

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Dawn Clemens, Employee)	Matter No. J-0004-18
)	
v.)	Date of Issuance: January 16, 2018
)	
D.C. Public Schools, Agency)	Senior Administrative Judge Joseph E. Lim, Esq.
)	
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Nicole Dillard, Esq., Agency Representative		
Alan B. Kelly, Esq., Employee Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 10, 2017, Dawn Clemens (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”), challenging the D.C. Public Schools’s (“Agency” or “DCPS”) decision to accept her resignation from her position as a Middle School Principal effective July 1, 2017. This matter was assigned to the undersigned on October 23, 2017.

Agency filed a Motion to Dismiss for Lack of Jurisdiction on October 27, 2017. An Order on Jurisdiction was issued on October 31, 2017, which required Employee to submit a brief addressing why she believed this Office may exercise jurisdiction over her appeal by November 9, 2017. When Employee failed to do so, I issued an Order for Good Cause Statement for her failure to comply. Employee submitted her statement of good cause on December 4, 2017, and her jurisdiction briefs on December 18, 2017, and December 22, 2017. Agency submitted its response on December 21, 2017. The record is now closed.

JURISDICTION

As discussed below, the jurisdiction of this Office has not been established.

ISSUE

Whether this Office has jurisdiction over Employee’s appeal.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.¹ 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.”²

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.³

UNCONTROVERTED FACTS⁴

1. Employee was employed by Agency as a School Principal of Stuart Hobson Middle School on a term appointment for the 2015-2016 school year.
2. On May 19, 2016, Agency reappointed Employee as a School Principal of Stuart Hobson Middle School for the 2016-2017 school year on a three-year term appointment beginning June 27, 2016, until the completion of the 2018-2019 school year.⁵
3. Employee signed her acceptance of the term appointment on May 31, 2016.⁶
4. According to the Notice of Reappointment and Three-year Appointment Offer and the attached Frequently Asked Questions, “Three-year appointments will be contingent upon one’s continued success as a principal. If a principal’s Leadership Framework average falls below 3.00, the terms of the appointment will be revisited. In addition, if a principal engages in misconduct, DCPS retains the right to impose discipline, up to and including separation from service.”⁷
5. IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2016-2017 school years to rate the performance of school-based personnel.
6. For the 2016-2017 school year, Employee received an IMPACT score of 268, which was an Ineffective final rating.⁸
7. On May 15, 2017, Employee submitted a resignation request from her position with a requested effective date of July 1, 2017.⁹
8. Pursuant to the Collective Bargaining Agreement between the Council of School Officers (“CSO”) and DCPS, Principals and Assistant Principals who do not intend to continue

¹ 59 DCR 2129 (March 16, 2012).

² *Id.*

³ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

⁴ Derived from the parties’ representations of facts and uncontested documents and exhibits of record.

⁵ Agency’s Answer to Employee’s Petition for Appeal, Exhibit 2.

⁶ *Id.*

⁷ *Id.*

⁸ Agency’s Answer to Employee’s Petition for Appeal, Exhibit 3.

⁹ Agency’s Answer to Employee’s Petition for Appeal, Exhibit 1.

employment with DCPS the following year, are required to submit a Declaration of Intent to Not Return (“DINR”) application no later than March 15th annually.

9. CSO members who do not submit the DINR application by March 15th, but voluntarily separate from DCPS during the 2016-2017 school year or at any point in the 2017-2018 school year, are required to pay a \$3,000 penalty fine to DCPS. Employee was a CSO member.¹⁰
10. Employee requested, and was granted, a waiver of the \$3,000 penalty fine for her failure to submit a timely DINR application.¹¹
11. On October 10, 2017, Employee filed a Petition for Appeal with OEA, challenging Agency’s decision to accept her resignation from her position as a Middle School Principal.

ANALYSIS AND CONCLUSIONS OF LAW

Chapter 6, Title 6 of the DCMR, the procedural rules of the Office of the Employee Appeals, states: “604.2 An appeal filed pursuant to § 604.1 must be filed within thirty (30) calendar days of the effective date of the appealed agency action.” 6 DCMR § 604.2 (2012).

In Agency’s Motion to Dismiss, it posits that based on Chapter 6, Title 6 of the DCMR, OEA Rule 604.2, Employee had thirty (30) calendar days of the effective date of the appealed agency action. Since the effective date of her resignation was July 1, 2017, Employee had only until July 31, 2017, to file an appeal with OEA. That Employee waited until October 10, 2017, more than two months past the deadline to file an appeal, makes Employee’s appeal untimely, and thus, OEA has no jurisdiction to hear her appeal.

Further, Agency points out that Chapter 6, Title 6 of the DCMR, OEA Rule 604.1 further states:

Except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq.* (2006 Repl. & 2011 Supp.)) or §604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A suspension for ten (10) days or more;

¹⁰ *Id.*

¹¹ *Id.*

- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.

Thus, Agency argues, Employee's separation from the District government was not due to an adverse action over which OEA has jurisdiction, but a voluntary resignation over which OEA had no jurisdiction.

In Employee's response to the Order on Jurisdiction, submitted on December 18 and 22, 2017, she argues that her resignation was not a voluntary action but a constructive discharge by Agency.¹² Employee relies on *Pennsylvania State Police v. Nancy Drew Suders*¹³ to prove her claim of constructive discharge.

In *Pennsylvania State Police*, the Supreme Court of the United States held that for the atmosphere of sexual harassment or hostility to be actionable under Title VII of the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq., the offending behavior must be sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. The constructive discharge at issue must stem from, and be regarded as, an aggravated case of sexual harassment or hostile work environment.

In *Pennsylvania State Police*, Nancy Suders claimed that her supervisors' sexual harassment created a hostile work environment so intolerable that a reasonable person would have felt compelled to resign. For months throughout her time with the Pennsylvania State Police, Suders' three male supervisors subjected her to a continuous barrage of sexual remarks and gestures involving oral sex. Suders approached her employer's Equal Employment Opportunity Officer ("EEOC") twice but failed to follow through on her complaint when she felt the EEOC's response was insensitive and unhelpful. Suders finally resigned when her supervisors arrested her for stealing the results of her computer skills exam that Suders said belied her supervisors' contention that she failed the exam.

In the instant matter, Employee claims that she suffered under a similar atmosphere of a hostile work environment when her supervisor instructed teachers and parents in her school to call her with regard to any concerns they may have with Employee's performance and later informed Employee that she would not be reappointed as school principal. In addition, Employee alleges that the DCPS Chief of Staff informed her that if she did not resign, she will receive a non-reappointment letter. Employee alleges that this created a work environment for her so hostile and intolerable that her resignation amounted to a constructive discharge.

However, even if we were to look at Employee's alleged facts in the light most favorable to her, the actions of school officials she alleges do not rise to the level of a hostile work environment so intolerable that a reasonable person would have felt compelled to resign. First, her supervisor had every right to solicit any concerns that teachers or parents may have regarding Employee's actions as a school principal. In addition, from the written terms of Employee's term

¹² See Employee's Response to Order on Jurisdiction (December 18, 2017, and December 22, 2017).

¹³ 542 U.S. 129 (2004).

appointment, it was explicitly stated that her reappointment or continued appointment was always subject to a satisfactory work performance. For the DCPS Chief of Staff to inform Employee that her unsatisfactory work performance, as evidenced by her Ineffective IMPACT rating, would result in a non-reappointment, is not an aggravated abusive act, but simply a fair statement of fact. Thus, Employee cannot plausibly allege she was a victim of a constructive discharge.

In conclusion, the undersigned finds that Employee's resignation was voluntary and not coerced. As noted in Chapter 6, Title 6 of the DCMR, OEA Rule 604, cited above, this Office has no jurisdiction over voluntary resignations. The fact that Employee asked for, and was granted, a waiver of the \$3,000 penalty fine for her failure to submit a DINR application, further bolsters the voluntary nature of her resignation.

Lastly, the District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative agency such as this Office is mandatory and jurisdictional in nature.¹⁴ The only exception that has been carved out by the OEA Board in excusing a late filing is when an agency has failed to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal."¹⁵ "A failure to file a notice of appeal within the required time period divests [OEA] of jurisdiction to consider the appeal."¹⁶

Here, Employee voluntarily resigned her position. Since Employee was not subjected to an adverse action by Agency, she was not entitled to a notice of appeal rights. Thus, I find that this Office lacks jurisdiction over this matter.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Motion to Dismiss for Lack of Jurisdiction is hereby **GRANTED**, and Employee's Petition for Appeal be **DISMISSED**.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

¹⁴ See *District of Columbia Public Employee Relations Board v. Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991)

¹⁵ See *Crockett v. D.C. Department of Public Works*, Initial Decision, OEA No. J-0064-12, April 23, 2012 (citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003)).

¹⁶ *Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944 (D.C. 1999).