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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	OEA Matter No.: 1601-0015-18
DELORES JUNIOUS,	)	
Employee	)	
	)	Date of Issuance: February 26, 2019
v.	)	
	)	
DEPARTMENT OF	)	
HUMAN SERVICES,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Delores Junious (“Employee”) worked as a Social Worker with the Department of Human Services (“Agency”). On September 19, 2017, Employee received an Advance Notice of Proposed Thirty-Day Suspension based on charges of neglect of duty; failure to follow instructions; unexcused tardiness; and unauthorized absence. On October 27, 2017, Agency issued its Final Notice, sustaining the charges against Employee. She was subsequently suspended without pay from October 30, 2017 until November 28, 2017.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on November 27, 2017. In her appeal, Employee argued that she was wrongly suspended despite having no progressive discipline. She stated that the charges were falsified and exaggerated as a

result of Agency's alleged lack of leadership, nepotism, and corruption. Therefore, Employee requested that her suspension be reversed with back pay and benefits.<sup>1</sup>

Agency filed its response on December 29, 2017. It asserted that Employee was appropriately suspended for thirty days because of her continuous tardiness in reporting to work; failure to attend mandatory meetings; and failure to arrive for scheduled appointments on time. Agency contended that Employee failed to offer any exculpatory or mitigating reason why her Petition for Appeal should be granted. Lastly, it argued that Employee failed to state a claim upon which relief could be granted because its adverse action was conducted in accordance with all applicable District rules and regulations. Consequently, Agency requested that Employee's appeal be dismissed.<sup>2</sup>

An OEA Administrative Judge ("AJ") was assigned to the matter in April of 2018. On April 10, 2018, the AJ issued an Order Convening a Status/Prehearing Conference to assess the parties' arguments.<sup>3</sup> On April 24, 2018, Agency filed a request for a continuance of the conference. The motion was granted and the status conference was rescheduled for June 13, 2018.<sup>4</sup> On June 13, 2013, Employee contacted the AJ, via email, and requested a further continuance because she was still attempting to secure an attorney. The AJ granted Employee's request and issued a Third Order Convening a Status/Prehearing Conference on July 5, 2018. The order provided that the rescheduled date for the conference was August 6, 2018.<sup>5</sup> Agency was present for the August 6, 2018 conference; however, Employee was not.

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<sup>1</sup> *Petition for Appeal* (November 27, 2017).

<sup>2</sup> *Agency Answer to Petition for Appeal* (December 29, 2017).

<sup>3</sup> *Order* (April 10, 2018).

<sup>4</sup> *Order Rescheduling Status/Prehearing Conference* (April 25, 2018).

<sup>5</sup> *Order Rescheduling Status/Prehearing Conference* (July 5, 2018).

As a result of Employee's absence, the AJ issued an Order for Statement of Good Cause on August 6, 2018.<sup>6</sup> The order directed Employee to submit to OEA a statement of cause explaining her failure to appear at the status conference. Employee's submission was due on or before August 18, 2018. Additionally, the notice provided that the failure to respond to the order in a timely fashion, or the failure to establish good cause for Employee's failure to attend the proceeding, could result in the imposition of sanctions, including the dismissal of the matter.<sup>7</sup> Employee did not submit a response to the Order for Statement of Good Cause before the prescribed deadline.

On August 24, 2018, the AJ issued an Initial Decision. She held that in accordance with OEA Rule 621.1, an AJ has the authority to impose sanctions upon parties as necessary to serve the ends of justice. She noted that the failure to take reasonable steps to prosecute or defend an appeal includes the failure to appear at a scheduled proceeding after receiving notice; failure to submit required documents after being provided with a deadline for such submission; and the failure to inform OEA of a change of address which results in correspondence being returned to this Office. Additionally, the AJ relied on the holdings in *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010) and *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010), which collectively provide that OEA may dismiss a matter for failure to prosecute if a party fails to attend a scheduled conference or hearing.

Based on the above, the AJ concluded that Employee failed to appear at the August 6, 2018 status conference and failed to provide a written response to the Order for Statement of

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<sup>6</sup> *Order for Statement of Good Cause* (August 6, 2018).

<sup>7</sup> *Id.*

Good Cause. Therefore, she concluded that Employee did not exercise the diligence expected of an appellant pursuing an appeal before this Office. Consequently, her appeal was dismissed.<sup>8</sup>

Employee, through her newly-acquired counsel, disagreed and filed a Petition for Review with OEA's Board on September 28, 2018. She argues that her appeal should not have been dismissed for failure to prosecute because the AJ failed to establish good cause for dismissing the matter. Employee opines that justice requires a review of this matter on its merits because she exercised due diligence in pursuing an appeal before this Office. Further, she states that dismissal was a harsh sanction for a *pro se* litigant who made efforts to comply with the AJ's order; communicated with the Office regarding her whereabouts; and requested an extension of time to respond to the Order for Statement of Good Cause after a reasonable delay. Therefore, Employee requests that the Board remand the matter for adjudication on its merits.<sup>9</sup>

In response, Agency asserts that Employee failed to appear at OEA multiple times prior to the rescheduled August 6, 2018 conference. It explains that Employee was aware of the Order for Statement of Good Cause but failed to submit a response. Agency also reiterates that Employee was informed that she was required to respond to the AJ's cause order to avoid dismissal of her appeal. Thus, it believes that the AJ correctly dismissed Employee's appeal for failure to prosecute, and asks this Board to deny her Petition for Review.<sup>10</sup>

### Discussion

This Board has historically relied on the holding *Murphy v. A.A. Beiro Construction Co.* et al., 679 A.2d 1039, 1044 (D.C. 1996), wherein the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible, and where there is any

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<sup>8</sup> *Initial Decision* (August 24, 2018).

<sup>9</sup> *Id.*

<sup>10</sup> *Agency Answer to Petition for Review* (November 2, 2018).

doubt, it should be resolved in favor of trial.”<sup>11</sup> In *Department of Mental Health v. District of Columbia Office of Employee Appeals*, et al., Case No. 2015 CA 7829 P(MPA)(D.C. Super. Ct. February 14, 2017), the District of Columbia Superior Court stated that even if the Court were to conclude that a filing deadline is jurisdictional, “. . . OEA [ ] retains the equitable authority to hear the matter even outside the filing period.”<sup>12</sup> Moreover, OEA Rule 633.3 permits the Board to grant a Petition for Review when the findings of the AJ are not based on substantial evidence.<sup>13</sup>

While this Board recognizes the AJ’s authority to dismiss appeals for failure to prosecute under OEA Rule 621, we disagree with her ultimate finding that Employee failed to exercise the diligence expected of an appellant pursuing an appeal before this Office. Employee filed a timely Petition for Appeal with OEA on October 27, 2017. After Agency requested an initial continuance of the April 25, 2018 Status Conference, Employee requested a second continuance, via email. The June 13, 2018 email to the AJ stated that Employee was requesting a further continuance because she had not secured legal counsel, but was “amendable to whichever date is agreeable and decided upon.”<sup>14</sup>

As it relates to the rescheduled conference date of August 6, 2018, the record reflects that Employee sent emails at 12:50 p.m. and 2:12 p.m. to advise the AJ that she would be late

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<sup>11</sup> The OEA Board also followed this holding in *Diane Gustus v. Office of Chief Financial Officer*, OEA Matter No. 1601-0025-08, *Opinion and Order on Petition for Review* (December 21, 2009) *Jerelyn Jones v. D.C. Public Schools*, OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013); and *Carmen Faulkner v. D.C. Public Schools*, OEA Matter No. 1601-0135-15, *Opinion and Order on Petition for Review* (March 29, 2016).

<sup>12</sup> See also *Macleod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977 (D.C. 1999) (holding that “[i]n matters involving pleadings, service of process, and timeliness of filings, *pro se* litigants are not always held to the same standards as are applied to lawyers).

<sup>13</sup> The Court of Appeals in *Baumgartner v. Police and Firemen’s Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.

<sup>14</sup> Delores Junious, *Continuance of Status Hearing for Junious v. DHS-OEA* Matter No. 1601-0015-18 (June 13, 2018).

because she mistakenly believed that the conference was scheduled for 1:00 p.m.<sup>15</sup> After arriving at OEA, Employee states that she was informed by the AJ that a show cause order would be issued as a result of her absence. However, Employee subsequently traveled out of town for ten days and states that she did not receive order until returning on August 20, 2018. After receiving the Order, Employee emailed the AJ on August 28, 2018 to request an extension of time in which to submit a response.<sup>16</sup> Employee subsequently secured legal representation with Alan Lescht & Associates, P.C.. Counsel for Employee filed a Petition for Review with OEA's Board on September 28, 2018.

In reviewing the record, we believe that Employee exercised a satisfactory amount of diligence in pursuing her appeal before OEA. Her actions demonstrate that she kept OEA apprised of her ability to attend scheduled status conferences. While Employee arrived late for the August 6, 2018 status conference, she contacted OEA on the same day to notify the AJ of her whereabouts. Additionally, there is no indication that Employee failed to submit a timely response to the Order for Statement of Good Cause in bath faith, or that she exhibited deliberate or willful non-compliance with the AJ's orders.<sup>17</sup> Employee actively sought legal representation while simultaneously prosecuting a *pro se* appeal before this Office and provided the AJ with written notice of her representation status. Lastly, remanding the matter to the AJ for adjudication on its merits will not result in a significant prejudice towards Agency. Based on the foregoing, we find that the AJ's decision to dismiss Employee's appeal for failure to prosecute was not based on substantial evidence. Therefore, in the interest of justice and fairness, we remand this matter to the Administrative Judge to consider the merits of Employee's appeal.

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<sup>15</sup> *Employee Petition for Review*, Exhibits D and E (September 28, 2018).

<sup>16</sup> *Employee Petition for Review*, Exhibit F (September 28, 2018).

<sup>17</sup> *See Murphy* at 1044.

**ORDER**

Accordingly, it is hereby ordered that Employee's Petition for Review is **GRANTED**, and the matter is **REMANDED** to the Administrative Judge for further consideration.

**FOR THE BOARD:**

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Clarence Labor, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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.