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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
THOMAS PIERRE,)	
Employee)	OEA Matter No. 1601-0186-12
)	
v.)	
)	Date of Issuance: May 10, 2016
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Thomas Pierre (“Employee”) worked as a Teacher with D.C. Public Schools (“Agency”). On June 12, 2012, Employee received a notice of termination from Agency. The notice provided that Employee was terminated because of a conviction of a “misdemeanor, when the conviction is based on conduct that affects adversely the employee’s or agency’s ability to perform effectively.” Specifically, Employee was arrested for lewd, indecent, or obscene acts.¹

On August 31, 2012, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He argued that his conviction had no impact on his or Agency’s performance. Employee contended that he received an evaluation score of “highly effective” at the time of his conviction. Moreover, he asserted that he was innocent of the charges.²

¹ *Petition for Appeal*, p. 9-10 (August 31, 2012).

² *Id.* at 2.

Agency filed its answer to Employee's Petition for Appeal on October 1, 2012. It explained that "Employee's conviction was based on conduct that would adversely affect his ability and the Agency's ability to perform effectively." Therefore, it requested that an evidentiary hearing be held in this case.³

On January 24, 2014, the OEA Administrative Judge ("AJ") issued an Order Scheduling a Status Conference on March 4, 2014.⁴ On March 11, 2014, the AJ issued an Order Rescheduling the Status Conference due to a conflict in Employee's counsel's schedule and because of a delayed opening for government offices due to inclement weather. As a result, the Status Conference was rescheduled for June 18, 2014.⁵

In a Show Cause Order dated June 18, 2014, the AJ provided that Agency failed to appear at the conference. Therefore, he requested that Agency offer a Statement for Good Cause by June 25, 2014, for its failure to appear. The order provided that "failure to respond in a timely fashion to this order, or failure to establish good cause for failure to appear, may result in the imposition of sanctions pursuant to OEA Rule 621. . . ."⁶

On June 25, 2014, Agency's counsel filed its Good Cause Statement. She provided that she attended the June 18, 2014 Status Conference. However, after waiting for thirty minutes, she left. Agency's counsel claimed that before she left, she and Employee's counsel agreed to a continuance of the Status Conference.⁷

After another exchange with the parties regarding alternate dates, the AJ issued another Order Scheduling Status Conference. The conference was held on August 4, 2014.⁸ Both parties

³ *District of Columbia Public Schools' Answer to Employee's Petition for Appeal*, p. 2 (October 1, 2012).

⁴ *Order Scheduling Status Conference* (January 24, 2014).

⁵ *Order Rescheduling Status Conference* (March 11, 2014).

⁶ *Show Cause Order* (June 18, 2014).

⁷ *District of Columbia Public Schools' Response to Show Cause Order* (June 25, 2014).

⁸ *Order Scheduling Status Conference* (July 21, 2014).

appeared at the conference, and the AJ issued an Order Requesting Briefs. Agency's brief was due on September 5, 2014, and Employee's reply was due on October 3, 2014.⁹

Agency failed to submit its brief. Therefore, a Show Cause Order was sent requesting both its brief and a Good Cause Statement for failing to meet the original filing deadline. Both filings were due by September 26, 2014. Similar to the language provided in his previous Show Cause Order, this order provided that "failure to respond in a timely fashion to this order, or failure to establish good cause for failure to appear, may result in the imposition of sanctions pursuant to OEA Rule 621. . . ." ¹⁰

Agency failed to respond to the AJ's order; thus, he issued his Initial Decision on September 30, 2014. He provided that he was more than lenient with Agency's counsel's conduct of failing to meet the ordered deadlines. However, Agency still had not filed its brief nearly one month after the deadline. The AJ held that Agency failed to exercise due diligence and take reasonable steps to defend its action against Employee. Hence, he ordered that Employee be reinstated to his position with back pay and benefits.¹¹

On November 4, 2014, Agency filed a Petition for Review with the OEA Board. Agency's counsel contends that she failed to file its brief on September 5, 2014, because she was out of the office due to a family emergency. She claims that she informed Employee's counsel that she would file her brief by September 10, 2014. Agency's counsel asserts that while she intended to file the brief by September 10th, she fell behind due to family emergencies and illnesses. Moreover, she provides that she did not receive the AJ's Show Cause Order in a timely fashion and only had one day to respond. Additionally, Agency's counsel submits that she was out of the office for Rosh Hashana, a Jewish holiday. Agency's counsel provides on

⁹ *Post Status Conference Order* (August 5, 2014).

¹⁰ *Show Cause Order* (September 19, 2014).

¹¹ *Initial Decision* (September 30, 2014).

Petition for Review that the AJ was not aware of any of the issues she raised as reasons she failed to comply with his orders. Thus, she considers her reasons new and material evidence and requests that the Board remand the matter to the AJ to consider the case on its merits.¹²

Employee filed a response to Agency's Petition for Review on December 19, 2014. He argues that Agency offered no grounds to grant its Petition for Review. Employee implies that Agency did not make good use of her time to file her brief by the deadline. Additionally, he explains that Agency failed to actually file a Motion for an Extension of Time to file her brief and simply emailed the AJ to inform him that she would file it by September 10th. However, Employee explains that Agency failed to meet her own self-imposed deadline. Accordingly, he requests that the Board deny Agency's Petition for Review.¹³

Nearly one year after filing its Petition for Review, Agency filed a Supplement to its Petition on July 30, 2015. It raises several arguments regarding the specifics of Employee's criminal charges and subsequent conviction. Agency then concludes its filing by stating that ". . . based on the Employee's conviction for indecent exposure[,] [it] is unwilling to reinstate the Employee."¹⁴

Notwithstanding Agency's assertions, it failed to comply with the AJ's order to file a brief and to show cause as to why its brief was not filed by the deadline. OEA Rule 621.3 provides the sanctions that the AJ may impose when a party fails to prosecute or defend a matter. The rule 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* (Emphasis added). Failure of a party to prosecute or defend an appeal includes, but is

¹² *District of Columbia Public Schools' Petition for Review*, p. 2-5 (November 4, 2014).

¹³ *Employee's Opposition to the District of Columbia's Petition for Review* (December 19, 2014).

¹⁴ *District of Columbia's Public Schools' Additional Argument for Petition for Review* (July 30, 2015).

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 the Office of a change of address which results in correspondence being returned.

Based on the aforementioned, it was proper for the AJ to rule in favor of Employee and overturn Agency's decision. Agency failed to comply with OEA Rule 621.3(b). Additionally, the Order to Submit Briefs and Show Cause Order provide that "failure to respond in a timely fashion to this order, or failure to establish good cause for failure to appear, may result in the imposition of sanctions pursuant to OEA Rule 621." Therefore, Agency was on notice that this outcome was a possibility if it failed to comply with the orders.

Moreover, as Employee provides, Agency set its own extended deadline to file its brief, and it still failed to submit the brief by the deadline. This Board provided in *Ronald Holman v. D.C. Public Schools*, OEA Matter No. 1601-0100-12, *Opinion and Order on Petition for Review* (March 3, 2015), that the AJ is within his authority to impose sanctions when counsel requests an extension and fails to adhere to its own revised deadline. Hence, we will not disturb the AJ's ruling in this matter.

As for Agency's position in its Supplement to the Petition for Review, in accordance with OEA Rule 633.4, this Board will not consider these arguments. OEA Rule 633.4 provides that "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Agency had an opportunity to present the arguments raised on Petition for Review in the brief the AJ ordered it to submit. However, the brief was never filed. The first time that the specific details of Employee's charges and conviction are raised was on Petition for Review. As a result, none of these arguments were

presented to the AJ. This Board has consistently held that an argument is waived if it was not raised on appeal before the AJ.¹⁵

Additionally, this Board is perplexed by Agency's counsel's admission that she failed to inform the AJ of any of the reasons why she could not comply with his deadline. She specifically states that the AJ "was not aware" of any of her reasons for non-compliance. However, it was her sole responsibility to inform the AJ of her excuses of missed deadlines. The AJ provided a reasonable length of time for Agency to submit its briefs, even after the missed deadlines. Agency's counsel's behavior was unprofessional and unfortunate. As the AJ provided in his Initial Decision, OEA has historically held that a matter may be decided in favor of an employee when Agency fails to defend its action against an employee by not submitting documents or by not attending a proceeding.¹⁶ Accordingly, we deny Agency's Petition for Review.

¹⁵ *Sharon Jeffries v. D.C. Retirement Board*, OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014); *Latonya Lewis v. D.C. Public Schools*, OEA Matter No. 1601- 0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); and *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011).

¹⁶ *Marlon Ray v. D.C. Public Schools, Division of Transportation*, OEA Matter No. J-0070-04, *Opinion and Order on Petition for Review* (May 15, 2007); *Sharon Young-Wester v. D.C. Public Schools*, OEA Matter No. J-0033-03, *Opinion and Order on Petition for Review* (September 19, 2006); *Francine H. James v. Office of Boards and Commissions (Board of Appeals and Review)*, OEA Matter No. 2401-0069-04, *Opinion and Order on Petition for Review* (July 31, 2007); *Isabelita Aglipay v. Department of Mental Health*, OEA Matter No. 1601-0072-08, *Opinion and Order on Petition for Review* (July 30, 2010); and *Ronald Holman v. D.C. Public Schools*, OEA Matter No. 1601-0100-12, *Opinion and Order on Petition for Review* (March 3, 2015).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.