THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| In the Matter of: | |
| MARTIN MCCARLEY<br>Employee | OEA MATTER NO. 1601-0023-05 |
| v. | DATE OF ISSUANCE: January 26, 2006 |
| DC OFFICE OF CONSUMER AND REGULATORY AFFAIRS<br>Agency | SHERYL SEARS, ESQ.<br>ADMINISTRATIVE JUDGE |

Martin McCarley, Employee, *Pro Se*
Charles E. Thomas, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND FINDINGS OF FACT

Employee was a Neighborhood Stabilization Officer. Agency charged Employee with acts constituting "*misuse*, mutilation, or destruction *of District property*, public records or funds, *and discourteous treatment of* the public, *a supervisor, or another employee*." (Emphasis added.) Agency alleged that, on November 14, 2003, while Employee was on duty and assigned Vehicle GT1791, he drove to College Park, Maryland without authorization. On September 20, 2004, Agency was notified that a parking citation was issued to that vehicle.

Larry Carr, Program Manager, and Darryl Clark, Acting Branch Chief, contacted Employee about the incident. Agency alleged that Employee responded with remarks including profanity. On February 1, 2005, Patrick J. Canavan, Psy.D., Acting Director of Agency, notified Employee that he would be removed from his position effective Friday, February 4, 2005. On March 3, 2005, he filed an appeal with this Office.

Employee acknowledged signing for the vehicle but denied that he drove it to Maryland. Employee maintains that he was at a "Noise Training Class" with other Neighborhood Stabilization Officers from 9:00 a.m. until 12:00 p.m. that day. He also

contends that other employees had keys and access to the car. Employee denies authorizing anyone else to use the car. Employee admitted using profanity when approached about the matter. However, he maintains that Mr. Clark set a tense tone for the conversation by chastising Employee for not being available at an earlier time. Employee maintains that he was unaware of any earlier request to meet.

This Judge ordered the parties to appear for a pre-hearing conference at 11:00 a.m. on Wednesday, August 24, 2005. Both parties appeared but Employee asked for a continuance because he was not prepared. The conference went on as planned. The parties were then ordered to appear for a hearing on December 10, 2005. It was rescheduled for January 6, 2006, at 10:00 a.m. because the parties were engaging in settlement negotiations. Agency requested a postponement but that request was denied so that Employee would not have to suffer further delay. On January 5, 2006, at 1:00 p.m., the day this Judge returned to from a holiday, Employee left a message asking that the hearing be postponed or, in the alternative, this matter be decided on the record. To prevent the Office from incurring the cost of a court reporter for a proceeding for which Employee was not prepared, the hearing was cancelled.

In a conference call on January 6, 2006, with Employee and the Agency Representative, this Judge asked Employee why he requested an extension. He said that he was not prepared. When asked whether he had been ill or otherwise unable to prepare, he said that he had not. When asked why he did not contact this Office earlier, he said that he tried to call but was told that this Judge was not available. Employee explained that he "tried to call" during the vacation of this Judge from December 30, 2005, until January 4, 2006. December 31, 2005 and January 1, 2006, were weekend days and January 2 was an official government holiday. Employee did not leave a message, however, until January 5th. When presented with that information, Employee said that he had been on holiday as well.

By the date set for the hearing, Employee had missed every deadline for making a submission. He failed to submit a witness list, list of documents, requests for subpoenas or a written opening statement as directed in an order of October 17, 2005. In an order issued on January 6, 2006, Employee was directed to show cause why his appeal should not be dismissed for failure to prosecute and submit the following: a written statement showing cause why this appeal should not be dismissed for his failure to prosecute, a witness list, list of documents, requests for subpoenas (if any) and written opening statement. This Judge noted that Employee's request to continue the hearing was "untimely and not for any good cause" and that Employee had begun a "pattern of requesting continuances of proceedings at the last minute."

The parties were advised that a hearing date would be held in reserve, but that if Employee did not present a timely statement showing good cause for his failures to act, the hearing would be cancelled and the appeal dismissed. Employee's deadline was January 20, 2006. On that day, Employee submitted a statement of the reasons he believed his appeal should not be dismissed for failure to prosecute along with list of witnesses and documents. He stated that he was unable to meet deadlines because of the "complexity of the case" and the "overwhelming and often difficult to understand legal jargon." He said that he expected "to receive more assistance from the Union" than he had and that he was "working

vigorously to secure counsel." He also cited financial burdens caused by his loss of employment.

## JURISDICTION

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

## ISSUE

Whether Employee's appeal should be dismissed for failure to prosecute.

## ANALYSIS AND CONCLUSIONS

OEA Rule 622.3, 46 D.C. Reg. 9313 (1999) reads, in relevant part, as follows:

> 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.

(Emphasis added.)

Employee failed to submit required documents in accordance with deadlines set for those submissions. He was unprepared for the pre-hearing conference and did not ready himself for the evidentiary hearing. Employee set forth some emotionally compelling reasons for excusing his actions. However, they are legally insufficient to justify his repeated failures to act in accordance with the orders of this Office.

No employee who files an appeal with this Office is required to have a representative. If he or she chooses one, that person may or may not be an attorney. While the orders and notices issued by the Office contain legal language, they are presented in plain English. Furthermore, Employee has had, throughout the course of this appeal, direct access to the Judge by telephone, and also the rules of the Office which explain its procedures in detail. Employee failed to avail himself of any of these devices to help him address the obstacles he claims to have faced in complying with this Judge's directives. As a result, he missed deadlines and was not prepared for his proceedings. Employee has presented no sound reason for his failure to either prepare for the adjudication of this appeal or maintain timely communication as circumstances arose that could prevent him from

doing so. Only in the face of the threat of dismissal of his appeal did Employee finally comply with a deadline. However, his response is not sufficient to show good cause for his repeated failure to prosecute this appeal.

ORDER

It is hereby ORDERED that this appeal is DISMISSED for failure to prosecute.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE

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Martin McCarley, Employee, *Pro Se*
Charles E. Thomas, Esq., Agency Representative

ORDER CLOSING THE RECORD

Pursuant to OEA Rule 630.1, 46 D.C. Reg. 9317 (1999), it is hereby ORDERED that the record in the above-captioned matter will close effective at the close of business on January 26, 2006. Pursuant to OEA Rule 630.2, 46 D.C. Reg. 9317 (1999), once the record closes no additional evidence or argument shall be accepted unless the presiding official reopens the record.

Sheryl Sears, Esq.
Administrative Judge