THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matters of:	)	
	)	
SHARON A. BARTEE,	)	OEA Matter No. 1601-0036-09
HELEN BUTLER,	)	OEA Matter No. 1601-0035-09
LAVERNE CRAWFORD,	)	OEA Matter No. 1601-0045-09
KATIE DAVENPORT,	)	OEA Matter No. 1601-0040-09
MARY SHORT DAVIS,	)	OEA Matter No. 1601-0039-09
PATRICIA MONTEGUT,	)	OEA Matter No. 1601-0037-09
THOMASINA STARKE,	)	OEA Matter No. 1601-0038-09
THOMASINA STARKE,	)	OEA Matter No. 1601-0086-09
ROY ROBINSON,	)	OEA Matter No. 1601-0034-09
Employees,	)	
	)	
v.	)	Date of Issuance: October 2, 2009
	)	
DISTRICT OF COLUMBIA	)	
OFFICE OF TAX AND	)	
REVENUE,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Kenneth D. Bynum, Esq., and Ronald Dixon, Esq., Employees Representatives
Clarene P. Martin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 5, 2008, Employees Sharon Bartee, Katie Davenport, Roy Robinson, Thomasina Starke[1], Patricia Montegut, Mary Davis, Helen Butler, and Laverne Crawford (hereinafter "Employees") filed their petitions for appeal with the Office of Employee Appeals (hereinafter "OEA" or "the Office") contesting their removals from service from the District of Columbia Office of Tax and Revenue (hereinafter "OTR" or "the Agency"). On February 9, 2009, Thomasina Starke filed another petition for appeal

[1] Ms. Starke filed her petition for appeal in OEA Matter Number 1601-0038-09 only on this date.

in OEA Matter Number 1601-0086-09.

I was assigned these matters *en masse* on or about June 1, 2009, with the exception of Thomasina Starke, OEA Matter Number 1601-0086-09, which was assigned to the undersigned on or about July 6, 2009. I convened a Prehearing Conference on July 2, 2009, during which I noted that there existed a threshold question regarding the jurisdiction of this Office over these matters. It was also during this conference that Employee Thomasina Starke, through counsel, requested that OEA Matter Number 1601-0086-09 be joined with the others. As a result of this conference, I issued a written order dated July 6, 2009, wherein I joined the above-captioned matters pursuant to OEA Rule 612.2, 46 D.C. Reg. 9309 (1999). As part of said order, I also required the parties to address the jurisdictional questions raised during the prehearing conference in a written brief. The parties were advised that "if any or all of the above named Employees are unable to establish jurisdiction as part of the briefing schedule that I have implemented, I shall then issue an Initial Decision that finds as much." I have since received both parties' respective submissions relative to the July 6, 2009, order. After considering the arguments contained therein, juxtaposed with the documents of record, as well as my own knowledge of the applicable laws, rules, and regulations pertaining to matters such as these, I have determined that an evidentiary hearing is unwarranted. The record is now closed.

ISSUE

Whether these matters should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> 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 629.2, id. states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been

established.

FINDING OF FACTS, ANALYSIS AND CONCLUSION

Employees Position

On or around late afternoon Thursday, October 16, 2008, Employees were notified by management that they were being placed on administrative leave with pay and that they had the option of either retiring or resigning in lieu of being terminated based upon an allegation that they at some point during their tenure with the Agency accepted monies or other gifts from Harriet Walters[2]. Employees were then instructed to turn in all government issued identification, keys, etc. and instructed to promptly leave the Agency's premises. Employees were instructed by the Agency that if Employees chose to retire or resign, they had until Monday October 20, 2008, in which to alert Agency of their choice. Employees further contend that they were not afforded an adequate opportunity to consider the options before them or to even consult about the ramification(s), financial or otherwise, of accepting Agency's option of retirement or resignation. All of the Employees, with the exception of Sharon Bartee and Thomasina Starke, chose to either retire or resign in lieu of being terminated. Employees Bartee and Starke were removed from service. Employees further contend that Agency's action of constructively discharging them from service violated their rights guaranteed by the United States Constitution, the District of Columbia Constitution, and applicable statute and case law. They further contend that in spite of their opting to retire or resign, which would, in of itself, under normal circumstances, void an employee's appeal rights to the OEA, that Agency's actions in these matters amount to coercion and consequently allow them to appeal their dismissals to this Office. Finally, Employees argue that, given the breadth, import and nature of the violations as alleged, this Office should exercise jurisdiction over these matters.

Agency's Position

Agency does not refute, in any meaningful way, Employees rendition of events relative to October 16, 2008, through October 20, 2008. Agency however notes that the OEA lacks jurisdiction to hear Employees appeals in these matters. The following lengthy excerpt from the Agency Post-Prehearing Conference Brief on Jurisdiction adequately defines Agency's position in these matters:

> For the reasons discussed below, the OEA does not have statutory authority to assert jurisdiction in personnel matters involving the Office of the Chief Financial Officer. Accordingly, the Petitioners do not have the right to appeal their removals to OEA.
>
> It is recognized that OEA has appellate jurisdiction over certain

[2] Harriet Walters is notorious for perpetrating the largest tax fraud in the history of the District of Columbia government.

employee claims against the District of Columbia government arising under the Comprehensive Merit Personnel Act, (See: D.C. Official Code 2-606.03 and Grillo v. District of Columbia, 731 A.2d 384). However, the Office of the Chief Financial Officer is expressly exempt from the Comprehensive Merit Personnel Act (hereafter "CMPA").

Most recently, Congress enacted permanent legislation amending the District of Columbia Home Rule Act making any OCFO employee an at-will employee and the appointment of said employee at the pleasure of and under the direction of the Chief Financial Officer. Specifically, the enacted language states that employees appointed by the Chief Financial Officer "shall be considered at-will employees not covered by the District of Columbia Merit Personnel Act of 1978." Section 202 of the "2005 District of Columbia Omnibus Authorization Act approved October 16, 2006 (P.L. 109-356) states in pertinent part:

> " . . . not withstanding any provision of law or regulation (including any law or regulation providing for collective bargaining or the enforcement of any collective bargaining agreement, employees of the Office of the Chief Financial Officer of the District of Columbia …shall be appointed by, shall serve at the pleasure of, and shall act under the direction and control of the Chief Financial Officer of the District of Columbia, and shall be considered at-will employees not covered by the District of Columbia Merit Personnel Act of 1978, except that nothing in this section may be construed to prohibit the Chief Financial Officer from entering into a collective bargaining agreement governing such employees and personnel or to prohibit the enforcement of such an agreement as entered into by the Chief Financial Officer."

See the reiteration of the Congressional intent in D.C. Official Code 1-204.25(a) wherein it specifically states that OCFO employees "shall be considered at-will employees not covered by Chapter 6 of the title."

This recent legislation gives permanency to what had been heretofore yearly legislative measures that OEA has previously considered in making its determination that employees of the OCFO are not entitled to the notice and just cause provisions of the

CMPA based upon, at that time, an implied repeal of those provisions under Section 152(a) of the 1996 District of Columbia Appropriations Act ("DCAA") and subsequent Congressional legislation.[3] See: Initial Decision, *Leonard et al. v. Office of the Chief Financial Officer,* OEA Matter No. 1601-0241-96 (February 5, 1997) (Judge Hollis) (holding that the CFO held legal authority to terminate employees without cause and opportunity to respond).[4] Judge Hollis' decision was upheld on appeal before the Superior Court of the District of Columbia and the Court of Appeals for the District of Columbia in *Leonard v. District of Columbia*, 794 A.2d 618, 626, 2002. Section 152 effectively removed employees of the OCFO from any protection afforded by the CMPA and these employees can be terminated without cause.[5]

Each of the Petitioners, in the instant cases, held an "at-will" status under P.L. Law 109-356 and served at the pleasure of the Chief Financial Officer (hereafter CFO). In accordance with P.L. 109-356 and controlling decisions of the OEA which are consistent with the decisions of the Court of Appeals for the District of Columbia, set forth above, the CFO has the legal authority to terminate any OCFO employee with or without cause and, except for employees covered by the collective bargaining agreement, without regard to the provisions of the CMPA[6] or any other law to the contrary.

In sum, it is well established that the CFO may terminate the employment of OCFO employees pursuant to the CFO's congressionally bestowed "at-will" authority, and that the U.S. Congress acted within the scope of its constitutional plenary

[3] The Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-102 (1996), as amended and extended, (hereinafter "OCRA Act") at §152, expands the authority of the chief financial officer (CFO) of the District of Columbia by transferring all budget, accounting, and financial management personnel in the executive branch of the District government from the Mayor's authority to the CFO's authority. It also provides, at § 152(a), that employees in these financial offices shall be appointed by, and shall serve at the pleasure of the CFO.

[4] Judge Hollis issued identical decisions on February 13 and 24, 1997 in *Gaines v. CFO*, OEA Matter No. 1601-0265-96, and *D. Jackson v. CFO*, OEA Matter No. 1601-0242-96.

[5] In the *Leonard* case, appellants sued the District of Columbia for unlawful termination, alleging that they were career civil service employees who had been terminated from their employment without cause, prior notice or due process and in violation of the CMPA. *Leonard* held that the OCRA Act "implicitly repealed appellants' career service status and converted them to "at-will" employees subject to discharge without the benefit of the procedures specified in the CMPA [Act]……., thereby divesting employees of any pre-termination procedural rights or rights to be terminated only for cause under the CMPA".

[6] The AFSCME, District Council 20, AFL-CIO collective bargaining agreement with the District and which the OCFO is a signatory requires "cause" for any adverse action against a union employee.

> authority over the District of Columbia in permanently removing OCFO personnel from the protections of the CMPA. *See Alexis v. Office of the Chief Financial Officer*, OEA Matter Nos. 1601-0120-97 *et.seq.*, *Opinion and Order on Petition for Review* (October 10, 1997) (recognizing Congressional authority to revoke statutory rights on a prospective basis by legislative enactment).
>
> Employer's Post-Prehearing Conference Brief on Jurisdiction at 1 – 3.

Upon thoughtful consideration of the parties' respective positions, I find that Agency's analysis of the applicable laws in these matters is thorough and accurate. After further review of the breadth of specificity of Agency's argument as encapsulated above, I note that I could not have stated it better myself. Accordingly, I hereby adopt Agency's aforementioned argument as my own. I find that at the time of their discharge, Employees served at the pleasure of the Chief Financial Officer. Whatever rights the above-captioned Employees may have, they are not free to exercise said rights before this tribunal. I further find that this Office lacks the authority to exercise jurisdiction over the Employees collective petitions for appeal.

Thomasina Starke, OEA Matter Number 1601-0038-09

The Employees Final Brief dated July 16, 2009, states the following on page 15 at footnote 3: "Ms. Starke withdraws [her] appeal in OEA Matter No. 1601-0038-09 in lieu of the consolidated case [in] OEA Matter No. 1601-0086-09."

Accordingly, with respect to OEA Matter No. 1601-0038-09 only, I find that this matter should be dismissed, with prejudice, because Employee Starke voluntarily withdrew her petition for appeal in this matter.

This Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ ( ). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ D.C. Reg. __ ( ); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ ( ); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ ( ).

Because the Employees have failed to meet their burden of proof relative to the jurisdiction of this Office, I lack the authority to address their additional jurisdiction related argument regarding whether they were constructively discharged from their positions and the implications that arise as result of *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975), (holding that a retirement where the decision to retire was involuntary, is treated as a constructive removal and may be appealed to this Office); and

D.C. vs. Stanley, 942 A2d 1172, 1175-1176 (2007), (holding that an employee's retirement or resignation may be involuntary if it is induced by the employer's application of duress, or coercion, time pressure or the misrepresentation or withholding of material information). Such analysis is reserved for matters that OEA jurisdiction may otherwise be exercised but for allegations that an employee's retirement or resignation is obtained through Agency's acts of duress, coercion, misrepresentation, or undue time pressure in which to make a life altering decision. For the reasons outlined above, I find that this is not the case in the instant matters. Therefore I am bereft of the authority to properly address the implications arising from *Christie*, *Stanley* and their progeny.

Based on the foregoing, I conclude that the Employees have failed to establish the jurisdiction of this Office in the instant matters and I must therefore dismiss their matters for lack of jurisdiction.[7]

ORDER

It is hereby ORDERED that these matters be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, Esq.
Administrative Judge

[7] Since the Employees failed to establish the jurisdiction of this Office in this matter, I am unable to address the factual merits (if any) of the Employees petition for appeal. I am also unable to address any other arguments that the Employees raised in the prosecution of same.