

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
STEPHANIE SIMMS,)	
Employee)	OEA Matter No. 1601-0380-10
)	
v.)	Date of Issuance: April 30, 2013
)	
D.C. DEPARTMENT OF)	STEPHANIE N. HARRIS, Esq.
EMPLOYMENT SERVICES,)	Administrative Judge
Agency)	
_____)	
Dawn Crawford, Esq., Employee Representative		
Tonya Sapp, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 24, 2010, Stephanie Simms (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Employment Services’ (“Agency” or “DOES”) action of suspending her for fifteen (15) days based on the charges of neglect of duty and misfeasance. A Final Agency Decision (“FAD”) was issued to Employee on July 27, 2010.

The undersigned Administrative Judge (“AJ”) was assigned this matter on July 17, 2012. Upon initial review of the file, the undersigned found that Agency had not submitted an Answer in this matter.¹ An Order for Statement of Good Cause was issued to Agency on July 24, 2012, to address why an Answer had not been submitted within thirty (30) calendar days of service of Employee’s Petition for Appeal. Agency timely submitted its Answer and Statement of Good Cause on August 3, 2012, explaining that a corresponding response was not issued because Agency had no record of receipt for OEA’s August 25, 2012 correspondence.

On September 25, 2012, the undersigned issued an Order Scheduling a Status Conference for October 18, 2012 (“October 18th Status Conference”), to address pending issues requiring further review. Both parties appeared at the October 18th Status Conference. During a November

¹ Notice of Employee’s Petition for Appeal and a deadline to submit an Answer was mailed by this Office to Agency on August 25, 2010.

19, 2012, Telephonic Prehearing Conference, an Evidentiary Hearing was scheduled for March 12, 2013. On February 27, 2013, Employee Representative Dawn Crawford made a request that the March 12, 2013 Evidentiary Hearing be rescheduled due to a conflict with Employee's medical treatment. Both parties agreed to reschedule the Evidentiary Hearing for April 1, 2013 ("April 1st Evidentiary Hearing"). Agency Representative and Employee Representative were present at the April 1st Evidentiary Hearing; however, Employee failed to appear.

Subsequently, the undersigned issued an Order for Statement of Good Cause on April 4, 2013 ("April 4th Order"). Employee was ordered to submit a statement of good cause, with specific explanation, based on her failure to appear at the Evidentiary Hearing on or by April 16, 2013. As of the date of this decision, OEA has not received a response from Employee regarding the aforementioned Order for Statement of Good Cause. Based on the record to date, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

ISSUE

Whether this appeal should be dismissed.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That 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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ANALYSIS AND CONCLUSIONS OF LAW

On January 23, 2013, the undersigned issued an Order ("January 23rd Order") convening an Evidentiary Hearing in this matter for March 12, 2013. However, Employee Representative, Dawn Crawford, contacted the undersigned and opposing party via email on February 27, 2013 to request that the Evidentiary Hearing be rescheduled because it conflicted with Employee's

dialysis treatment. The undersigned granted Employee's rescheduling request and the Evidentiary Hearing was set for April 1, 2013.

The parties were required to appear at the Evidentiary Hearing on April 1, 2013 at 9:30 a.m. Both the Agency Representative and Employee Representative were present at the scheduled date and time; however, Employee failed to appear. Representative Crawford, indicated that she had been unable to reach Employee prior to the start of the Hearing. After speaking with both parties, the undersigned gave Representative Crawford until approximately 10:15 a.m. to attempt to reach Employee. Representative Crawford was eventually able to contact Employee and relayed that Employee was currently in a dialysis session, which had been rescheduled. However, there is no record that Employee attempted to contact the undersigned (or her Representative) prior to the scheduled date and time of the Evidentiary Hearing to inform the AJ that she would not be in attendance at the hearing or to request that the proceeding be rescheduled from the April 1, 2013, date.

Agency Representative was prepared to present her case, and her first witness was present to testify. Upon consultation with both parties, the undersigned gave Representative Crawford the option to proceed without Employee, but she indicated that she planned to call Employee as her only witness and could not proceed for that reason. The undersigned informed both parties that because Representative Crawford was unable to proceed without Employee, the Evidentiary Hearing would be canceled until further notice and an Order for Statement of Good Cause would be issued for Employee, with Agency having an option to reply.

The April 4th Order for Statement of Good Cause required Employee to prove, through detailed explanation and supporting documentation, that there was good cause for her absence at the Evidentiary Hearing. Employee was directed to address her (or her Representative's) failure to contact the AJ about Employee's inability to appear *prior* to the start of the Evidentiary Hearing (emphasis added).² Additionally, Employee was asked to address and provide supporting documentation regarding Ms. Crawford's statement that Employee was unable to attend the April 1st Evidentiary because she was having dialysis treatment, the same day.

Representative Crawford's Statement of Good Cause was returned to this Office as undeliverable on April 9, 2013. The undersigned contacted Representative Crawford by email on April 11, 2013, to verify her mailing address, and an attachment of the Order for Statement of Good Cause was provided. Representative Crawford responded by email the same day and provided her updated mailing address. Since Employee's copy of the Order for Statement of Good Cause was not returned and the record shows that it was sent to the last address of record this Office has, it is presumed that it was properly delivered. Additionally, Representative Crawford was provided with a copy of the Order for Statement of Good Cause prior to the deadline, since the original was sent to the last address of record for the Employee Representative, which had not been updated. However, as noted above, Employee's Statement of

² The undersigned notes that OEA Rule 624.3, 59 DCR 2129 (March 16, 2012) states that [p]ostponement of an evidentiary hearing will be allowed only upon good cause show or upon agreement of the parties, with the concurrence of the Administrative Judge. Except in extraordinary circumstances, a motion for a postponement shall not be considered unless it is served and filed at least seven (7) calendar days in advance of the date designated for the evidentiary hearing.

Good Cause was due on or by April 16, 2013 and as of the date of this decision, OEA has not received a response from Employee or her Representative.

Additionally, the undersigned contacted Representative Crawford by telephone on April 23, 2013, to inquire about the status of Employee's Statement of Good Cause. During that telephone conversation, Representative Crawford noted that she had not spoken with Employee since the April 1st Evidentiary Hearing. The undersigned informed Representative Crawford that the deadline for submitting the Statement of Good Cause had passed; however, if she was able to get in contact with Employee, the undersigned would consider a motion for an extension of time to submit the Statement of Good Cause. The undersigned also told Ms. Crawford that she would also need to contact Agency to see if they would agree to the extension of time, so that could also be part of the undersigned's consideration for the motion. Several days passed with no follow-up response from Representative Crawford, and a subsequent call was placed to her on April 29, 2013, but I have not received any further communication as of the date of this decision.

The January 23rd Order Convening Hearing informed Employee that "if a party failed to appear without good cause, the matter may be adjudicated on the record or the matter may be *dismissed*" (emphasis added). Further, OEA Rule 624.4³ states that "[f]ailure of a party to appear for an evidentiary hearing, *unless excused by the [AJ] for good cause shown*, before or after the fact, may be deemed to be a waiver by that party of all rights to participate further in the proceeding, and *may be grounds for dismissal of the case or the imposition of other sanctions*" (emphasis added).

Additionally, OEA Rule 621⁴ grants an AJ the authority to impose sanctions upon the parties as necessary to serve the ends of justice and in the exercise of sound discretion, may dismiss the action or rule for the appellant if a party fails to take reasonable steps to prosecute or defend an appeal. Specifically, OEA Rule 621.3(a)-(b), states that failure to prosecute an appeal includes, but is not limited to, a failure to appear at a scheduled proceeding after receiving notice and/or submit required documents after being provided with a deadline for such submission. Moreover, this Office has *consistently held* that a matter may be dismissed for failure to prosecute when a party fails to appear at a scheduled proceeding or fails to submit required documents (emphasis added).⁵

Employee did not appear at the scheduled April 1st Evidentiary Hearing and she failed to submit a response to the April 4th Order for Statement of Good Cause. Employee's appearance at the scheduled Evidentiary Hearing was necessary to address pertinent issues in this matter and was required for a proper resolution of this matter on its merits. Further, both the January 23rd and April 4th Orders advised Employee that failure to comply could result in sanctions, including dismissal. The undersigned concludes that Employee's failure to prosecute her appeal, appear at

³ 59 DCR 2129 (March 16, 2012).

⁴ 59 DCR 2129 (March 16, 2012).

⁵ *Douglas v. District of Columbia Department of Mental Health*, OEA Matter No. 2401-0034-10 (January 27, 2012); *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); *Powell v. Office of Property Management*, OEA Matter No. J-0097-09 (August 10, 2009); *Veazie v. District of Columbia Public Schools*, OEA Matter No. 1601-0112-07 (January 16, 2008); *Hall v. District of Columbia Office of Attorney General*, OEA Matter No. 1601-0057-04 (May 24, 2005); *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985).

the scheduled Evidentiary Hearing, and to explain her absence are violations of OEA Rules 621.3 and 624.4. Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. Accordingly, this matter should be dismissed for Employee's failure to prosecute her appeal.

ORDER

It is hereby **ORDERED** that the petition in this matter is dismissed for Employee's failure to prosecute her appeal.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge