THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JILL LUCHNER,	)	
Employee	)	OEA Matter No. 1601-0216-12
	)	
v.	)	Date of Issuance: January 10, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Jill Luchner, Employee *Pro-Se*
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 21, 2012 , Jill Luchner ("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 as a Teacher at Bell Multicultural High School. The effective date of her removal from service was August 10, 2012. The undersigned was assigned this matter on or about October 10, 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 it was alleged, by the Agency, that Employee was an at-will probationary employee with no right to contest her removal before the OEA. Accordingly, I issued an Order dated November 19, 2012, wherein I required Employee to address this jurisdictional issue. According to said Order, Employee was required to submit her brief on or before December 3, 2012. Employee did not respond to this Order. Accordingly, on December 6, 2012, I issued an Order for Statement of Good Cause wherein Employee was required to provide an explanation for her failure to submit her brief and she was required to submit her brief regarding the jurisdiction of this Office. Employee did not respond to this order either. To date, the OEA has not received a response from Employee. The record is now closed.

JURISDICTION

As will be explained below, the OEA lacks jurisdiction over this matter.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

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.
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> 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

Probationary Employee

According to the Agency's Answer dated September 26, 2012, Employee was not a permanent Employee at the time of her removal. The Agency states as follows "Ms. Luchner was not a permanent employee at the time of her separation. She was hired in the ET salary class and began his (*sic*) with DCPS on August 16, 2010. Pursuant to 5 DCMR § 1307.3, an initial appointee to ET salary class shall serve a two (2) year probationary period requirement. Ms. Luchner's probationary period would have ended on or about August 16, 2012. Her employment with the Agency ended on August 10, 2012." Agency's Answer at 5 – 6. Pursuant to this allegation, Agency moved for dismissal of this matter due to lack of jurisdiction. Employee was provided many opportunities to address whether the OEA may exercise jurisdiction but she chose to remain silent. I agree with the Agency and find that at the moment of her removal, Employee was not a permanent employee but rather was still serving in her probationary period. Accordingly, Employee served solely in an "at will" capacity, subject to Agency's discretion with regard to whether she qualified for continued employment. It is well established that in the District of Columbia, an employer may discharge an at-will employee "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). *See also Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). As an "at will" employee, Employee did not have any job tenure or protection. *See* Code § 1-609.05 (2001). Further, as an "at will" employee, Employee had no appeal rights with this Office. *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 204 (February 13, 1991). Accordingly, I find that this matter should be

dismissed.

Failure to Prosecute Petition for Appeal

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:
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> (a) Appear at a scheduled proceeding after receiving notice;
>
> (b) Submit required documents after being provided with a deadline for such submission; or
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> (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 November 19, and December 6, 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 has not exercised the diligence expected of an appellant pursuing an appeal before this Office. This represents another reason why this matter should be dismissed.

ORDER

Based on the foregoing, it is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.
Senior Administrative Judge