THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0055-19
v.	)	
	)	Date of Issuance: June 30, 2022
D.C. OFFICE OF POLICE COMPLAINTS, Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as an Investigator with the D.C. Office of Police Complaints ("Agency" or "OPC"). On May 14, 2019, Agency issued a final notice of separation removing Employee from his position effective on May 15, 2019. Agency charged Employee with failure to follow instructions: negligence, failure to comply with rules, regulations, written procedures, or proper supervisory instructions, 6B District of Columbia Municipal Regulations ("DCMR") § 1607.2(d)(1);[2] conduct prejudicial to the District government: conduct that an employee should reasonably know is a violation of law or regulation and unauthorized disclosure of confidential information, 6B DCMR § 1607.2(a)(4) and (10);[3] conduct prejudicial to the District government:

[1] Employee's name was removed from this decision for the purpose of publication on the Office of Employee Appeals' website.
[2] Agency alleged that Employee violated its body-worn camera video usage policy. *Petition for Appeal*, p. 8-10 (June 13, 2019).
[3] In Agency's Answer to Employee's Petition for Appeal, it addressed that its final notice contained a typographical error listing the regulation as 6B DCMR § 1607.2(a)(3), but it should have been 6B DCMR § 1607.2(a)(4). *Agency's*

use of District service or funds for inappropriate or non-official purpose, 6B DCMR § 1607.2(a)(12);[4] and conduct prejudicial to the District government: conduct that an employee should reasonably know is a violation of law or regulation and unauthorized disclosure of confidential information, 6B DCMR § 1607.2(a)(4) and (10).[5]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 13, 2019. He argued that his termination was not taken for cause in accordance with chapter 16 of the DCMR. Employee asserted that Agency terminated him for working with his attorney to present a response to Agency's action. He conceded that he used Agency's transcription software which incurred a cost to the District of Columbia; however, he asserted that printing those documents was necessary for him to respond to Agency's action. Employee further contended that Agency did not notify him that he could not use evidence that he deemed relevant and necessary. Therefore, Employee reasoned that Agency's termination exceeded the bounds of reasonableness. Accordingly, he requested that he be reinstated with back pay and benefits.[6]

In response, Agency provided that prior to the current action, Employee was issued a notice of proposed suspension on an unrelated issue. Employee was authorized to use four (4) hours of administrative leave to draft his response to the suspension action. Agency alleged that while gathering information for his response, Employee used government funds to purchase a transcript without authorization. Moreover, it argued that Employee utilized his body-worn camera account

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Answer to Employee's Petition for Appeal, p. 5 (July 9, 2019). As for the charge, Agency contended that Employee shared confidential information with a member of the public which contained Metropolitan Police Department ("MPD") officer's names and badge numbers, along with suspect charges on an open MPD case. *Petition for Appeal*, p. 8-10 (June 13, 2019).

[4] According to Agency, Employee used government time and resources, outside of the allotted four hours of administrative leave, to generate documents that were subsequently provided to a member of the public. Additionally, it asserted that Employee's actions resulted in an unauthorized cost to the District Government. *Id*.

[5] For the final charge, Agency submitted that Employee shared confidential email communications with a member of the public which included information regarding an open MPD investigation. *Id*.

[6] *Id,* 2-5.

to access audit reports which included details of an open MPD investigation. Agency asserted that when it received Employee's response, it found that he provided information to his attorney, a member of the public, that contained unredacted, confidential government information, which violated Agency's policy.[7] Agency offered several alternative options that Employee could have utilized to work with his attorney while maintaining confidential government information. It provided that Employee could have requested permission to access body-worn camera footage; made known to Agency, his desire to obtain a transcript; or sought consent to redact the confidential government information. Therefore, it requested that OEA uphold its termination action.[8]

Prior to issuing an Initial Decision, the Administrative Judge ("AJ") held a two-day evidentiary hearing. In his Initial Decision, the AJ found that Agency committed procedural errors in removing Employee; however, he ruled that the errors were harmless. As for the first cause of action taken against Employee, the AJ analyzed the policy agreement between Agency and MPD regarding the use of MPD's Evidence.com system. He noted that the policy indicated that "any viewing of a video accessed from the website Evidence.com must only be in the course of handling an OPC complaint." The AJ held that because Employee did not provide his attorney with body-worn camera video and because Agency's policy was silent on audit trail reports from Evidence.com, Employee did not violate the policy.[9] Similarly, the AJ found that Employee did not violate Agency's policy regarding distributing emails and concluded that Agency failed to prove that Employee was guilty of prejudicial conduct. As it relates to the administrative leave

[7] Agency asserted that the documents provided contained sensitive information regarding MPD police officers and civilians. *Agency's Pre-hearing Statement*, p. 2-4 (November 20, 2019).
[8] *Agency's Answer to Employee's Petition for Appeal*, p. 5-6 (July 9, 2019).
[9] The AJ noted that Employee accessed Evidence.com to retrieve the audit trails which he provided to his attorney in support of his defense.

issue, the AJ held that Agency did not produce evidence to contradict Employee's testimony that he used his free time to work on his defense. As for the charges incurred for Agency's transcript, the AJ found that because Agency did not specify this allegation in its notice to Employee, it could not be used against him. Accordingly, the AJ reversed Agency's termination action and ordered that Employee be reinstated with back pay and benefits.[10]

The case was subsequently appealed to the Superior Court of the District of Columbia. The Court issued a decision on June 21, 2021. It found that for charge one, the AJ did not fully address the issue of Employee accessing Evidence.com. Additionally, it did not agree with the AJ's conclusion that Employee was not charged with wrongfully accessing the website.[11] Thus, because a discrepancy existed between the record and the AJ's ruling, the Court remanded this issue for further review by the AJ.[12]

As for charge two, the Court noted that Agency cited to DPM § 1607.2(a)(4) in its charge against Employee. However, it found that the AJ's analysis was based on Agency's policy instead of an analysis of the DPM. The Court concluded that the AJ only addressed whether the policy prohibited unauthorized disclosure of the documents, but he should have determined if Employee reasonably should have known that his conduct was a violation of law or whether the disclosure constituted an unauthorized disclosure of protected information, pursuant to DPM § 1607.2(a)(10). Accordingly, this issue was also remanded to OEA for further consideration.[13]

Regarding charge three, the Court affirmed OEA's determination that Agency failed to

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[10] *Initial Decision*, p. 10-16 (August 6, 2020).
[11] The Judge cited to Agency witness testimony and subsequent charges to demonstrate that Agency's charge was that Employee improperly accessed the website.
[12] *District of Columbia Office of Police Complaints v. District of Columbia Office of Employee Appeals, et al.*, Case No. 2020 CA 004294 P(MPA)(D.C. Super. Ct. June 24, 2021).
[13] *Id.*, 7-9.

prove the charge. The Court found that Agency did not offer evidence to dispute Employee's testimony that he used his work breaks to generate the documents or order the transcript.[14] As for the final charge that Employee shared confidential documents, the Court again found that the AJ's analysis should have considered the DPM and not Agency's policy. Therefore, the fourth charge was remanded for further consideration.[15]

On remand, the parties submitted several briefs. After consideration of those briefs, the AJ issued his Initial Decision on Remand on January 14, 2022. Because the Superior Court judge affirmed the AJ's ruling on charge three, the AJ only had to consider charges one, two, and four on remand. For charge one, as the AJ opined in his Initial Decision, he held that because Employee did not provide his attorney with body-worn camera video and because Agency's policy was silent on audit trail reports from Evidence.com, Employee did not violate the policy. However, he did find that Employee was insubordinate because he was aware that access of the Evidence.com website for anything other than handling an Agency complaint, required written permission from a supervisor. The AJ was not persuaded by Employee's contention that requesting permission would have been futile. He held that Employee understood the policy but chose not to follow it. Therefore, because the penalty for the first offense of this charge included removal, the AJ upheld Agency's removal action.[16]

On February 18, 2022, Employee filed a Petition for Review with the OEA Board. He argues that charge one was not proven; however, even if the Board found that it was, the removal action should be reversed because Agency failed to consider mitigating factors. Employee asserts

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[14] *Id.*, 9-10.
[15] *Id.,* 11-12.
[16] As for charges two and four, the AJ held that Agency did not offer any specific trainings or written documents to show that Employee knew or should have known that information from the Evidence.com website was confidential and could not be shared with anyone, including attorneys. Therefore, the AJ found that Agency did not meet its burden of proof for these charges. *Initial Decision on Remand*, 7-13 (January 14, 2022).

that his actions were reasonable and within the standard of care established by Agency's trainings, practice, and written policy. He argues that although he was alleged to have violated the section related to obtaining a supervisor's written permission, this language appears under the heading "accessing and viewing videos on Evidence.com." Therefore, the policy's prohibition was based on assessing and viewing the videos and not audit trail or user information. He further contends that with the exception of video footage, there is no language in the policy that prohibits accessing any user data accessible from the system. Additionally, Employee contests the AJ's credibility determinations related to his testimony and that of his witness. Finally, he argues that Agency did not properly consider the *Douglas* factors. As a result, Employee requests that the Board reverse the AJ's ruling on charge one and the penalty of removal.[17]

On April 1, 2022, Agency filed its Reply to Employee's Petition for Review. It argues that Employee failed or refused to follow instructions and violated the policy when he accessed Evidence.com for unofficial purposes. Agency contends that Employee was aware of its policy; he signed a log pledging his adherence to the policy; and after working in his capacity for two years, he understood how Evidence.com was to be utilized. According to Agency, access for any unofficial purpose required written approval by a supervisor. Because Employee accessed Evidence.com to retrieve the audit trails for an unofficial purpose and without approval, Agency opines that he failed to comply with its written procedures in violation of 6B DCMR § 1607.2(d)(1). Agency asserts that removal was within the range of penalties, and it considered the *Douglas* factors when arriving at its penalty. Therefore, it requests that Employee's removal be upheld.[18]

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[17] *Employee's Petition for Review of Initial Decision on Remand*, p. 13-24 (February 18, 2022).
[18] *Agency's Reply to Employee's Petition for Review* (April 1, 2022).

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[19]

Cause

Of the four charges originally levied against Employee, the only charge on appeal before this Board is "failure or refusal to follow instructions: negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions, 6B DCMR § 1607.2(d)(1)."[20] Specifically, Agency alleged that Employee violated its body-worn camera video usage policy. The policy provides the following:

> Staff members shall only access Evidence.com or search for and review videos while at OPC offices using OPC computers, and only as necessary in the course of handling an OPC complaint. Access under any other circumstance must be approved in writing by a supervisor.

After a review of the policy, the AJ found that because Employee did not provide his attorney with body-worn camera video and because Agency's policy was silent on audit trail reports from Evidence.com, Employee did not violate the policy. However, he did find Employee was insubordinate because he was aware that access of the Evidence.com website for anything

[19] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[20] The Administrative Judge properly used the May 19, 2017, Table of Illustrative Actions which was in effect at the time of the adverse action taken against Employee.

other than handling an Agency complaint required written permission from a supervisor.[21] This Board disagrees with the AJ's ruling in part.

The policy provides that "staff members shall only access Evidence.com *or* search for and review videos while at OPC offices using OPC computers, and only as necessary in the course of handling an OPC complaint (emphasis added)." The AJ's ruling seems to focus on the second part of the policy related only to a search or review of videos. However, the policy provides that access to Evidence.com *or* a search for and review of videos outside of handling an Agency complaint is a violation (emphasis added). Given the plain reading of the policy, mere access to Evidence.com while at Agency offices, outside of the necessary course of handling an Agency complaint, rose to the level of a violation. Moreover, as Agency provides in its reply to the petition, Employee had to access Evidence.com to retrieve the audit trail reports.[22] Therefore, even if the policy was silent on audit trail reports, the argument could be made that these reports were encompassed by mere access to Evidence.com for non-work reasons without permission. Accordingly, we disagree with the AJ on this specific issue.

However, this Board does agree with the AJ's assessment that Employee violated the policy by not seeking written permission from his supervisor to access the website. The record shows that Employee did not access Evidence.com for the purpose of handling an Agency compliant. Therefore, in accordance with the second sentence of the policy, access for any other purpose required written permission. During the evidentiary hearing, Employee conceded that he did not feel comfortable asking anyone in the agency for permission because he felt that it had

[21] *Initial Decision on Remand*, 8-9 (January 14, 2022).
[22] *Agency's Reply to Employee's Petition for Review*, p. 9 (April 1, 2022). Additionally, during the evidentiary hearing, Rochelle Howard testified that Employee downloaded the audit trail information from his account on Evidence.com. *OEA Hearing Transcript*, p. 48 (February 18, 2020).

become a hostile work environment.[23] Accordingly, the record supports the AJ's finding that Employee violated the policy to obtain written permission to access Evidence.com for a reason other than handling an Agency complaint.

Penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985).[24] 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.[25] 6B DCMR § 1607.2(d)(1) provides that the range of penalties for the first offense of failure or refusal to follow instructions: negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions is counseling to removal. Thus, pursuant to Chapter 16, removal was within the range of penalties.

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[23] *OEA Hearing Transcript*, p. 231 (February 24, 2020).

[24] *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 Correctiotns*, 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).

[25] 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.

Douglas Factors

Employee contends that Agency did not properly consider the *Douglas* factors.[26] He specifically alleges that Agency failed to consider any mitigating factors when deciding its penalty. OEA held the following in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011):

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

[26] The *Douglas* 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 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.

Moreover, in *Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14, *Opinion and Order on Petition for Review* (July 11, 2017) (citing *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), the OEA Board held that an Agency's penalty decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion. The evidence in this case did not establish an abuse of discretion by Agency. As presented above, the penalty for the first offense of failure or refusal to follow instructions is counseling to removal. Additionally, Agency presented evidence that it considered relevant factors, as outlined in *Douglas*, when arriving at its decision to remove Employee.[27]

As for Employee's argument regarding Agency's failure to consider mitigating circumstances, this Board will rely on the holding in *Bryant v. Office of Employee Appeals, et al.*, Case No. 2009 CA 006180 P(MPA)(D.C. Super. Ct. August 2, 2012)(citing *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, 101 (M.S.P.B. 2006)). In *Bryant*, the Superior Court for the District of Columbia held that even "significant mitigating factors . . . do not offset the seriousness of the sustained misconduct and make the penalty of removal outside the bounds of reasonableness and impermissible." Therefore, Employee's mitigation arguments are not sufficient to overturn Agency's discretionary termination decision.

Witness Credibility

Employee contests the AJ's credibility determinations related to his testimony and that of his witness. As this Board previously held, it lacks the authority to question an AJ's credibility determinations.[28] The Court in *Metropolitan Police Department v. Baker,* 564 A.2d 1155 (D.C.

[27] *Petition for Appeal*, p. 16-21 (June 13, 2019) and *Agency's Answer to Employee's Petition for Appeal*, Exhibit #12 (July 9, 2019).
[28] *Ernest H. Taylor v. D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-

1989), provided that great deference to any witness credibility determinations is given to the administrative fact finder. Similarly, the courts in *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia,* 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services,* 683 A.2d 470, 477 (D.C.1996); and *Kennedy, supra,* 654 A.2d at 856, provided that due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. The Court in *Raphael* held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. Thus, although it is hard for this Board to determine how much weight the AJ gave to each witness' testimony, after a review of the hearing transcript, a reasonable mind would accept the credibility determinations the AJ made as adequate to support his conclusion.

Conclusion

Agency had cause for the charge of failure or refusal to follow instructions and proved that Employee violated the policy to obtain written permission to access Evidence.com for a reason other than handling an Agency complaint. Moreover, removal was within the range of penalties for this cause of action. Agency considered the *Douglas* factors when imposing its penalty. Additionally, the Administrative Judge's witness credibility determinations are reasonable. As a result, this Board must deny Employee's Petition for Review.

0211-98, *Opinion and Order on Petition for Review* (September, 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Anita Staton v. Metropolitan Police Department,* OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department,* OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); *James Washington v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0292-10, *Opinion and Order on Petition for Review* (December 10, 2014); and *Barry Braxton v. Department of Public Works*, OEA Matter No. 1601-0012-12, *Opinion and Order on Petition for Review* (September 13, 2016).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

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.