THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
NICHOLE WORMSLEY	)	
Employee	)	OEA Matter No. J-0049-17
	)	
v.	)	Date of Issuance: July 12, 2017
	)	
OFFICE OF THE CHIEF FINANCIAL OFFICER	)	Lois Hochhauser, Esq.
Agency	)	Administrative Judge
	)	

Nichole Wormsley, Employee, *Pro-Se*
Chaia Morgan, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Nichole Wormsley, Employee, filed a petition with the Office of Employee Appeals (OEA) on May 17, 2017, appealing the decision of the Office of the Chief Financial Officer, Agency, to terminate her employment as a Supervisory Compliance Manager, effective April 26, 2017. On May 22, 2017, Agency filed a motion to dismiss for lack of jurisdiction. The matter was assigned to this Administrative Judge on June 5, 2017.

In its motion to dismiss, Agency argued that pursuant to D.C. Official Code 1-204-25(a), all Agency employees have at-will status, and therefore this Office has no jurisdiction to hear Employee's appeal. On June 12, 2017, the AJ issued an Order directing Employee to respond to Agency's motion by June 30, 2017. In the Order, Employee was reminded that employees have the burden of proof on all issues of jurisdiction. The Order also stated that unless the parties were notified to the contrary, the record in this matter would close on June 30, 2017. The Order was sent by first class mail, postage prepaid, to Employee as the address she listed in her petition for appeal. The Order was not returned to OEA as undelivered. Employee did not respond to the Order, or contact the AJ to ask for additional time. The record closed on June 30, 2017.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this appeal be dismissed?

ANALYSIS AND CONCLUSIONS OF LAW

This Office has long maintained that Agency employees were converted to "at will" status and were not covered by the rights provided by the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Official Code 1-606.03 *et seq.* including the right to appeal adverse actions to this Office, pursuant to § 152(a) of the District of Columbia Appropriations Act of 1996. Senior Administrative Judge Daryl J. Hollis first addressed this issue in 1997 in *J. David Leonard et al. v. Office of the Chief Financial Officer,* OEA Matter Nos. 1601-0241-96 *et al*. (February 5, 1997). In the Initial Decision, Judge Hollis concluded that § 152(a) of the District of Columbia Appropriations Act of 1996 converted Agency employees to "at-will" status thereby divesting them of rights provided by the CMPA, including the right to appeal adverse actions to OEA. Judge Frederick Weisberg of the Superior Court of the District of Columbia upheld this decision, utilizing the same reasoning. *Leonard v. District of Columbia*, C.A. No. 96-9962 (July 28, 1997). The District of Columbia Court of Appeals concluded that Agency employees had "at-will" status and could not appeal adverse actions to this Office, confirming the decisions and reasoning used by both this Office and Judge Weisberg in *Leonard et al v. District of Columbia*, 794 A.2d 618 (D.C.C.A. 2002).

In 1997, the same year Judge Hollis issued the Initial Decision in *Leonard,* Judge Emmit Sullivan of the United States District Court for the District of Columbia reached the same conclusion, *i.e.*, that § 152 converted Agency employees to at-will status in *American Federation of State, County and Municipal Employees v. District of Columbia*, C.A. No. 97-0185 (D.D.C. July 29, 1997), The conclusions that Agency employee maintain at-will status and that they are excluded from the rights provided by the CMPA, including the right to appeal adverse actions to this Office, have remained unchanged. The statutory provision is now contained in § 202 of the 2005 District of Columbia Omnibus Authorization Act, approved on October 16, 2006 (Pub. L. 109-356) which states in pertinent part:

> [N]otwithstanding any provision of law or regulation (including any law or regulation providing for collective bargaining or the enforcement of any collective bargaining agreement), employees of the Office of the Chief Financial Officer of the District of Columbia, including personnel described in subsection (b), shall be appointed by, shall serve at the pleasure of, and shall act under the direction and control of the Chief Financial Officer of the District of Columbia, and shall be considered at-will employees not covered by the District of Columbia Merit Personnel Act of 1978, (emphasis added.)

For these reasons, the AJ concludes that Employee held at-will status at the time of her removal; and that as an at-will employee, she could not appeal her removal to this Office. It is well established, that in the District of Columbia, an at-will employee can 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 (DCDC 2006). Employee's at-will status deprived her of job tenure or protection from removal. *See* D.C. Official Code § 1-609.05 (2001). Further, as an "at will" employee, she could not appeal the decision of Agency to terminate her, with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012) places the burden of proof on employees on the issue of jurisdiction, This burden must be met by a preponderance of the evidence, which is defined in OEA Rule 618.2 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." Employee did not present any argument in support of this Office's jurisdiction, and did not refute Agency's position. The AJ concludes that the appeal should be dismissed based on Employee's failure to meet her burden of proof on the issue of jurisdiction.

There is an alternative basis for dismissing this appeal. OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) states, in pertinent part:

> 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

By Order dated June 12, 2017, Employee was directed to file her response to Agency's motion to dismiss by June 30, 2017. The Order was sent to Employee, by first class mail, postage prepaid, at the address that she listed in her petition for appeal. The Order was not returned as undelivered to OEA, and is presumed to have been received by Employee in a timely manner. Employee neither filed a response nor contacted the AJ to request additional time. The AJ concludes that Employee's failure to respond to the Order by the stated deadline constitutes a failure to prosecute her appeal, and that the AJ, in the exercise of "sound discretion," should therefore dismiss the appeal.

In sum, the AJ concludes that this appeal should be dismissed based either on Employee's failure to meet her burden of proof on the issue of jurisdiction or on Employee's failure to prosecute her appeal.[1]

[1] The AJ realizes that Employee may not have responded to the Order because she agreed that this Office lacked jurisdiction to hear her appeal due to her at-will status. Therefore, failure to meet her burden of proof and failure to prosecute are alternative grounds for dismissal.

ORDER

It is hereby:

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

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[2] Since the appeal is dismissed, Agency's motion to dismiss, is denied as moot.