THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. J-0037-23
	)	
v.	)	Date of Issuance: May 18, 2023
	)	
D.C. CHILD AND FAMILY SERVICES AGENCY,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 31, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Child and Family Services Agency ("Agency") adverse action of removing her from service. Employee's last position of record was Social Worker, DS-0185-11. By letter dated March 31, 2023, the Executive Director of the OEA required Agency to submit an Answer to Employee's Petition for Appeal by April 30, 2023. Agency timely submitted its Answer and Motion to Dismiss on April 28, 2023. According to letter addressed to Employee from the Agency dated March 3, 223, the effective date of her removal from service was March 17, 2023. Of note, this letter informed Employee that she was being removed from service during her probationary period and that given as much, she could neither appeal nor grieve her termination. In its Answer and Motion to Dismiss, the Agency noted that Employee was first appointed to her previous position of record on February 27, 2023.

This matter was assigned to the Undersigned on or around May 1, 2023. In her Petition for Appeal, Employee admitted to having worked for the Agency for less than one month prior to her removal from service. Upon initial review of the documents of record, the Undersigned noted that there was a valid question as to whether the OEA may exercise jurisdiction over this matter due to Employee's removal being effectuated during her probationary period. Accordingly, on May 1, 2023, an Order was issued whereby Employee was required to provide factual and legal

justification for the OEA to exercise jurisdiction over this matter. This Order required Employee to submit her response on or before May 15, 2023. To date, Employee has not filed a response with the OEA.[1] After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

As will be explained below, the OEA lacks authority to adjudicate this matter.

ISSUE

Whether this matter should be dismissed.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> 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.

OEA Rule 631.2 id. States:

> For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Probationary Employee

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

[1] On May 17 and 18, 2023, Employee emailed the OEA inquiring about the status of her matter. The first email was sent to the OEA Operations team, and it was then forwarded to the Undersigned for appropriate review. Employee alleged that she had not received any correspondence that would further clarify the status of her matter. The Undersigned responded by informing her that an Order regarding jurisdiction was sent to her address of record, via first class mail, on May 1, 2023. The Undersigned did not respond to her other questions as that may be interpreted as giving advice. Employee was then given the only advice that ethics rules allow; that she should seek out her own legal counsel. Given as much, I find that the certificate of service attached to the May 1, 2023, Order regarding jurisdiction suffices as proof that said Order was adequately sent to Employee's address of record.

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

The above referenced career/education service rights conferred by the CMPA may be exercised by aggrieved employees. The District Personnel Manual ("DPM") § 814.3, provides in relevant part that "a termination during a probationary period is not appealable or grievable. Thus, according to preceding sections of the DPM and the CMPA, Career Service employees who are serving in their probationary period are precluded from appealing a removal action to this Office until their probationary period is finished. As was noted previously, Employee has the burden of proof regarding the jurisdiction of this Office. In her Petition for Appeal, Employee admits that she had worked for Agency for less than one month prior to her termination. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[2] I find that when Employee was removed from service, she was still within her one-year probationary period. Because Employee was in a probationary status when she was removed from service, I conclude that she is not allowed to appeal her removal to this Office.

Failure to Prosecute

OEA Rule 621.3, *id.*, states as follows:

> 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:
>
> (a) Appear at a scheduled proceeding after receiving notice;
>
> (b) Submit required documents after being provided with a deadline for such submission; or
>
> (c) Inform this Office of a change of address which results in correspondence being returned.

This Office has held that a matter may be dismissed for failure to prosecute when a party fails to submit required documents. *See David Bailey Jr. v. Metropolitan Police Department*, OEA

[2] *See Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

Matter No. 1601-0007-16 (April 14, 2016). Here, Employee did not file her response to my Order dated May 1, 2023. Her response was integral to making an informed decision regarding the OEA's ability to exercise jurisdiction over this matter. I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. I further find that Employee's inaction presents another valid basis for dismissing the instant matter.

Conclusion

Taking into account the discussion above, I find that Employee has failed to meet her burden of proof regarding the OEA's ability to exercise jurisdiction over the instant matter.[3] [4] Accordingly, I conclude that I must dismiss this matter for lack of jurisdiction.

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE: /s/ *Eric T. Robinson*
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[3] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[4] Since I have found that he OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee's petition for appeal.