personnel regulations up to the effective date of Employee's resignation. Agency also asserts that it had lawfully processed Employee's voluntary resignation and thus its obligation to pay backpay terminated on the effective date of Employee's resignation.

Employee argues that because his voluntary resignation did not comply with the DCMR §1020.1, (which requires that the resignation must be submitted in writing at least ten (10) working days before the effective date of the resignation), then his resignation should not have been processed by Agency. He also argues that because he attempted to rescind his resignation before Agency processed it, then he did not actually resign.

In the alternative, Employee argues that his resignation was involuntary due to Agency's coercion, undue pressure, or withholding of information.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

1. Whether Employee resigned his position.

There is a presumption that Employee's decision to resign is voluntary. *Christie v. United States*, 518 F.2d 584 (Cl. Ct. 1975). The presumption, however, can be rebutted. If, for example, Employee established that his decision to resign was a result of coercion or erroneous information deliberately provided by Agency, the resignation could be considered a constructive discharge over which this Office has jurisdiction. *See, e.g., Dunham v. District of Columbia Public Schools*. OEA Matter No. 2401-0291-96, *Opinion and Order on Petition for Review*, (September 28, 2000)_____ D.C. Reg. 1244_____.

Employee makes several contradictory and convoluted arguments to contend that his resignation was not voluntary. First, he contended that his resignation was obtained under duress and thus was not voluntary. However, Employee's basis for his contention that Agency supposedly misled or coerced him into resigning was that Agency failed to pay him his backpay until after Employee filed his motion for enforcement. He also makes a convoluted argument that because Agency allegedly used his improper resignation to try to force a settlement, then his

resignation was involuntary.

Even assuming for the sake of argument that Employee's allegations are true, none of them would show that Agency coerced or misled Employee into resigning. All of his arguments bespeak of Agency's alleged actions *after* he had submitted his letter of resignation. (Emphasis provided.) Thus, Agency could not have coerced or misled Employee to resign.

Second, Employee also attempts to use *his own violation* of DCMR §1020.1 to contend that his resignation was involuntary. (Emphasis provided.) That he failed to submit his written resignation letter at least ten (10) working days before the effective date of the resignation does not prove that his resignation was involuntary.

Third, Employee argues that because he attempted to rescind his resignation before Agency processed his resignation, then he should be allowed to act as if he never submitted his resignation. Unfortunately, Employee cannot cite any statute or regulation that Agency *must* allow him to rescind his resignation after it was submitted. The Court of Appeals has stated that "there appears to be no legal basis for a claim that [an employer] has a duty to reinstate an employee who voluntarily resigns." *Watson v. District of Columbia Water and Sewer Authority*, 923 A.2d 903, (May 17, 2007) at 906 n.8. The Court of Appeals also stated in *Wright v. District of Columbia Dep't of Employment Servs.*, 560 A.2d 509, 513 (D.C.1989), that "once an employee voluntarily resigns from her job, the employer's decision not to accept a subsequent withdrawal of that resignation does not transform the employee's act into an involuntary one."

Lastly, Employee conveniently omits the other sections of DCMR §1020 unfavorable to his arguments. For instance, DCMR §1020.4 clearly states, "A resignation shall be binding on an employee immediately after submission." DCMR §1020.5 further states, "An employee may reconsider his or her resignation and, upon approval of the Director of Personnel, may withdraw or postpone the resignation at any time prior to the effective date." There is no allegation that the Director of Personnel ever approved Employee's attempt to withdraw his resignation. Lastly, DCMR §1020.6 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 does not assert that he ever returned to work after he submitted his letter of resignation.

In conclusion, Employee offered no factual or legal basis that would support the conclusion that his resignation was involuntary or that it was caused by deliberate misinformation provided to him by Agency. *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995). Employee did not establish that a reasonable person would have been misled by Agency's statements into resigning. *Covington v. Department of Health and Human Services*, 710 F.2d 1572 (Fed. Cir. 1982). Employee did not meet his burden of proof on this issue.

I therefore find that Employee voluntarily resigned his position.

2. If so, what, if any, should be his backpay.

Because I find that Employee voluntarily resigned effective July 25, 2008, I also find that

Agency was legally obligated to pay Employee his backpay only from October 26, 2004, (the date of Employee's termination) to the effective date of Employee's resignation on July 25, 2008. District personnel regulations DPM §1149.12 mandate that Agency should offset an employee's backpay with whatever he or she earned during the relevant time period.

ORDER

1. It is hereby ORDERED that Agency pay Employee all back pay and benefits covering the period from October 26, 2004, through July 25, 2008.
2. Agency file with this Office, within 30 calendar days of the day on which this decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge