

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ISABELITA AGLIPAY,)	OEA Matter No. 1601-0072-08
Employee)	
)	Date of Issuance: July 30, 2010
)	
)	
DEPARTMENT OF MENTAL HEALTH,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Isabelita Aglipay (“Employee”) worked as a medical technologist with the Department of Mental Health (“Agency”). On February 13, 2008, Agency issued an advance notice to remove Employee from her position for malfeasance.¹ Employee filed a Petition for Appeal of Agency’s final decision with the Office of Employee Appeals (“OEA”).

In her petition, Employee argued that Agency’s removal action was improper because she did not threaten her co-workers. Employee provided that a co-worker asked

¹ Specifically, Employee was accused of threatening to do bodily harm to co-workers and creating a hostile work environment. Agency claimed that Employee threatened co-workers that she would shoot them and bragged to staff about carrying a .357 gun. Agency’s final decision was issued on April 17, 2008.

if she had a gun, and she informed her that she did not own a gun. She went on to note that she was so upset by her co-worker's question that she said that it was a "good thing that [she] took her medicine or else [she] was going to have a seizure."² Thus, Employee requested that she be reinstated with back pay and attorney's fees.³

On June 2, 2008, Agency filed its response to Employee's Petition for Appeal. It reasoned that Employee was terminated for cause pursuant to D.C. Personnel Regulations § 1603.3 because she threatened to do bodily harm to her co-workers. Agency provided that Employee made threatening comments in March and October of 2007. It asserted that these comments constituted "on duty or employment-related acts that interfered with the efficiency and integrity of government operations." Agency stated that the comments were deliberate, intentional, and adversely affected government operations because they "... increased the level of stress among her co-workers, to the point where numerous co-workers are afraid to work with [Employee]."⁴

On October 24, 2008, OEA's Administrative Judge ("AJ") held a Pre-hearing Conference. During the conference, Employee provided that she did not have a copy of Agency's adverse action file. Agency's representative stated that he would provide Employee with the file. However, on November 4, 2008, Employee had not received the file containing documents and tape recordings. Consequently, the AJ issued an order on November 10, 2008, requiring Agency to provide the evidence by November 14, 2008.

² Alternatively, Agency's witnesses contended that Employee said "it's a good thing [she] took her medicine because if [she] had not taken [her] medicine, [she] would shoot them all." *Petition for Appeal*, p. 6-9 (April 25, 2008).

³ *Id.* at 3-5.

⁴ *Department of Mental Health's Response to Appellant's Petition for Appeal*, p. 1-7 (June 2, 2008).

Additionally, the AJ scheduled a hearing in the current matter on January 8, 2009.⁵

On December 22, 2008, Employee still had not received the documents and tape recordings from Agency. Therefore, he filed a Motion to Compel. The AJ called the Agency's representative on December 24, 2008, regarding his failure to produce the documents and recordings. She was informed that Agency's representative was out of the office until January 5, 2009.⁶

On January 8, 2009, the AJ held a hearing. Employee and her witness were present. However, Agency's representative nor its witnesses were present. Employee requested that the AJ issue a default judgment in her favor because Agency failed to produce evidence and failed to appear. The AJ noted on the record that Agency's representative did not request a continuance. Accordingly, she issued an order for Agency to provide a statement of good cause for failing to attend the hearing.⁷

On January 15, 2009, the AJ issued her Initial Decision on this matter. She held that pursuant to OEA Rule 622.3, 46 D.C. Reg. 9313 (1999) she could rule in favor of Employee because Agency failed to take reasonable steps to defend her appeal. The AJ found that OEA has previously reversed agency's personnel actions when it has failed to comply with an order to submit documents. Moreover, she held that cases have been decided in favor of the employee if agency's representative fails to appear at a scheduled proceeding. Hence, she reversed Agency's decision and ordered that Employee be

⁵ The hearing date was scheduled in January because Agency's representative informed the AJ that he was not available until that date.

⁶ *Employee's Motion to Compel*, p. 1 (December 22, 2004). AJ attached a note with the details of her phone call to Employee's Motion to Compel.

⁷ *OEA Hearing Transcript*, p. 3-6 (January 8, 2009).

reinstated with back pay and benefits.⁸

Agency filed a Petition for Review of the Initial Decision. It argued that the AJ failed to exercise discretion when she imposed the sanction against it. Agency provided that default judgments should only be reserved for extreme circumstances and when lesser sanctions are not appropriate. It also outlined that the AJ did not consider if its representative and witness absences were deliberate; if it was prejudicial to Employee; or whether lesser sanctions were appropriate. Thus, it requested that the OEA Board vacate the Initial Decision.⁹

Employee filed an opposition to Agency's Petition for Review on March 3, 2009. She asserted that the hearing date was proposed by Agency's counsel in advance and accepted by Employee and the AJ. She also stated that Agency did not request a postponement of the hearing date. Additionally, Employee provided that Agency's failure to appear at the hearing was one of several defaults in this case. She also highlighted that Agency missed deadlines to deliver its file and pre-hearing statement. Moreover, Agency failed to produce a tape recording made by one of its primary witnesses. Accordingly, Employee requested that the Initial Decision be upheld because it was issued after numerous defaults by Agency.¹⁰

Contrary to Agency's assertions, it failed to comply with the AJ's order to produce evidence; it failed to attend a scheduled hearing; and it failed to produce a witness. OEA Rule 622.3, 46 D.C. Reg. at 9313 provides the sanctions that the AJ may

⁸ *Initial Decision*, p. 2-3 (January 15, 2009).

⁹ *Agency's Petition for Review*, p. 2-4 (February 19, 2009).

¹⁰ *Employee's Memorandum in Opposition to Agency's Petition for Review* (March 3, 2009).

take 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 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 622.3(a). It failed to appear at the January 8, 2009 hearing after receiving notice of the hearing on at least two occasions – on November 3, 2008 and December 17, 2008.¹¹ In her November 3, 2008, Order Convening a Hearing, the AJ scheduled the evidentiary hearing for January 8, 2009 at 10:00 a.m. The order provides in bold letters the following message: “if a party fails to appear without good cause, the case may be adjudicated on the record or the case may be dismissed.” Agency's representative failed to appear at the hearing.¹²

Additionally, in a Memorandum to the Record, the AJ required that Agency make its witness, Ms. Chang, available to testify at the January 8, 2009 hearing.¹³ She held that

¹¹ As previously provided, the AJ issued an Order Convening a Hearing and a Memorandum to the Record. Both documents referenced the January 8, 2009 hearing.

¹² The representative's reason for failing to attend the hearing was that it was not on his calendar. Although it is not made clear in the Initial Decision, we believe that the AJ did not accept this reason as good cause for his absence. This Board agrees.

¹³ *Memorandum to the Record* (December 17, 2008).

Agency should produce Ms. Chang to testify in accordance with OEA Rule 628.2.¹⁴

However, Ms. Chang also failed to appear at the evidentiary hearing.

Furthermore, Agency did not adhere to OEA Rule 622.3(b) because it did not submit the tape recordings as required by the November 10, 2008 order to produce said recordings. During a Pre-hearing Conference on October 24, 2008, the AJ informed Agency that it should provide its file containing documents and tape recordings to Employee. Agency failed to comply with the AJ's request. Thus, on November 10, 2008, the AJ issued an order requiring Agency to produce the documents and tape recordings by November 14, 2008.¹⁵ Agency did not comply with the AJ's second request. The tape recordings were not filed and are not a part of the official OEA record.

As the AJ provided in her Initial Decision, OEA has consistently 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 hereby deny Agency's Petition for Review.

¹⁴ OEA Rule 628.2 provides that "each District of Columbia government agency shall make its employees available to furnish sworn statements or affirmation or to appear as witnesses at depositions and hearings when requested by the Administrative Judge. When providing such statements or testimony, witnesses shall be on official duty status."

¹⁵ *Order for Agency to Provide Documentation*, p. 1 (November 10, 2008).

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), ___ D.C. Reg. ___ (); *Sharon Young-Wester v. D.C. Public Schools*, OEA Matter No. J-0033-03, Opinion and Order on Petition for Review (September 19, 2006), ___ D.C. Reg. ___ (); *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), ___ D.C. Reg. ___ ().

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is
DENIED.

FOR THE BOARD:

Clarence Labor Jr., Chair

Barbara D. Morgan

Richard F. Johns

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 formal notice of the decision or order sought to be reviewed.