THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RONALD MARSHALL	)	OEA Matter No. J-0006-18
Employee	)	
	)	Date of Issuance: November 22, 2017
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS	)	Administrative Judge
Agency	)	

Ronald Marshall, Employee, *Pro Se*
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Ronald Marshall, Employee, filed a petition for appeal with the Office of Employee Appeals (OEA) on October 12, 2017, appealing the final decision of the District of Columbia Department of Public Works, Agency, terminating his employment as a Transfer Operations Manager, effective October 6, 2017.

Upon review of the petition, following my appointment to this matter on October 23, 2017, I determined that this Office's jurisdiction was at issue. The October 2, 2017 letter from Agency notifying Employee that he would be removed, stated that Employee held a Management Supervisory Service (MSS) appointment. MSS employees are considered at-will, and not eligible to appeal their removal to this Office. On November 3, 2017, I issued an Order, directing the parties to file arguments and documents in support of their positions on this Office's jurisdiction by November 17, 2017. Employee was advised that employees have the burden of proof on issues of jurisdiction. The Order stated that unless the parties were notified to the contrary, the record would close on November 17, 2017. Agency filed a timely response. Employee did not file a response and did not seek an extension of time to do so. The record closed on November 17, 2017.

JURISDICTION

This Office's jurisdiction was at issue in this matter.

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

This Office's jurisdiction was initially established by the Comprehensive Merit Personnel Act of 1978, which identifies the classifications of employees over which this Office has jurisdiction, and those who are excluded from appealing adverse actions 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.

The District Personnel Manual similarly states in Chapter 38, §2819.1:

> An appointment to the Management Supervisory Service (MSS) shall be an at-will appointment. A person appointed to a position in the [MSS] shall not acquire Career Service status, shall serve at the pleasure of the appointing personnel authority, and may be terminated at any time.

This Office has long determined that it does not have the jurisdiction to hear appeals of terminations of at-will employees, since they can be removed "at any time and for any reason, or for no reason at all." [1] *See, e.g., Leonard, et al v. Office of Chief Financial Officer,* OEA Matter Nos. 1601-0241-96 *et al*. (February 5, 1997). This determination has been consistently supported by the District of Columbia Court of Appeals. In *Grant v. District of Columbia*, 908 A.2d 1173, 1178 (D.C. 2006), for example, 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."

Agency attached several documents to support its position. In the document entitled "Acceptance/Declination of Management Supervisory Service Appointment," Agency notified Employee that his position of Transfer Operations Manager, was an MSS position and therefore an at will appointment with no Career Service job protection rights. Employee signed the acceptance on April 11, 2002, checking the provision that stated:

> I voluntarily accept appointment to the [MSS]. I understand that I will no longer have Career Service job protection rights and that, as [an MSS] employee, I will

[1] *Adams v. George W. Cochran & Co.,* 597 A.2d 28, 30 (D.C. 1991).

> be in an at-will appointment, and I may be terminated from service with the District government upon being given a 15 day notice prior to termination.

Pursuant to OEA Rule 628.1, 59 D.C.R. 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 his burden of proof on the issue of jurisdiction. Indeed, the documents submitted in this matter support the conclusion that Employee held an MSS appointment. As discussed above, this Office does not have jurisdiction to hear appeals of employees with MSS appointments. The Administrative Judge concludes that the appeal should be dismissed for lack of jurisdiction.

Employee's failure to file a timely response by the November 17, 2017 deadline provides an alternative basis for dismissing the appeal. The Order imposing the deadline was sent to Employee at the address listed in his petition, by first class mail, postage prepaid. It was not returned to OEA as undelivered, and is presumed to have been received by Employee in a timely manner. Employee did not file a response to the Order and did not contact the undersigned to seek an extension. OEA Rule 621.3, 59 D.C.R. 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 held that an appeal may be dismissed for failure to prosecute. *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 November 3, 2017 Order which contained a deadline. The Order was mailed to Employee at the address listed on his petition, and was not returned as undelivered to OEA. It is presumed to have been received by Employee in a timely manner. The Administrative Judge, "in the exercise of sound discretion" concludes that Employee's failure to respond to the Order provides an alternative basis to dismiss this appeal.

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.

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge