THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARCIA ROPER,	)	
Employee	)	OEA Matter No. 1601-0006-12
	)	
v.	)	Date of Issuance: November 5, 2012
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Agency	)	
	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Marcia Roper, Employee
John F. Mercer[1], Employee Representative
Sara White, Esq., Agency Representatives

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 11. 2011, Marcia Roper ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("the Agency") action of removing her from service. Employee's last position of record with the Agency was Counselor at Roosevelt Senior High School. The effective date of her removal from service was September 1, 2011. The undersigned was assigned this matter on or about February 13, 2012. After reviewing the matter, I initially determined that there existed a question as to whether the OEA may exercise jurisdiction over this matter because at first review it seemed as if Employee elected to have her removal reviewed via her Collective Bargaining Agreement. Accordingly, I issued an Order dated February 27, 2012, wherein I required Employee's designated representative, John Mercer, Esq[2]., to address this jurisdictional

[1] As will be noted later in this decision, when Mr. Mercer was initially designated as Employee's representative, he was licensed to practice law in the District of Columbia. However, according to an email sent by Mr. Mercer to the undersigned on October 19, 2012, Mr. Mercer's license to practice law in the District of Columbia was revoked. As of the date of this Initial Decision, the undersigned has not received any information as to the status of his District of Columbia Bar licensure. The parties should note that it is not necessary for a designated representative to be licensed as an attorney in order to represent a party before the OEA.

[2] *See* footnote 1 *supra*.

issue. According to said Order, Employee, through counsel, was required to submit her brief on or before March 8, 2012. On March 9, 2012, Employee, through counsel submitted her response. Accordingly, on March 20, 2012, I issued an Order to Agency allowing it to submit a reply brief. Agency then submitted an Amended Answer to Employee's Petition for Appeal.

While reviewing this matter, the undersigned, *sua sponte*, noted another reason as to why the OEA may not be able to exercise jurisdiction over this matter. The effective date of Employee's removal via Excess was September 1, 2011. Employee did not file her petition for appeal with the OEA until October 11, 2011. Briefly, aggrieved employee's have thirty (30) calendar days after the effective date of Agency's adverse action to file a petition for appeal with the OEA. Employee's petition for appeal was filed with the OEA more than thirty (30) calendar days from the effective date of her removal. *See* D.C. Official Code § 1-606.3(a). Noting this issue, on October 1, 2012, the undersigned issued a Second Order regarding OEA's jurisdiction. According to this Order, Employee through counsel, was required to submit her brief on or before October 10, 2012. Neither Employee, nor her representative submitted a response. On October 18, 2012, Sara White, Esq., Agency's representative sent an email to Mr. Mercer and the undersigned noting that she had not received Employee's response from the said order. On that same date, the undersigned issued a second Order for Statement of Good Cause requiring Employee and her counsel to explain why Employee had not submitted a response to the October 1, 2012, order; moreover, Employee was required to submit a response to said order. On October 19, 2012, Mr. Mercer sent an email to the undersigned explaining, *inter alia*, that his District of Columbia Bar License had been revoked as of October 1, 2012. This email was initially just only to the undersigned. In an effort to ensure that no *ex parte* communication occurred, the undersigned promptly forwarded said email to Ms. Sara White. To date, the undersigned has not received an adequate response from Employee (or her designated representative) to either the October 1, or October 18, 2012 orders. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether this matter should be dismissed.

BURDEN OF PROOF

OEA Rule 628 *et al*, 59 DCR 2129 (March 16, 2012) states:

> 628.1 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 the 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.

> 628.2 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.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

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. *See, e.g., Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985). Here, Employee did not file her response as she was required to do pursuant to the October 1, and October 18, 2012, Orders. Furthermore, she did not provide a written response to aforementioned Order for Statement of Good Cause. All were required for a proper resolution of this matter on its merits. Employee, either on her own or through counsel, has not exercised the diligence expected of an appellant pursuing an appeal before this Office. Accordingly, I find that this matter should be dismissed.

ORDER

It is hereby ORDERED that this matter be DISMISSED due to Employee's failure to prosecute her appeal.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
Senior Administrative Judge