THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HERMAN AUSTIN	)	
Employee	)	OEA Matter No. 1601-0010-17
	)	
v.	)	Date of Issuance: September 20, 2018
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS	)	Lois Hochhauser, Esq.
	)	Administrative Judge
Agency	)	
	)	

Nada Paisant, Esq., Agency Representative
J. Scott Hagood, Esq., Agency Representative[1]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 9, 2016, Herman Austin, Employee, filed a petition with the Office of Employee Appeals (OEA) appealing the decision of the District of Columbia Department of Corrections, Agency, to remove him from his position as a Correctional Officer, effective November 8, 2016. At the time of termination, Employee held a permanent appointment in the career service. The matter was assigned to this Administrative Judge (AJ) on February 2, 2017.

The Order scheduling the prehearing conference (PHC) for March 8, 2017, was issued on February 10, 2017. The Order also directed that Andra Parker, who had represented Employee during mediation but had not entered his appearance with this Office, file an entry of appearance by February 27, 2017 if he was continuing to represent Employee. No entry of appearance was filed by February 27, 2017.

Ms. Paisant was present at the scheduled time for the PHC, but neither Employee nor Mr. Parker appeared, and neither contacted the Office. On March 9, 2017, the AJ issued an Order directing Employee to show good cause for his failure to appear. Employee filed a timely response, but upon review, the AJ determined that he had not established good cause. The AJ

[1] Mr. Hagood entered his appearance on August 13, 2018. Prior to that time, Employee was represented by Andra Parker. Mr. Parker did not withdraw his appearance, although he was directed to do so by Order issued on August 24, 2018.

did not impose sanctions, but rather issued an Order on May 10, 2017 detailing the reasons she found the response did not establish good cause, and giving Employee another opportunity to provide good cause. Employee filed a timely submission. Agency filed its objections, and sought dismissal of the appeal. On August 25, 2017, the AJ issued an Order in which she determined that, although Employee had not fully responded to the Order and had not established good cause, she would not impose sanctions since Employee had exhibited some effort by submitting timely responses. The PHC was scheduled for September 13, 2017.

Employee, Mr. Parker and Ms. Paisant were present at the PHC. On September 14, 2017, an Order was issued summarizing the PHC and scheduling the evidentiary hearing for December 6, 2017. The hearing was postponed because the parties were engaged in mediation. When the AJ was informed that mediation efforts had failed, she issued an Order on February 22, 2018 scheduling the proceeding for May 24, 2018. On May 17, 2018, Agency filed a consent motion, seeking a continuance based on the sudden unavailability of an essential witness. The AJ asked the parties to consult and provide her with dates that the parties and witnesses were available. They provided her with three days when the parties were available, including July 25, 2018. On May 18 2018, an Order was issued scheduling the hearing for July 25, 2018.

Employee and his representative did not appear at the hearing on July 25, did not contact the AJ and did not respond to telephone messages left to them on that date. On July 26, 2018, the AJ issued an Order directing that Employee submit good cause for his failure to attend the proceeding. Employee submitted a timely response. The AJ issued an Order directing Agency to file a response, if it sought to do so. Agency filed a response, seeking dismissal of the appeal.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Should this appeal be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

This matter is governed by OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) which provides in pertinent part:

> 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:
>
> (a) Appear at a scheduled proceeding after receiving notice;

At issue is whether Employee took "reasonable steps to prosecute" this appeal. Employee maintains that sanctions should not be imposed since he has actively pursued the appeal and has filed timely submissions. He contends that this is not the "typical" case of a party simply not

appearing at a proceeding, since he did not receive the May 18 Order scheduling the hearing. Agency maintains that the appeal should be dismissed as a sanction based on Employee's continued noncompliance and failure to establish good cause for these failures.

In the first Order, issued on February 10, 2017, the AJ scheduled the PHC for March 8, 2017 and directed Mr. Parker to enter his appearance if he was continuing to represent Employee. In the Order, the AJ notified the parties that compliance with all OEA Rules was mandatory throughout this process, stating in pertinent part:

> **Failure to attend a scheduled proceeding in a timely manner…may result in the imposition of sanctions, including the dismissal of the petition, without additional notice.** (emphasis in original).

Employee and his representative did not appear at the PHC and did not contact the AJ to request a delay or continuance. Therefore on March 9, 2017, an Order was issued directing Employee to show good cause for his failure to appear at the PHC by March 22, 2017. Although Employee also failed to file a designation of representative by the February 27 deadline, a courtesy copy of this Order was also sent to Mr. Parker. Employee filed his response and designation of representative on March 22. His explanation for not attending the PHC is stated, in pertinent part, below:

> The Employee failed to appear for the PHC due [to] a medical illness by his Representative. The Employee Representative notified the Employee he would make notification to OEA regarding the Employee Representation for failure to appear. However, prior to Representative making notification to OEA [for] his and Employee cause for not attending the PHC, the Employee received an Order from OEA to respond by March 22, 2017 for the same. Representative Parker failed to receive notification regarding the responding correspondence. Enclosed is the Employee Representative supporting medical documentation.

The supporting medical documentation submitted by Employee was a Notice of Eligibility Determination for Medical Leave issued by Agency to Mr. Parker on February 1, 2017, stating that on January 30, 2017, Mr. Parker requested medical leave beginning January 27, 2017. The notice was not "medical documentation," it merely stated that Mr. Parker would not be granted leave unless and until he qualified for the certain types of leave for which he was eligible. The AJ did not find that Employee established good cause. She explained in her May 10, 2017 Order:

> Although this AJ will excuse a first time failure to attend a scheduled proceeding if a reasonable explanation is offered, the AJ finds, even before allowing Agency to respond, that Employee failed to meet the minimal threshold required to establish good cause. First, and most important, Employee, and not his representative, is accountable for complying with OEA Rules and the consequences of noncompliance will impact on Employee. He is not excused from the consequences of noncompliance, because of his representative's actions or nonactions. Second, Employee states that Mr. Parker told him that he would contact the AJ to explain why neither he nor Employee attended the PHC, but then he received the March 9

> Order. The March 9 Order was issued following the PHC. Employee's statement confirms that both he and Mr. Parker were aware of the PHC and that neither contacted the Office or AJ prior to the PHC, despite notification in the February 10 Order of the requirement of complying with OEA Rules, the consequences of not complying, and the procedure for seeking a continuance. Third, Employee contends that Mr. Parker "failed to receive notification regarding the responding correspondence." The AJ does not understand the meaning of this phrase. If it refers to the Orders, both were sent to Mr. Parker at the address used by this Office, Mr. Parker and Employee for Mr. Parker. No Order was returned as undelivered, and both are presumed to have been timely received. However, this is not a major problem, although it must be addressed, since Employee received the Orders and represents that he and Mr. Parker spoke before and after the scheduled PHC. Finally, Employee drafted and signed the submission, which raises the concern of whether Employee is represented at this time. If Employee is going to submit pleadings in his own name, Employee and his representative must submit a document to that effect to avoid confusion in the future.

The AJ determined, however, that she would give Employee another opportunity to establish good cause, cautioning him that he had to address each reason given by the AJ for finding his response insufficient. Although a copy of the Order was sent to Mr. Parker, Employee was again directed to file a designation of representative or inform the AJ that he was no longer represented by Mr. Parker by the May 26 filing deadline. Agency was given a filing deadline in the event that it chose to respond to Employee's pleading.

Employee filed a timely response in which he stated that Mr. Parker's leave request for "chronic medical illness" was approved in February 2017, and that when he contacted Mr. Parker on March 7 about the PHC, Mr. Parker stated he had not received the notice, that he could not meet with Employee because he was ill, and that he would notify the AJ that he could not attend. Employee also explained that losing his job had caused both emotional and financial problems and placed him under "medical issues of stress."

Agency replied, arguing that Employee's explanation was "still insufficient to establish good cause for his failure to appear at the [PHC] or for his failure to timely notify this tribunal or undersigned counsel of his unavailability." Agency asked that the AJ dismiss the appeal as a sanction for Employee's failure to appear and to show good cause for that failure.

Despite the fact that the AJ found Employee's second response was still insufficient, failing to address each issue as directed in the previous Order, the AJ declined to impose sanctions, but instead scheduled the PHC, explaining in the August 25, 2017 Order:

> The AJ will not impose sanctions, although she did not find the additional information provided by Employee established good cause. However, the imposition of sanctions is a serious matter. There are a number of reasons, which if viewed together, led her to that decision. First, she considered that Employee responded to both Orders in a timely manner, which shows responsibility. It also demonstrated that Employee now knows that his reliance on his representative's statements, will not excuse his failure to comply. If sanctions are imposed, they are

> imposed on the employee, not his representative. With regard to Mr. Parker's health, Employee is now on notice that if Mr. Parker cannot actively participate in this matter, then some other course of action must be taken. In addition, although the AJ understands that termination often causes financial and emotional problems, and Employee, like many others who appeal to this Office, may well suffer from stress and medical problems, absent unusual or emergency circumstances, this would not excuse a failure to attend a scheduled matter or utilize the procedures for requesting a continuance. Employee now knows the reasons that will not be accepted in the future. Further, the AJ will treat Agency's first violation, if there is one, with the same leniency**. Finally, Employee is on notice that another violation could result in the imposition of sanctions, including dismissal of this appeal**. (emphasis added).

The PHC took place on September 13, 2017, and was attended by Employee, Mr. Parker and Ms. Paisant. At the PHC, the AJ explained why she had decided not to impose sanctions, and discussed with the parties the importance of compliance with OEA Rules and Orders. She cautioned the parties that violations would not be excused as easily in the future, and placed the parties on notice that sanctions would be imposed for significant violations. The parties agreed to mediation, and the matter was referred for appointment of a mediator. The evidentiary hearing was scheduled for December 6, 2017 and deadlines were established for consultations, and exchanging lists of witnesses and documents. An Order summarizing the PHC was issued on September 14, 2017. [2]

In February 2018, the AJ was advised that mediation efforts had not been successful. By Order issued on February 22, 2018, the hearing was scheduled for May 24, 2018. However, prior to the hearing date, Agency was advised that one of its witnesses had been assaulted, and would not be available. The AJ directed Ms. Paisant to contact Mr. Parker to obtain consent and to jointly propose three dates that both parties were available. In Agency's Consent Motion to Reschedule the Evidentiary Hearing, the parties offered July 18, July 19 and July 25, 2018 for the rescheduling hearing date. On May 18, 2018, the AJ issued an Order granting the motion and scheduling the hearing for July 25, 2018, one of the dates proposed by the parties.

On July 25, 2018, at 9:00 a.m., the scheduled start time, in addition to the AJ and Court Reporter, Ms. Paisant was in attendance as were three Agency witnesses. At about 9:30 a.m., the AJ telephoned Mr. Parker at the telephone number he provided. There was no answer, so the AJ left a message, stating that the proceeding was scheduled to begin at 9:00 a.m., that neither he nor Employee had contacted the AJ or the Office, that he should contact the Office immediately, that those present would be dismissed within the hour unless he responded, and that Employee risked the imposition of sanctions, including the dismissal of the appeal, unless he appeared or could establish good cause for his failure to do so. The AJ then telephoned Employee at the number he provided, and left a similar message when he did not answer. Neither Mr. Parker nor Employee returned the call. At approximately 10:15 a.m., the AJ dismissed the parties and closing the proceeding.

[2] Due to continued mediation efforts, the December 6 proceeding was cancelled.

By Order dated July 26, 2018, the AJ directed Employee to show good cause, if it existed, for his failure to appear at the proceeding by August 13, 2018. Employee filed a timely response stating in pertinent part, that he received a copy of the May 17 Consent Order, but had not received a copy of the May 18 Order. Employee, through his new representative, contended that if he had received the Order, "he would have gladly appeared and had his day in court – which he has sought for two years." He added that this was not a "typical" instance where a case is dismissed for failure to prosecute, since Employee "has been active in his case and submitted a timely response to an order to show cause." Attached to the submission was a document signed by Employee, stating in part, that he stated that he "expected to receive an order setting a date for the evidentiary hearing from the three dates proposed in the Consent Motion…July 18, 19 or 25," that he had diligently checked his mail but that he did not receive the scheduling Order.[3] In its submission, Agency sought dismissal of the appeal as a sanction, arguing that July 25 was not the first time that Employee had failed to appear to a scheduled proceeding, and also that his August 13 submission did not establish good cause for his failure to appear.

The AJ has considered this matter carefully, since dismissal of the appeal as a sanction is a very serious matter. She has included the chronology and summary of the Orders issued in this matter to establish that numerous Orders were issued, each providing specific instructions and reasoning. In all, nine Orders were issued. The certificate of service attached to each Order documents that a copy of each Order was mailed by first class mail, postage prepaid, to both Employee and to Mr. Parker at the mailing addresses provided by them. None of the Orders was returned to OEA as undelivered. The AJ therefore assumes that each Order was received by the designated recipient in a timely manner. She finds it difficult to accept Employee's proffer that only the May 18 Order was not delivered to him. However, the AJ knows that the U.S. Postal Service is not without its flaws, and therefore, for the purpose of reaching a decision in this matter, accepted Employee's assertion that he did not receive a copy of that Order. It does not change the outcome, as discussed below.

Based on a careful review of the facts presented in this matter, the AJ concludes that Employee did not establish good cause for his failure to attend the hearing based even if he did not receive a copy of the May 18 Order. In his submission, Employee stated that he knew that the hearing would be scheduled on July 19, July 20 or July 25. Since he knew that it would be one of those dates, and since, as previously noted, numerous Orders were issued in this matter, the reasonable step for Employee to have taken, would have been to contact his representative, this Office, or this AJ when he did not receive an Order within a reasonable period of time. The representatives proposed the dates to the AJ in May 2018. Employee was in contact with his representative at that time, and knew the dates. If his representative was not responsive, the AJ had provided Employee with her contact information, and he could have contacted her for this information.

In reaching her decision, the AJ also considered that Employee had failed to attend the PHC, despite having received notice of the proceeding. He had failed to establish good cause for this failure, but rather than impose sanctions, the AJ gave him another opportunity, identifying specific items he needed to address. He filed a timely response, but failed to address those items and did not establish good cause. Rather than imposing sanctions, however, the AJ allowed the

[3] Although the document was titled "Affidavit," it was not sworn to before a Notary Public.

matter to proceed, although Employee was cautioned that future violations would result in sanctions.

Employee argues that the "typical" reason for dismissal for failure to prosecute is when an employee fails to respond to an Order or attend a proceeding, and fails to communicate his reasons to the AJ either before the hearing or in response to an Order. However, each matter is judged on its own merits. In this case, sanctions were not previously imposed despite Employee's failure to show good cause for his absence at the first scheduled PHC. Rather, Employee was given another opportunity and directed to respond to specific items. He filed a timely submission, but not an adequate response. The AJ did not impose sanctions, but recognizing that he had at least filed timely responses, rescheduled the PHC. However, she made it clear to Employee that he was responsible for pursuing the appeal, and that sanctions would be imposed if he failed to appear at another proceeding and did not establish good cause. Employee conceded he was aware that the parties had offered three days in July, including July 25, for the rescheduled proceeding. He knew that this AJ regularly issued Orders in this matter. The reasonable step for Employee to have taken to prosecute this matter, when he did not receive an Order after a reasonable period of time, after being advised of the three proposed dates by his representative in May, would have been to contact his representative, the Office or the AJ. Employee was "on notice" that serious consequences would ensue, but still failed to take the necessary and reasonable affirmative steps to prosecute this matter. There are other matters that the AJ must consider. Significant time and expenses are associated with evidentiary hearings. The Court Reporter, the AJ, the Agency representative and its witnesses are present, prepared and wait for Employee for a considerable period of time. Failing to appear for a scheduled proceeding and taking reasonable steps to meet this requirement, in the absence of good cause, demonstrates a lack of respect for the other participants and a disregard for the time and expense incurred.

This AJ understands the seriousness of this matter, and that Employee has been negatively impacted by his removal. She avoids imposing sanctions, as she did in this matter, and gives employees several chances to comply. However, as in this case, once an employee is on notice that sanctions will be imposed for future violations, the employee must take reasonable steps to pursue the appeal or, absent good cause, sanctions may well be imposed for a future violation. In this matter, Employee failed to take reasonable steps or to otherwise establish good cause for his failure to miss the scheduled proceeding. For these reasons, the AJ, in accordance with OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) and in the "exercise of sound discretion" concludes that Employee failed to prosecute the appeal and that dismissal of the appeal is the appropriate sanction.

ORDER

The petition for appeal is dismissed.

FOR THE OFFICE:

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Lois Hochhauser, Esq.
Administrative Judge