HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 32-12

ORDER

IN THE MATTER OF THE APPEAL OF:

ARTHUR BELL JR., Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, SOLID WASTE MANAGEMENT,
and the City and County of Denver, a municipal corporation, Agency.

---

1. Background.

On August 28, 2012, this appeal was dismissed as abandoned. The Appellant failed to file a pre-hearing statement as required by the previously served "Notice of Hearing and Pre-hearing Order." Subsequently, an Order to Show Cause issued commanding the Appellant to file his pre-hearing statement by August 27, 2012, or risk having the case dismissed as abandoned. When Appellant failed to respond timely, an order dismissing the appeal entered. Appellant, through new counsel, filed a motion to vacate the dismissal order and the Agency filed a response in opposition. The question to resolve is if there is good cause to overturn the Order Dismissing Appeal. [Career Service Rule (CSR) 19-43 A.]. Having considered the parties' responses, pertinent authority, and the case file, I find and order as follows.

2. Appellant's motion.

Appellant's attorney-at-law filed a motion to vacate the Order Dismissing Appeal based on the following alleged good cause. (a) Appellant did not receive either the Pre-hearing Order or the Order to Show Cause in time to file timely responses. (b) The Agency knew enough to send notice to Appellant by U.S. Mail, thus (inferably), the Hearings Office should have known better than to send notice by email. (c) Appellant spoke with Hearings Office staff on August 8, 2012 and explained his non-attorney representative was no longer representing him and he was seeking legal counsel. He specifically asked if there were any upcoming deadlines and was told his attorney would know, but did not reply concerning any deadlines. (d) Counsel for Appellant submitted the above-referenced motion to vacate dismissal as soon as he discovered the missed deadline. (e) Appellant's lack of actual notice constitutes good cause to grant his motion. (f) Appellant was not served in accordance with CSR 19-35 by the Hearings Office. (g) Appellant's failure to confirm receipt of Hearing Office orders as requested within the emails should have alerted the Hearing Office that Appellant hadn't received those orders sent by email. (h) Appellant indicated his intent to pursue his appeal by hiring legal counsel. These allegations fall into three categories: lack of notice; hearing office impropriety; and intent to prosecute.

3. Analysis.

a. Lack of notice. The Appellant argues he did not receive timely notice because he does not check his email. Appellant is responsible for tracking his own appeal and the appeal

may be dismissed for failure to file a pre-hearing statement. CSR 19-44 B. Appellant argues his failure to insert his email address was evidence that he did not intend to permit service by email. Indeed the Hearing Office appeal form ends with a place to insert "Address for service of pleadings and orders [Note: Listing email or fax waives personal or mail service. §19-35]." Appellant does not dispute that his first representative, Vernon Howard, listed an email address to which pleadings were sent. Under basic agency law, Appellant is considered to have received notice when his representative has notice. In addition parties, and by implication, their representatives, are charged with keeping the Hearings Office apprised of any change in contact information.

b. Hearing Office impropriety. The method for sending pleadings and other documents between parties and to the Hearings Office is governed by Career Service Rule (CSR) 19-35. That rule, to date, requires service by hand delivery or first class mail. The rule does not mention orders sent from the Hearings Office. Consequently, the method for sending orders from the Hearings Office is governed by internal policy. That policy is stated in the appeal form, which asks for the preferred method and place for delivery of Hearing Office Orders. Appellant's representative marked his email address as the preferred method for delivery of Hearing Office Orders and notices. Consequently there was no impropriety in delivery as requested by Appellant's representative.

Regarding Appellant's allegation that he specifically asked Hearings Office staff if there were any pending due dates and was not given a direct answer, that question would be resolved only by conducting a hearing. Such a procedure is rendered moot by this Order.

c. Intent to prosecute.

Appellant's main arguments are not persuasive. However, there are other, overriding factors which are more convincing. Appellant states he has always intended to prosecute his appeal. As cause, he states he "was attempting to retain [his current] counsel at the time the Order to Show Cause was issue..." [Appellant's Motion to Vacate Dismissal Order"]. Taken in the light most favorable to Appellant, this assertion tends to establish that Appellant always intended to prosecute his appeal; his first representative failed his responsibility to keep the Hearings Office and his client apprised of impending deadlines; and but for such wrongdoing, Appellant would have met this non-jurisdictional deadline.

The Hearings Office prefers to decide cases on the merits. Some deadlines - those involving jurisdictional requirements - must be strictly observed. [In re Webster, CSA 78-10 (12/7/10)]. Other, non-jurisdictional deadlines are subject to some discretion upon showing of good cause. Here, the dismissal of his appeal would cause Appellant to suffer undue prejudice due to a missed non-jurisdictional deadline not of his own doing.[1] Moreover, setting aside the default would advance administrative economy by avoiding requiring the Appellant to pursue other remedies to redress his representative's neglect. These factors weight heavily in favor of permitting Appellant's request to be heard on the merits. *See Estep v. People*, 753 P.2d 1241, 1248 (Colo. 1988). For reasons stated here, good cause is shown to vacate the Order Dismissing Appeal in this case.

---

[1] Had Appellant been represented by legal counsel, he would have had redress to the Colorado Supreme Court Disciplinary Committee. The redress for poor representation by non-attorneys is less apparent, although it is clear Mr. Howard should no longer represent clients in this forum, absent a showing of good cause.

4. Order

The Appellant's Motion to Vacate Dismissal is GRANTED. A new Notice of Hearing and Pre-hearing Order will be issued. The only issue at hearing will be whether Appellant complied with the terms of his Stipulation and Agreement. The parties are reminded it is their responsibility to keep the Hearing Office informed of any change in representation and contact information.

DONE September 18, 2012.

Bruce A. Plotkin
Career Service Hearing Officer

I certify that on September 18, 2012, I delivered a correct copy of this Order to the following, in the manner indicated:

Mr. Arthur Bell, Jr., arbelljr@yahoo.com (via email);
Whitney Traylor, Esq., Wtraylor@traylorlawgroup.com (via email);
Craig Truitt, ctruitt@traylorlawgroup.com (via email);
City Attorney's Office at Dlefiling.litigation@denvergov.org (via email);
HR Services, HRServices@denvergov.org (via email).