THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FELICIA COWSER	)	OEA Matter No. J-0029-17
Employee	)	
	)	Date of Issuance: April 25, 2017
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA OFFICE OF AGING	)	Administrative Judge
Agency	)	
	)	

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Felicia Cowser, Employee, filed a petition for appeal with the Office of Employee Appeals (OEA) on February 15, 2017, appealing the final decision of the District of Columbia Office of Aging, Agency, terminating her employment with Agency, effective February 10, 2017.

After reviewing the submissions, I determined that this Office's jurisdiction was at issue. In her petition, Employee, a Supervisory Social Worker, identified the type of service she held as "MSS", *i.e.*, "Management Supervisory Service." She also submitted Agency's January 27, 2017 letter notifying her of its decision to terminate her which stated, in pertinent part:

> In accordance with section 3813 of Chapter 38 of the D.C. personnel regulations, Management Supervisory Service, this constitutes a notice…of the termination of your Management Supervisory Service appointment as a Supervisory Social Worker…As you know, appointments to the Management Supervisory Service are at will; therefore this termination action is neither grievable nor appealable.

In its March 23, 2017 response, Agency moved to dismiss the appeal, based on Employee's MSS status. In addition to legal arguments, Agency submitted documents that support its position that

Employee held MSS status. The Job Summary of Employee's position, for example, states in pertinent part:

> Management Supervisory Service (MSS): At-will employment applied to the MSS. All positions and appointments in the MSS serve at the pleasure of the appointing authority and may be terminated at any time with or without cause.

Agency also submitted Employee's Notification of Personnel Action, which stated in the "Remarks" section:

> Employee accepted appointment offer to the Management Supervisory Service (MSS) on 5/11/2015 and serves at-will in this position. Appointment offer informed employee of the conditions of employment.

On March 27, 2017, I issued an Order notifying Employee that the jurisdiction of this Office was at issue based on her status as an MSS employee. I also advised her that employees have the burden of proof on all issues of jurisdiction. She was directed to submit legal and/or factual argument supporting her position regarding this Office's jurisdiction by April 14, 2017. The Order stated that her failure to file a response could be considered concurrence that this Office lacks jurisdiction and/or could provide an additional ground for dismissal, *i.e.*, as a sanction for failing to prosecute her appeal. The parties were advised that if Employee did not file a timely response, the record in the matter would close at 5:30 p.m. on April 14, 2017. Employee did not file a response or contact the undersigned to seek an extension of time. The record therefore closed at 5:30 p.m. on April 14, 2017.

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The threshold issue is one of jurisdiction. This Office's jurisdiction is conferred on it by law. The Comprehensive Merit Personnel Act identifies the classifications of employees over which this Office has jurisdiction, and those who are excluded from appealing adverse actions, including dismissals, to this Office. § 1-606.03 of the D.C. Official Code (2001) excludes MSS employees from this Office's jurisdiction:

> Management Supervisory Service (MSS): At-will employment applies to the MSS. All positions and appointments in the MSS serve at the pleasure of the appointment authority and may be terminated at any time and with or without cause.

In *Grant v. District of Columbia,* 908 A2d 1173, 1178 (D.C. 2006), the District of Columbia Court of Appeals concluded that "MSS employees are statutorily excluded from the Career Service and thus cannot claim [the] protections" afforded to Career Service employees who are subject to adverse employment actions, such as notice, hearing rights, and the right to be terminated only for cause. An at-will employee can be discharged "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.,* 597 A.2d 28, 30 (D.C. 1991). As an at-will employee, Employee lacked job tenure and could not appeal her removal to this Office. *Leonard, et al v. Office of Chief Financial Officer,* OEA Matter Nos. 1601-0241-96 *et al.* (February 5, 1997).

Employee stated that she held an MSS appointment in her petition for appeal, and submitted documentation which identified her as an MSS employee. Agency submitted legal argument and additional documents supporting its request that the matter be dismissed for lack of jurisdiction based on Employee's MSS status. Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), employees have the burden of proof on all issues of jurisdiction. This burden must be met by a "preponderance of the evidence" which is defined in OEA Rule 628.2 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." The Administrative Judge concludes that Employee failed to meet her burden of proof on the issue of jurisdiction. The documents submitted support the finding that Employee had an MSS appointment. As discussed above, this Office does not have jurisdiction to hear appeals of MSS employees. Therefore, the Administrative Judge concludes that the appeal should be dismissed for lack of jurisdiction.

Employee's failure to file a timely response to the March 27, 2017 Order provides an alternative basis for dismissing the appeal. The Order was sent to Employee at the address listed in her petition by first class mail, postage prepaid. It was not returned and is presumed to have been received by Employee in a timely manner. In the Order, Employee was notified that her failure to respond to the Order by the stated deadline could be considered a failure to prosecute her appeal and could result in the dismissal of the petition. Employee did not respond to the Order and did not contact the undersigned. OEA Rule 621.3, 59 DCR 2129 (March 16, 2012), 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) [s]ubmit required documents after being provided with a deadline for such.

This Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). In this matter, Employee failed to respond to the Order which contained a specific deadline for her response and which notified her that her petition could be dismissed if she did not file a timely response. The Order was sent to Employee at the address listed as her appeal. It was not returned and is presumed to have been received. The Administrative Judge, "in the exercise of sound discretion" concludes that Employee's failure to respond to the Order provides another basis upon which this appeal should be dismissed.

ORDER

Based on the findings, conclusions and analysis, the Administrative Judge concludes the appeal should be dismissed. Therefore, it is now:

ORDERED: The petition for appeal is dismissed.[1]

FOR THE OFFICE: _____
Lois Hochhauser, Esq.
Administrative Judge

[1] Since this petition for appeal is being dismissed, Agency's "Motion to Dismiss or in the Alternative, Stay Proceedings" is denied as moot.