

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Administrative Assistant of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
TONY OLDS, JR.)	OEA Matter No. J-0021-05
Employee)	
)	Date of Issuance: June 7, 2005
v.)	
)	Lois Hochhauser, Esq.
D.C. FIRE AND EMERGENCY)	Administrative Judge
MEDICAL SERVICES DEPARTMENT))	
Agency)	

Tony Olds, Jr., Employee
Adrian H. Thompson, Agency Chief

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals (OEA) on February 2, 2005, challenging Agency's action of terminating his employment. Both the notice of termination and Employee's petition for appeal identified Employee as a "probationary" employee at the time of removal.

This matter was assigned to this Administrative Judge on or about February 9, 2005. On February 10, 2005, the Administrative Judge issued an Order notifying Employee that it appeared that the Office lacked jurisdiction because of his status as a probationary employee. He was advised that he had the burden of proof before this Office on the issue of jurisdiction. A copy of this Office's Rules was enclosed. Employee was directed to submit legal and factual arguments to support his position that this Office had jurisdiction of this appeal. He was also notified that his failure to respond could result in the dismissal of the petition without further notice. The parties were also advised that unless they were notified to the contrary, the record in this matter would close on March 1, 2005. The Order was sent to the address listed by

Employee on his petition for appeal. It was not returned to this office. Employee did not respond to the Order by filing any document or requesting an extension. The record therefore closed on March 1, 2005.

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this matter be dismissed?

ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. 9297 (1999) provides that employees have the burden of proof on issues of jurisdiction. Employee filed a petition for appeal with OEA challenging Agency's decision to remove him. It is undisputed that at the time the petition was filed, Employee was in a one-year probationary status. Employee lists "probationary" as his status in his petition. In its Letter of Termination, Agency lists his appointment date as April 18, 2004 and his removal date as September 24, 2004, some five months after his appointment.

An employee who is terminated during the one-year probationary period is an "at-will" employee, does not have a statutory right to be removed for cause, and therefore cannot utilize the adverse action procedures of the Comprehensive Merit Personnel Act, which includes appealing an adverse action to this Office. An appeal to this Office by an employee serving in a probationary status must therefore be dismissed for lack of jurisdiction. *See, e.g., Davis v. Lambert*, MPA No. 17-89, 119 DWLR 305 (1991); *Day v. Office of the People's Counsel*, OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (July 10, 1995), D.C. Reg. ____ (); *Employee v. Agency*, OEA Matter No. 1601-0057-83, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 6057 (1985); *Jones v. D.C. Lottery Board*, OEA Matter No. J-0231-89, *Opinion and Order on Petition for Review* (August 19, 1991), D.C. Reg. ____ (); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993), ____ D.C. Reg. ____ (); *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0314-94, *Opinion and Order on Petition for Review* (September 29, 1995), ____ D.C. Reg. ____ (); *Ramos-McCall v. D.C. Pretrial Services*, OEA Matter No. J-0197-93, *Opinion and Order on Petition for Review* (March 18, 1994), ____ D.C. Reg. ____ (); *Smith v. D.C. Public Schools*, OEA Matter No. J-0143-03 (June 1, 2005), ____ D.C. Reg. ____ (). Based on the above, the Administrative Judge concludes that Employee failed to meet his burden of proof on the issue of jurisdiction.

Finally, Employee was notified in the Order that the petition would be dismissed if he failed to respond or did not obtain a timely extension of time to respond. Employee did not respond and did not seek an extension. The Order was mailed to the address provided by Employee in the petition. The Order was not returned to the Office by the U.S. Postal Service. A petition for appeal may be dismissed with prejudice when a party fails to prosecute the appeal pursuant to OEA Rule 622.3, 46 D.C. Reg. at 9313. Failure to prosecute is determined on a case by case basis. This Office has consistently held that failure to respond to directives from this Office constitutes a failure to prosecute. *See, e.g., Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985). Employee did not respond to the Order issued by this Administrative Judge, despite the warning that failure to comply would result in the dismissal of this appeal. The undersigned concludes that Employee has failed to prosecute this appeal.

Based on these conclusions, the Administrative Judge concludes that the petition for appeal should be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:


LOIS HOCHHAUSER, Esq.
Administrative Judge