THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DARYL JACKSON	)	OEA Matter No. 1601-0366-10
Employee	)	
	)	Date of Issuance: August 23, 2012
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Administrative Judge
Agency	)	
	)	

Mr. Daryl Jackson, Employee
Bobbie Hoye, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Daryl Jackson, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 17, 2010, appealing the final decision of the District of Columbia Public Schools, Agency herein, to remove him from his position as Maintenance Supervisor, effective July 30, 2010. In the final Agency notice, dated July 23, 2010, Agency provided Employee with several alternatives for appealing his removal, which included filing a grievance pursuant to a collective bargaining agreement between Agency and his Union or filing an appeal with this Office. He was notified that he could pursue only one of these alternatives. In his petition, Employee stated that he filed a grievance with Teamsters Local 639, his exclusive bargaining representative, on July 26, 2010. In its Answer, filed on September 24, 2010, Agency argued that the matter should be dismissed since Employee filed a grievance with his Union prior to filing his appeal with OEA.

The matter was assigned to me on July 20, 2012. On that date, I issued an Order, advising Employee that the jurisdiction of this Office was at issue because D.C. Official Code § 1-616.52 provides that an employee can select only one method of appealing an adverse action, and that it appeared from his petition that he had filed a grievance pursuant to a collective bargaining agreement between Agency and his Union prior to filing his appeal with OEA. I directed him to submit legal and/or factual arguments supporting his claim that this Office has jurisdiction of this matter, by

August 14, 2012. I also informed him that employees have the burden of proof on the issue of jurisdiction. The parties were advised that the record would close on August 14, 2012, unless they were notified to the contrary. The Order was sent to Employee at the address he listed as his mailing address in his petition by first class mail; postage prepaid, and was not returned by the U.S. Postal Service. Employee did not respond to the Order and did not otherwise contact this Office. The record closed on August 14, 2012.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this petition for appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

This Office's jurisdiction is conferred upon it by law. It is governed in this matter by D.C. Official Code § 1-616.52 which provides in pertinent part the following:

> (d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter [providing appeal rights to OEA] for employees in a bargaining unit represented by a labor organization. . . .
>
> (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 § 1-606.03, or the negotiated grievance procedure, **but not both**. (emphasis added).
>
> (f) An employee shall be deemed to have exercised their *(sic)* option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever event occurs first**.(emphasis added).

Employee filed a grievance with his Union on July 26, 2010, several weeks before he filed this petition for appeal with OEA. In so doing, he chose to pursue his appeal through a negotiated grievance procedure. As stated in D.C. Official Code § 1-616.52(e), Employee is limited to one method of appealing an adverse action. The method chosen, according to D.C. Official Code § 1-616.52(f), is the one initiated first. In this instance, Employee filed the grievance with his Union several weeks before filing his petition for appeal with OEA. Thus this Office does not have

authority to hear his appeal.

Pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), Employee has the burden of proof on issues of jurisdiction. Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, as 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". *See*, OEA Rule 604.1, 46 D.C.Reg. 9299 (1999). Employee was given the opportunity to meet this burden of proof, but did not do so. I conclude that Employee did not meet his burden of proof on the issue of jurisdiction, and that the petition should therefore be dismissed. .

There is another basis to dismiss this petition. In accordance with OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. In this matter, Employee failed to respond to the July 20, 2012 Order which provided a deadline of August 14, 2012. The Order was sent to Employee at the address he listed as his home address in his petition, by first class mail, postage prepaid, and was not returned by the U.S. Postal Service. It is deemed to have been received by Employee. Employee did not seek an extension or otherwise contact the undersigned. The failure to prosecute an appeal includes the failure to respond to an Order after being given a deadline for the submission. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). Employee failed to respond to an Order which contained a deadline for the submission. I conclude that Employee failed to prosecute his appeal, and that this matter should also be dismissed for that reason.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE: LOIS HOCHHAUSER, ESQ.
Administrative Judge