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

In the Matter of:	)	
	)	
EDWARD JOHNSON,	)	
Employee	)	OEA Matter No. 1601-0171-11
	)	
v.	)	Date of Issuance: July 17, 2013
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Administrative Judge
	)	
Edward Johnson, Employee <i>Pro Se</i>		
Carl Turpin, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On August 15, 2011, Edward Johnson (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to terminate him from his position as a Maintenance Worker effective July 29, 2011. Employee was terminated for receiving an ‘Ineffective’ rating under the IMPACT Performance Assessment System for the 2010-2011 school year. On September 15, 2011, Agency submitted its Answer to Employee’s Petition for Appeal.

I was assigned this matter on June 18, 2013. Thereafter, I issued an Order dated June 20, 2013, requiring the Employee to address the jurisdiction issue in this matter because he noted in his Petition for Appeal that he filed a grievance with the Union on July 18, 2011, before filing his Petition for Appeal with this Office. Employee’s brief was due on June 28, 2013. Following Employee’s failure to submit his brief on jurisdiction by the required deadline, on July 5, 2013, I issued an Order for Statement of Good Cause to Employee. Employee was ordered to submit a statement of good cause based on his failure to submit a response to the June 20, 2013, Order on

or before July 12, 2013.<sup>1</sup> As of the date of this decision, Employee has not responded to either Order. The record is now closed.

### JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

### ISSUE

Whether this appeal should be dismissed for failure to prosecute.

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to 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 628.2 *id.* states:

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.

### ANALYSIS AND CONCLUSIONS OF LAW

There is a question as to whether OEA has jurisdiction over this appeal. Employee noted in his Petition for Appeal that he filed a grievance with his Union on July 18, 2011, before filing his Petition for Appeal with this Office on August 15, 2011. Agency also highlights in its Jurisdiction brief dated July 8, 2013, that this matter should be dismissed for lack of jurisdiction because Employee filed a grievance with Teamsters Local 639 before filing an appeal with this Office.

D.C. Official Code (2001) §1-616.52 reads in pertinent part as follows:

(e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to Section 1-606.03, or the negotiated grievance procedure, **but not both**. (Emphasis added).

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<sup>1</sup> The June 20, 2013, Order also noted that Agency could submit a response to Employee's jurisdiction brief. On July 8, 2013, Agency submitted a Jurisdiction Response brief noting that because Employee filed a grievance prior to filing his Petition for Appeal, this matter should be dismissed for lack of jurisdiction.

(f) An employee shall be deemed to have exercised their option (*sic*) pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever occurs first** (emphasis added).

Additionally, the Notice of “Ineffective” IMPACT Rating and Termination dated July 15, 2011, informed Employee that he may “elect to file an appeal to [his] termination in *one* of the following ways:

1. You may elect to file a grievance pursuant to the Collective Bargaining Agreement between DCPS and your Union...
2. You may elect to file an appeal with the D.C. Office of Employee Appeals (OEA)...

According to Employee’s termination letter and pursuant to the above referenced code, Employee had the option to appeal his termination with either OEA or through his Union, **but not both**. (Emphasis added). Employee elected to appeal his termination by filing a grievance under the CBA between Agency and his local union several weeks before he filed his Petition for Appeal with OEA. And by doing so, Employee waived his rights to be heard by this Office. Therefore, I conclude that this Office does not have jurisdiction over Employee’s appeal. And for this reason, I am unable to address the factual merits, if any, of this matter.

Assuming *arguendo* that this Office had jurisdiction over Employee’s appeal, OEA Rule 621.1 grants an Administrative Judge (“AJ”) the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ “in the exercise of sound discretion may dismiss the action or rule for the appellant” if a party fails to take reasonable steps to prosecute or defend an appeal.<sup>2</sup> 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 consistently held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.<sup>3</sup> Here, Employee was warned in the June 20, 2013, and July 5, 2013, Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to either Order. Both were required for a proper resolution of this matter on its merits. I find that Employee’s failure to prosecute his appeal is a violation of OEA Rule 621. Accordingly, I

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<sup>2</sup> *Id.* at 621.3.

<sup>3</sup> *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

further find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office and this represents another reason why this appeal should be dismissed.

ORDER

It is hereby **ORDERED** that the petition in this matter is dismissed for Employee's lack of jurisdiction and failure to prosecute his appeal.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Administrative Judge