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

_____	)	
In the Matter of:	)	
	)	
ELLIOTT DUVALL,	)	
Employee	)	
	)	OEA Matter No. J-0013-16
v.	)	
	)	Date of Issuance: February 29, 2016
MAYOR’S OFFICE OF VETERAN AFFAIRS,	)	
Agency	)	
_____	)	
Elliott Duvall, Employee, <i>Pro Se</i>	)	MICHELLE R. HARRIS, Esq.
Leah N. Brown, Esq., Agency Representative	)	Administrative Judge

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On November 13, 2015, Elliott Duvall (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Mayor’s Office of Veteran Affairs’ (“Agency” or “MOVA”) decision to terminate him. On December 16, 2015, Agency filed its Answer to Employee’s Petition for Appeal and Motion to Dismiss.

I was assigned this matter on November 20, 2015. Agency noted in its Motion to Dismiss that OEA does not have jurisdiction over this appeal because Employee’s position classification was a term appointment. On December 21, 2015, I issued an Order directing Employee to submit a brief addressing the jurisdiction issue raised by Agency in its Motion to Dismiss. Employee’s brief was due on or before January 7, 2016. Additionally, Agency had the option to submit a response to Employee’s brief. Employee did not submit his brief by the deadline.<sup>1</sup>

On January 15, 2016, 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 provide a response to the December 21, 2015 Order. Employee had until January 25, 2016 to respond.<sup>2</sup> On January 25, 2016, Employee sent an email in response to this Order. Employee did not address the jurisdiction issue and only addressed the issue with his change of address. Employee was advised by the

<sup>1</sup> Employee called OEA and indicated that he had a change of address and did not receive Agency’s Answer. Employee was advised that a change of address must be submitted in writing to the Office. An email was sent to Agency Representative making her aware of this issue.

<sup>2</sup> This Order was sent to the updated address Employee provided over the phone and later via email.

undersigned Administrative Judge that his responses must be sent via postal service or hand delivery so that it may be appropriately entered into the record. On February 5, 2016, a subsequent Order for Statement of Good Cause was issued, specifically requesting Employee provide his response to the regarding jurisdiction in writing to this Office on or before February 12, 2016.

On February 11, 2016, a person called OEA identifying himself as an attorney who was assisting Employee with his appeal, and that more time was needed to respond to the February 5, 2016, Order.<sup>3</sup> Employee's attorney was advised that any request for an extension of time must be presented in writing to this Office. Additionally, the attorney was advised that his designation as Employee's representative must also be submitted to the Office in writing. As of the date of this decision, Employee has not responded to the February 5, 2016, Order. After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

### JURISDICTION

The jurisdiction of this Office has not been established in this matter.

### ISSUE

Whether this appeal should be dismissed for lack of jurisdiction and failure to prosecute.

### FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked for Agency as a Veteran Outreach Coordinator, DS-0301-07, under a Term Appointment. In a Final Agency Decision dated October 30, 2015, Employee was notified that his term "which he was appointed to on May 20, 2013 is set to expire on November 14, 2015." As a result, Employee was notified that his term would expire at the close of business on Saturday, November 14, 2015.

#### ***Employee's Position***

Employee asserts that he was improperly terminated because "the Office of Veteran's affairs did not follow the proper procedures as defined in the [sic] Personnel Policy Manual."<sup>4</sup> Employee is seeking "three year's salary plus cost of benefits."

#### ***Agency's position***

Agency asserts in its Motion to Dismiss Employee's Petition for Appeal that this Office lacks the jurisdiction to adjudicate this matter. Agency argues that Employee was subject to a term appointment which expired on November 14, 2015. Agency indicates that on May 20, 2013, Employee was hired as a Veteran Reach Coordinator, DS-0301-07, under a Term Appointment.<sup>5</sup> The

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<sup>3</sup> The attorney did not submit a designation as a representative for Employee. The attorney identified himself as Thomas Bansel with Veteran's Affairs.

<sup>4</sup> Employee's Petition for Appeal (November 13, 2015).

<sup>5</sup> Agency's Answer to Employee's Petition for Appeal (December 16, 2015).

original Not to Exceed (“NTE”) date was October 18, 2013<sup>6</sup>, but was extended four (4) times to a final NTE date of November 14, 2015. Agency asserts that the October 30, 2015, letter that was sent to Employee notified him of this November 14, 2015, expiration date.

### ***Jurisdiction***

This Office’s jurisdiction is conferred upon it by law, and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (“CMPA”), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 (“OPRAA”), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation (“DCMR”) § 604.1<sup>7</sup>, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
- (c) A reduction-in-force; or
- (d) A placement on enforced leave for ten (10) days or more.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction...” Pursuant to this rule, the burden of proof is by a preponderance of the evidence which is defined as “[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.” This Office has no authority to review issues beyond its jurisdiction.<sup>8</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>9</sup>

In the instant matter, the undersigned agrees with Agency’s assertion that OEA does not have jurisdiction over this matter. Because Employee was a term employee, this Office is required to follow District Personnel Regulations § 823.7 and § 823.8.<sup>10</sup> Section 823.8 provides that “employment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier.”<sup>11</sup> Here, Employee’s original NTE date was extended until November 14, 2015. Employee was provided notice in a letter from Agency dated October 30, 2015, that his position would expire in alignment with the end of his term appointment on November 14, 2015. There is no evidence offered from Employee that his appointment was not a term appointment or that there was any issue in the manner by which his appointment expired. District Personnel Regulation § 823.7 provides that “an employee serving under a term appointment shall not

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<sup>6</sup> *Id.* at Tab 2. (\*Note that in the Answer, the Not to Exceed date was listed as October 18, 2015, however the SF-50 indicates that this date is October 18, 2013).

<sup>7</sup> *See also*, Chapter 6, §604.1 of the District Personnel Manual (“DPM”) and OEA Rules.

<sup>8</sup> *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>9</sup> *See Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

<sup>10</sup> *See Roxanne Smith v. District of Columbia Department of Parks and Recreation*, OEA Matter J-0103-08, *Opinion and Order on Petition for Review* (May 23, 2011).

<sup>11</sup> *Id.*

acquire permanent status on the basis of the term appointment, and shall not be converted to a Regular Career Service appointment without further competition, unless eligible for reinstatement.” In this instance, Employee’s term ended on November 14, 2015, following several extensions of his term appointment. However, there is no information or evidence in the record to suggest that the Agency had to reappoint Employee. This Office has consistently held that OEA lacks jurisdiction over term employees.<sup>12</sup> Employees have the burden of proof for issues regarding jurisdiction and must meet this burden by a “preponderance of evidence.” I have determined that Employee did not meet this burden. For these reasons, I find that OEA lacks the jurisdiction to adjudicate this matter.

### ***Failure to Prosecute***

Additionally, OEA Rule 621.3 states in relevant part, that the “Administrative Judge, 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. 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 (Emphasis added);* or
- (c) Inform this Office of a change of address which results in correspondence being returned.”<sup>13</sup>

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 a submission.<sup>14</sup> In the instant matter, Employee was provided notice in the December 21, 2015, January 15, 2016 and February 5, 2016, Orders that a failure to comply could result in sanctions, including dismissal. Employee failed to comply with the deadlines for submissions as required in these Orders. All of the Orders were sent via postal service to the address provided by Employee.<sup>15</sup> Employee replied to the January 15, 2016, Order via electronic mail on January 25, 2016. Employee was advised at that time that correspondence related to his appeal must be submitted to OEA via personal delivery or mail. OEA Rule 607.6<sup>16</sup>, holds that the “filing of pleadings and documents with the Office, other than a petition for appeal, or a petition for review filed pursuant to § 633, shall be made as prescribed in § 607.4 unless the Administrative Judge assigned to the appeal directs otherwise.”<sup>17</sup> As of the date of this decision, Employee has not submitted his brief or other supporting documents as directed, thus resulting in his failure to comply with OEA Rules as required.<sup>18</sup>

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<sup>12</sup> See *Carolynn Brooks v. D.C. Public Schools*, OEA Matter No. J-0136-08, *Opinion and Order on Petition for Review* (July 30, 2010); *Roxanne Smith v. D.C. Department of Parks and Recreation*, OEA Matter No. J-0103-08, *Opinion and Order on Petition for Review* (May 23, 2011).

<sup>13</sup> OEA Rule 621.3, 59 DCR 2129 (March 16, 2012).

<sup>14</sup> *Williams v. D.C. Public Schools*, OEA Matter 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

<sup>15</sup> Employee did not provide an address through written notice via mail or personal delivery as directed, but only via email and telephone. However, information was sent to the updated address to ensure his receipt of all documents related to his appeal.

<sup>16</sup> OEA Rule 607.6, 59 DCR 2129 (March 16, 2012).

<sup>17</sup> OEA Rule 607.4<sup>17</sup>, provides that “the filing of a petition for appeal and a petition for review *must be made by personal delivery at the Office during normal business hours, Monday through Friday, or by mail addressed to the Office.*” (Emphasis Added).

<sup>18</sup> Agency Representative, Leah Brown, Esq., contacted Administrative Judge Michelle Harris on February 26, 2016, indicating that Employee sent a response to her office on February 15, 2016. Employee did not submit this or any other subsequent

A response to each of these Orders was required to ensure an appropriate review and resolution of the matter. Consequently, I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. I further find that Employee's failure to prosecute his appeal is a violation of OEA Rule 621 and constitutes another reason why this appeal should be dismissed.

ORDER

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

FOR THE OFFICE:

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MICHELLE R. HARRIS, Esq.  
Administrative Judge