

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
ISABELITA AGLIPAY) OEA Matter No. 1601-0072-08
Employee)
)
v.) Date of Issuance: January 15, 2009
)
DEPARTMENT OF MENTAL) Muriel A. Aikens-Arnold
HEALTH) Administrative Judge

)

Kevin J. Turner, Esq., Agency Representative
Alan Lescht, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On April 25, 2008, Employee, a Medical Technologist, filed a Petition for Appeal (PFA) with this Office regarding Agency's action terminating her employment effective April 19, 2008 based on Malfeasance: Making Threatening Comments to Do Bodily Harm to Your Co-workers, Creating a Hostile Working Environment.

This matter was assigned to this Judge on July 28, 2008. On September 16, 2008, an Order to Convene a Prehearing Conference was issued scheduling said meeting on October 9, 2008. Due to Employee's request, the Prehearing Conference was postponed and conducted on October 24, 2008, at which time a January 8, 2009 hearing date was mutually agreed upon.¹

¹ The parties were directed to submit prehearing statements no later than 10/15/08. Agency did not file its prehearing statement with the Judge or provide a copy thereof to Employee until 10/24/08. Nor had Agency previously provided Employee with its adverse action file. Based on those two (2) Agency missteps, Employee was given a week to review Agency's evidence and witness list; and to submit a supplemental Employee witness list, if necessary. .

On November 10, 2008, an Order for Agency to Provide Documentation (to Employee) supporting its action, *ie.*, all documents and tape recordings, was issued with a deadline of November 14, 2008. On December 22, 2008, Employee filed a Motion to Compel Agency to produce the tape recording regarding the alleged incident. Agency did not produce said tape recording, despite being cautioned that failure to do so by the deadline may result in sanctions as necessary to serve the ends of justice. On December 24, 2008, this Judge attempted to contact Agency's representative, to no avail.²

On January 8, 2009, the Judge, Employee, her representative, Rosita Chang (witness for Employee), and the Court Reporter appeared for the Hearing. Agency's representative did not appear, nor did he communicate with the Judge, prior thereto, regarding his absence. Nor did any witnesses for the Agency appear. Employee's representative orally requested a ruling in her favor based on Agency's default. The Hearing was opened and closed, after the Judge stated that this matter would be taken under advisement.³ Late on the same day, Agency's Representative contacted this Judge and advised that the Hearing was not on his calendar. The record is closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action should be reversed for its failure to defend.

ANALYSIS AND CONCLUSIONS

OEA Rule 622.3, 46 D.C. Reg. 9313 (1999) reads, in pertinent part, as follows:

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:

² Agency representative's voice-mail indicated that he was out of the office until 1/5/09. Nevertheless, he did not respond to the Judge's phone call. On 12/29/08, this Judge was contacted by Employee's representative who advised that he had not been able to reach Agency's representative and expressed concern regarding the nonreceipt of the tape recording prior to the hearing.

³ Before dismissing Employee, her representative and the court reporter, this Judge made two phone calls: one to Agency's representative; the other to A. Comentale, Esq., Acting Chief, Personnel & Labor Relations, to no avail.

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission . . .

(emphasis added). Further, this Office has previously reversed an agency's personnel action against an employee when the agency failed to comply with an order to submit documents. *Morris v. Department of Mental Health*, OEA Matter No. 2401-0080-03R04 (April 14, 2004), ___ D.C. Reg. ___ ().

This Office has consistently held that a matter may be decided in favor of the Employee when an Agency Representative fails to appear at a scheduled proceeding or fails to submit required documents. *See, e.g., 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); *Syrena Bonds v. D.C. Public Schools*, OEA Matter No. 2401-00083-04P05, *Opinion and Order on Petition for Review*, (April 25, 2005); *Dwight Gopaul v. D.C. Public Schools*, OEA Matter No. 2401-0114-02 (June 16, 2005); *Employee v. Agency*, OEA Matter No. 1602-0078-83, 32 D.C. Reg. 1244 (1985). Here, Agency failed to comply with written Orders to produce supporting evidence and failed to appear at the scheduled Hearing, for which costs were incurred in hiring a court reporter. To summarize::

- 1) Agency did not file its Prehearing Statement by the deadline as required in the Order to Convene a Prehearing Conference dated September 16, 2008, and amended by Order to Continue Prehearing Conference dated September 24, 2008.
- 2) Agency did not provide the pertinent tape recording, by the deadline in the November 10, 2008 Order to Provide Documentation, despite being cautioned that a failure to do so could result in sanctions as necessary to serve the ends of justice.
- 3) Agency did not appear at the scheduled Hearing and did not communicate regarding his absence prior thereto, despite being warned, in the November 3, 2008 Order Convening a Hearing, that such failure to appear without good cause may result in the case being adjudicated on the record or dismissed.

Based on the foregoing, this Judge finds that Agency has not exercised the diligence expected of an appellee defending its actions before this Office. Not only did Agency's representative fail to appear, neither did Agency witnesses appear; which leads this Judge to suspect that no witness preparation was made. This Office will not allow Agency to benefit from its own misstep. *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). Accordingly, this Judge concludes that Agency's behavior constitutes a failure to defend its action separating

Employee, and is sound cause for a ruling in Employee's favor.

It is hereby ORDERED that:

1. Agency's action removing Employee from service is REVERSED;
2. Agency shall reinstate Employee to her last position of record or a comparable position;
3. Agency shall reimburse Employee all back pay and benefits lost as a result of her removal; and
4. Agency shall file with this Office, *within thirty (30) calendar days* from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

ORDER

It is hereby ORDERED that this matter is REVERSED

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge