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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. CSV 02184-20

AGENCY DKT. NO. 2020-1915

**IN THE MATTER OF EARL
POLHAMUS, DEPARTMENT OF
HUMAN SERVICES, WOODBINE
DEVELOPMENTAL CENTER,**

Earl Polhamus, appellant, pro se

Elizabeth A. Davies, Deputy Attorney General, appearing for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: January 31, 2022

Decided: February 7, 2022

BEFORE KATHLEEN M. CALEMMO, ALJ:

In accordance with N.J.A.C. 1:1-3.3(b) and 1:1-14.4(a) this tribunal is directing the Clerk to return the case to the transmitting agency for the reasons stated below:

On December 30, 2019, Woodbine Developmental Center served appellant Earl Polhamus with a Final Notice of Disciplinary Action (FNDA) after sustaining the charge of job abandonment for being absent from work for five consecutive days without permission and imposed the discipline of resignation not in good standing. On or about January 17, *New Jersey is an Equal Opportunity Employer*

2020, Polhamus through his attorney, Anthony J. Harvatt, II, Esq., appealed the FNDA. The appeal was transmitted to the Office of Administrative Law (OAL) and filed on February 13, 2020.

The case proceeded to a settlement conference on March 16, 2021, but did not settle. It was assigned to me. After conducting telephone conferences, I received a motion from appellant's attorney asking to withdraw from the matter. Mr. Horvatt certified that Mr. Polhamus was non-compliant with his requests for discovery and was non-receptive to communication requests. By Order, dated September 15, 2021, I granted Mr. Horvatt's motion and scheduled the next telephone conference for October 21, 2021.

Mr. Polhamus participated in the October 21, 2021, telephone conference and advised that he was seeking representation from his union. The matter was rescheduled for November 10, 2021, but Mr. Polhamus failed to appear at the conference. During the December 6, 2021, telephone conference, Mr. Polhamus appeared with Mr. Pinto, a representative from the union. However, after Mr. Pinto informed me that the union still needed to process Mr. Polhamus' request for representation, I rescheduled the conference. On December 22, 2022, Mr. Pinto appeared only to tell me he had not been retained because Mr. Polhamus never completed the forms.

The next conference was scheduled for January 12, 2022, and Mr. Polhamus failed to participate.

On January 13, 2022, I sent the parties a letter detailing the history of non-compliance and advising Mr. Polhamus that if he failed to participate in the mandatory telephone conference scheduled for January 31, 2022, I would return the case to the transmitting Agency.

Mr. Polhamus failed to appear for the January 31, 2022, telephone status conference and to date has provided no explanation for his failure to appear.

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:1-14.4:

- (a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).
- (b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.
- (c) If the judge receives an explanation:
 - 1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or
 - 2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may reschedule the matter and, at his or her discretion, order any of the following:
 - i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
 - ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
 - iii. Such other case-related action as the judge deems appropriate.
- (d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a

decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

I **CONCLUDE** that the appellant was provided with appropriate notices of scheduled proceedings, namely a telephonic prehearing status conference, to be held on January 12, 2022, and January 31, 2022, at 4:00 p.m. The appellant was provided with written notice of these scheduled proceedings which contained specific warnings to the appellant of the consequences of a non-appearance and, despite having been provided with appropriate notice, the appellant failed to appear and failed to provide the OAL with an explanation for his non-appearance.

The OAL did not receive "an explanation for the nonappearance within one day" of the appellant's non-appearance for the scheduled conference on January 31, 2022, within the meaning of N.J.A.C. 1:1-14.4(a). Having not received an explanation from the appellant to explain his non-appearance, N.J.A.C. 1:1-14.4 directs that this tribunal "shall, unless proceeding pursuant to [N.J.A.C. 1:1-14.4(d)], direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c)." As the respondent has not requested a decision on the merits of the matter be issued ex parte, no further proceedings pursuant to N.J.A.C. 1:1-14.4(d) are necessary. This tribunal, therefore, is left only with the mandate that the matter "shall" be returned to the transmitting agency for appropriate disposition. N.J.A.C. 1:1-14.4(a).

I **CONCLUDE** that the appellant has been dilatory in prosecuting his appeal, effectively abandoning the prosecution of his petition, and failed to present good cause in a timely manner as to why his failure to appear for two previously scheduled conferences should be excused pursuant to the provisions of N.J.A.C. 1:1-14.4(c). A plain reading of N.J.A.C. 1:1-14.4(a), therefore, requires that the matter now be returned to the transmitting agency for appropriate disposition. See also N.J.A.C. 1:1-3.3(b).

ORDER

Based on the foregoing, I **ORDER** that the clerk return the case to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Kathleen M. Calemno

February 7, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

February 7, 2022

Date Mailed to Parties:
KMC/tat

February 7, 2022