THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JERELYN JONES,	)	OEA Matter No. 2401-0053-10
Employee	)	
	)	Date of Issuance: April 30, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Jerelyn Jones ("Employee") worked as a Special Education Teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that she was being separated from her position pursuant to a reduction-in-force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

Employee challenged the RIF by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 21, 2009. She argued that she was not given prior notice of her separation and that Agency failed to follow the appropriate procedures in accordance with D.C. Official Code 1-624.08. Employee believed that under-qualified employees were hired and as a result, she was removed from her position. She believed that she should not have been separated. Accordingly, she requested to be returned to her position or to be compensated for

[1] *Petition for Appeal,* p. 9 (October 21, 2009).

Agency's improper actions.[2]

In its answer to Employee's Petition for Appeal, Agency asserted that it conducted the RIF pursuant to D.C. Official Code § 1-624.02 and Title 5, Chapter 15 of the District of Columbia Municipal Regulations ("DCMR"). It provided that pursuant to 5 DCMR § 1501, Woodson Senior High School ("Woodson") was determined to be a competitive area, and under 5 DCMR § 1502, the Special Education Teacher position was the competitive level subject to the RIF. Accordingly, Employee was provided one round of lateral competition where the principle of Woodson rated each employee through the use of Competitive Level Documentation Forms ("CLDF"), utilizing the weight of each competitive factor, as defined in 5 DCMR § 1503.2. After discovering that Employee was ranked the lowest in her competitive level, Agency provided her a written thirty-day notice that her position was being eliminated. Therefore, Agency believed the RIF action was proper.[3]

Before issuing his Initial Decision, the AJ ordered both parties to submit legal briefs addressing whether the RIF should be upheld.[4] In its brief, Agency reiterated its position and also explained that it had discretion over weighting the factors defined in 5 DCMR § 1503.2.[5] Employee did not respond to the AJ's order.

Having not received Employee's brief, the AJ issued his Initial Decision on January 27, 2012. He held that Employee's failure to respond to the order constituted a failure to prosecute her appeal. Accordingly, Employee's appeal was dismissed.[6]

On March 2, 2012, Employee filed a Petition for Review and Request for Reinstatement

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[2] *Petition for Appeal,* p. 3-5 (October 21, 2009).
[3] *Agency's Answer to Employee's Petition for Appeal* (December 17, 2009).
[4] *Post Conference Order* (December 28, 2011).
[5] Agency believed that OEA is limited to determining whether it followed the proper procedures under D.C. Official Code § 1-624.02 and 5 DCMR §§ 1503 and 1506. *District of Columbia Public Schools' Brief,* p. 5-8 (January 26, 2012).
[6] *Initial Decision,* p. 2-3 (January 27, 2012).

with the OEA Board. She asks for the appeal to be reinstated so that she can respond to the AJ's December 28, 2011 order. Counsel for Employee explains that the failure to respond to the order was due to oversight, inadvertence, and the press of other business.[7] Employee also requests that the reinstatement of her case allow for sufficient time to conduct discovery, submit an affidavit, gather facts and evidence, and substantiate her claims.[8] Finally, she states that the dismissal of her case for her failure to prosecute the appeal leaves her no redress and is contradictory to the purpose and intent of OEA.[9] Therefore, Employee requests that the Board reconsider the Initial Decision's findings of fact and conclusions; reinstate her appeal; allow for sufficient time to conduct discovery; and allow her case to be tried on the merits.[10]

Agency asserted in its Response to Employee's Petition for Review that the petition failed to state permissible grounds for review by the Board. Agency contends that Employee agreed to file her responsive brief by January 13, 2012, and her claim that she did not have enough time and her failure to request an extension of time are not objections to the Initial Decision. It reiterated its position that the RIF action was proper. Therefore, Agency requests that the Board affirm the Initial Decision and declare it final; dismiss Employee's Petition for Review as insufficient; and declare that its RIF action was proper.[11]

OEA Rule 622.3 provides that "if a party fails to take reasonable steps to prosecute . . .

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[7] Employee's counsel explains that he only had a couple of weeks to conduct discovery, and there are no procedures that permit him to conduct discovery prior to the case being assigned to an AJ. He provides that he is handling more than fifteen RIF matters with competing deadlines, and the short amount of time allotted to conduct discovery and to submit the brief was unreasonable and unfair to Employee. *Petition for Review and Request for Reinstatement,* p. 2-6 (March 2, 2012).

[8] After the petition for review was filed, Employee submitted an affidavit and responsive brief to the AJ's order.

[9] Employee provides that Agency's excessing school placement was improper; it violated the collective bargaining agreement between the Washington Teachers' Union and Agency; and it violated the *Americans with Disabilities Act of 1990*, (ADA), 42 U.S.C. §§ 12101-12213 (2000). Further, she argues that Agency failed to prove that the RIF was based on a budgetary shortfall; Agency failed to show that the RIF was executed with adequate notice to her and the proper due process; and Agency unfairly administered, scored, and ranked her one round of lateral competition.

[10] *Petition for Review and Request for Reinstatement,* p. 12 (March 2, 2012).

[11] *District of Columbia Public Schools' Response to Employee's Petition for Review and Request for Reinstatement* (April 9, 2012).

the Administrative Judge, *in the exercise of sound discretion*, may dismiss the action. . . . (emphasis added)." 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 with prejudice for failure to prosecute should be sparingly exercised. In *In re Estate of Davis*, the appellant appealed the trial court's decision to dismiss his case with prejudice. The trial court ruled that he failed prosecute his appeal after he missed a pretrial scheduling and settlement conference. On appeal the Court held 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. . . ."[12] It reasoned that appellant's circumstances did not demonstrate a pattern of dereliction amounting to willful and deliberate delay, gross indifference, or gross negligence. Therefore, the Court held that the trial court abused its discretion and reversed its decision.

In *Murphy v. A.A. Beiro Construction Company*, 679 A.2d 1039 (D.C. 1996), the Court of Appeals outlined several factors to be considered when determining if there is abuse of discretion. The Court ruled that "factors relevant to determining whether the trial court or agency abused its discretion include . . . any lack of good faith, and any prejudice to the opposing party." In the current matter, the AJ did not allow Employee to present if good cause existed before dismissing the matter. It is OEA's policy that when a party misses a filing deadline or fails to appear for a proceeding, the AJ is to issue an Order for Statement of Good Cause to determine if there was a legitimate reason for the oversight. Allowing Employee to respond to an Order for Good Cause Statement would not have prejudiced Agency in any way. Moreover, there was clearly not a pattern of willful or deliberate delay in this case.

The AJ's dismissal was not warranted. There was only one instance of delay. Therefore,

[12] *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)).

the AJ's sanction of dismissal for failure to prosecute must be reversed. The Board believes, as was provided in *Murphy* that decisions on the merits are preferred whenever possible. We believe that the AJ abused his discretion, and for that reason, this matter is remanded for him to consider the case on its merits.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED** and the matter is **REMANDED** to the Administrative Judge to consider the case on its merits.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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Necola Y. Shaw

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Alvin Douglass

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.