THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0034-22R23
v.	)	
	)	Date of Issuance: August 7, 2025
D.C. DEPARTMENT	)	
OF CORRECTIONS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON REMAND

This matter was previously before the Board. Employee worked as an Operations Research Analyst with the Department of Corrections ("Agency"). On September 2, 2021, Employee received a Fifteen-Day Advance Written Notice of Proposed Removal based on charges of failure to meet established performance standards; negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions;[2] and violation of Section 3300.1E of the Employee Code of Ethics and Conduct. Specifically, Agency alleged that Employee failed to meet the performance standards established in a May 24, 2021, Performance Improvement Plan ("PIP"). The effective date of her termination was December 3, 2021.[3]

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *See* 6-B District of Columbia Municipal Regulations ("DCMR") §§1607.2(d)(1) and (2).
[3] *Agency's Answer to Petition for Appeal* (February 22, 2022).

An OEA Administrative Judge ("AJ") was assigned to the matter in May of 2022. After reviewing the parties' legal briefs, the AJ issued an Initial Decision on May 17, 2023. First, she held that Agency violated Chapter 6-B, Section § 1410.5 of the D.C. Municipal Regulations ("DCMR") because it failed to establish that Employee received written notice of the PIP results within ten business days following the completion of the PIP evaluation period. According to the AJ, Agency did not satisfy its obligation under § 1410.5 until September 10, 2021, when Employee admitted to receiving the PIP results at her home address while she was on approved leave. Further, she concluded that Agency's error was reversible since the mandatory language of DCMR § 1410.11 provides that whenever an immediate supervisor or a reviewer fails to issue a written decision within the specified time period outlined in DCMR § 1410.5, the employee shall be deemed to have met the requirements of the PIP.[4]

Next, the AJ held that assuming *arguendo* Agency complied with DCMR § 1410.5, it nonetheless violated § 1410.3 because Employee was never informed of the duration of her PIP. Finally, the AJ held that Agency violated DCMR § 1410.2 by placing Employee on a PIP based on her Fiscal Year ("FY") 2020 work performance, and not her then-current performance (FY21). Thus, she determined that Agency lacked cause to discipline Employee because of its various violations of DCMR § 1410. Consequently, Employee was ordered to be reinstated with back pay and benefits lost as a result of the termination action.[5]

Agency disagreed with the Initial Decision and filed a Petition for Review and a Memorandum in Support of Petition for Review with the OEA Board on June 21, 2023.[6] Employee subsequently filed a Motion for Summary Affirmance in Support of Denying Agency's Petition for Review on July 6, 2023.

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[4] *Initial Decision* (May 17, 2023).
[5] *Id*.
[6] *Petition for Review* (June 21, 2023) and *Agency's Memorandum in Support of Petition for Review* (June 26, 2023). Agency's initial filing requested an extension of time in which to file a supporting memorandum. In response, Employee filed an opposition to Agency's request on June 22, 2023, requesting that Agency be denied an extension of time to file a supporting brief.

On September 7, 2023, the Board issued an Opinion and Order on Petition for Review. It denied Agency's request for relief as to the AJ's denial of its motion to dismiss for timeliness and its request to reopen discovery. However, the matter was remanded to the AJ to conduct an evidentiary hearing because the Board concluded that there were contested facts related to whether Agency followed the procedures established in DCMR § 1410.[7]

The AJ subsequently held a status conference on October 7, 2023, to discuss the issues identified in the Board's remand order.[8] On November 1, 2023, the AJ issued an order convening an evidentiary hearing, outlining the issues to be determined as follows: whether Agency complied with the notice requirement provided in District Personnel Manual ("DPM") § 1410.5; whether the ePerformance Frequently Asked Questions page located on the District of Columbia Human Resources website provided binding legal authority as to DPM § 1410.3; whether Employee was apprised of the ending date of the PIP prior its start date; whether Agency had cause to discipline Employee; and if so, whether the penalty was appropriate under District law.[9] An evidentiary hearing was held on October 17, 2024, wherein the parties presented documentary and testimonial evidence in support of their positions.

The AJ issued an Initial Decision on Remand on February 13, 2025. First, she held that Agency failed to timely notify Employee of the results of her PIP as mandated by DCMR § 1410.5. She explained that the results of the PIP, which concluded on August 22, 2021, were required to be received by Employee within ten business days, or no later than September 3, 2021. While Agency mailed its notice of the PIP results to Employee via U.S. Postal Service Express Mail on September 2, 2021, the AJ nonetheless found that Agency's notice was deficient. She reasoned that Employee did not receive the physical mailing of the PIP results until September 10, 2021; there was no confirmation of a signature receipt on the notice;

[7] *Opinion and Order on Petition for Review* (September 7, 2023).
[8] *Status Conference Order* (September 25, 2023).
[9] *Order Convening an Evidentiary Hearing* (November 1, 2024).

and Agency failed to provide this Office with a copy of the certificate of service evincing proof of delivery.[10]

Next, the AJ held that Agency violated DCMR § 1410.2 by placing Employee on a PIP based on her FY20 performance and not her FY21 performance. Additionally, she concluded that Agency was not required to apprise Employee of the ending date of the PIP and ruled that Agency was within its discretion to end the PIP on the ninetieth day in accordance with DCMR § 1410.3. Contrary to her initial ruling, on remand, the AJ found that there was substantial evidence in the record to establish that Employee did not meet the performance requirements of the PIP; therefore, Agency had cause to initiate the termination action in accordance with DCMR § 1410.12. While finding that the termination action was taken for cause, the AJ nonetheless opined that Agency's error related to § 1410.5 was reversible because Employee did not receive the PIP results within the ten-day mandatory deadline. Thus, she concluded that she could not be disciplined pursuant to 6-B DCMR §§ 1607.2(d)(1) and (2) and Section 3300.1E of Agency's Policy and Procedures. Consequently, Employee's termination remained reversed.[11]

Agency sought review of the Initial Decision on Remand with the OEA Board on March 20, 2025. It argues that the AJ erred in finding that it failed to timely issue the results of Employee's PIP. Agency submits that because DCMR § 1410.5 only addresses when a written decision must be issued, without reference to when it must be received, the date on which the decision was physically received by Employee was irrelevant. Agency maintains that its September 2, 2021, mailing to Employee satisfied the notice requirements set forth in the PIP regulations. Moreover, it notes that the only reason that Employee did not receive the notice on the same day that the PIP results were issued was because she was on approved leave beginning on September 1, 2021.[12]

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[10] *Initial Decision on Remand* (February 13, 2025).
[11] *Id*.
[12] *Agency's Petition for Review* (March 20, 2025).

According to Agency, the AJ also erred in finding that it violated DCMR § 1410.2 since its compliance with this subsection was not an issue presented to the AJ on remand, and because OEA lacks the jurisdiction to review whether an employee was rightfully placed on a PIP. Agency avers that prior to the evidentiary hearing, the AJ framed one of the remanded issues as whether Agency violated DCMR § 1410.3, but after the hearing, instead found that Agency violated § 1410.2, which was an error. Alternatively, it suggests that even if the AJ was permitted to adjudicate this issue, the record supports that Dr. Chakraborty, Employee's supervisor, was authorized to make the decision to place her on a PIP. It lastly claims that the AJ erroneously relied on evidence that was not admitted during the evidentiary hearing, namely the ePerformance Frequently Asked Questions ("FAQs") section for Performance Improvement Plans on the D.C. Human Resources website. Therefore, Agency requests that the Initial Decision on Remand be reversed or remanded.[13]

Employee filed a response to Agency's petition on April 2, 2025. She asserts that the AJ did not err or exceed her authority in referencing DCMR § 1410.2, rather than § 1410.3, in the Initial Decision on Remand. According to her, Agency had the opportunity to address this inconsistency prior to the closing of the record. Employee maintains that the AJ was within her discretion to decide whether Agency properly placed her on a PIP in accordance with § 1410.2. She further submits that the AJ correctly found that the PIP was not a result of her underperformance in FY21, and she opines that the PIP was unjustified because Agency could not prove any performance deficiencies prior to the adverse action. As a result, Employee asks that Agency's petition be denied.[14]

DCMR § 1410.5

On remand, the AJ held that Agency violated DCMR § 1410.5 because the results of the PIP, which concluded on August 22, 2021, were required to be delivered to Employee within ten business days,

[13] *Id.*
[14] *Employee's Answer to Agency's Petition for Review* (April 2, 2025).

or no later than September 3, 2021. Thus, she opined that Employee's receipt of the notice on September 10, 2021, was untimely and violated the mandatory nature of DCMR § 1410.5. Pertinent to this Board's analysis are DCMR §§ 1410.5 and 1410.11, which collectively provide the following:

> 1410.5: "[w]ithin ten (10) business days after the end of the PIP period, the employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, shall issue a written decision to the employee as to whether the employee has met or failed to meet the requirements of the PIP."
>
> 1410.11: "[w]henever an immediate supervisor or, in the absence of the immediate supervisor, a reviewer, fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP."

In *D.C. Dep't of Health v. D.C. Office of Employee Appeals*, No. 20-CV-655 (April 28, 2022), the District of Columbia Court of Appeals addressed the mandatory nature of DCMR § 1410.6 – a predecessor regulation to § 1410.11 – as it applied to the agency's failure to comply with the ten-day deadline for issuing results of a PIP.[15] The Court determined that the employee was placed on what the agency purported to be a 101-day PIP. It then notified the employee of his termination six days after that period concluded, or on day 107 after the PIP began. The Court agreed with OEA's findings that a plain reading of the regulations provided that the employee's PIP could not extend beyond the ninetieth day from its start date; a written determination regarding whether the employee had met the PIP requirements was "due" no later than ten days following the conclusion of the PIP; and because no determination was "issued" by that date, the regulations provided that the employee was deemed to have met the PIP requirements.

The Court reasoned that DCMR § 1410.5 imposed an unquestionably a mandatory deadline because DCMR § 1410.6 "specified the consequences for failing to issue a written decision within the

[15] The District amended its regulations concerning PIPs in 2019. *See* 66 D.C. Reg. 005868 (May 10, 2019). The Court's ruling refers to the 2017 regulations, which were in effect at the time of the employee's termination

specified time period: the employee is deemed to have met the PIP requirements."[16] It went on to explain that "the ten-day notification period in the regulations makes sense when read in tandem with the ninety-day cap on PIPs. Together, those two provisions ensure that no employee will be subjected to an unduly protracted PIP or be left to worry about their fate for more than 100 days after its inception."[17] Accordingly, the Court in *D.C. Dep't of Health v. D.C. Office of Employee Appeals* has held that there is a "maximum 100-day PIP-plus-determination period provided by the regulations."[18]

DCMR § 1410 is silent as it relates to service of the results of a PIP. However, within this context, this Board construes "issued" to mean that a document, notice, or item has been provided by the employer. The distinction between "issued" and "received" is significant, as "issued" focuses on the employer's action; whereas, "received" confirms the employee's actual possession or acknowledgement of the item. Therefore, it follows that the term "issued to employee" must evaluate whether the employer has fulfilled its duty by providing the particular document or notice. Moreover, the language utilized in *D.C. Dep't of Health v. D.C. Office of Employee Appeals supra* provides us with guidance related to § 1410.5, as the Court evaluated the timeline within which a "*public official must act"* to issue the results of the PIP. (emphasis added). The Court also determined that the regulations allow in total 100 days for a PIP and a written determination "*to be completed*." (emphasis added). Accordingly, this Board concludes that the target of determining compliance with DCMR §§ 1410.5 is based on an assessment of the agency's actions and not the employee's receipt of the notice.

In this case, Employee's PIP evaluation period was from May 24, 2021, to August 22, 2021.

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[16] *D.C. Dep't of Health v. D.C. Office of Employee Appeals* at p. 11. *See Thomas v. Barry*, 729 F.2d 1469 (D.C. Cir. 1984)(holding that "[t]he general rule is that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision"). *See also Office of the Attorney General v. D.C. Office of Employee Appeals*, No. 20-CV-0482 (May 23, 2023)(affirming the mandatory nature of § 1410.5 because § 1410.6 specifies the consequences for failing "to issue a written decision within the specified time period").
[17] *District of Columbia Dep't of Health v. D.C. Office of Employee Appeals* at p. 11.
[18] *Id*. at p. 14.

Therefore, the duration of the PIP was ninety days, in compliance with DCMR § 1410.3.[19] Pursuant to DCMR § 1410.5, Agency was then required to issue a written decision of the outcome of the PIP "[w]ithin ten (10) business days after the end of the PIP period." Ten business days from August 22, 2021, is September 3, 2021. Employee was on approved leave status at the time Agency distributed its findings. As a result, Agency issued a Fifteen-Day Advance Notice of Proposed Removal to Employee on September 2, 2021, via U.S. Postal Service, Priority Mail Express.[20] Included with the notice were the results of Employee's failed PIP.[21] The mailing was accepted by the Post Service at 11:17 a.m. on September 2, 2021, and the scheduled delivery date on the envelope was September 3, 2021. The notice discussed in detail the reasoning as to why Employee failed the standards identified in her PIP and identified the basis for the proposed removal action. Since the results of the PIP were *issued* by the tenth business day following the conclusion of the PIP evaluation period, Agency did not violate the mandatory restraints imposed by DCMR § 1410.5.

Based on the foregoing, this Board concludes that the PIP-plus-determination period for Employee totaled 100 days. This duration is not inapposite with the parameters established in *D.C. Dep't of Health v. D.C. Office of Employee Appeals.* While the AJ relied on the testimony of Human Resource Specialist, Philip Mancini, who testified that the regulations required receipt by Employee of the notice within ten days, nothing in the language, context, or background of § 1410.5 suggests a different construction of the regulation. We believe that if the D.C. Council intended receipt by the employee as a prerequisite to satisfying § 1410.5, it would have stated such.

As the AJ held, Employee failed the requirements of the PIP; therefore, Agency established cause

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[19] Under Section 1410.3, "a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) days.
[20] DCMR § 1410.7 provides that: "The written decision may serve as a notice of proposed reassignment, reduction in grade, or removal and be provided to the employee when the decision complies with the provisions of Chapter 16. Alternatively, the agency may issue a written decision and subsequently issue a separate notice of proposed reassignment, reduction in grade or removal."
[21] *Agency's Evidentiary Hearing Exhibit 27.*

to reassign, reduce in grade, or remove her in accordance with DCMR § 1410.12.[22] However, this Board finds that the AJ erred in determining that Agency violated DCMR § 1410.5 by failing to issue the results of the PIP in a timely manner. For this reason, we must reverse her ruling on this issue, and we conclude that Agency has satisfied the procedural requirement outlined in DCMR § 1410.5.

DCMR § 1410.2

The AJ also held that Agency violated DCMR § 1410.2 by placing Employee on a PIP based on her work performance for the previous fiscal year and not her then-current FY21 performance. In support thereof, the AJ relied on the FAQs for Performance Improvement Plans as well as Dr. Chakraborty's testimonial and documentary evidence. According to the AJ, Dr. Chakraborty's May 24, 2021, written statement concerning Employee's performance was more credible than her testimony provided during the evidentiary hearing because her previous statement was captured in real time; whereas, the hearing testimony occurred more than three years after the PIP at issue was conducted.

While the AJ determined that Employee's placement on a PIP based on the previous fiscal year's performance constituted a reversible error, we find that her analysis and conclusion do not support a violation of DCMR § 1410.2. The regulation provides the following as it relates to the purpose of a PIP:

> "a PIP is designed to facilitate constructive discussion between an employee and his or her immediate supervisor to clarify areas of work performance that must be improved. Once the areas for improvement have been identified, the PIP provides the employee the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations."

Contrary to the AJ's assessment, this subsection does not govern when or if an employee may be placed on a PIP. Section 1410.2 only provides guidance as to the overall purpose of a PIP and its goals for

[22] Section 1410.12 provides "[w]henever an employee fails to meet the requirements of a PIP[,] and it results in a reassignment, reduction in grade, or termination action as specified in Subsections 1410.6(b) or 1410.10, the action taken against a Career Service employee or an Educational Service employee in the Office of the State Superintendent of Education shall comply with Chapter 16."

employees who are placed on this performance tool. There is no language contained within this subsection that directs agency action, nor is there any language to indicate that an agency could commit a reversible procedural or substantive error in its application. Additionally, there is no evidentiary proof that the FAQ section relied upon by the AJ imposed a binding legal authority as it relates to the guidance provided in DCMR § 1410.2. As a result, we conclude that the AJ's findings on this issue are not based on substantial evidence.

Moreover, the Agency's compliance with DCMR § 1410.2 was not one of the issues identified to be adjudicated on remand.[23] As it relates to whether Agency erroneously placed Employee on a PIP based on her work performance during the previous fiscal year, the AJ outlined the issue to be adjudicated as "whether the ePerformance Frequently Asked Page on the District of Columbia Human Resources website provided binding legal authority as to [DCMR] ***§ 1410.3***." (emphasis added). Under Section 1410.3, "a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) days and must: (a) Identify the specific performance areas that require improvement; and (b) Provide concrete, measurable action steps the employee can take to improve in those areas." The AJ found that Agency did in fact comply with DCMR § 1410.3, and she ruled that Agency was not required to apprise Employee of the PIP end date. Finally, there is no statute, regulation, or case law to support a finding that OEA may review an agency's initial decision to place an employee on a PIP.[24] Accordingly, we find that Agency did not violate DCMR §§ 1410.2 or 1410.3.

Penalty

[23] *See Order Convening Evidentiary Hearing* at pp. 1-2. The issues outlined by the AJ on remand were: whether Agency complied with the notice requirement provided in District Personnel Manual ("DPM") § 1410.5; whether the ePerformance Frequently Asked Page on the District of Columbia Human Resources website provided binding legal authority as to DPM § 1410.3; whether Employee was apprised of the ending date of the PIP prior its start date; whether Agency had cause to discipline Employee; and if so, whether the penalty was appropriate under District law.

[24] According to Chapter 6-B of the District of Columbia Municipal Regulation ("DCMR"), Section 604.1, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting: (a) A performance rating resulting in removal; (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or (c) A reduction-in-force; or (d) A placement on enforced leave for ten (10) days or more.

While finding that Agency established cause to initiate the adverse action in this matter, the AJ concluded that because Agency did not comply with DCMR § 1410.5, it could not discipline Employee pursuant to 6-B DCMR §§ 1607.2(d)(1) and (2) and Agency's Policy and Procedures, Section 3300.1E. However, as previously stated, this Board reverses her findings as to DCMR §§ 1410.5 and 1410.2; hence, a review of the penalty is appropriate. Concerning Agency's selection of the imposed penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).[25] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.[26] A first offense of negligence under 6-B DCMR §1607.2(d)(1) carries a penalty of counseling to removal. A first offense of deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions pursuant to 6-B DCMR §1607.2(d)(2) carries a penalty of a three-day suspension to removal. Agency in this case has performed a thorough analysis of the relevant *Douglas* factors,[27] and there is no indication that management has abused its

[25] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No.1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007*); Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[26] The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011). Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

[27] The factors are provided in the matter *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The court held that an agency should consider the following when determining the penalty of adverse action matters: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level

managerial discretion in selecting the penalty of termination. Since both of the identified charges permit termination upon the first offense, this Board finds that Agency was within its authority to remove Employee based on her failure to meet the standards established in her PIP. Based on the foregoing, we must reverse the Initial Decision on Remand and uphold Agency's termination action.

and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED.** The Initial Decision on Remand is **REVERSED**; therefore, Employee's termination is **UPHELD.**

FOR THE BOARD:

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Dionna Maria Lewis, Chair

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Arrington L. Dixon

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Lashon Adams

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Jeanne Moorehead

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Pia Winston

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.