THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RANDY STEWART	)	OEA Matter No. 1601-0168-11
Employee	)	
	)	Date of Issuance: August 23, 2013
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Administrative Judge
Agency	)	
	)	

Randy Stewart, Employee
Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Randy Stewart, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 15, 2011, appealing the final decision of the District of Columbia Public Schools, Agency herein, to remove him from his position as Maintenance Worker, effective July 29, 2011. In the final Agency notice, dated July 15, 2011, Agency informed Employee that he could file an appeal with this Office or file a grievance pursuant to a collective bargaining agreement between Agency and his Union. In his petition, Employee stated that he filed a grievance with Teamsters Local 639, his exclusive bargaining representative, on July 18, 2011.

The matter was assigned to me on May 3, 2013. On July 9, 2013, I issued an Order advising Employee that the jurisdiction of this Office was at issue because D.C. Official Code § 1-616.52 provides that an employee can select only one method of appealing an adverse action, and that it appeared from his petition that he had filed a grievance pursuant to a collective bargaining agreement prior to filing his appeal with OEA. He was informed him that employees have the burden of proof on all issues of jurisdiction and directed to submit legal and/or factual arguments supporting his claim that this Office has jurisdiction to hear his appeal by July 26, 2013. I also informed him that his failure to respond to the Order could be considered as a failure to prosecute his appeal as well as concurrence that this Office lacks jurisdiction of this appeal. Finally, the parties were advised that the record would close on July 26, 2013, unless they were notified to the contrary.

The Order was sent to Employee at the address he listed as his mailing address in his petition by first class mail; postage prepaid, and was not returned by the U.S. Postal Service Employee did not respond to the Order and did not otherwise contact this Office. The record closed on July 26, 2013.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition for appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

This Office's jurisdiction is conferred upon it by law. It is governed in this matter by D.C. Official Code § 1-616.52 which provides in pertinent part the following:

> (d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter [providing appeal rights to OEA] for employees in a bargaining unit represented by a labor organization. . . .
>
> (e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, **but not both**. (emphasis added).
>
> (f) An employee shall be deemed to have exercised their *(sic)* option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever event occurs first**.(emphasis added).

Employee filed a grievance with his Union on July 18, 2011, almost a month before he filed the petition for appeal with OEA on August 15, 2011. In so doing, he chose to pursue his appeal through a negotiated grievance procedure. As stated in D.C. Official Code § 1-616.52(e), Employee is limited to one method of appealing an adverse action. The method chosen, pursuant to D.C. Official Code § 1-616.52(f), is the one initiated first. Employee was advised of both options in the final agency notice and notified that he could select only one option. He chose to grieve the matter through his Union before filing the petition with this Office. Therefore, this Office does not have authority to hear this matter if Employee first filed an appeal with his Union.

Pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), Employee has the burden of proof on issues of jurisdiction. Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, as 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". *See*, OEA Rule 604.1, 46 D.C.Reg. 9299 (1999). Employee was given the opportunity to meet this burden of proof, but did not do so. He did not submit any evidence or argument that would establish that he filed an appeal first with OEA or that there is any ground for accepting the petition under the circumstances. The Administrative Judge concludes that Employee did not meet his burden of proof on the issue of jurisdiction, and that the petition should be dismissed.

There is another basis to dismiss this petition. In accordance with OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. In this matter, Employee failed to respond to the July 9, 2013 Order which provided a deadline of July 26, 2013 for Employee to file a response. The Order notified Employee that failure to respond to the Order could result in the dismissal of his appeal for failure to prosecute. The Order was sent to Employee at the address he listed as his home address in his petition, by first class mail, postage prepaid, and was not returned by the U.S. Postal Service. It is presumed to have been received by Employee in a timely manner. Employee did not seek an extension of time to respond or otherwise contact the undersigned.

This Office considers an employee's failure to respond to an Order after being given a deadline for the submission as a failure to prosecute an appeal which can result in the dismissal of an appeal. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). In this matter, Employee failed to respond to an Order which contained a deadline for the submission. The Administrative Judge concludes that Employee's failure to respond to the Order constitutes a failure to prosecute his appeal. She further concludes that Employee's failure to prosecute this appeal constitutes an additional and independent basis for dismissing this matter.

ORDER

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

FOR THE OFFICE: LOIS HOCHHAUSER, ESQ.
Administrative Judge