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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
HILTON BURTON	)	OEA Matter No. 1601-0219-11
Employee	)	
	)	Date of Issuance: February 7, 2013
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA METROPOLITAN	)	Administrative Judge
POLICE DEPARTMENT	)	
Agency	)	
_____	)	

E. Scott Frison, Jr., Esq., Employee Representative  
Teresa Quon Hydon, Esq., Agency Representative  
Brenda Wilmore, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Hilton Burton, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on September 14, 2011, appealing the final decision of the District of Columbia Metropolitan Police Department to reassign him from the position of Commander to the position of Captain, an action that Employee characterized as an impermissible demotion. The matter was assigned to me on November 11, 2011.

On November 3, 2011, Agency filed a motion to dismiss the matter. On November 18, 2011, Employee filed an opposition to the motion as well as a motion to file the opposition out of time, since Employee filed the motion beyond the date permitted by OEA Rule 611.3. On December 5, 2011, I issued an Order directing Agency to respond to Employee's request to permit the late filing of the motion. Agency was also directed to present its position on whether Employee's petition for appeal was filed in a timely manner. Employee was directed to clarify the type of appointment he held since he had identified himself as a "probationary employee" in his petition. Employee was further advised that if he maintained that he was a probationary employee, he needed to present argument regarding this Office's jurisdiction to hear the matter. The submissions were due on December 15, 2011. Agency filed a timely response. Employee filed a motion on December 28, 2011 seeking an extension until December 22, 2011. Employee represented that he had obtained Agency's consent for the extension until December 22, 2011. Since Employee did not meet the agreed-upon deadline of December 22, 2011, that he had sought, I issued an Order on February 15,

2012 directing him to show cause why the matter should not be dismissed for failure to prosecute. Employee filed his response in a timely manner.

On December 12, 2012, I issued an Order scheduling a prehearing conference for 9:00 a.m. on January 16, 2013. I advised the parties that they would be given the opportunity to present oral argument on a number of issues. The Order stated that failure to appear at the prehearing conference at the scheduled time could result in the dismissal of the petition without further notice. The Order was sent by first class mail, postage prepaid, to Employee and Mr. Frison at the addresses listed by those individuals. Neither Order was returned to OEA and it is presumed that both Employee and Mr. Frison received copies of the Order in a timely manner.

Neither Employee nor counsel appeared at the prehearing conference and neither contacted me or other OEA staff to request that the matter be rescheduled. Brenda Wilmore, Esq., was presented on behalf of Agency. At 9:30 a.m., I telephoned Mr. Frison and left a voicemail message about this matter. I excused Ms. Wilmore at approximately 9:50 a.m.. Mr. Frison did not return the telephone call, and to date, neither Employee nor his representative has contacted this Office.

I issued an Order on January 17, 2013 directing Employee to show good cause why this matter should not be dismissed for failure to prosecute his appeal. The Order was sent to Employee and counsel at their listed addresses by first class mail, postage prepaid. The response was due by 4:00 p.m. on February 4, 2013. The parties were notified that unless they were advised to the contrary, the record would close at that time. The correspondence was not returned to OEA and it is presumed that Employee and counsel received their copies in a timely manner. Employee did not respond. The record was closed on January 17, 2013.

### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

### ISSUE

Should this petition be dismissed?

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

In accordance with OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), this Office has long maintained that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute his or her appeal. In this matter, Employee failed to comply with Orders issued by the undersigned by failing to appear at the prehearing conference and by failing to meet deadlines for the submission of documents. Orders were sent to Employee and his representative by first class mail, postage prepaid, at the addresses listed by Employee and counsel in the petition for appeal. No Order was returned as undelivered to OEA, and all Orders are presumed to have been received. Neither Order was returned, and both are presumed to have been received by Employee.

OEA Rule 622.3, 46 D.C. Reg. 9313 (1999), states that a petition for appeal may be dismissed with prejudice when an employee fails to prosecute his or her appeal. Failure to prosecute an appeal includes failure to attend a prehearing conference for which notice was provided and a time was scheduled. In this matter, Employee failed to attend a prehearing conference for which notice was provided and a time was scheduled. He was given the opportunity provide a reason, but did not. In addition, Rule 622.3 states that the failure to “[s]ubmit required documents after being provided with a deadline for such submission” as a failure to prosecute an appeal. *See, e.g., Employee v. Agency*, OEA Matter No.1602-0078-83, 32 D.C. Reg. 1244 (1985). Employee failed to respond to the three Orders issued in this matter in a timely manner. With regard to the first Order, he provided a reason for his late filing. With regard to the second Order issued on December 5, 2011, he asked for additional time after the Order was due and after the additional time that he requested had expired. Finally, with regard to the January 17, 2013 Order, he failed to respond at all. His failure to attend the prehearing conference and his failure to respond to the December 5, 2011 and January 17, 2013 Orders in a timely manner, are each independent grounds for establishing a failure to prosecute and merit dismissal of this matter. I conclude this petition for appeal should be dismissed.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge