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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE,)	
Employee)	OEA Matter No. 1601-0021-21-R22
)	
v.)	Date of Issuance: November 9, 2023
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	ERIC T. ROBINSON, ESQ.
)	SENIOR ADMINISTRATIVE JUDGE
_____)	
David Branch, Esq., Employee Representative)	
Lynette Collins, Esq., Agency Representative)	

INITIAL DECISION ON REMAND

Employee filed a Petition for Appeal on April 6, 2021, challenging the District of Columbia Public Schools’ decision to terminate him from his position as an Investigator. The effective date of his removal from service was March 6, 2021. By notice dated, May 27, 2021, Agency was required to submit an Answer to Employee’s Petition for Appeal. Agency complied and timely filed its Answer on June 26, 2021. The above captioned matter was first assigned to Administrative Judge (“AJ”) Arien Cannon on October 1, 2021. During the Prehearing Conference which was held on December 16, 2021, AJ Cannon noted that issues surrounding whether the OEA may exercise jurisdiction were present and Ordered the parties to brief this issue as well as issues surrounding the merits of this matter. On April 29, 2022, AJ Cannon issued an Initial Decision in this matter. In the ID, AJ Cannon held that the OEA may exercise jurisdiction and further held that Employee’s termination should be reversed due to Agency’s failure in following the appropriate Performance Improvement Plan procedures for removing an Educational Service employee that is not serving in a probationary period.

In an Opinion and Order on Petition for Review, this matter was subsequently remanded by the Board of the Office of Employee Appeals for a review of this matter on its merits.¹ Of note,

¹ See *Employee v. DCPS*, OEA Matter No. 1601-0021-21, *Opinion and Order on Petition for Review* (June 30, 2022).

the OEA Board held that evidence that was first produced by the Agency after the record was closed should be evaluated as to whether it should be admitted considering its untimely disclosure. And, if so, consider this newly submitted evidence on its merit. Thereafter, AJ Cannon left the OEA.

On October 5, 2022, this matter was then reassigned to the Undersigned Senior Administrative Judge, for a decision consistent with the terms of the OEA Board remand. On October 27, 2022, the Undersigned issued an Order Convening a Status Conference (“SC”) which was set for November 16, 2022. The Status Conference was set for multiple continuances at the request of Employee’s attorney. Eventually, a SC was held on February 2, 2023, and a briefing schedule was set whereby both parties would address the outstanding issues set forth by the OEA Board. Employee, through counsel, also tacitly acknowledged that he was continuing to pursue Employee’s cause of action in another forum. Agency was required to submit its brief by February 24, 2023; Employee, through counsel, was required to submit his reply brief by March 20, 2023. DCPS submitted its brief. However, Employee, through counsel, never submitted his brief.

Thereafter, another Status Conference was set to be held on October 5, 2023, to ascertain why Employee, through counsel, has not complied with the Undersigned’s Post Status Conference Order (February 9, 2023). This conference was never held. However, Employee’s counsel noted that Employee was still pursuing the underlying cause of action in another forum. He indicated this in an October 5, 2023, email² to the Undersigned and opposing counsel that stated as follows: “[Employee’s] claims are pending in the DC Superior Court and he is not going to pursue his claims at OEA any further.” In a follow up email, Employee’s counsel was then instructed that a proper withdrawal notice must be signed before it can be accepted by the OEA. Based on this email, he was then instructed to submit a signed withdrawal notice. However, no further communication was received by the OEA. On October 12, 2023, the Undersigned issued an Order for Statement of Good Cause (“Good Cause Order”) to Employee’s counsel. This Order noted that Employee has not submitted either an executed withdrawal notice or the reply brief in response to Agency’s brief. Employee’s counsel was then instructed to explain this discrepancy and to submit either of those documents no later than October 26, 2023. To date, the OEA has not received any response to the Good Cause Order. After reviewing the documents of record, I find that no further proceedings are warranted. 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 matter should be dismissed.

² This email was sent in lieu of his appearing for the aforementioned conference.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for 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 631.2 id. States:

For appeals filed under §604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Failure to Prosecute

OEA Rule 621.3, *id.*, states 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.

This Office has held that a matter may be dismissed for failure to prosecute when a party fails to appear for scheduled proceedings or fails to submit required documents. *See David Bailey Jr. v. Metropolitan Police Department*, OEA Matter No. 1601-0007-16 (April 14, 2016). As noted above in this matter, Employee, through counsel, did not submit his brief in response to my Post Status Conference Order date February 9, 2023; he did not submit a written notice voluntarily withdrawing his Petition for Appeal as his representative indicated he would during our last Status Conference and; he did not file a response to the Undersigned's Order for Statement of Good Cause. Employee's active prosecution of this matter is integral to making an informed decision regarding the facts and circumstances surrounding the dictates of the OEA Board in its Opinion

and Order on Petition for Review. I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. I further find that Employee's inaction presents a valid basis for dismissing the instant matter.³ Accordingly, I conclude that I must dismiss this matter due to Employee's failure to prosecute his Petition for Appeal.

ORDER

Based on the foregoing, it is hereby **ORDERED** that this matter be **DISMISSED**.

FOR THE OFFICE:

/s/ Eric T. Robinson
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

³ Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").