THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE[1] Employee	OEA Matter No. J-0012-23
v.	Date of Issuance: April 18, 2023
DISTRICT OF COLUMBIA DEPARTMENT OF FOR-HIRE VEHICLES Agency	LOIS HOCHHAUSER, Esq. Administrative Judge

Employee, *Pro Se*
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY AND BACKGROUND

Employee filed a petition with the Office of Employee Appeals ("OEA") on October 31, 2022, appealing the decision of the District of Columbia Department of For-Hire Vehicles ("Agency") to terminate him from his position as Vehicle Inspection Officer, effective October 12, 2022. By memorandum dated October 31, 2022, Sheila Barfield, Esq., OEA Executive Director, informed Dory Peters, Agency Interim Director, of the appeal and that, pursuant to OEA Rule 612.1, the filing deadline for Agency's response was November 30, 2022. In its Answer, filed on November 30, 2022, Agency argued, in part, that this Office lacked jurisdiction since Employee was in probationary status at the time he was terminated. This Administrative Judge ("AJ") was appointed to hear this matter on or about December 7, 2022.

In the Petition for Appeal ("PFA"), Employee identified his appointment as both "permanent" and "probationary," stating that he had held the position for one month. He also reported that he filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on October 5, 2022 related to the termination. On December 14, 2022, the AJ issued an Order notifying Employee that jurisdiction was at issue if he was in probationary status at the time of termination and/or if he had challenged his removal in another forum before filing the PFA with OEA. The AJ also informed him that employees have the burden of proof on all issues regarding jurisdiction. Employee was directed to submit legal and/or factual argument in support of the Office's jurisdiction by January 5, 2023.

[1] Employees are not identified by name in decisions published on the Office of Employee Appeals website.

Employee did not file a response or contact the AJ. By Order dated February 16, 2023, Employee was directed to explain why he did not respond to the prior Order or risk dismissal of the appeal. The parties were advised that the record would close on March 3, 2023, the filing deadline, unless they were notified to the contrary. Employee did not file a response or contact the AJ, and the record closed on that date.

JURISDICTION

The jurisdiction of this Office was at issue in this matter.

ISSUES

Did Employee meet his burden of proof regarding this Office's jurisdiction of this appeal? If not, should this appeal be dismissed? Did Employee prosecute this appeal? If not, is this another basis for dismissing this PFA?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Agency notified Employee by letter dated on or about August 11, 2022, that it had selected him for the position of Vehicle Inspection Office, and that his appointment would begin on August 15, 2022. The undated letter included the following paragraph:

> **Probationary Period Requirement:**
> To retain employment…you must satisfactorily complete a one-year…probationary period beginning on **August 15, 2022**. (emphasis in original).[2]

Employee signed the last page of the letter on August 11, 2022, accepting the offer and stating that he understood and accepted "the conditions of employment."

By letter dated September 28, 2022, the Agency Interim Director notified Employee that he was being terminated, stating in pertinent part:

> While you offer great knowledge and remarkable skills, unfortunately, they do not meet our immediate needs, and we regret to inform you that we will end your probationary period and your service within the District government, effective close of business October 12, 2022.[3]

Employee did not dispute that he was in probationary status at the time of termination, noting in the appeal that he was terminated after one month in that position and circling the word "probationary" as one type of appointment that he held. Employee instead argued that he was "wrongfully terminated," and that Agency failed to provide any "documentation" or "reasoning" for its decision. He asserted that a Union representative in fact told him that he was terminated because of "two counts of sexual harassment with a… female employee, not passing a pop quiz test and losing

[2] This letter was submitted by Agency with its Answer. It was not challenged by Employee, and is accepted as accurate for the purpose of this *Initial Decision*.
[3] Employee provided additional information in a "continuation sheet," submitted with the PFA.

government equipment." He also contended that the work environment was hostile.[4]

The threshold issue is one of jurisdiction. This Office has no authority to hear matters beyond its jurisdiction. *See, e.g., Banks v. District of Columbia Public Schools*, OEA Matter 1602-0030-90, *Opinion and Order* (September 30, 1992). The jurisdiction of this Office was first established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq*. (2001) and then amended by the Omnibus Personnel Reform Amendment Act of 1998("OPRAA"), D.C. Law 12-124. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in Career and Education Service who are not serving in a probationary period, or who have successfully completed their probationary period.

The District Personnel Manual ("DPM"), which governs personnel practices within the District of Columbia Government, states at §813.2 that, with exceptions not relevant to this matter, that employees are "required to serve a probationary period of one (1) year." In its letter of offer, Agency notified Employee that he was required to serve a one year probationary period, beginning on August 15, 2022, Employee acknowledged that he understood and accepted this condition of employment. According to the DPM, an agency can terminate an employee in probationary status if it determines that he is not suitable or qualified for the position. It is only required to provide Employee with written notice and include the effective date of removal. It is not required to provide a reason for its decision. Termination during a probationary period is not appealable, except that an employee who argues that the termination was the result of a "violation of public policy, *e.g.,* the Whistleblower protection law, or District of Columbia or federal anti-discrimination laws" can challenge the action "under any such laws, as appropriate." *See* DPM §§ 814.1-814.

The documents submitted by the parties support the conclusion that Employee was in probationary status when he was terminated. The AJ finds that Agency complied with the requirements stated in the DPM by providing Employee with written notice of his termination by letter dated September 28, 2022, which listed October 12, 2022 as the effective date for the removal. Employee maintained that his termination was wrongful, contending that Agency did not provide him with any documents or reasons for its decision. However, Agency is not required to provide any reason or document in support of its decision. In the September 28 letter, Agency, in fact, used language consistent with the DPM, stating that the termination was based on its decision that Employee's skills and knowledge did not meet Agency's "immediate needs." Employee's contention that Agency may have terminated him because of a sexual harassment allegation, a failed quiz and/or a lost item is therefore moot and will not be addressed. Termination during probation is not an adverse action, but rather a decision reserved for the employing agency.[5]

As stated above, a probationary employee can challenge the removal if he claims a violation of public policy, whistleblower protection and/or anti-discrimination laws. Employee asserted that the

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[4] This information is contained in the narrative Employee submitted with his PFA.

[5] Employee did not have tenure or any other protection from dismissal while he was in probationary status, and therefore was employed "at-will." *See* D.C. Code § 1-609.05 (2001). The District of Columbia has long held that an employer can terminate an at-will employee "at any time and for any reason, or for no reason at all." An at-will employee has no appeal rights with this Office. *Adams v. George W. Cochran & Co*., 597 A.2d 28, 30 (D.C. 1991), and *Bowie v. Gonzalez*, 433 F.Supp.2d 24 (D.C.D.C. 2006).

work environment was hostile, but he did not contend that the hostile work environment resulted in his removal and did not present anything more than the allegation.. In his narrative, Employee alleged that Agency directed him "to do an illegal act," but he did not argue that he reported the matter or that his termination resulted from any action on his part which would entitled him to protection as a whistleblower.

Pursuant to OEA Rule 631.2, employees have the burden of proof on all issues of jurisdiction. The burden must be met with a preponderance of evidence, which is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact is more likely to be true than untrue." OEA Rules, p. 31. Based on the findings and conclusions as discussed herein, the AJ concludes that Employee failed to meet the burden of proof on the issue of jurisdiction based on his probationary status, and that this appeal therefore should be dismissed.[6]

There is an alternative basis to dismiss this appeal. The AJ issued two Orders in this matter. Both were sent to Employee by first class mail, postage prepaid, at the address he listed in his PFA. Neither Order was returned, and both are presumed to have been received by Employee in a timely manner.

In the first Order, issued on December 14, 2022, the AJ notified Employee that the jurisdiction of this Office to hear this appeal was at issue if he was in probationary status when terminated or if he challenged his termination in another forum before filing the PFA with this Office. The Order also notified Employee of possible consequences if he did not file his response by the January 5, 2023 deadline:

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> Employee's failure to file a timely response may be considered as concurrence that this Office lacks jurisdiction of this appeal and/or his failure to prosecute this appeal. This may result in the imposition of sanctions, including the dismissal of this appeal. See OEA Rule 624.

The Order stressed the importance of complying with OEA Rules and AJ directives, and the possible consequences of failing to comply:

> **Compliance with OEA Rules and directives issued by this Administrative Judge ("AJ") is mandatory. Failure to comply may result in the imposition of sanctions, including the dismissal of the appeal. Copies of current OEA Rules are available on-line and at OEA.** (emphasis in original)

Employee did not file a response or contact the AJ. Therefore on February 16, 2023, the AJ issued another Order, notifying Employee that his failure to file a timely response as directed in the December 14 Order constituted a failure to prosecute the appeal and could result in the imposition of

[6] In addition, Employee stated in the PFA that he filed a complaint with the EEOC on October 5, 2022, more than three weeks before he filed this PFA. Employee was directed to submit additional information regarding the EEOC complaint but failed to do so. The AJ therefore has insufficient information to make a decision regarding this matter and will not make findings or reach a conclusion of this issue. However, she does conclude that Employee failed to meet his burden of proof on this jurisdictional issue as well.

sanctions, including dismissal of the PFA. Employee was directed to explain his reason for failing to comply. He was further notified that his failure to file a response by the March 3, 2023 deadline would "likely result in the dismissal of this appeal based on…failure to prosecute and/or his probationary status."

The December 14 Order stated in boldface that compliance with OEA Rules and AJ directives was mandatory and failure to comply could result in sanctions. It gave him information about getting a copy of the OEA Rules. The AJ again cautioned Employee in the second Order, issued on February 16, 2023, that he risked dismissal of this appeal if he failed to respond to the Order. He was given the opportunity to offer a reason for his failure to respond, and warned the appeal could be dismissed if he did not file a timely response. But again he failed to comply or contact the AJ .

This Office's Rule 624.1, authorizes the AJ to impose sanctions, "as necessary to serve the ends of justice." OEA Rule 624.3(b) states that the failure of a party to "[s]ubmit required documents after being provided with a deadline for such submission" represents a failure to prosecute or defend a matter, and can result in the imposition of sanctions. Employee failed to comply with both Orders issued in this matter, each of which had a stated filing deadline. As noted earlier, it is presumed that Employee received these Orders in a timely manner. Both Orders stated that failure to file a timely response could be considered as concurrence that this Office lacked jurisdiction to hear the appeal because of Employee's probationary status and/or could be dismissed based on his failure to prosecute. Employee did not respond to either Order and did not contact the AJ.[7]

Therefore, the AJ determines, for the reasons stated above, that Employee's failure to respond to two Orders issued by the AJ which directed him to file responses by stated deadlines constitutes a failure to prosecute this appeal. Employee had an affirmative duty to prosecute this PFA, but failed to do so, despite being notified of requirements and possible consequences in both Orders. The AJ concludes that sanctions should be imposed, and further, that the sanction of dismissal of this appeal is warranted "to serve the ends of justice" pursuant to OEA Rule 624.1.

In sum, the AJ concludes that this appeal should be dismissed based on Employee's failure to establish, by a preponderance of evidence, that this Office had jurisdiction of this matter and/or based on his failure to prosecute his appeal.

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge

[7] The AJ took extra care in this matter because of Employee's *pro se* status. She notified him of requirements and deadlines, often quoting the Rule or provision rather than just giving the citation. *Macleod v. Georgetown Univ. Med. Center*, 736 A.2d 977 (D.C. 1992). If he had responded to either Order or contacted the AJ, it is likely if he would have been given additional time to file a response.