BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

WAYNE KEVIN MARSHALL, Employee/Grievant, DEPARTMENT OF HEALTH AND SOCIAL SERVICES/DIVISION OF PUBLIC HEALTH, Employer/Respondent.	)	**DOCKET No. 11-11-530** **DECISION AND ORDER**

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:10 a.m. on January 17, 2013 at the Veterans Affairs Commission, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Dr. Jacqueline Jenkins, Paul R. Houck, and Victoria D. Cairns, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of Health and Social Services

Roy S. Shiels, Esquire
on behalf of the Employee/
Grievant Wayne Kevin Marshall

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Health and Social Services (DHSS) to dismiss the appeal of the employee/grievant, Wayne Kevin Marshall (Marshall), for lack of jurisdiction.

DHSS attached to its motion: Merit Appeal Form for Employees Dismissed, Demoted or Suspended (received by the Board on November 28, 2011) (Exh. A); Step Three Grievance Decision dated May 25, 2012 (Exh. B); and Letter dated July 3, 2012 from Mr. Shiels to the Board Administrator (Exh. C).

At the hearing, Marshall testified on his own behalf. DHSS was prepared to call its own witnesses, but the Board advised counsel that it did not need any further testimony.

FINDINGS OF FACT

DHSS hired Marshall as a Social Worker/Case Manager in 2004. Marshall worked in the Division of Public Health (DPH), Sussex County Health Unit.

In a performance review for the period December 13, 2010 to April 30, 2011, DPH documented Marshall's poor work performance identifying areas where his performance was unsatisfactory and needed improvement. In particular, the performance review cited his failure to correctly compute the federal poverty level for clients, an important factor to establish their eligibility for support and benefits; failure to maintain current client progress notes; and failure to submit timely billing sheets.

In May 2011, DPH placed Marshall on a performance improvement plan (PIP). During the five months the PIP was in effect (until October 17, 2011), and despite increased supervision,

counseling, and assistance with cases, Marshall did not improve his job performance.

According to Marshall, on the morning of October 27, 2011 his supervisor, Susan Ellis, asked him to attend a meeting at 3:00 p.m. that day with Anna Short, Clinic Manager, to discuss his weekly performance. According to Marshall, when he got to the meeting Ellis advised him that DPH intended to terminate him for poor job performance, but he could resign to preserve his employment opportunities.

According to Marshall, he was shocked by this "ultimatum" and tried to plead his case. Marshall believed that he had improved on all levels required by the PIP. During the meeting, Marshall called William Wharton in Labor Relations. According to Marshall, Wharton told him that, if he did not resign, DHSS would proceed with the termination process which could take about two weeks. Marshall then called and talked with a Human Resource representative (Tanika Thompson) to ask about health and life insurance benefits.

On October 27, 2011, Marshall sent a hand-written letter to Anna Short.

> It is with great distress that I write this note to you, a note to disclose my intention to resign my position as case manager.
>
> I still feel my performance has greatly improved during the past few months, but with the volume of weekly and daily audits and the subsequent findings from small to more significant ones I feel that I will have a very hard time defending myself against the sheer volume.
>
> I have enjoyed working with my clients and helping them make significant improvements in their lives.
>
> I resign my position as Senior Social Worker/Case Manager effectively immediately.

By letter dated October 27, 2011, Susan Ellis accepted Marshall's "resignation from your

position of Senior Social Worker Case Manager with the Sussex County Health Unit, effective immediately."

According to Marshall, he did not understand that, if he resigned, he would not be able to grieve under the Merit Rules. However, he acknowledged at the Step 3 hearing that a Human Resources representative told him that if he were dismissed for cause he could grieve his dismissal, but if he resigned he would not have any appeal rights.

At the hearing, Marshall testified that he knew he had a choice: he could resign, or he could contest his termination. According to Marshall, he made a deliberate decision to resign in order to preserve his employment opportunities because he was concerned about being able to support his family.

The Board finds as a matter of fact that Marshall voluntarily resigned his position as a Senior Social Work/Case Manager.

The Board finds as a matter of fact that Marshall did not resign due to coercion or duress.

The Board finds as a matter of fact that Marshall did not resign because DHSS misrepresented a material fact to him about his appeal rights.

CONCLUSIONS OF LAW

The Merit Statutes provide:

> **An employee in the classified service who has completed a probationary period of service may not, except for cause, be dismissed or demoted or suspended for more than 30 days in any 1 year. Within 30 days after any such dismissal, demotion or suspension, an employee may appeal to the Board for review thereof.**

29 *Del. C.* §5949(a).

Merit Rule 12. 9 provides:

> **Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file with the Director, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the Director's level, then the appeal shall continue at the MERB.**

The Board concludes as a matter of law that it does not have jurisdiction over Marshall's appeal because he was not dismissed but rather voluntarily resigned.

Marshall claims that DHSS "constructively discharged" him by leaving him no choice but to resign rather than face termination for poor job performance.

In *Lapinski v. Board of Education of the Brandywine School District*, 2004 WL 202900 (D. Del., Jan. 29, 2004), Thomas Lapinski resigned as principal of Mount Pleasant High School when the school district decided not to renew his employment contract. "In general, an employee's decision to resign or retire, even in the face of pending termination by his employer, is presumptively voluntary." 2004 WL 202900, at p. 3 (citing *Leheny v. City of Pittsburgh*, 183 F.3d 220, 227 (3rd Cir. 1998)).

"There are only two circumstances where a resignation is deemed involuntary: (1) when the employer forces the resignation or retirement by coercion or duress, or (2) when the employer obtains the resignation or retirement by deceiving or misrepresenting a material fact to the employee." *Lapinski*, 2004 WL 202900, at p.3 n.2 (citing *Leheny*, 183 F.3d at 228).

In *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), the Navy Department notified Ruth Christie of intent to discharge her for assaulting her supervisor. The installation where Christie worked was undergoing a reduction in force. The Navy extended the effective date of

her discharge to give her the opportunity to resign and apply for a discontinued service retirement.

The Navy rejected Christie's first letter of resignation because she stated she was tendering the letter under duress. Christie tendered a second letter of resignation free of protest – which the Navy accepted – and applied for discontinued service retirement.

Christie appealed to the Civil Service Commission claiming that her resignation was coerced. The Commission dismissed her appeal for lack of jurisdiction over a voluntary resignation and Christie appealed to the Court of Claims.

Christie "failed to show that her resignation was obtained by external coercion or duress. Duress is not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one." 518 F.2d at 587.

> While it is possible [Christie], herself, perceived no viable alternative but to tender her resignation, the record evidence [shows] that [she] chose to resign and accept the discontinued service retirement rather than challenge the validity of her proposed discharge for cause. The fact remains, [Christie] had a choice. She could stand pat and fight. She chose not to. Merely because [Christie] was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.

518 F.2d at 587.

"This court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause." *Id.* at 588. "Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation." *Id.* at 587. "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." *Id.* "Although

[Christie] has attempted to impugn the agency's motivation for proceeding with her proposed termination, [she] does not deny that the incident which formed the basis of the charge against her had taken place (although she does assert that the so-called assault was nothing more than an 'inadvertent touching')." 518 F.2d at 587. "Whether the charge could have been sustained had [Christie] chosen to appeal her discharge for cause is irrelevant." *Id.*

Christie also claimed that the Navy misrepresented the consequences of a discharge for her retirement/annuity rights. It is true "that a normally voluntary action is transformed into an involuntary one if obtained by agency misrepresentation." 518 F.2d at 588. However, [Christie] concedes that the alleged misrepresentations were corrected 'in later explanations of alternatives' before she submitted her disputed resignation." *Id.*

Marshall did not show that DPH knew or believed that his termination for poor job performance could not be substantiated. His supervisors had documented his unsatisfactory job performance and his performance had not improved over five months under the PIP.

There is no evidence in the record that DHSS coerced Marshall into resigning. Marshall may have had a difficult choice to make: "[He] could stand pat and fight. [He] chose not to. Merely because [Marshall] was faced with an inherently unpleasant situation in that [his] choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of [his] resignation." *Christie,* 518 F.2d at 587.

There is no evidence in the record that anyone at DHSS made a material misrepresentation which induced Marshall to resign.

The Board concludes as a matter of law that Marshall was not constructively discharged. He voluntarily resigned. The Board therefore does not have jurisdiction over Marshall's appeal.

ORDER

It is this **29th** of January, 2013, by a vote of 4-0, the Decision and Order of the Board to dismiss Marshall's appeal for lack of jurisdiction.

MARTHA K. AUSTIN, MERB Chairwoman

PAUL R. HOUCK, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

VICTORIA D. CAIRNS, MERB Member

I concur in the result of the decision because I agree that Marshall did not meet the legal standard for constructive discharge. I write this concurring opinion to express my concerns about how the agency presented a difficult choice to Marshall. Marshall went into the meeting on October 27, 2011 believing it was only his weekly performance review. His supervisors had already prepared a letter accepting his resignation, and told him that he had to decide on the spot. I believe that the agency should have given Marshall more time (even overnight) before having to make such a momentous decision.

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(c) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **January 29, 2013**

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