THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0017-23
v.	)	
	)	Date of Issuance: July 13, 2023
D.C. DEPARTMENT OF YOUTH REHABILITATION SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Youth Development Representative with the D.C. Department of Youth Rehabilitation Services ("Agency"). On December 2, 2022, she received a Final Agency Decision suspending her for fourteen (14) days for violation of District Personnel Manual ("DPM") §§ 1605.4(a), 1607(a)(15), 1607.2(a)(16), 1605.4(d), and 1607.2(d)(1) – conduct prejudicial to the District: assaulting fighting, threatening, attempting to inflict or inflicting bodily harm while on District property or while on duty; use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct; quarreling, creating a disturbance or disruption; or inappropriate horseplay; and failure or refusal to follow instructions: negligence, including the careless failure to comply with rules, regulations, written procedures, or

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

proper supervisory instructions.[2] Employee was subsequently suspended without pay from December 5, 2022 until December 22, 2022.[3]

On December 22, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She asserted that Agency's adverse action was without merit because it lacked evidence to support its claim. Additionally, Employee contended that she received counseling immediately following her alleged misconduct and reasoned that the suspension action after counseling, constituted double jeopardy. She also argued that Agency did not appropriately apply the *Douglas*[4] factors in response to the proposed discipline. Therefore, she requested back pay and asked that the adverse action be removed from her personnel file.[5]

Agency filed an Answer to the Petition for Appeal on January 19, 2023. As it related to the conduct prejudicial to the District charges, Agency argued that Employee violated DPM §

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[2] The charges were based on a June 15, 2022, incident where Employee was accused of using profanity towards a youth resident and a supervisor at Agency's New Beginning Youth Development Center.
[3] *Petition for Appeal*, p. 6 (December 22, 2022).
[4] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses.
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct.

[5] *Id.* at 2, 5-6.

1607.2 because she was unprofessional by verbally abusing a youth in the care and custody of Agency. Moreover, Agency opined that Employee lacked decorum and deference for her supervisor by using profanity. As for the failure or refusal to follow instructions charge, Agency alleged that pursuant to DPM § 1605.4(d), Employee failed to submit a Staff Incident Notification Form, which was required whenever a reportable incident occurred. Agency disagreed with Employee's argument that its adverse action constituted double jeopardy. It explained that Agency's immediate counseling with Employee following the June 15, 2022, incident did not amount to verbal counseling. Lastly, Agency contended that the penalty of a suspension was appropriate based on the Table of Illustrative Actions. Therefore, it requested that OEA uphold its suspension action.[6]

Prior to issuing an Initial Decision, the OEA Administrative Judge ("AJ") ordered both parties to submit prehearing statements by February 16, 2023. Additionally, both parties were required to appear for a prehearing conference on February 23, 2023.[7] Agency filed a timely statement and appeared at the conference.[8] However, Employee failed to provide a timely submission or appear on February 23, 2023. Consequently, the AJ issued an Order for Good Cause Statement, which directed Employee to respond no later than March 6, 2023.[9] However, the AJ realized that the order was mailed to an incorrect address for Employee. Therefore, he issued a second Order for Good Cause Statement on March 17, 2023. The deadline for Employee to respond was April 7, 2023.[10] According to the AJ, Employee failed to respond by the prescribed deadline.

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[6] *Agency's Answer to Employee's Petition for Appeal*, p. 5-8 (January 19, 2023).
[7] *Order Convening a Prehearing Conference* (January 24, 2023).
[8] *Agency's Prehearing Statement* (February 16, 2023).
[9] *Order for Statement of Good Cause* (February 23, 2023).
[10] *Order for Statement of Good Cause* (March 27, 2023).

On April 11, 2023, the AJ issued an Initial Decision. He held that in accordance with OEA Rule 621.3, an AJ has the authority to dismiss a matter for failure to prosecute when a party fails to appear for scheduled proceedings or fails to submit required documents. The AJ provided that Employee failed to appear for the prehearing conference; she did not submit a prehearing statement; and she did not file a response to the AJ's Order for Statement of Good Cause. Therefore, he concluded that Employee did not exercise the diligence expected of an appellant pursing an appeal before this Office. Consequently, her Petition for Appeal was dismissed.[11]

Employee filed a Petition for Review on May 4, 2023. She argues that her union representative did timely comply with the AJ's February 23, 2023, Order for Good Cause Statement. According to Employee, her representative emailed the AJ and Agency's counsel both her response to the Order for Statement of Good Cause and a prehearing statement. Employee's representative explains that she missed the prehearing conference because of a death in her family. She concedes that she made filing errors in prosecuting her appeal before OEA and provides that she is now apprised of OEA's requirements for non-electronic filings. However, Employee contends that Agency was not prejudiced by her filing error. Moreover, she argues that a dismissal of Employee's appeal based on a harmless error is an unduly harsh sanction, with an obvious prejudice to her ability to challenge her suspension. Finally, Employee provides that she did not file an additional response to the March 27, 2023, Order for Statement of Good Cause because she already submitted her response on March 6, 2023, in accordance with the original Good Cause Order. Therefore, Employee requests that the matter be remanded for adjudication on the merits.[12]

On June 7, 2023, Agency filed its Opposition to Employee's Petition for Review. It asserts that Employee failed to appear before OEA and failed to file a prehearing statement or a response

[11] *Initial Decision* (April 11, 2023).
[12] *Petition for Review*, p. 1-4 (May 4, 2023).

to the AJ's Order for Statement of Good Cause. It also argues that Employee was aware of the second Order for Statement of Good Cause but failed to submit a response. Agency contends that Employee was required to respond to the AJ's order by mail or hand delivery to avoid dismissal of her appeal. Thus, it believes that the AJ correctly dismissed Employee's appeal for failure to prosecute and asks that the Board deny her Petition for Review.[13]

In his Initial Decision, the AJ found that Employee failed to appear for the prehearing conference; she did not submit a prehearing statement; and she did not file a response to the AJ's Order for Statement of Good Cause. The AJ relied on OEA Rule 624.3, which provides that "if a party fails to take reasonable steps to prosecute . . . the Administrative Judge, *in the exercise of sound discretion*, may dismiss the action. . . . (emphasis added)." However, in *In re Estate of Davis*, 915 A.2d 955, 962 (D.C. 2007) (quoting *Wilds v. Graham,* 560 A.2d 546, 547 (D.C.1989)), the D.C. Court of Appeals held that dismissal for failure to prosecute should be sparingly exercised. The Court found that "a single absence from a pretrial conference with no other evidence of dilatoriness on the part of the plaintiff is an insufficient basis for the sanction of dismissal. . . ."[14] It reasoned that appellant's circumstances did not demonstrate a pattern of dereliction amounting to willful and deliberate delay, gross indifference, or gross negligence. In the current case, Employee missed one prehearing conference on February 23, 2023. In accordance with *Davis*, Employee missing this one conference does not rise to a pattern of dereliction. We find this especially true because Employee submitted proof that she timely submitted a statement for good cause for missing the prehearing conference, along with her prehearing statement.

The Administrative Judge's initial deadline to respond to his Good Cause Order was March

[13] *Agency's Opposition to Employee's Petition for Review*, p. 4-5 (June 7, 2023).
[14] *In re Estate of Davis,* 915 A.2d 955, 962 (D.C. 2007) (quoting *Watkins v. Carty's Automotive Electrical Center, Inc.*, 632 A.2d 109, 110 (D.C. 1993) quoting *Durham v. District of Columbia*, 494 A.2d 1346, 1351 (D.C. 1985)).

6, 2023. The order provided that a statement for good cause should be submitted ". . . by first class mail or hand delivery to the Office of Employee Appeals [,] AND you are required to submit a courtesy copy by email. . . ." Agency is correct that the order did request a hard copy submission. However, the AJ also requested that an electronic copy be emailed to him.

In her Petition for Review, Employee submitted evidence of an email that was addressed to Administrative Judge Robinson and Agency's counsel. The email was sent on March 6, 2023, and it noted that it included Employee's ". . . response to show cause for the prehearing statement and conference . . . ."[15] Thus, Employee did not totally disregard the AJ's order; she partially adhered to the terms of the order by submitting her responses via email and not via email and hard copy.[16]

Furthermore, while this Board recognizes the AJ's authority to dismiss appeals for failure to prosecute, we believe that the AJ could have considered the emailed statement of good cause and prehearing statement, which were both timely filed electronically. In *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. 1996), the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial."[17] Therefore, in the interest of justice

[15] The email provided that the reason that Employee's representative was not present at the prehearing conference was because she lost a family member and unfortunately missed the date. In addition to offering good cause for missing the conference, Employee's representative also provided her prehearing statement. The statement outlined her response to the cause of action taken against her by Agency. *Petition for Review*, Exhibit D (May 4, 2023).
[16] This Board is unsure why the AJ failed to acknowledge the electronic filing of the statement for good cause in his Initial Decision since he ordered that the response also be sent to him via email.
[17] *Matthew Keisling v. D.C. Department of Forensic* Sciences, OEA Matter No. 1601-0015-21, *Opinion and Order on Petition for Review* (June 17, 2021); *Hugh Long v. University of the District of Columbia,* OEA Matter No. 1601-0026-18, *Opinion and Order on Petition for Review* (May 19, 2020); *Carl Mecca v. Office of the Chief Technology Officer,* OEA Matter No. 2401-0094-17, *Opinion and Order on Petition for Review* (September 4, 2018); *Khaled Falah v. Office of the Chief Technology Officer,* OEA Matter No. 2401-0093-17, *Opinion and Order on Petition for Review* (September 4, 2018); *Carmen Faulkner v. D.C. Public Schools,* OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29, 2016); *Cynthia Miller-Carrette v. D.C. Public Schools,* OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); and *Jerelyn Jones v. D.C. Public Schools,* OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013).

and fairness, this matter must be remanded to the Administrative Judge to consider the merits of Employee's appeal.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED**, and this matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Jelani Freeman

_____
Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.