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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ILBAY OZBAY)	OEA Matter No. 1601-0073-09AF15
Employee)	
)	Date of Issuance: June 28, 2016
v.)	
)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA DEPARTMENT)	Administrative Judge
OF TRANSPORTATION)	
Agency)	
_____)	
Michael O'Connell, Esq. Agency Representative)	
James Kestell, Esq., Employee Representative ¹)	
Tyler Freiberger, Esq., Employee Representative)	

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

Ilbay Ozbay, Employee, filed a request for an award of attorney fees with the Office of Employee Appeals (OEA) on July 3, 2013. The matter was assigned to this Administrative Judge (AJ) on or about January 5, 2015.

On January 5, 2015, I issued an Order directing the parties to consult on the fee request and to advise me by February 5, 2015, if they wanted the opportunity to resolve this issue through negotiations. Agency was also directed to file its Answer by that date. Agency filed a timely Answer. However, neither party otherwise responded to the Order. By Order dated June 8, 2015, I noted that Agency stated in its submission that it did not object to the payment of attorney fees but raised specific objections with reasons for its objections. I directed that the parties consult and advise me by July 22, 2015, if they wanted to attempt to negotiate a resolution or would prefer to proceed before me. The deadline was extended until August 13, 2015 by Order dated July 23, 2015.

¹ On or about January 6, 2016, Mr. Freiberger notified Administrative Judge Monica Dohnji, who was hearing the compliance matter related to the same matter, by email, that Mr. Kestell had died, but did not provide the date of his passing. I had spoken with Mr. Kestell several times, most recently in August 2015, primarily because mail sent to him had been returned to OEA as undeliverable. I was unaware of Mr. Kestell's death, until receiving a copy of the January 6 email months later. However, since Mr. Freiberger took over the representation of Employee in the compliance matter, and subsequent emails he sent to Judge Dohnji indicate that he was involved in this matter as well, he is listed as Employee representative in this matter, despite the fact that he did not enter an appearance in this matter, respond to Orders, or communicate with me.

By letter dated August 11, 2015, Mr. Kestell submitted a joint request from the parties asking that this matter be held in abeyance because Administrative Judge Monica Dohnji was currently hearing compliance issues involving the same appeal, and attorney fees could be incurred in that matter. By Order dated August 28, 2015, I granted the request, directing the parties to advise me by September 16, 2015 if they wanted all attorney fees matters to be heard by this AJ since she would be unfamiliar with the time incurred involving compliance issues; and if the response was affirmative; to file a status report by October 9, 2015. Neither party responded, I issued an Order on March 2, 2016, directing each party to file a response by March 18, 2016 to questions listed in that Order.

Agency filed a timely response, asking that this matter “be deemed resolved” based on its agreement to pay the requested fees. During this same time period, Judge Dohnji provided me with a copy of an email that Mr. Freiburger sent her which stated that the parties had “reached an agreement on attorney fees and that issue is now completed.” Therefore, on May 16, 2016, I issued an Order summarizing these communications, and directing that by May 31, 2016, Employee either file a request seeking the dismissal of this matter based on its resolution or show good cause why the matter should not be dismissed. Employee was notified that failure to file a timely submission would be considered “concurrence that the matter should be dismissed” because it had been resolved, but also, that failure to respond in a timely manner could result in the imposition of sanctions, including dismissal, without further notice. The Order stated that the record would close on May 31, 2016, unless the parties were notified to the contrary. Employee did not file a response. The record closed on May 31, 2016.

JURISDICTION

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

ISSUE

Should this matter be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Although Employee did not respond to Orders that I issued, he did notify Judge Dohnji that the parties had “reached an agreement on attorney fees and that issue is now completed.” His statement confirmed Agency’s representation that the attorney fees issue had been resolved. OEA Rule 619.2(g), 59 DCR 2129 (March 16, 2012), authorizes Administrative Judges to dismiss a matter which has been settled. *See e.g., Rollins v. District of Columbia Public Schools*, OEA Matter No. J-0086-92, *Opinion and Order on Petition for Review* (December 3, 1990). It is preferable that a request be filed asking for dismissal of a matter so that the record can reflect that the matter is resolved and dismissal is sought. Employee was ordered to do so, and was aware that his failure to do so would be deemed concurrence that the matter had been resolved and should be dismissed. However, although Employee did not submit a request, both parties stated that the matter was

resolved. Employee's email to Judge Dohnji stated that the attorney fees matter was settled and the "issue is now completed." I conclude that there is sufficient communications now in the official file confirming that the parties successfully resolved all issues concerning Employee's request for the payment of attorney fees, and that the request for fees should therefore be dismissed.²

There is an alternative basis for dismissing this matter. OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) 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." The failure of an employee to prosecute an appeal includes the failure to submit documents after being provided with a deadline for the submission. As noted above, Employee failed to respond to Orders issued in this matter, all of which had filing deadlines. The AJ concludes that this failure to comply with Orders with specific filing deadlines, constitutes a failure to prosecute and serves as an alternate basis for dismissing this matter. *See e.g., Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010). Even excusing some of the problems caused by the first attorney's death and the substitution of counsel; the failure of Employee to respond to any Order issued after August 11, 2015, constitutes a failure to prosecute within the meaning of the Rule. The May 16, 2016 Order specifically notified Employee that his failure to respond in a timely manner could result in the imposition of sanctions, including the dismissal of this matter, without further notice. He still failed to respond. I conclude that it is an appropriate exercise of discretion to dismiss this matter based on Employee's failure to prosecute.

In sum, and for the reasons presented herein, I conclude that this matter should be dismissed.

ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

² The parties are commended on their successful resolution of this matter.