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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHELBY ANDERSON,	)	
Employee	)	OEA Matter No.: 1601-0053-13
	)	
v.	)	Date of Issuance: June 6, 2014
	)	
OFFICE OF UNIFIED COMMUNICATIONS,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
	)	Administrative Judge

Shelby Anderson, Employee *Pro Se*
Gregory Evans, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 8, 2013, Shelby Anderson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Office of Unified Communications ("OUC" or "Agency") decision to suspend him from his position as a Telephone Equipment Operator for fifteen (15) days. On June 26, 2013, Agency submitted its Answer to Employee's Petition for Appeal.

After reviewing the case file and the documents of record, I issued an Order dated March 11, 2014 ("March 11th Order"), wherein I ordered the parties to address whether OEA may exercise jurisdiction over the instant matter because of allegations that Employee filed a grievance of his suspension through the negotiated procedure via his collective bargaining unit, the National Association of Government Employees ("NAGE"). Employee was ordered to submit his brief on or before March 28, 2014.

Employee failed to submit his brief by the prescribed deadline and on April 3, 2014, the undersigned issued an Order for Statement of Good Cause ("April 3rd Order"). Employee was ordered to submit his Statement of Good Cause, along with his brief, on or before April 15, 2014. Employee requested an extension of time on April 15, 2014, which was granted by the

undersigned in an Order dated April 17, 2014 ("April 17th Order"). This Order extended Employee's submission deadline to May 9, 2014. However, Employee did not submit his brief by the prescribed deadline. Subsequently, on May 20, 2014, the undersigned issued a second Statement of Good Cause ("May 20th Order"), ordering Employee to address his failure to submit his brief by the prescribed deadline. As of the date of this decision, Employee has not responded to any of the aforementioned Orders or submitted his brief. 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 for failure to prosecute.

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

The undersigned notes that Employee's January 4, 2013 Final Decision on Suspension states that Employee had the option to either file 1) an appeal with OEA or 2) a grievance through the negotiated grievance procedures outlines in the Collective Bargaining Agreement for NAGE/Local R3-07, but he could not pursue both procedures.[1] Agency contends that OEA does not have jurisdiction in this matter and submitted documents showing that on January 9, 2013, Employee filed a grievance contesting his suspension through NAGE.[2] Agency's contention raised a jurisdictional issue in this matter. Further, the record shows that Employee filed his Petition for Appeal with OEA on February 8, 2013. Because Employee has the burden of proof in jurisdiction issues, he was ordered on several occasions to address whether this Office has

[1] *Id*., Exhibit 4.
[2] *See* Agency Answer, Exhibit 1 (June 26, 2013).

jurisdiction in this matter. However, as noted above, Employee failed to address the undersigned's Orders.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

Additionally, D.C. Official Code § 1-616.52 (d)-(f), reads in pertinent part as follows:

> (d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization. Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, ***be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, but not both***.
>
> (e) An employee ***shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal*** under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, ***whichever event occurs first***. (emphasis added)

Employee had concurrent avenues available for reviewing Agency's adverse action- file a grievance through his Union or file an appeal with OEA. However, an aggrieved employee cannot simultaneously request review of a matter before OEA and through a negotiated grievance procedure.[3] Further, once an Employee selects an avenue of review, either through OEA or the Union's negotiated grievance procedure, then the possibility of review via the other route is no longer available.[4] I find that the record shows that Employee elected to appeal his termination by filing a grievance under the CBA through his Union, prior to filing his Petition for Appeal with OEA, which caused a waiver of his rights to be heard by this Office.

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[3] *See* D.C. Official Code § 1-616.52(e) (2000).

[4] *See* D.C. Official Code § 1-616.52(f) (2000); *Dyrus Hines v. D.C. Public Schools*, OEA Matter No. J-0090-11 (June 6, 2011); *Raquel Beafort v. Office of the Attorney General*, OEA Matter No. 1601-0051-11 (July 12, 2011); *Carla Richardson v. D.C. Department of mental Health*, OEA Matter No. 1601-0054-11 (August 12, 2011); *Stephen Whitfield v. D.C. Public Schools*, OEA Matter No. 1601-0016-12 (January 9, 2012).

Consequently, I further find that OEA lack jurisdiction over the instant matter. This Office has no authority to review issues beyond its jurisdiction.[5] Accordingly, I am unable to address the factual merits, if any, of this matter.

Additionally, OEA Rule 621.1 grants an Administrative Judge ("AJ") the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ "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.[6] Failure of a party to prosecute or defend an appeal includes, but is 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 this Office of a change of address which results in correspondence being returned.

This Office has consistently held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.[7] Here, Employee was warned in the March 11th, April 3rd, and April 17th Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to any of the aforementioned Orders. Both were required for a proper resolution of this matter on its merits. I find that Employee's failure to prosecute his appeal is a violation of OEA Rule 621. Accordingly, I further find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office; therefore, this matter should also be dismissed for his failure to prosecute.

ORDER

It is hereby **ORDERED** that the petition in this matter is **DISMISSED** for lack of jurisdiction, and for Employee's failure to prosecute his appeal.

FOR THE OFFICE:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

[5] *See Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[6] *Id.* at 621.3.
[7] *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985); *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).