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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
JEROME WEST)	OEA Matter No.1601-0038-03C09
Employee)	
)	Date of Issuance: July 13, 2012
v.)	
)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA DEPARTMENT)	Administrative Judge
OF CORRECTIONS)	
Agency)	
)	
Joseph Kaplan, Esq., Employee Representative		
Frank McDougald, Agency Representative		

DECISION ON COMPLIANCE

INTRODUCTION AND STATEMENT OF FACTS

Jerome West, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on March 14, 2003, appealing the decision of the District of Columbia Department of Corrections, Agency herein, to terminate his employment as a correctional officer. At the time of the removal, Employee had a permanent appointment and was in career status. The matter was assigned to me on December 4, 2003.

The Initial Decision was issued on April 21, 2005, following an evidentiary hearing. In the Initial Decision, I reversed Agency's action, and ordered Agency to reinstate Employee with appropriate back pay and benefits. Agency was directed to file documentation of its compliance within the Initial Decision 30 days from the date it became final.

In 2009, Employee filed a Motion for Enforcement. The matter was assigned to Judge Sheryl Sears. The parties then entered into mediation and settlement discussions. The matter was reassigned to me in May 2010, following the retirement of Judge Sears. I thereafter directed the parties to file status reports. On August 12, 2010, the first status conference was held, during which the parties identified the outstanding issues and documentation needed. Following the status conference, I issued an Order directing Agency to submit specific information and documentation to support its position regarding the amount of back pay, annual leave and sick leave owed to Employee. Agency provided the documentation and information in a timely

manner. However, Employee claimed the information was inadequate, because Agency had not explained how it reached its conclusions. I issued an Order on December 21, 2010, directing Agency to provide the calculations and rationale it used to reach its figures. Agency was directed to file its submission by January 28, 2011, and Employee was given until February 25, 2011 to respond.

At the status conference on May 24, 2011, the parties advised the undersigned of the status of their continuing efforts to resolve the matter, and presented their positions on the outstanding issues. On May 25, 2011, I issued a Summary of Proceedings and Order, in which I summarized the proceedings and ordered the parties to exchange more information on their rationale and calculations. Another status conference took place on June 27, 2011. Those proceedings were summarized in the Summary of Proceedings and Order issued on June 29, 2011 in which the parties were directed to exchange additional information. A status conference, scheduled for September 21, 2011, was continued at the request of Agency and with the consent of Employee, until October 4, 2011. In the Order granting the request, issued on September 14, 2011, I also noted that neither party had complied with the deadlines imposed in the previous Order. The representatives contacted me on October 4, 2011 and requested a continuance, stating that they thought they could resolve the outstanding issues, but needed several more weeks to determine if those efforts would be successful. By Order dated October 4, 2011, I granted the request and directed the parties to submit a status report by October 26, 2011.

On October 27, 2011, the parties advised me by email that they were still in settlement negotiations and asked for two additional weeks to file their status reports. The request was granted, and in the Order issued on November 1, 2011, I directed the parties to notify me by November 15, 2011 if the matter had been resolved or if further proceedings were necessary. The parties were directed to notify me with specificity as to which issues remained outstanding. On November 15, 2011, the parties requested two more weeks to determine if they could resolve all issues, stating that their settlement discussions were on-going and productive. On November 21, 2011, I issued an Order granting the request, but noting that if the parties were not successful in their efforts, it was unlikely additional extensions would be granted because of the length of time the matter had remained unresolved. The parties were directed to submit their reports by December 13, 2011. On December 13, 2011, I received an email from Employee's counsel, requesting, on behalf of both parties, additional time since the parties were still in negotiations. On December 27, 2011, I granted the request, and directed the parties to notify me of the outcome of their efforts by January 12, 2012. Neither party complied with that Order.

On May 29, 2012, I issued an Order, stating that the parties had not responded to the previous Order and had not contacted me since the issuance of the December 27 Order. I stated that although I strongly supported their efforts to resolve all the outstanding issues through negotiations, this Office could not keep the matter in a pending status indefinitely. I directed the parties, in pertinent part, to notify me by June 19, 2012 if all issues have been resolved. The parties were cautioned that if they failed to respond to this Order in a timely manner, sanctions could be imposed, including the dismissal of this matter without further notice. Employee was specifically advised that I could also conclude from his failure to respond that all issues were resolved, and the matter would be dismissed. The Order stated that unless the parties were notified

to the contrary, the record in this matter would close on June 19, 2012. Neither party responded. The record closed on June 19, 2012.

JURISDICTION

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

ISSUE

Should this petition be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

There are two bases upon which this matter can be dismissed. The first is Employee's failure to prosecute. This matter is certainly not typical of those cases which get dismissed because an employee fails to pursue an appeal. In this matter, Employee, through counsel, has pursued the matter vigorously and continuously for many years. However, Employee did not comply with OEA Rule 621.3 which 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.

In this matter, Employee failed to comply with Orders issued on December 27, 2011 and May 29, 2012, both of which provided deadlines. In addition, the Order of May 29, 2012 specifically stated that Employee's failure to comply could result in the imposition of penalties including the dismissal of the petition. To further remind the parties of the importance of a response, the Order stated that unless the parties were notified to the contrary, the record in this matter would close on June 19, 2012, the date the final submissions were due. Both representatives are highly experienced and well-qualified advocates. As noted above, in the past, whenever the parties sought a continuance, they contacted the Administrative Judge who granted the requests. No extensions were sought in relation to the last two Orders issued, and no responses were filed by the parties.

As described in the previous section, numerous Orders were issued by the Administrative Judge in this matter. All were sent by first class mail, postage prepaid and none were returned to this Office for non-delivery. They are presumed to have been delivered in a timely manner. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). The Administrative Judge also notes that the representatives have contacted the undersigned by

telephone and email to request extensions, even at the last minute, and given the on-going efforts to resolve the remaining issues, she granted all requests. . The Administrative Judge believes it is fair to state that with the exception of the two final Orders, the matter was prosecuted with diligence. However, based on Employee's failure to respond to her last two Orders which had specific deadlines, despite the warning in the final Order that the matter could be dismissed as a sanction, the Administrative Judge, in an exercise of "sound discretion" concludes that this matter should be dismissed based on Employee's failure to prosecute this matter.

The second basis upon which this petition could be dismissed is that it has been settled. Given the expertise and experience of counsel, it is likely that they failed to respond to the last two Orders because they resolved all issues in dispute, and overlooked the need to notify the Administrative Judge of the resolution. She is aware from the requests for extensions initiated by the representatives jointly, that they were close to resolving all outstanding issues. In addition, she specifically notified Employee in the May 29, 2012 Order that she could conclude from his failure to respond to the Order that all issues were resolved, and that she would then dismiss the petition. No response or request for an extension was filed. Although the parties did not submit a formal settlement agreement, they did notify the undersigned they were close to resolving all issues, and they were aware that if they did not respond to the final Order, the Administrative Judge could reasonably presume that all issues were settled. D.C. Official Code §1-606.06(b) (2001) states in pertinent part:

If the parties agree to a settlement without a decision on the merits of the case, a settlement agreement, prepared and signed by all parties, shall constitute the final and binding resolution of the appeal, and the [Administrative Judge] shall dismiss the appeal with prejudice.

This matter cannot be dismissed based on a settlement because the Administrative Judge was never notified, in writing or orally, that the matter was settled. She cannot assume that there is a settlement without written notification from Employee. For that reason, the Administrative Judge concludes that there is insufficient evidence in the record to dismiss the matter based on f D.C. Official Code §1-606.06(b) (2001). Therefore, OEA Rule 621.3 is the sole basis for the dismissal of this petition.

ORDER

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

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge