THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARY GREEN	)	OEA Matter No. 1601-0263-12
Employee	)	
	)	Date of Issuance: December 7, 2012
v.	)	
	)	Lois Hochhauser, Esq.
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION	)	Administrative Judge
Agency	)	
	)	

Mary Green, Employee, *Pro Se*
Hillary Hoffman-Peek, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Mary Green, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on September 18, 2012, appealing the final decision of the Office of the State Superintendent of Education, Agency herein, to remove her from her position as Clerical Assistant, effective September 6, 2012.

I was assigned the matter on November 5, 2012. In reviewing the file, I noted that Employee attached a copy of a Step 2 Grievance filed by American Federation of State, County and Municipal Employees (AFSCME), her collective bargaining representative, dated August 30, 2012 regarding the removal that is the subject of this appeal. Therefore, I issued an Order directing Employee to show good cause by November 25, 2012 why this petition for appeal should not be dismissed since she had filed a grievance with her Union before filing this appeal with OEA. Employee was cautioned that her failure to respond could be viewed both as concurrence that this Office lacks jurisdiction and as a failure to prosecute this appeal. The parties were advised that the record would close on November 25, 2012, unless they were notified to the contrary. Employee did not respond to the Order, and the record closed on November 25, 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 by D.C. Office Code (2001) Section 1-616.52 which states in pertinent part:

> (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 Section 1-606.03, or the negotiated grievance procedure, **but not both**. (emphasis added).
>
> (f) An employee shall be deemed to have exercised their option *(sic)* pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever occurs first**.(emphasis added).

Pursuant to OEA Rule 628.2, 59 D.C. Reg. 2129 (March 16, 2012), Employee has the burden of proof on issues of jurisdiction. Employee must meet this burden by a "preponderance of the evidence," defined in OEA Rule 621.1, 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." The documents submitted in this matter support the conclusion that this Office lacks jurisdiction since Employee filed a grievance with her Union regarding her removal prior to filing the petition for appeal with OEA. Employee did not submit evidence or argument to the contrary. She did not meet her burden of proof on the issue of jurisdiction.

Employee's failure to respond to the Order provides an additional basis to dismiss this petition. OEA Rule 621.3(b) provides that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute the appeal. Failure to prosecute includes the failure to meet a deadline for responding to an Order. *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 of November

5, 2012, which directed her to respond by November 25, 2012 or risk dismissal of the matter. The Order also informed Employee that her failure to respond could be considered as a failure to prosecute this matter. The Order was sent to Employee at the address she listed as her home address in her petition. It was sent by first class mail by the U.S. Postal Service, postage prepaid, and was not returned to OEA. It is presumed to have been received by Employee in a timely manner. Employee's failure to respond to the Order which had a deadline constitutes another basis for dismissing the petition for appeal.

In sum, for the reasons discussed herein, there are two independent bases for dismissing this petition and I conclude that the petition should be dismissed.

ORDER

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

FOR THE OFFICE: LOIS HOCHHAUSER, ESQ.
Administrative Judge