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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EDRIES JEMAL)	
Employee)	OEA Matter No. 1601-0270-09
)	
v.)	Date of Issuance: June 18, 2012
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF CONSUMER)	
AND REGULATORY AFFAIRS)	
Agency)	Lois Hochhauser, Esq.
)	Administrative Judge
_____)	
Ross Buchholz, Esq., Agency Representative ¹)	
Edries Jemal, Employee)	

CORRECTED² INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 4, 2009, Edries Jemal, Employee herein, filed a petition for appeal with the Office of Employee Appeals (OEA) appealing the decision of the District of Columbia Department of Consumer and Regulatory Affairs, Agency herein, to remove him from his position of Program Specialist, effective August 7, 2009. At the time of the suspension, Employee was in career status and held a permanent appointment. The matter was assigned to me on or about February 25, 2011.

On March 7, 2011, I issued an Order scheduling the prehearing conference for March 30, 2011. The Order stated that failure to appear could result in the imposition of sanctions,

¹ Mr. Buchholz entered his appearance as Agency representative on February 24, 2012. Prior to that time, Charles Thomas, Esq. represented Agency.

² This Corrected Initial Decision is being issued only to correct typographical errors in the Initial Decision issued on June 13, 2012. The first correction is in the first full paragraph on page 2 of this document. The correct date is "May 26, 2011". The second correction is in the second full paragraph on the same page. The correct date is "June 29, 2011".

including the dismissal of the petition. Agency representative attended the prehearing conference. However, Employee did not appear and did not contact me or anyone at OEA to request that the matter be rescheduled. The Order was sent by first class mail, postage prepaid, to the address listed by Employee in his petition as his home address. It was not returned, and was presumed to have been delivered.

On May 16, 2011, I issued an Order directing that Employee show good cause for his failure to attend the prehearing conference or risk dismissal of the matter. Employee responded on May 26, 2011, that he “never received any written or verbal notification”. He requested a “continuance...and proper and ample notification to ensure [his] attendance”. On June 3, 2011, I issued an Order in which I accepted Employee’s explanation as “good cause,” although I noted that the initial Order, pursuant to the certificate of service, was mailed to Employee’s home address and was not returned. I also scheduled another prehearing conference was scheduled for June 29, 2011.

At the June 29, 2011 prehearing conference, attended by Employee and Agency representative, the parties agreed to refer the matter for mediation. In the Order memorializing the decisions reached at the prehearing conference, I directed the parties to file status reports by August 12, 2011. Agency filed its report in a timely manner. Employee did not submit a status report. By Order dated August 22, 2011, the parties were directed to file status reports by September 16, 2011. No status reports were filed.

On or about October 7, 2011, I was notified that mediation had not been successful. On October 14, 2011, I issued an Order scheduling an evidentiary hearing for November 8, 2011. On October 24, 2011, Employee telephoned me and requested that the matter be rescheduled until January 2012 because he was scheduled to leave the country within a few days and would not be returning until January. I directed him to contact Agency representative and request consent. Employee subsequently telephoned me and notified me that he had obtained Agency’s consent. I issued an Order on October 24, 2011, continuing the matter until January 17, 2012. On December 20, 2011, the matter was rescheduled until January 24, 2012, due to a scheduling conflict.

Agency, with Employee’s consent, requested a continuance due to “the unavailability of an essential witness”. The request was granted, and by Order dated February 8, 2012, the hearing was rescheduled for March 5, 2012. On or about March 14, 2012, Agency submitted a consent motion asking for additional time to request the issuance of subpoenas and exchange witness and document lists. On March 14, 2012, I issued an Order granting that request.

On March 15, 2012, I received a voicemail message from the parties, in which Employee requested a continuance until mid-May 2012, based on a family emergency, i.e., his wife was scheduled to have surgery on the day of the proceeding. I was unable to arrange a conference call with the parties, but telephoned with Employee and emailed the content of the conversation to Agency representative. During our conversation, Employee stated that his wife was scheduled to have emergency surgery on March 27, the date of the proceeding. I explained to Employee that due to the continuances already granted in this matter, one of them for several months while he was out of the country, I could not grant the request unless and until he filed a written request

with OEA which included detailed information regarding the reason for the request, as discussed more fully below. I instructed him to file the request with OEA by March 16, 2012, so that I could rule on it immediately. Employee asked to file it on March 19. I granted the request, but told him that it needed to be filed by noon on that date. I did not issue a written Order, since it would not have been received by Employee until after he was scheduled to file his submission.

Employee's submission, filed at 5:21 p.m. on March 19, 2012, stated, in pertinent part:

This [is] a follow-up to our recent conversation, requesting that my administrative hearing be postponed. Pursuant to our conversation, March 27, 2012 my wife will be in the hospital for a medical procedure. In this regard, I respectfully request that the hearing be postponed until a later date.

I determined that although Employee may have "technically" complied, he did not adhere to the directives that were given to him regarding the need for detailed information. Further he did not submit his request in a timely manner. That is particularly troubling because Employee has received the cooperation from both this Administrative Judge as well as Agency representative, and he was being required to do no more than what he should have done in a timely manner when he first became aware of the situation. The Administrative Judge reviewed her concerns and gave her directives to Employee several times, stating Employee was required to file a written statement with specific information in order to establish good cause for granting the continuance. I explained that I do not want to pry into the personal situation of Employee or his spouse and he did not need to provide any medical information. However, given the number of continuances and delays already granted, and the fact that another two month delay was being sought, he would have to provide specific information, including the date of the procedure, and why the matter would have to be delayed for two additional months. None of this information was included in Employee's statement. Therefore, on March 20, 2012, I issued an Order directing Employee to submit a notarized statement by noon on March 28, 2012 providing the name of the hospital where the procedure will be conducted, the date the procedure was scheduled, and why the matter has to be delayed for two additional months because of the procedure. The Order concluded that if Employee did not comply in a timely manner, and without obtaining an extension of time, the appeal could be dismissed without further notice. Employee did not respond.

On or about May 24, 2012, I took the unusual step of contacting Employee by telephone in order to ensure that he had received the Order and perhaps filed a timely response which had not been received by this Office. I was also sensitive to the reasons the request had initially been made and wanted to be certain that Employee was aware of the Order. I was unable to reach Employee to arrange a telephone conference, but was advised by Ross Buchholz, Agency representative, that Agency had not received a response from Employee. I informed Mr. Buchholz that I was going to again try to contact Employee to determine if he had in fact filed a response which neither OEA nor Agency had received. Mr. Buchholz stated that he did not need to participate in that telephone call. I next telephoned and spoke with Employee. He stated that he had received the Order and had not responded to it. I did not discuss the matter further with Employee. Once I received this information, I told him that I would be issuing an Order.

The Order, issued May 24, 2012, directed Employee to show good cause for his failure to respond to the March 20, 2012 Order and to, in fact, provide the information as directed in that Order. The Order concluded that if Employee did not respond by 5:00 p.m. on June 8, 2012, or obtain an extension, “the record in this matter [would] close on that date, and the petition [would] be dismissed without further notice.” Employee did not respond. The record closed on June 8, 2012.

JURISDICTION

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

ISSUE

Should this appeal be dismissed for failure to prosecute?

ANALYSIS AND CONCLUSION

OEA Rule 622.3, 46 D.C. Reg. at 9313 (1999) provides as follow:

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.

In accordance with OEA Rule 622.3, this Office has consistently held that a matter may be dismissed for failure to prosecute, if a party fails to appear at a scheduled proceeding or fails to submit respond to Orders that provide specific dates for responses. *See e.g., Employee v. Agency*, No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); and *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010), ___ D.C. Reg. ___ (). In this matter, Employee failed to respond to several Orders that were issued, all of which contained specific deadlines, and all stating that failure to comply could result the dismissal of this appeal. In addition to failing to respond to the two most recent Orders, Employee also failed to respond to Orders dated June 29, 2011 and August 11, 2011. The Orders were sent by first class mail, postage prepaid, by the U.S. Postal Service, to both Employee, who confirmed to the undersigned that he had received the March 20 Order. Indeed, numerous Orders were issued in this matter, and none were returned to this Office as undeliverable. All of the Orders are presumed to have been delivered. As noted above, numerous continuances had previously been granted causing extensive delays in this matter, and the undersigned had stressed to Employee the need for him to provide specificity in order to obtain another continuance. Although

Employee's earlier request for a continuance had not been in writing, it was granted because Employee represented that he would be leaving the country shortly for a number of months.

The Administrative Judge was aware that Employee was appearing *pro se* and, with the consent of Agency, gave him considerable leeway while stressing the need to comply with OEA rules and Orders. However, she became increasingly concerned about the number of requests made by Employee, and the informal nature of those requests. The Administrative Judge stressed to Employee the need to submit written requests and to provide support for those requests. Employee did not comply and did not respond to the final Order directing him to show cause for his failure to respond. The Administrative Judge even contacted Employee to ensure that he had received the Order and that he had not filed a response, in order to avoid a situation that could have been attributed to faulty mail delivery. However, Employee stated he had received the Order and had not filed a response.

This matter was assigned to me more than a year ago, and due to numerous requests for delays and continuances, the hearing could not be scheduled. The parties had previously been notified that future requests would have to be made in writing and that good cause would have to be shown, even if the other party consented, in order to bring this matter to closure. Employee failed to comply with the Orders. For these reasons, I conclude that Employee failed to prosecute his appeal, and that the matter should therefore be dismissed.

ORDER

It is hereby **ORDERED** that the petition in this matter is dismissed.

LOIS HOCHHAUSER, Esq.
Administrative Judge

FOR THE OFFICE: