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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. J-0060-23
	)	
v.	)	Date of Issuance: October 30, 2023
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF	)	
TRANSPORTATION,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
_____	)	SENIOR ADMINISTRATIVE JUDGE
Employee, <i>Pro-Se</i>		
Kathleen R. Miskovsky Black, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On August 25, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District of Columbia Department of Transportation’s (“Agency”) adverse action of removing him from service. Employee’s last position of record was Maintenance Mechanic (WS-4749-10). By letter dated August 25, 2023, the Executive Director of the OEA required Agency to submit an Answer to Employee’s Petition for Appeal by September 24, 2023. Agency timely submitted its Answer and its Motion to Dismiss on September 22, 2023. According to a letter dated July 14, 2023, the effective date of Employee’s removal was July 28, 2023. This letter informed Employee that he was being removed from service during his probationary period and that given as much, he could neither appeal nor grieve his termination. This matter was assigned to the Undersigned on or around September 25, 2023. In his Petition for Appeal, Employee admitted to having worked for the Agency for approximately eleven months prior to his 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 his probationary period. Accordingly, on September 25, 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 his response on or before October 13, 2023. To

date, Employee has not filed a response with the OEA. 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:

(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”) § 227.4, provides in relevant part that “separation from government service during a probationary period is neither appealable nor grievable. Thus, according to the 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 his Petition for Appeal, Employee admits that he had worked for Agency for less than one year prior to his termination. The OEA Board has previously held that an employee’s admission is sufficient to meet Agency’s burden of proof.<sup>1</sup> I find that Employee was removed from service while he was still within his one-year probationary period. Because Employee was in a probationary status when he was removed from service, I conclude that he is not allowed to appeal his 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.<sup>2</sup> Here, Employee did not file his response to my Order dated September 25, 2023. His 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.

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<sup>1</sup> See *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

<sup>2</sup> See *David Bailey Jr. v. Metropolitan Police Department*, OEA Matter No. 1601-0007-16 (April 14, 2016).

*Conclusion*

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

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

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<sup>3</sup> Since I have found that the OEA lacks jurisdiction over this matter, I am unable to address the factual merits, if any, contained within Employee's Petition for Appeal.

<sup>4</sup> 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 Tinto 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").