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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ANTHONY COE)	
Employee)	OEA Matter No. 1601-0080-14
)	
v.)	Date of Issuance: February 23, 2016
)	
DISTRICT OF COLUMBIA HOUSING)	Lois Hochhauser, Esq.
AUTHORITY/POLICE DEPARTMENT)	Administrative Judge
Agency)	
)	
Anthony Coe, Employee, <i>Pro Se</i>		
Chelsea Johnson, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 30, 2014, Anthony Coe, Employee, filed a petition with the Office of Employee Appeals (OEA) appealing the decision of the District of Columbia Housing Authority/Police Department, Agency, to remove him from his position as a Special Police Officer, effective April 30, 2014. The matter was assigned to this Administrative Judge (AJ) on July 18, 2014.

Upon review of the documents, it appeared that this Office's jurisdiction was at issue. Agency filed a motion for summary disposition, arguing that this Office lacked jurisdiction to hear appeals of Special Police Officers employed by Agency. In the alternative, it contended that Employee failed to exhaust his administrative remedies.

On July 24, 2014, the AJ issued an Order directing Employee to respond to Agency's motion. In addition Employee was directed to respond to the documentation in the file that indicated that Employee had chosen to pursue this matter through his collective bargaining representative prior to filing the appeal with OEA. Employee filed a timely response, but addressed only the issue of whether he had pursued the matter with his Union prior to filing an

appeal with this Office, maintaining that he had been “surprised” when he found out that the Union was pursuing arbitration on his behalf.

On December 9, 2015, the AJ issued an Order directing Agency to address the issue of the jurisdiction to hear this appeal based on Employee’s status as a Special Police Officer by January 14, 2016. Employee was directed to file his response, “if any,” to Agency’s submission, by February 11, 2016. Employee was reminded that he carried the burden of proof on all issues of jurisdiction. The parties were advised that the record would close on February 11, 2016, unless they were notified to the contrary.

On January 14, 2016, Agency filed a motion asking for an extension, explaining that it was now amenable to mediation. In the accompanying certificate of service, Agency represented that it had mailed Employee a copy of its submission at the address listed in the petition. This AJ requires the party requesting an extension to seek the consent of the other party before filing its request. Agency counsel represented that she had telephoned Employee at the number listed in his petition, and was notified through a recording that the number was no longer in service.¹ Agency counsel was directed to contact Employee at any other telephone number listed for Employee in Agency files. Agency counsel advised the AJ on January 19, 2016 that she had telephoned Employee at another number, but again got a recording that the number had been disconnected. The AJ also telephoned Employee at both numbers, and confirmed that both numbers were disconnected.

The AJ again notified Employee, by email, of Agency’s requests for the extension and the opportunity to mediate, stating that if he did not respond by a time certain, Agency’s request would be granted and the matter would be referred to mediation. Employee was also reminded of the need to keep this Office apprised of any changes in his contact information. The AJ did not want to delay this matter further and considered that Employee would not be prejudiced by referral to mediation since mediation is voluntary. Emails sent to Employee were not returned as undeliverable, and are presumed received by Employee. Employee did not respond to any email correspondence from the AJ.

On January 22, 2016, an Order was issued notifying Employee that his continued failure to respond to emails and to provide updated contact information could be interpreted as a failure to prosecute his appeal, and that failing to prosecute the appeal could result in its dismissal. Employee was directed to file “written confirmation of his intention to proceed” with the appeal and current contact information by February 10, 2016. He was notified that if he failed to respond by the deadline, the record would close and the appeal could be dismissed without further notice.² The Order was sent to Employee at the address listed in his petition, by first class mail, postage prepaid. As with the previous Orders sent to Employee, it was not returned to the Office by the U.S. Postal Service as undelivered. It is presumed that this Order, as all previous Orders, was received by Employee in a timely manner. Employee did not respond. The record closed on February 11, 2016.

¹ In order to avoid *ex parte* communication with Agency counsel, the AJ communicated with counsel primarily by email, and copies of all communications were emailed to Employee at the email address listed in his petition.

² Agency’s requests for an extension and to mediate the matter were held in abeyance.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUE

Should this appeal be dismissed?

ANALYSIS AND CONCLUSIONS OF LAW

There are several reasons to dismiss this appeal. First, Employee failed to prosecute this matter. 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:

(b) Submit required documents after being provided with a deadline for such submission

Employee was cautioned that his failure to respond to the January 22, 2016 Order could result in the dismissal of the appeal without further notice. As noted above, none of the Orders mailed to Employee was returned to this Office as undelivered. It is presumed that Employee received this Order a timely manner. This conclusion is supported by the fact that Employee filed a timely response to the July 24, 2014 Order. He failed, however, to respond to the January 22, 2016 Order which had a deadline of February 10, 2016. The record, however, did not close until February 11, 2016, since that deadline was contained in the December 9, 2015 Order; and the AJ wanted to give Employee every opportunity to respond. The AJ concludes that Employee failed to prosecute this appeal, and that, in an “exercise of sound discretion,” it is appropriate to dismiss the appeal for this reason.

An alternative basis for dismissing this matter is Employee’s failure to meet his burden of proof on the issue of jurisdiction. Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), Employee has the burden of proof on all issues of jurisdiction. This burden must be met by a “preponderance of the evidence,” defined in OEA Rule 628.2 as “[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.” Employee did not respond to the December 9, 2015 Order and failed to address the jurisdictional issues as directed. He did not offer any factual or legal argument to support his position regarding the jurisdiction of this Office to hear this appeal. The jurisdictional issue is not been resolved, but resolution is not required in order to dismiss this matter since the burden of proof was on Employee, and he did not meet this burden.³

³ Since several bases are presented to support dismissal, this Initial Decision does not address the issues of when Employee failed to exhaust administrative remedies or whether he elected to pursue the grievance process prior to filing with OEA.

In sum, the Administrative Judge concludes that this petition should be dismissed based on Employee's failure to prosecute this matter and/or his failure to meet his burden of proof on the jurisdiction of this Office to hear this matter.

ORDER

It is hereby:

ORDERED: This petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge