THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	OEA Matter No. J-0077-24
Employee	)	
	)	Date of Issuance: November 25, 2024
v.	)	
	)	LOIS HOCHHAUSER, Esq.
DISTRICT OF COLUMBIA DEPARTMENT OF BEHAVIORAL HEALTH	)	Administrative Judge
Agency	)	

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

INITIAL DECISION

PROCEDURAL HISTORY AND BACKGROUND

Employee filed a Petition for Appeal ("PFA") with the Office of Employee Appeals ("OEA") on August 12, 2024, challenging the decision of the District of Columbia Department of Behavioral Health ("Agency") to terminate him from his employment as a Supervisory Social Worker, effective July 29, 2024. By letter dated August 14, 2024, Sheila Barfield, Esq., OEA Executive Director, provided Agency Director Barbara Bazron with a copy of the appeal, and informed her of the September 13, 2024 filing deadline for Agency's response. Agency filed "Department of Behavioral Health's Response and Motion to Dismiss Employee's Petition for Appeal" ("Agency Response and Motion") on September 12, 2024. The matter was assigned to this Administrative Judge ("AJ") on or about September 13, 2024.

By Order issued on September 16, 2024, the AJ notified Employee that this Office's jurisdiction was at issue, and informed him that employees have the burden of proof on jurisdictional issues. Employee was directed to file legal and factual arguments to support his position regarding this Office's jurisdiction of his PFA by 5:00 p.m. on October 10, 2024; and advised that failure to file a timely response could result in the dismissal of the appeal, either as a sanction for failure to prosecute or because it was considered concurrence that this Office lacks jurisdiction. The Order stated that the record would close at 5:30 p.m. on October 10, 2024, unless the parties were notified to the contrary. The Order was sent to Employee by first class mail, postage prepaid, at the address he

[1] This Office does not identify employees in the *Initial Decisions* published on the Office of Employee Appeals website.

listed on his PFA on September 16, 2024. It was not returned as undelivered to this Office. Employee did not file a response or request an extension. The record closed at 5:30 p.m. on October 10, 2024.

JURISDICTION

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

ISSUES

Did Employee meet his burden of proof in this matter? Did Employee prosecute this appeal? Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The relevant facts in this matter appear undisputed.[2] Employee was hired as a Supervisory Social Worker, an appointment in the Management Supervisory Services, ("MSS") in 2020 and held this appointment until his termination on July 29, 2024. Employee signed Agency's March 18, 2020 Letter of Confirmation of Oral Acceptance regarding this appointment on March 19, 2020. The letter stated, in pertinent part, that the position was an MSS appointment:

> Please be advised that persons appointed in the [MSS] do not acquire permanent status, serve at the pleasure of the appointment personnel authority, and may be terminated at any time.

The threshold issue in this matter is one of jurisdiction, since this Office can only hear matters that it is authorized to hear. *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 established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA) as amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124. The legislation authorizes, in pertinent part, this Office to hear appeals filed by permanent District of Columbia Government employees. However, not all categories of employees come within this Office's jurisdiction.

Pursuant to D.C. Official Code §1-609.54, MSS employees serve at-will, and are excluded from this Office's jurisdiction. *See also,* DPM §3800.3. MSS employees serve at the "pleasure of the appointing authority and can be terminated at any time. *See,* DPM §3813.1. It is "well settled in the District of Columbia that an employee with at-will status may be removed by an employer at any time and for any reason, or for no reason at all." *Adams v. George W. Cochran* & Co. 597, A2d, 28, 30 (D.C. 1991). *See also, Kassem v. Washington Hospital Cente*r, 513, F3d 251 (D.C. Cir. 2008). This Office has consistently held that at-will employees cannot appeal adverse actions to this Office. *See., e.g., Gizachew Wubishet v. District of Columbia Public* Schools, OEA Matter No. 1601-0106-06, *Opinion and Order* (June 23, 2009).

The only requirement placed on a District of Columbia Government agency seeking to terminate an MSS employee, is that it must provide the employee with a 15 day written notice in advance of the effective day of the removal. *See,* DPM §3813.1. Agency complied with that requirement. In in its

[2] The findings of fact are derived from the submissions by the parties.

letter of July 12, 2024, it notified Employee that his MSS appointment as a Supervisory Social Worker would terminate on July 29, 2024.

Employee has the burden of proof on the issue of jurisdiction and must meet this burden by a preponderance of evidence.[3] *See*, OEA Rule 631.2. In this matter, there was sufficient documentation to supporting a finding that Employee held an MSS appointment. In addition, there was sufficient legal and statutory support for concluding that MSS employees hold at-will status and, with some exceptions not relevant here, cannot appeal removals to this Office. Employee failed to submit any legal or factual argument supporting this Office's jurisdiction, despite notice that failure to do so could be deemed concurrence that this Office lacks jurisdiction. The AJ concludes that this appeal should be dismissed due to Employee's failure to meet the burden of proof on the issue of jurisdiction.

There is an alternate basis for dismissing this appeal. OEA Rule 624.3 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…

The September 16, 2024 Order directed Employee to file legal and/or factual arguments to support his position that this Office had jurisdiction of this matter by October 10, 2024. It further notified him that failure to comply by this deadline could be considered a failure to prosecute which could result in the imposition of sanctions, including dismissal of the appeal. The Order was sent to Employee by first class mail, postage prepaid, at the address he listed in the PFA. The Order was not returned to this Office as undelivered, and is presumed timely received by Employee. However, Employee did not file a response, and did not contact the AJ to ask for an extension of the filing deadline. The AJ concludes that Employee failed to take "reasonable steps" to prosecute this appeal, and in the exercise of sound discretion," she imposes the sanction of dismissal of this appeal.

In sum, for the reasons discussed herein, the AJ concludes that this appeal should be dismissed.

ORDER

The petition for appeal is dismissed.[4]

Lois Hochhauser

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge

[3] The OEA Rules define preponderance of evidence as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." OEA Rules at 31.

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