

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0102-14
JUAN JOHNSON,)	
Employee)	
)	Date of Issuance: September 13, 2016
v.)	
)	
METROPOLITAN)	
POLICE DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Juan Johnson (“Employee”) worked as a Police Officer with the Metropolitan Police Department (“Agency”). On May 1, 2014, Agency issued its Final Notice of Adverse Action to Employee informing him that he was being suspended for forty days, with five days held in abeyance.¹ Specifically, Employee was charged with violating Metropolitan Police General Order Series 120.21 for Conduct Unbecoming of an Officer. The charges stemmed from an October 20, 2013 incident wherein he was observed sleeping inside of his personal vehicle while off-duty, allegedly under the influence of alcohol.² The effective date of Employee’s suspension was June 24, 2014.

¹ The notice also stated that based on his ongoing substance abuse issues, Agency directed him to report to the Police and Fire Clinic for a Fitness for Duty evaluation.

² *Agency Answer to Petition for Appeal*, Tab 2 (August 18, 2014).

Employee filed a Petition for Appeal with the Office of Employee's Appeal ("OEA") on July 23, 2015. Although he was only subject to a charge of conduct unbecoming of an officer, Employee stated that Agency failed to conduct a thorough investigation of its Reduction-in-Force ("RIF") action. He further requested that this Office review his suspension.³

Agency filed an Answer to Employee's Petition for Appeal on August 18, 2014. It denied each of his allegations. Accordingly, it requested that an evidentiary hearing be conducted.⁴

The matter was assigned to an OEA Administrative Judge ("AJ") on October 21, 2014. On February 4, 2015, the AJ issued a Status Conference Order to assess the parties' arguments via telephone.⁵ Employee could not be reached for the March 30, 2015 telephonic conference. Therefore, the AJ issued a Show Cause Order on April 13, 2015, to allow him an opportunity to explain his absence for the conference.⁶ Employee was further warned that his appeal may be dismissed if he did not submit a response to the order on or before April 21, 2015.⁷ Employee did not submit a response to the order.

The AJ issued an Initial Decision on April 29, 2015, dismissing Employee's appeal.⁸ The AJ held that dismissal was appropriate in light of OEA Rule 621.3, 59 DCR 2129 (March 16, 2012), which provides that an appeal may be dismissed if a party fails to take reasonable steps to prosecute or defend an appeal before this Office. Employee failed to make himself available for the March 30, 2015 telephonic Status Conference. He also failed to file a statement of cause on

³ *Petition for Review* (July 23, 2015).

⁴ *Id.* at 2.

⁵ *Order Convening a Status Conference* (February 4, 2015).

⁶ *Show Cause Order* (April 13, 2015). The Order was mailed to the address Employee provided in his Petition for Appeal; however, it was returned to this Office as "Return to Sender, Unable to Forward."

⁷ *Id.*

⁸ *Initial Decision* (April 29, 2015).

or before the required deadline. The AJ, therefore, dismissed his Petition for Appeal for failure to prosecute.⁹

Employee subsequently filed a Petition for Review with OEA's Board on June 2, 2015. He does not address any of the issues raised in the Initial Decision regarding his failure to prosecute his Petition for Appeal. Instead, Employee offers several explanations and arguments regarding the charges levied against him in Agency's Final Notice of Adverse Action.¹⁰ Agency did not submit a response to Employee's petition.

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Moreover, in accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." The D.C. Court of Appeals held in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008) that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal."

⁹ *Id.* The Initial Decision was also mailed to Employee's address of record and was returned to this Office as "Return to Sender, Unable to Forward."

¹⁰ *Answer to Petition for Appeal* (August 18, 2014).

Additionally, the Courts ruled in *Brown v. Watts*, 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals*, 886 A.2d 70 (D.C. 2005) that any arguments are waived when a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision. Moreover, this Board has consistently held that an argument is waived if it was not raised on appeal before the AJ.¹¹

In this case, Employee had numerous opportunities to present his arguments to the AJ in his Petition for Appeal or through the submission of oral or documentary evidence, but he chose not to. Furthermore, he has not raised any of the aforementioned reasons as a basis for granting his Petition for Review. As previously stated, OEA Rule 621.3 provides the sanctions that the AJ may impose when a party fails to prosecute or defend a matter. The rule provides that:

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 the Office of a change of address which results in correspondence being returned

¹¹ *Sharon Jeffries v. D.C. Retirement Board*, OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014); *Latonya Lewis v. D.C. Public Schools*, OEA Matter No. 1601-0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Ilbay Ozbay v. Department of Transportation*, OEA Matter No. 1601-0073-09R11, *Opinion and Order on Petition for Review* (October 28, 2014); and *Yordanos Sium v. Office of State Superintendent of Education*, OEA Matter No. 1601-0135-13, *Opinion and Order on Petition for Review* (May 10, 2016).

Based on the foregoing, it was proper for the AJ to rule in favor of Agency and dismiss Employee's Petition for Appeal. He did not provide an excuse for his failure to respond to the AJ's Order for Statement of Good Cause and did not contact opposing counsel or this Office to request an extension of time to reschedule the Status Conference. In addition, it was incumbent upon Employee to provide an updated address to OEA to ensure that all correspondence can be mailed to the correct address of record. Accordingly, this Board must uphold the AJ's decision and deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.