THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 2401-0048-10
MARCIA FUQUA,	
Employee	
	Date of Issuance: March 8, 2012
v.	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	
Agency	Sommer J. Murphy, Esq.
	Administrative Judge

John Mercer, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 20, 2009, Marcia Fuqua ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public School's ("Agency" or "DCPS") action of terminating her employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was a Physical Education Teacher at Anacostia Senior High School.

I was assigned this matter on or around November of 2011. A Status Conference was held on January 9, 2011 for the purpose of assessing the parties' arguments with respect to the instant appeal. Because there was a question as to whether this Office can exercise jurisdiction over Employee's appeal, I ordered the parties to submit briefs on the issue of jurisdiction.

Employee's brief was originally due on January 27, 2012. On January 26, 2012, Employee, via legal counsel, requested and extension of time in which to file her brief. The request was granted and Employee was given until February 10, 2012 to submit a brief on jurisdiction. As of February 24, 2012, Employee had not submitted a brief. I subsequently issued an Order for Good Cause, requesting a statement from Employee because a brief had not

been submitted. Employee's attorney submitted a Statement of Cause on March 6, 2012.[1] Counsel for Employee has consistently and blatantly ignored deadlines imposed by this Administrative Judge in several orders. Furthermore, Employee's Statement of Cause statement lacks any reasonable grounds for extending the time in which to file a brief on jurisdiction. Notwithstanding the lack of diligence in pursuing this appeal on Employee's behalf, I will address the merits of the case based on the documents of record. The record is now closed.

ISSUE

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

ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1, states that 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: "[t]hat 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."

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Amended D.C. Code §1-606.3(a) states:

> "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee…an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more…or a reduction in force…."

Chapter 8, Section 814 of the District Personnel Manual and D.C. Official Code § 5-105.04 (2001) provide that a termination during a probationary period cannot be appealed to this Office. An appeal to this Office by an employee serving in a probationary status 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).

Here, Employee was subject to a one year probationary period. Agency argues that this matter must be dismissed because Employee was in probationary status at the time she was terminated. Employee also states in her Petition for Appeal that her hire date was August 17, 2009. Employee received notice that she was being terminated through the RIF on October 2, 2009, with an effective removal date of November 2, 2009. Thus, Employee was separated from

[1] It should be noted that Employee's January 26, 2012 Motion for an Enlargement of Time to File a Brief and the March 6, 2012 Statement of Cause contain substantially similar language. It appears as if the language from Employee's Enlargement motion was simply copied and pasted into the Statement of Cause. Counsel for Employee claims to be representing several employees affected by the instant RIF and submits that his firm lacks the staff to handle the large amount of cases pending before this Office.

service less than two (2) months after her start date and prior to the completion of the statutorily required one year probationary period. Because Employee was in probationary status at the time she was terminated, she was considered an "at-will" employee and could be terminated by Agency without cause. Accordingly, I find that this Office does not have jurisdiction over this appeal. Based on the foregoing, Employee's appeal must be dismissed.[2]

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

_____
Sommer J. Murphy, Esq.
Administrative Judge

[2] An additional ground for dismissal is failure to prosecute. OEA Rule 622.3 provides that 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: Appear at a scheduled proceeding after receiving notice; Submit required documents after being provided with a deadline for such submission; or Inform this Office of a change of address which results in correspondence being returned. Employee's Cause Statement requests "patience, study, and reflection" from this Office. Employee was required to submit a brief on jurisdiction on January 27, 2012 and was granted a total of thirty nine (39) additional calendar days to file a brief. I find that granting Employee's multiple requests for extensions to be reasonable in light of the lack of diligence and good faith exercised in the prosecution of Employee's appeal.