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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| DEMETRIUS MCKENNEY, |) | |
| Employee |) | OEA Matter No. 1601-0207-12 |
| |) | |
| v. |) | Date of Issuance: May 7, 2014 |
| |) | |
| D.C. PUBLIC SCHOOLS, |) | |
| Agency |) | MONICA DOHNJI, Esq. |
| _____ |) | Administrative Judge |
| Brandi S. Nave, Esq., Employee Representative | | |
| Sara White, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 16, 2012, Demetrius McKenney (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency”) decision to terminate him from his position as an Educational Aide effective August 10, 2012. On September 20, 2012, Agency submitted its Answer to Employee’s Petition for Appeal.

Following a failed mediation attempt, I was assigned this matter on February 24, 2014. Thereafter, I issued an Order dated February 25, 2014, requiring the parties to attend a Status Conference on March 25, 2014. On March 24, 2014, Employee’s representative submitted a Motion to Continue Status Conference.¹ This Motion was granted in an Order dated March 24, 2014.² This Order also informed the parties that the Status Conference was rescheduled for April 15, 2014. While Employee’s representative was present for the Status Conference, Agency was a

¹ On or about February 28, 2014, Employee’s representative contacted the undersigned to request that the scheduled Status Conference be continued due to a conflict in her schedule. The undersigned advised Employee’s representative to contact Agency’s representative as stated in the February 25, 2014, Order to determine an agreeable date for both parties, and then submit her request in writing.

² Because Employee’s request was received by this Office one day to the date of the scheduled Status Conference, the undersigned sent Agency’s representative a courtesy email notifying her that the Status Conference was rescheduled for April 15, 2014, and that an Order had been sent out to this effect.

no-show. On April 15, 2014, I issued an Order for Statement of Good Cause to Agency, wherein, Agency was ordered to submit a statement of good cause based on its failure to attend the April 15, 2014, Status Conference. Agency had until April 25, 2014 to respond. On April 29, 2014, Agency's representative emailed the undersigned stating that "I think I have a show cause due today, and I cannot find it anywhere. It didn't make it onto my calendar. Would you please let me know? I am so sorry to interrupt." The undersigned responded to this email by asking Agency's representative what case she was referring to. Later that day, Agency's representative sent another email to the undersigned stating that "That was my question, actually. The case is Demetrius McKenney and I will file it tomorrow..." On May 1, 2014, Agency's representative again emailed the undersigned noting that "I will have that filing to you this afternoon..." At approximately 9:44 pm on May 1, 2014, Agency's representative emailed the undersigned its good cause statement. On May 5, 2014, Agency's representative send the undersigned another email stating that "Tuesday April 15, 2014 was also the first full day of Passover and I was observing. I was just reminded." As of the date of this decision, Agency has still not submitted a written Statement for Good Cause via mail, or hand-delivery as required by the April 15, 2014 Order for Statement of Good Cause. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether this appeal should be dismissed.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

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:

That 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.

OEA Rule 628.2 *id.* states:

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.

ANALYSIS AND CONCLUSIONS OF LAW

OEA Rule 621.1 grants an Administrative Judge (“AJ”) the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ “in the exercise of sound discretion may dismiss the action or rule for the appellant” if a party fails to take reasonable steps to prosecute or defend an appeal.³ 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.

This Office has consistently held that a matter may be decided in favor of the Employee when an Agency fails to submit required documents.⁴ Here, Agency was warned in the February 25, 2014, and April 15, 2014, Orders that failure to comply could result in sanctions, including dismissal. Agency did not appear for the April 15, 2014, Status Conference or provide a written response to the April 15, 2014, Order. Both were required for a proper resolution of this matter on its merits. Additionally, on March 24, 2014, the undersigned sent a courtesy email to Agency’s representative, notifying her that the Status Conference was rescheduled for April 15, 2014. Moreover, the certificate of service attached to the February 25, 2014, and April 15, 2014, Orders shows that a copy of these Orders was mailed to Agency’s representative’s address of record. Further, this Office has not been notified by Agency of a change of address or by the Post Office that the correspondence was returned. Accordingly, I find that Agency’s behavior constitutes a failure to defend its action of separating Employee and this is a violation of OEA Rule 621.

In addition, Agency’s representative is well aware that email submissions are courtesy copies and are not included in the official record, thus, her email submission on May 1, 2014 at 9:44 pm is considered a courtesy submission and not included as part of the official record. Moreover, the April 15, 2014, Order specifically stated that “you are hereby ORDERED to submit your statement for good cause by *first class mail or have it hand delivered* to this Office.” (Emphasis added). Additionally, Agency’s representative in her email dated April 29, 2014 stated that she will submit her show cause statement the next day – April 30, 2014, however, she failed to do so. Again on May 1, 2014, Agency’s representative noted in her email to the undersigned that she will have the show cause statement filed that afternoon, and again, she failed to do so. Further, in her May 5, 2014, email, Agency’s representative noted that April 15, 2014, was the first full day of Passover, and that she was observing it. It is worth noting that April 15, 2014, is not an official District government holiday, and as such, if Agency’s representative knew she would not be present for the Status Conference for any reason whatsoever, she should have submitted a written request for a continuance as Employee’s

³ *Id.* at 621.3.

⁴ *Dwight Gopaul v. District of Columbia Public Schools*, OEA Matter No. 2401-0114-02, (June 16, 2005); *Morris v. Department of Mental Health*, OEA Matter No. 2401-0080-03R04 (April 14, 2004); *James v. Office of Boards & Commissions*, OEA Matter No. 2401-0069-04 (October 8, 2004).

representative did on March 24, 2014. Also, Agency's representative has on numerous occasions requested for an extension of time which was granted by the undersigned. Moreover, Agency's representative had notice of the scheduled Status Conference through the March 24, 2014, Order and my courtesy email to her on the same day. It is not the responsibility of the undersigned to manage Agency's representative's docket. Agency's representative's failure to notify the undersigned of a conflict in her schedule after being provided with ample notice portrays a complete disregard for the policies and procedures of this Office. Accordingly, I find that Agency has not exercised the diligence expected when defending an appeal before this Office.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to his last position of record and reimburse him all back-pay, and benefits lost as a result of his removal; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge