THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DIANE GUSTUS, Employee	
v.	OEA Matter No.: 1601-0025-08
OFFICE OF THE CHIEF FINANCIAL OFFICER Agency	Date of Issuance: January 25, 2010

OPINION AND ORDER

ON

PETITION FOR REVIEW

Diane Gustus ("Employee") was Real Property Program Specialist in the Office of the Chief Financial Officer ("Agency"). In September 2007, FBI authorities informed Agency that Employee was involved in a scheme to steal tens of millions of dollars from the District of Columbia. The scheme involved approving and issuing fraudulent property tax refund requests in order to generate approximately forty separate fraudulent refund checks.

On November 6, 2007, a criminal complaint was filed against Employee in the United States District Court for the District of Columbia. The complaint alleged ten charges, including mail fraud, conspiracy, money laundering and bank fraud.[1] Employee was arrested and jailed on November 7, 2007. As a result, Agency issued Employee a Notice of Termination letter. The notice stated that Employee's termination was to be effective immediately.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 20, 2007. Employee argued that she was wrongfully terminated because she was performing job duties under the direction of her immediate supervisor. Employee requested that she be reinstated or placed on administrative leave pending the outcome of the criminal proceedings.[2]

On February 14, 2008, the Administrative Judge issued an Order Convening a Prehearing Conference ("Prehearing Order"). The Prehearing Order required the parties to submit prehearing statements by March 6, 2008. The Order also required Employee, her representative and Agency's representative to appear before the AJ on March 20, 2008 for a prehearing conference. Agency filed a timely prehearing statement on March 5, 2008. Employee's representative, Steven White, failed to file a prehearing statement and was not present at the March 20th prehearing conference.

The AJ issued an Order for Statement of Good Cause on March 20, 2008, ordering Employee's representative to explain: 1) his failure to appear at the prehearing conference and 2) his failure to submit a prehearing statement. Steven White, an AFL-CIO staff representative with Employee's union, filed a Statement of Good Cause on

[1] *Agency's Answer to Petition for Appeal* (January 28, 2008).
[2] *Petition for Appeal* (December 20, 2007).

April 2, 2008. Mr. White argued that he did not receive the Prehearing Order until February 21, 2008 and did not have sufficient time to prepare for the hearing.[3] Mr. White further explained that a serious mouth infection rendered him incapacitated on the morning of the prehearing conference and was therefore unable to appear for the hearing. No prehearing statement was filed with the Statement of Good Cause.

In an Initial Decision issued March 31, 2008, the AJ dismissed Employee's appeal for failure to prosecute. The AJ held that Employee failed to exercise the "diligence expected of an appellant pursuing an appeal before this Office."[4] The AJ stated that there was no credible explanation given to excuse Employee's and White's absence at the prehearing conference. The Initial Decision cited OEA Rule 622.2, 46 D.C. Reg. 9313 (1999), which allows an AJ to dismiss an action for failure to prosecute or defend an appeal under certain circumstances.

Employee then filed a Petition for Review with this Office on May 5, 2008. Employee obtained new representation and subsequently filed a Supplemental Memorandum in Support of Employee's Petition for Review on February 9, 2009. Employee asks us to reverse the Initial Decision because: 1) new and material evidence is available that, despite due diligence, was not available when the record closed and 2) the findings of the AJ were not based on substantial evidence. Specifically, Employee argues that Agency failed to conduct an internal investigation into the alleged charges and had no documentary or testimonial evidence to substantiate its claim that Employee's conduct was an immediate hazard to the agency or was detrimental to public health, safety or

[3] Employee's Statement of Good Cause (April 2, 2008).
[4] *Initial Decision* at 5 (March 31, 2008).

welfare.[5] Employee also argues that the US Attorneys' dismissal of all charges against her constitutes new and material evidence that was not available when the record closed. Lastly, Employee contends that she received disparate treatment with respect to other Agency employees who also signed forms and received gifts from the mastermind of the scheme.

While this Board recognizes an AJ's authority to dismiss appeals for failure to prosecute under OEA rule 622, we believe that a decision on the merits is warranted in this circumstance. In *Murphy v. A.A. Beiro Construction Co. et al.*, the District of Columbia Court of Appeals held that "decisions on the merits of a case is preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial."[6] Furthermore, OEA rule 634.3 permits the Board to grant a petition for review when the petition establishes that new and material evidence is available that, despite due diligence, was not available when the record closed. The US Attorney's dismissal of the charges against Employee after her termination constitutes new and material evidence that was not available when the AJ closed the record. Based on the ruling in *Murphy* and OEA Rule 634.3, this Board is compelled to remand this case for a decision on the merits.

[5] Article 7 Section 5 of the Master Agreement between the American Federation of State, County and municipal Employees and Agency states that appropriate notice of termination is not required if "there is reasonable cause to believe that an employee's conduct is an immediate hazard to the agency, the employee or other employees, or is detrimental to public health, safety or welfare."
[6] 679 A.2d 1039, 1044 (D.C. App. 1996).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **REMANDED** for proceedings consistent with this opinion.

FOR THE BOARD:

_____
Sherri Beatty-Arthur, Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

_____
Hilary Cairns

_____
Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after the formal notice of the decision or order sought to be reviewed.