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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
MARVIN R. LEONARD)
Employee)
)
v.)
)
DEPARTMENT OF)
CORRECTIONS)
Agency)
_____)

OEA Matter No. 1601-0327-97P01

Date of Issuance: **March 10, 2004**

OPINION AND ORDER
ON
PETITION FOR REVIEW

On September 29, 1997, Employee timely filed with the Office of Employee Appeals (OEA) a Petition for Appeal from Agency's final decision denying as untimely a grievance he filed on July 14, 1997. On November 6, 1998, OEA's Administrative Assistant notified Agency that it had until December 8, 1998 to file its Answer. Agency did not file its Answer by the stated deadline. Therefore, on February 26, 1999, Employee's representative filed a motion

requesting as a sanction a ruling in Employee's favor.

Employee's appeal was subsequently assigned to an Administrative Judge on June 7, 2000. The Administrative Judge did not make a ruling on Employee's motion. Rather, he issued an Order on June 7, 2000 scheduling a Prehearing Conference for July 7, 2000 with each party's respective prehearing submission due on June 30, 2000. Agency filed its Prehearing Statement on July 5, 2000. The next day, Employee's representative filed an unopposed motion requesting a 90 day extension to complete discovery and file Employee's Prehearing Statement, claiming that he had been prejudiced in those efforts by Agency's failure to file its Answer. He also requested that the Prehearing Conference be postponed.

The Administrative Judge did not contact the parties again until June 26, 2001 when he rescheduled the Prehearing Conference for July 13, 2001 and ordered Employee to file his prehearing submission by July 3, 2001.¹ On June 29, 2001, one of Employee representative's senior associates filed a motion requesting a further extension of time to file Employee's Prehearing Statement, stating that the law firm only received the Order two business days before the prehearing submission was due, Employee's representative was out of the area until July 1, 2001, and no other attorney in the law office was familiar enough with the case to prepare the statement within the short period of time available. The attorney also requested that the Prehearing Conference be rescheduled because Employee's representative planned to be out

¹ The Administrative Judge did issue an Order on May 18, 2001 that contained earlier deadlines; however, due to an administrative error, a copy of that Order was not sent to Employee's representative.

of the country on July 13, 2001. The motion stated that Employee's representative would be available the week of July 2nd to discuss alternative dates. Agency filed an opposition to Employee's motion on July 5, 2001.

On July 6, 2001, the Administrative Judge issued an Order rescheduling the Prehearing Conference for August 6, 2001. That Order also included a deadline of July 27, 2001 for Employee to show cause why he had not filed his prehearing submission by July 3, 2001. On July 26, 2001, Employee's representative responded that he had not filed Employee's prehearing submission by July 3, 2001 because his June 29, 2001 motion requesting an extension of time to do so had not been denied by the Judge by the stated deadline. Employee's representative also renewed his request for a new date to submit the statement. The Administrative Judge did not respond to the show cause submission.

Neither Employee nor his representative attended the Prehearing Conference on August 6, 2001. By Initial Decision dated August 7, 2001, the Administrative Judge dismissed Employee's appeal for failure to prosecute the case, concluding that Employee had failed on three occasions to respond to orders to submit a Prehearing Statement and attend a Prehearing Conference. The instant Petition for Review ensued. Employee argues that the Administrative Judge's determination that he failed to prosecute his appeal is based on an erroneous interpretation of OEA policies and is not based on substantial evidence. We are constrained to agree.

Pursuant to OEA Rule 622.3, 46 D.C. Reg. 9297, 9313 (1999), if a party fails to take reasonable steps to prosecute an appeal, the Administrative Judge in the exercise of sound discretion may dismiss the action. Though the rule states that failure of a party to prosecute an appeal includes a failure either to appear at a scheduled proceeding after receiving notice or submit required documents by a stated deadline, such a determination must be made on a case by case basis. Here, although the manner in which Employee's representative prosecuted this appeal fell short of our expectations of attorneys who practice before the Office, we conclude that there is not substantial evidence in the record to support the Administrative Judge's failure to prosecute finding.

By Order issued June 7, 2000, the Administrative Judge required the parties to file their respective prehearing submission by June 30, 2000 and attend a conference on July 7, 2000. However, on July 6, 2000, Employee's representative filed an unopposed motion requesting additional time to submit Employee's statement and asking that the conference be postponed. Though that request was untimely as it related to the submission of Employee's Prehearing Statement, Agency did not comply with the June 30, 2000 deadline either. Agency did not file its prehearing submission until July 5, 2000. Employee should not be sanctioned for failing to meet a deadline that the opposing party missed without recourse.

Nevertheless, Employee's request to postpone the conference was not untimely as it was received in this Office before the conference was to have been held. Because the Administrative

Judge had not denied the request before the stated date of the conference, it appears that Employee's representative made an assumption that the conference had been cancelled. Employee's representative, however, should not have made such an assumption. He should have followed-up his request with a phone call to the Administrative Judge before allowing the date to pass. His failure to contact the Judge in those circumstances demonstrates the lack of thoroughness with which we believe he has prosecuted this appeal. Nonetheless, by filing a motion to request that the proceeding be postponed before the conference was to have been held, Employee's representative did participate in the adjudicatory process. We cannot say that his failure to attend the proceeding after requesting in advance that it be rescheduled without his request having been denied by the Judge supports the Judge's finding that he failed to prosecute the appeal.

By Order issued June 26, 2001, the Administrative Judge rescheduled the Prehearing Conference for July 13, 2001 and gave Employee a deadline of July 3, 2001 to file his prehearing submission. However, on June 29, 2001, the law firm representing Employee filed another motion requesting additional time to submit Employee's statement and asking that the proceeding be further rescheduled. That request came before either of the deadlines had passed. When the Administrative Judge did not respond to the motion by the July 3rd deadline for filing Employee's Prehearing Statement, it appears that Employee's representative made another assumption that the statement did not have to be filed then. As we stated above,

Employee's representative should not have made such an assumption and instead should have contacted the Administrative Judge by telephone to be certain that the request had been granted before he allowed the deadline to pass. And, we further note that because Employee had already been given over a year to file his statement, well in excess of the 90 days he had requested on July 6, 2000, there should not have been any need to request another extension of time. Nonetheless, we cannot say that the failure of Employee's representative to file the prehearing submission by July 3rd when there was a pending motion to extend the deadline supports the Judge's finding that he failed to prosecute the appeal.

Further, the Administrative Judge had already rescheduled the July 13, 2001 conference before it was to have taken place, and therefore, neither Employee nor his representative was required to appear in this Office on that date. As a result, any failure to appear could not support the Judge's finding that Employee failed to prosecute his appeal.

Lastly, by Order issued July 6, 2001, the Administrative Judge rescheduled the Prehearing Conference for August 6, 2001. There is no dispute that neither Employee nor his representative appeared for that proceeding. In the instant Petition for Review, Employee's representative states that he did not reasonably believe that the conference remained scheduled because neither party had filed its Prehearing Statement,² a ruling had not been made on Employee's June 29, 2001 motion for an extension of time to file his statement and no response

² Employee's representative is factually incorrect. Agency filed its prehearing submission on July 5, 2000. The certificate of service indicates that a copy was mailed to Employee's representative.

had been issued to Employee's show cause statement. We do not believe that it was reasonable, nor necessary, to assume that the conference had been cancelled. Although we are unclear as to why the Administrative Judge included in his Order rescheduling the conference a requirement that Employee show cause why he had missed a deadline that was the subject of a previous motion and we acknowledge that by not responding to the submission by the scheduled date of the conference there could have been some confusion regarding the status of that proceeding, any resulting confusion could easily have been resolved if Employee's representative had contacted the Administrative Judge by telephone. He should have done so. Nonetheless, by filing the various motions and responding to the show cause Order, Employee's representative did participate in the adjudicatory process. We cannot say that the failure of Employee's representative to attend the August 6, 2001 proceeding under the circumstances described above supports the Judge's finding that he failed to prosecute the appeal. Therefore, we grant Employee's Petition for Review and remand this matter to the Administrative Judge.

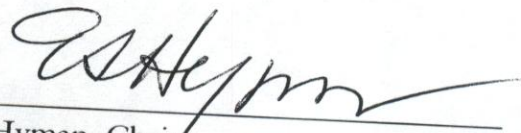
On remand, we do not expect that Employee will delay any further in submitting his Prehearing Statement given that he had already been given over a year to submit the statement before his appeal was dismissed. Further, we encourage the Administrative Judge to promptly issue a ruling on all motions that either party may file going forward. However, in the absence of such a ruling, the parties must follow-up their request by contacting the Administrative Judge

to be certain about the status of their motion before allowing a deadline to pass. This Board will not look favorably upon any further argument by Employee's representative that he failed to comply with a deadline of this Office because he was awaiting a response from the Administrative Judge to one of his filings.

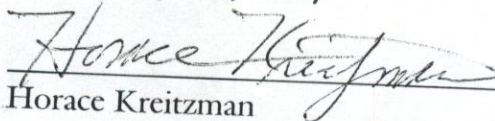
ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED** and this appeal is **REMANDED** to the Administrative Judge for further action consistent with this order.

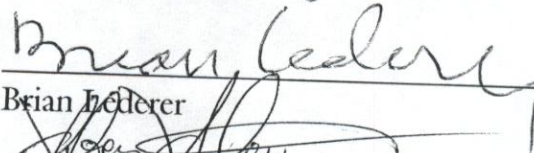
FOR THE BOARD:



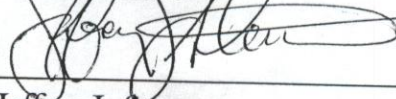
Erias A. Hyman, Chair



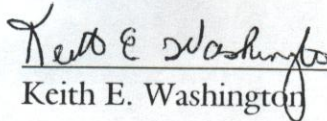
Horace Kreitzman



Brian Lederer



Jeffrey J. Stewart



Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals five days after the issuance date on 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.