

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
TERRELL HILL) OEA Matter No. 1601-0244-12
Employee)
) Date of Issuance: December 18, 2014
v.)
) Lois Hochhauser, Esq.
D.C. DEPARTMENT OF CONSUMER) Administrative Judge
AND REGULATORY AFFAIRS)

Agency)
Terrell Hill, Employee, *Pro Se*
Adrienne Lord-Sorensen, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On September 10, 2012, Terrell Hill, Employee, filed a petition with the Office of Employee Appeals (OEA), appealing the final decision of the D.C. Department of Consumer and Regulatory Affairs, Agency, to suspend him for ten business days without pay, effective September 10, 2012. At the time he filed the appeal, Employee was an Investigator with Agency and held a permanent appointment in the career service. The matter was assigned to me on or about January 28, 2014.

On February 10, 2014, I issued an Order scheduling the prehearing conference for 3:00 p.m. on February 25, 2014. The Order noted that in his petition, Employee stated that he had filed a complaint in this matter and that OEA had issued a decision. Employee was directed to submit a copy of that decision “or of any complaint, appeal or grievance” previously filed, by 4:00 p.m. on February 18, 2014. The Order also required a party seeking a continuance or extension to request consent from the opposing party before filing the request. For that reason, the telephone numbers of both parties were included in the Order. Finally, the Order stated that parties were required to comply with all OEA Rules and that failure to comply with the Rules or Orders could result in the imposition of sanctions, including the dismissal of the appeal. The Order was sent to Employee at the address listed in his petition. It was not returned to OEA.

Employee did not submit the required information by the stated deadline and did not request an extension. He did not appear at the prehearing conference. Rather, on the evening of February 24, 2014, he telephoned OEA and informed Ms. Katrina Hill, OEA Clerk, that he was in the Philippines where he has a residence. He told Ms. Hill that the person living at the address listed in the petition, which remained his mailing address, had not given him sufficient advance

notice so that he could make travel arrangements to attend the scheduled proceeding. Employee left an overseas number, but the Administrative Judge was unable to reach him. Ms. Lord-Sorensen was present at the scheduled time, and was excused.

On March 24, 2014, I issued an Order rescheduling the prehearing conference for April 29, 2014. In the Order, I stated that Employee had not complied with the directive to submit a copy of an earlier decision, complaint or grievance he referred to in his petition. He was directed to comply with that provision by April 16, 2014, and advised that if he made that statement in error, he needed to correct petition accordingly. He was notified that if he did not meet the deadline, sanctions could be imposed, including the dismissal of the appeal. Employee did not file a response by the stated deadline. The prehearing conference was rescheduled to May 14, 2014.

The prehearing conference took place on May 14, 2014. Agency initially requested that Employee be sanctioned for his failure to comply with previous Orders. The Administrative Judge stated that although Employee had not fully complied with the Orders, he had contacted the undersigned after April 16, to provide the information by telephone. At that time, I told him that I could not engage in *ex parte* communication, and directed him to provide the information at the prehearing conference. The Administrative Judge told Employee that because he was appearing *pro se*, he had been given some leeway, but that in the future he was expected to fully comply with directives or risk the imposition of sanctions, including the dismissal of the petition. With the participation of the parties, the hearing was scheduled for July 23, 2014. The parties also agreed to timeframes for consulting, exchanging lists of witnesses and documents, and filing subpoena requests. The Administrative Judge provided a short description of the proceeding. An Order memorializing the decisions reached at the prehearing conference was issued on May 19, 2014.

On July 16, 2014, Agency filed a consent motion, requesting that the hearing be continued since the parties were engaged in settlement negotiations. An Order was issued on July 22, 2014, granting the request and directing the parties to file a settlement agreement or status reports, by September 16, 2014. On August 28, 2014, Employee sent an email to the Administrative Judge advising her that the matter had not been resolved and requesting that a hearing be scheduled. He did not file a written request with OEA as required. By Order dated September 16, 2014, the parties were notified that the hearing would take place on November 25, 2014, beginning at 9:30 a.m. Order included other filing deadlines, including a deadline of 5:00 p.m. on November 3, 2014 for the parties to exchange lists of witnesses and documents that they intended to introduce at the hearing.

On October 30, 2014 the parties submitted a document entitled Joint Documentary and Testimonial Evidence. In that document, each party listed witnesses. On November 4, 2014, Employee, by email, asked for leave to add several witnesses to his witness list. He did not file a written submission with OEA or seek Agency's permission, as required by OEA Rules and earlier Orders. Nevertheless, because the hearing date was approaching, I told him I would notify Agency of his request and ask Agency if it consented. Agency did not consent, and by Order dated November 10, 2014, I denied his request determining that he had not established good cause for the request.

Employee did not appear at 9:30 a.m. on November 25 when the hearing was scheduled to begin. Ms. Lord-Sorensen and an Agency witness appeared in a timely manner. The Court Reporter was also present. Employee had not contacted the undersigned or telephoned OEA to ask for a slight delay or a continuance. At 9:40 a.m., I telephoned him at the telephone number he provided at the prehearing conference, to find out if there was a problem. He did not answer the call, and the voicemail did not allow me to leave a message. I directed Ms. Lord-Sorensen to wait until 10:15 a.m., expecting that Employee would appear or at least contact me by that time. He did neither. I excused Ms. Lord-Sorensen at about 10:15 a.m., and advised her that I would be issuing an Order directing Employee to show cause for his failure to appear at the proceeding.

At approximately 10:35 a.m., Ms. Hill left me a voicemail message stating that Employee had just arrived at OEA and wanted the hearing go forward. I immediately returned the call, and spoke with Ms. Hill at about 10:40 a.m. She told me that Employee had left OEA, telling her that he would return but not telling her when that would occur. Ms. Hill also stated that several of Employee's witnesses had recently arrived. I asked Ms. Hill to inform Employee that the proceeding would not go forward on that day and I would be issuing an Order. At 12:13 p.m. on November 25, 2014, Employee submitted a handwritten document which stated:

Judge, If at all possible may we reconvene at 11:00 a.m. when my witnesses will be present.

On November 25, 2014, I issued an Order directing Employee to show good cause for his failure to appear at the proceeding in a timely manner. I stated that if Employee had contacted me and advised me that he was going to be an hour late, and offered some reasonable explanation for the delay, it is likely that the delay would have been excused and the hearing would have been held. However, Employee did not contact this Office at any point before or after the scheduled starting time to advise me that he would be late. Since there was no reason to assume Employee would show up, it was fair and reasonable to excuse the Court Reporter and Agency representative after they had waited 45 minutes after the scheduled starting time. In the Order, I described some of Employee's other failures to fully comply with directives and reminded him of his obligation to prosecute his appeal. Employee was given a filing deadline of 5:00 p.m. on December 12, 2014 and notified that if he failed to file a timely submission, the record would immediately close and the petition would be dismissed. Employee did not file a response and the record was closed.

JURISDICTION

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

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Employee was given considerable leeway because he was appearing *pro se*, although he was repeatedly cautioned that he was still required to fully comply with OEA Rules and Orders, and that sanctions could be imposed for failure to comply. Employee did not offer any reason for his failure to appear at the November 25, 2014 in a timely manner. The Administrative Judge notes that in the subpoenas issued at Employee's request, his witnesses were directed to appear at 11:30 a.m. on November 25. However, Employee was aware that the hearing would begin at 9:30 a.m. and that Agency would present its case first. Therefore, he cannot, and indeed did not, offer the time on the subpoena as the reason for his failure to appear in a timely manner.

Parties are notified of starting times for proceedings, and they are expected to be present and ready to begin at that time. If they cannot be present on time, they must notify the Administrative Judge and request a slight delay or a continuance. Employee did neither. Rather, he appeared at OEA more than an hour after the scheduled starting time, then left, returning at about 12:13 p.m., at which time he submitted a request to begin the proceeding at 11:00 a.m... The Administrative Judge, Court Reporter, Agency representative and Agency witness were present at the designated time and were required to wait for 45 minutes. Expenses were incurred and time was wasted because of Employee's disregard of the requirement to appear at the scheduled time. It is irrelevant that Agency is located in the same building as OEA. The Agency representative, witnesses and Court Reporter were still required to be present at these proceedings. In addition, Employee's witnesses had begun arriving at OEA, so Employee also inconvenienced his witnesses.

OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) states in pertinent part:

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;

Employee's failure to appear at the scheduled proceeding in a timely manner after receiving notice, constitutes a failure to prosecute. In addition, the November 25, 2014 Order notified Employee that if he failed to timely respond, sanctions could be imposed, including the dismissal of the appeal. Employee had previously been cautioned that he must comply with directives. However, he did not respond and did not contact the undersigned. The Administrative Judge concludes that Employee's lack of diligence in pursuing his appeal before OEA, specifically his failure to appear at the hearing at the scheduled time and to respond to the Order, constitutes a failure to prosecute. She further concludes that the appropriate sanction is the dismissal of this petition for appeal. *See e.g., Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE:

LOIS HOCHHAUSER, Esq.
Administrative Judge