

The Order issued on May 21, 2018, notified the parties that the evidentiary hearing would take place on July 10, 2018, beginning at 9:15 a.m., and provided deadlines for prehearing submissions.

At 9:15 a.m. on July 10, 2018, in addition to the Court Reporter, the following individuals were present on behalf of Agency: Hillary Hoffman-Peak, representative; Na Na Jeon, representative; Andy Ball, representative; Quiyana Hall, Director of Human Resources; Patrice Bowman, Associate Director of Business Operations; Tatia Hart, Supervisory Terminal Manager Specialist; and Kevin Washington, Deputy Terminal Manager. Employee was not present, and had not contacted the AJ or the Office. As discussed below, the AJ eventually spoke with Employee by telephone, and offered to delay the proceeding until his arrival, but he stated that he would not appear on that date, and requested a continuance. The AJ cautioned him that failure to appear without good cause could result in the imposition of sanctions, including dismissal of the appeal. Employee again declined and requested that the matter be rescheduled. The AJ issued an Order on July 11, 2018, directing Employee to show good cause for his failure to appear at the proceeding. The filing deadline was 5:00 p.m. on July 26, 2018. The Order stated that unless the parties were advised to the contrary, the record in the matter would close on July 26, 2018. Employee did not file a response, and the record closed at 5:30 p.m. on July 26, 2018.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) states:

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:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

At issue is whether Employee established good cause for his failure to attend the evidentiary hearing and respond to the July 11 Order in a timely matter. If he did not, then the AJ must

determine if he failed to take “reasonable steps to prosecute” his appeal; and if he did not take reasonable steps, then a decision must be reached on whether dismissal of the appeal is an appropriate sanction. Based on the facts and discussion as stated below, the AJ concludes that Employee did not show good cause for his failure to attend the evidentiary hearing or timely respond to the July 11 Order; that he has failed to take “reasonable steps to prosecute” his appeal, and that the sanction of dismissal is appropriate.

In the first Order issued in this matter on February 28, 2018, the AJ reminded the parties that adherence to OEA Rules was mandatory throughout the appeal process, and that certain procedures should be followed if a continuance or extension of time was requested:

Parties are reminded that adherence to OEA Rules is mandatory. In addition, if a continuance or extension is sought, the party seeking such relief, must first contact the opposing party and request consent, and must include the other party's response in the request for relief as well as the date or dates mutually agreed upon by the parties if the request is not opposed. The pleading must be filed with OEA in accordance with OEA Rules, and a courtesy copy of the pleading must be provided to the AJ by email (lhochlaw@aol.com) or fax (202-408-5297) since resolution may be time sensitive. (original in italics).

The AJ reviewed these requirements with the parties at the PHC and explained that *pro se* parties are not excused from these requirements. Nevertheless, Employee failed to comply with OEA Rule 621.3(a) and (b), cited above, as well as other OEA Rules.

At the PHC, the AJ directed Employee and Agency to consult with their witnesses and each other and to notify the AJ of six dates when all parties were available for the evidentiary hearing by May 15, 2018. The AJ did so in part because Ms. Hoffman-Peak was not present and Kevin Stokes, Esq., who stood in for her, did not know her schedule. In addition, because vacations are often scheduled during the summer months, the AJ wanted the parties to ensure that their witnesses were available. However, in Agency's submission proposing hearing dates, counsel stated that she had contacted Employee about the matter, but he had not responded. Employee's failure to respond and to meet the May 15 deadline violated OEA Rule 621.3. The AJ did not impose sanctions but cautioned Employee of the importance of adhering to OEA Rules and Orders issued by the AJ in her May 21, 2018 Order.

Employee failed to appear at the evidentiary hearing. The Order scheduling the proceeding was mailed to Employee at the address listed in his petition and on the PHC attendance sheet; by first class mail, postage prepaid. None of the five Orders issued in this matter and sent to Employee at that address, was returned to this Office as undelivered, and all are presumed to have been received by Employee in a timely manner. After waiting for Employee about 15 minutes after the scheduled start time, the AJ asked Ms. Hoffman-Peak if she had been in contact with Employee recently. Ms. Hoffman-Peak responded that she had seen Employee the week before and that they had mentioned to each other that they would see each other again the following week at this proceeding. At about 9:40 a.m., the AJ telephoned Employee and when he did not answer, she left a voicemail message, stating that the hearing was due to start at 9:15

a.m., that the AJ, Agency personnel, and the Court Reporter were waiting; and that Employee should telephone the AJ as soon as he received the message.

Employee telephoned the AJ at about 10:05 a.m. In response to the AJ's question about his failure to appear, Employee initially said that he was unaware of the hearing date, but then conceded that he had talked with Ms. Hoffman-Peak about the hearing when they met the previous week, and that he had received the May 21, 2018 Order with the hearing date and time. The AJ asked Employee if there was any emergency or reason for his failure to appear. He did not offer a reason, but said only that he wanted the hearing to be rescheduled. Employee agreed that he had not requested a continuance. The AJ explained that the Court Reporter and seven Agency employees were waiting, and that since Employee did not live far from this Office, he could get to the Office within the next 45 minutes so that the hearing could be completed that day. When he declined, the AJ offered him additional time to appear. He again declined. The AJ asked him if there was any reason for his refusal to attend the proceeding at any time that day. She cautioned him that he risked the imposition of sanctions, including the dismissal of the appeal, because he had not given any good reason for his refusal to attend, despite the granting of additional time to appear. Employee's response was that he would not attend the proceeding that day and wanted the hearing to be rescheduled. The AJ told him that she would issue an Order directing him to show good cause for his failure to appear. She also informed him that she would convey his request to reschedule the matter to Ms. Hoffman-Peak and would include her response in the Order. The AJ conveyed Employee's request to Ms. Hoffman-Peak, who stated that Agency was ready to proceed and opposed the request. The parties were dismissed at about 10:30 a.m..

By Order dated July 11, 2018, the AJ directed Employee file a response establishing good cause for his failure to attend the July 10 proceeding by 5:00 p.m. on July 26, 2018. He was again cautioned about the imposition of sanctions, including the dismissal of the appeal. Employee did not file a response by the deadline, and did not seek an extension of time for filing. The record closed at 5:30 p.m. on July 26, 2018.

Employee sent the AJ an email on Sunday, July 29, 2018 at 3:50 p.m., which stated in pertinent part:

I am writing to request a new court date. Unfortunately, I was unable to attend the previous court date that was scheduled on July 10, 2018, due to I had two separate court appearances during the months of June and July and I forgot the July 10, 2018, court date.

Employee did not file his response with OEA in a timely manner in accordance with OEA Rule 621.3, and this AJ's Order. In addition, he violated other OEA Rules by failing to file the submission with OEA, by failing to serve Agency counsel, and by failing to include a certificate of service. However, the AJ reviewed the submission in order to confirm that Employee had not established good cause. She determined that he had not offered good cause and had failed to take reasonable steps to prosecute his appeal. He was aware of the time and date of the proceeding, and failed to attend, despite being given several opportunities to appear late. He offered no reason that would have prevented him from attending, and was aware that his failure

to attend could result in the imposition of sanctions, including the dismissal of his appeal. He was also aware that in addition to the AJ and Court Reporter, seven Agency employees were waiting for him. Under these circumstances the AJ determined that unless Employee could establish good cause, there was sufficient reason to impose sanctions.

Despite being cautioned by the AJ of the importance of the July 11 Order and the consequences of not complying with the Order in a timely manner, Employee failed to file a timely response, and did not seek an extension although he was aware of the procedures for doing so. This constituted another violation of OEA Rule 621.3 and this AJ's Order.

The AJ stressed to Employee, when allowing him to arrive late to the proceeding, that the AJ, Court Reporter and seven Agency employees were waiting, that considerable time and effort had been expended, and that the matter could still be completed that day. He nevertheless declined the opportunity to mitigate his failure to appear.

For these reasons, the AJ concludes that Employee violated OEA Rule 621.3(a) and (b) several times during this process and did not establish good cause for these violations. He did not appear at the scheduled proceeding and did not avail himself of several opportunities to appear late. In addition, he failed to file a response to the July 11 Order in a timely manner and in compliance with other OEA Rules. His July 29 email was reviewed, although it was untimely and improperly filed, to ensure that good cause was not provided, and the AJ determined it was not. The AJ concludes that Employee did not take reasonable steps to prosecute his appeal, that under the circumstances presented, sanctions should be imposed, and that dismissal of the appeal is the appropriate sanction in this matter.

ORDER

The petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge