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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0234-12
WANDA HOSTON,)	
Employee)	
)	Date of Issuance: October 9, 2014
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Trevor Alexander, Employee Representative		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 4, 2012, Wanda Houston filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District of Columbia Schools’ (“DCPS” or “Agency”) action of terminating her employment. Prior to being terminated, Employee worked as an ET-15 Social Worker. Employee was terminated because of her failure to secure a permanent position by mutual consent for the 2012-2013 school year, as required under the Washington Teacher’s Union Agreement. Employee’s termination was effective on August 10, 2012.

Agency initially moved to dismiss Employee’s appeal based on her statement that she had filed a grievance with her union prior to filing an appeal with OEA. Because issues of jurisdiction can be raised at any time during proceedings before this Office, the matter was assigned to Administrative Judge Lois Hochhauser for the sole purpose of addressing Agency’s first jurisdictional argument. On March 15, 2013, Judge Hochhauser directed Agency to withdraw its motion to dismiss or show good cause as to why the motion should not be dismissed. Agency did not file a proper response to the order.¹ Therefore, on May 3, 2013, OEA

¹ Judge Hochhauser held that Agency’s email response was not a formal filing.

issued an Order finding that Agency's motion to dismiss was denied. The case was subsequently assigned to the Undersigned in December of 2013 to adjudicate this matter on its merits.

On December 11, 2013, an Order scheduling a Prehearing Conference was issued for the purpose of assessing the parties' arguments. Due to scheduling conflicts and Employee's illness, the conference was required to be rescheduled. Thus, orders were issued on February 12, 2014, March 4, 2014, and May 8, 2014. On June 19, 2014, Employee's attorney submitted a Motion to Withdraw Representation. The withdrawal stated that Trevor Alexander would be representing Employee in further proceedings before this Office. On June 27, 2014, Mr. Alexander submitted a Designation of Employee Representative Form.

On August 29, 2014, Agency filed a Motion to Dismiss, asserting that Employee elected to retire. On September 8, 2014, I issued an order directing Employee to submit a written brief, together with copies of cited statutes, regulations, or cases on whether this appeal should be dismissed for lack of jurisdiction because Employee elected to retire in lieu of being terminated. Employee submitted a response on September 18, 2014. After reviewing the record, the Undersigned has determined that there are no material issues of fact that warrant an evidentiary hearing. The record is therefore closed.²

JURISDICTION

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

ISSUE

Whether OEA has jurisdiction over Employee's appeal.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

“An employee may appeal 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....”

Thus, §101(d) restricted this Office's jurisdiction to employee appeals from the following personnel actions only: a performance rating that results in removal; a final agency decision affecting an adverse action for cause that results in removal, a reduction in grade, a suspension of 10 days or more, or a reduction-in-force.

² On October 26, 2012, Employee submitted a motion to dismiss the case based on Agency's failure to file a timely answer to the Petition for Appeal. Employee did not raise this issue in any subsequent proceedings before this Office, and the Undersigned therefore denies Employee's motion.

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.

This Office has no authority to review issues beyond its jurisdiction.³ Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.⁴ 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 constructive discharge.⁵ 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.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, *Christie v. United States*.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

³ See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

⁴ 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).

⁵ 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).

⁶ *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975).

⁷ 518 F.2d 584 (Ct. Cl. 1975).

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

It is incumbent on the employee; therefore, to present sufficient evidence to prove that his or her resignation or retirement was involuntary. Here, Agency has provided this Office with a copy of Employee's Notification of Personnel Action Form 50 (SF-50) in support of its contention that Employee voluntarily retired. The SF-50 reflects an effective retirement date of August 10, 2012. The 'Remarks' section of the form indicates that Employee elected to retire on Discontinued Service Retirement. Moreover, I find no *credible* evidence of misrepresentation or deceit on the part of Agency in procuring Employee's retirement. There is also no evidence in the record to support a finding that Agency misinformed Employee about her option to retire. While Employee was undoubtedly faced with a difficult choice in the face of financial hardship, this tribunal is unpersuaded that her choice to retire was involuntary. Nonetheless, the Undersigned most certainly recognizes and commends Employee for her countless years dedicated to serving DCPS in an effort to educate our community's youth.

Employee has failed to address the jurisdictional issues concerning her retirement status or provide any credible evidence that her retirement was involuntary, despite being provided an opportunity to address this issue. Further, even if the record reflected that Employee submitted her retirement application after the effective date of her termination, this Office lacks jurisdiction over any voluntary retirement, irrespective of the application or retirement effective date.⁹

Even if the Undersigned were to find that OEA has jurisdiction over this matter, it should be noted that Articles 4.5.5.1 through 4.5.5.3.3.5 of the Collective Bargaining Agreement ("CBA") between the Washington Teachers Union ("WTU") and the District of Columbia

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

⁹ Employee's request for mediation is hereby denied, as OEA lacks jurisdiction to adjudicate the merits of her arguments.

School System governs the instant appeal. According to Agency, in June of 2011, Employee, who was a member of the WTU, became an “excessed” Teacher as a result of a process called “equalization.” Equalization is a tool utilized by DCPS which seeks to align staffing levels with the student enrollment at each school. Employee was informed that pursuant to the CBA, she had the option to remain a temporary DCPS employee for an additional year after being excessed. Agency submits that Employee’s temporary assignment ended at the end of the 2011-2012 school year; however, she was unable to secure a mutual-consent placement on or before June 20, 2012 in order to continue employment with DCPS. Employee’s failure to secure a position for the 2012-2013 school year, is a violation of the CBA between DCPS and the WTU. Accordingly, I find no evidence in the record to demonstrate that DCPS violated the terms of the CBA.

Based on the foregoing, I find that Employee’s retirement was voluntary. Further, I conclude that Employee has not met her jurisdictional burden of proof and that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

SOMMER J MURPHY, ESQ
ADMINISTRATIVE JUDGE