THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOHN COTTON	)	OEA Matter No. 1601-0140-11
Employee	)	
	)	
v.	)	Date of Issuance: October 5, 2012
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Lois Hochhauser, Esq.
Agency	)	Administrative Judge

Sara White, Esq., Agency Representative
John Cotton, Employee, *pro se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

John Cotton, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on July 22, 2011, appealing the decision of the District of Columbia Public Schools, Agency herein, to remove him from his teaching position, effective August 12, 2011. The matter was assigned to me on August 7, 2012.

In his petition, Employee identified his employment status as permanent. However, in its answer, Agency asserted Employee was serving in probationary status at the time of his termination. Therefore, on August 10, 2012, I issued an Order directing Employee to present legal and/or factual argument by August 27, 2012, to support his position that this Office had jurisdiction of his appeal, specifically addressing Agency's contention that he was in probationary status at the time of his removal. In the Order, I notified Employee that employees have the burden of proof on all jurisdictional issues. He was cautioned that his failure to respond to the Order could constitute a failure to prosecute, another basis for dismissal; and could also be considered as concurrence that this Office lacks jurisdiction to hear the matter. The parties were advised that unless they were notified to the contrary, the record would close on August 27, 2012. The Order was sent to Employee at the address listed as his mailing address in his petition, by first class mail, postage prepaid. It was not returned to OEA and is presumed to have been received by Employee in a timely manner. Employee did not respond to the Order. The record closed on August 27, 2012.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should the petition be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), Employee has the burden of proof on all issues of jurisdiction. Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, 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 has the burden of proof on the issue of his employment status, since it is a basis for this Office's jurisdiction. Employee was given the opportunity to meet this burden of proof, but did not do so. *See*, OEA Rule 604.1, 46 D.C.Reg. 9299 (1999). Agency represented that Employee was hired on August 16, 2010. He was terminated effective August 12, 2011. Employee was still in probationary status at the time of his removal, since he had been employed with Agency for less than a year at the time he was removed. Chapter 8, Section 814.3 of the District Personnel Manual states that a termination during the probationary period cannot be appealed to this Office. An appeal to this Office by a probationary employee must therefore be dismissed for lack of jurisdiction. *See, e.g., Day v. Office of the People's Counsel,* OEA Matter No. J-0009-94, *Opinion and Order on Petition for Review* (August 19, 1991). Employee's failure to respond may be considered, as stated in the August 10, 2012 Order, as an admission that this Office lacks jurisdiction of the appeal. In any event, I conclude that Employee did not meet the burden of proof on this issue of jurisdiction based on his status as a probationary employee.

Employee's failure to respond to the Order provides an additional basis to dismiss this petition. In accordance with OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). In this matter, Employee failed to respond to the August 10, 2012 Order which contained a specific deadline for the response and informed Employee of the consequences of not responding. The Order was sent to Employee at the address he listed as his home address in his petition, by first class mail, postage prepaid. It was not returned and is presumed to have been received by Employee in a timely manner.

In sum, for these reasons, the Administrative Judge concludes that Employee failed to meet his burden of proof on the issue of jurisdiction based on his status as a probationary employee. She further concludes that Employee failed to prosecute his appeal. Either reason standing alone is sufficient for this matter to be dismissed. The Administrative Judge concludes the petition should be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE: _____.
LOIS HOCHHAUSER, Esq.

Administrative Judge