THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOHN GOLDMAN	)	
Employee	)	OEA Matter No.J-0044-18
	)	
v.	)	Date of Issuance: August 20, 2018
	)	
DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD	)	Lois Hochhauser, Esq.
	)	Administrative Judge
Agency	)	
	)	

John Goldman., Employee, *Pro Se*
Lindsay Neinast, Esq. and Alison Davis, Esq.,
Agency Representatives

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

John Goldman, Employee, filed a petition with the District of Columbia Office of Employee Appeals (OEA) on April 27, 2018, appealing the decision of the District of Columbia Public Charter School Board, Agency, to terminate his employment, effective March 28, 2018. In his petition, Employee stated that he had served as a Senior Manager with Agency for about six months, but did not know the type of service or appointment he held. The matter was assigned to this Administrative Judge (AJ) on May 21, 2018.

Agency filed a Motion to Dismiss for Lack of Jurisdiction on June 1, 2018, arguing that this Office lacked jurisdiction to hear this appeal for reasons that are discussed below. The Certificate of Service attached to the pleading, stated that Agency mailed a copy of the submission to Employee at the address listed in the appeal, by first class mail, postage prepaid.

On June 14, 2018, the AJ issued an Order notifying Employee that the jurisdiction of this Office was at issue, based on the arguments raised by Agency in its Motion to Dismiss. Employee was reminded that employees have the burden of proof on all issues of jurisdiction. He was directed to file his response to Agency's Motion by July 9, 2018. The Order stated that Employee's failure to file a timely response could be deemed as concurrence with Agency's position or as a failure to prosecute, and if the latter, could result in the imposition of sanctions,

including dismissal of the petition. The Order also notified the parties that the record would close at 5:30 p.m. on July 9, 2018, unless they were advised to the contrary. Employee did not submit a response and did not contact the AJ or OEA to request an extension. The record therefore closed at 5:30 p.m. on July 9, 2018.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUES

Did Employee meet his burden of proving that this Office has jurisdiction of this matter? Should this petition be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue is one of jurisdiction. This Office's jurisdiction is conferred upon it by law Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), employees have the burden of proof on issues of jurisdiction. This burden must be met by "preponderance of the evidence," which is defined in OEA Rule 628.2 as "[t]hat 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."

Agency raised several arguments in support of its position. It argued that this Office lacked jurisdiction because Employee was in probationary status at the time of his removal. Probationary employees, *i.e.*, those employed by the District of Columbia Government for less than one year, cannot appeal their removals to this Office. See, e.g., 6-B DCMR §1600.2(8). In his petition, Employee stated that he had been employed by Agency for six months, which supports Agency's contention. In addition, Agency attached its September 1, 2017 offer of employment letter, which included Employee's acceptance and signature, dated September 2, 2017. Since Employee was terminated in March 2018, this letter also supports the conclusion that Employee was terminated before he completed one year of employment. Employee did not dispute Agency's contention that he was in probationary status since he failed to file a response. His failure to file a response may be considered as concurrence. Chapter 8 of the District Personnel Manual (DPM) governs the removal of probationary employees. §§ 814.1 and 814.2 state that an agency may remove an employee holding probationary status provided it gives the employee written notice which contains the effective date of removal and the employee's appeal rights. Agency's March 28, 2018 letter complied with these provisions, providing written notice of the removal and an effective date. The letter did not contain information regarding appeal rights, since it is Agency's position that Employee had no appeal rights. The AJ concludes that Employee failed to meet his burden of proof on this issue of jurisdiction based on his probationary status at the time of his removal. *See, e.g., Stewart v. Department of Corrections*, OEA Matter No. J-0078-15 (July 19, 2015), and Jason *Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010).

Agency also maintained that this Office lacks jurisdiction to hear this appeal because Employee held at-will status when he was terminated. Agency attached a document entitled "Applicant Acknowledgement, and Release of Information" to its Motion. In the document, which appears to have been signed by Employee on August 28, 2017, Employee acknowledged that there was an at-will employment relationship between himself and Agency, and that he understood "that this aspect of [his] employment may not change absent an individual written agreement signed by both [Employee] and the Executive Director."[1] There is no reference to or argument by either party that such an agreement was ever executed. Additional support for finding that Employee held at-will status is provided in Agency's September 1, 2017 letter offering employment the position:

> This letter will also confirm…that your employment with the Board is one of at-will employment: that is, you may leave employment with the Board, at any time, for any reason and similarly, the Board or Board Chair may terminated your employment at any time for any reason. This at-will relationship may not be modified or changed during your employment with the Board, except by written agreement between you and the Board.

As noted earlier, there is no argument or evidence that any such agreement was executed. Therefore, Agency's position that Employee served at-will is undisputed and supported by documentation acknowledged by Employee. Employee was notified that his failure to respond to Agency's Motion could be considered as concurrence with its contentions regarding this jurisdictional issue. The documents support the finding that Employee was aware that he was employed at-will, and his failure to respond indicates that he does not dispute that characterization of his employment status.

It is well established in the District of Columbia, that an at-will employee may be terminated "at any time and for any reason, or for no reason at all." *Adams v. George W. Cochran & Co*., 597 A.2d 28, 30 (D. C. 1991). *See also. Bowie v. Gonzalez*, 433 F.Supp.2d 24 (D.C.D.C. 2006). As an at-will employee, Employee lacked job tenure and could not appeal his removal to this Office. *Leonard, et al v. Office of Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al*. (February 5, 1997). The AJ concludes that Employee failed to meet his burden of proof on this jurisdictional issue as well.

There is another basis for dismissing this appeal. OEA Rule 621.3, 59 D.C.R. 2129 (March 16, 2012) states:

> If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to…
>
> (b) Submit required documents after being provided with a deadline for such submission; or

[1] The entire paragraph, which includes this language, is in capital letters and bold-faced print.

The June 14 Order notified Employee that his failure to file a timely response could be considered as a failure to prosecute, and could result in the imposition of sanctions, including dismissal. The Order was sent to Employee at the address he provided in his petition, by first class mail, postage prepaid. It was not returned as undelivered to OEA, and is presumed to have been received by Employee in a timely manner. Employee did not file a response by the deadline and did not contact the AJ to request an extension. OEA Rule 621.3(b), cited above, provides that an employee's failure to meet a stated deadline, may be considered as a failure to prosecute; and that the AJ, "in the exercise of sound discretion" may dismiss the appeal as a sanction. The AJ concludes that Employee's failure to file a timely response constitutes a failure to "take reasonable steps to prosecute his appeal, and that in an "exercise of sound discretion," the dismissal of the appeal is an appropriate sanction.

In sum, the AJ concludes, based on the analysis herein, that there several independent bases for dismissing this petition for appeal *i.e.,* Employee's failure to meet the burden of proof regarding this Office's jurisdiction based on his at-will status or probationary status, or his failure to take reasonable steps to prosecute the appeal..

ORDER

It is hereby:

ORDERED: This petition for appeal is dismissed.[2]

FOR THE OFFICE:

_____
Lois Hochhauser, Esq.
Administrative Judge

2 Therefore, Agency's Motion to Dismiss for Lack of Jurisdiction is dismissed as moot.