**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | |
| EMPLOYEE[1] | |
| v. | OEA Matter No. 1601-0083-22 |
| OFFICE OF THE CHIEF TECHNOLOGY OFFICER, | Date of Issuance: November 16, 2023 |
| Agency | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as an Information Technology Specialist for the Office of the Chief Technology Officer ("Agency"). On August 31, 2022, Agency issued a final notice of separation removing Employee from his position. Employee was charged with falsifying time entries, in violation of 6-B District of Columbia Municipal Regulations ("DCMR") §§ 1607.2(c)(1) – knowing submission of (or causing or allowing the submission of) falsely stated time logs, leave forms, travel or purchase vouchers, payroll, loan, or other fiscal document(s) and 1607.2(b)(2) – misrepresentation, falsification, or concealment of material facts or records in connection with an official matter, including investigations. Agency alleged that Employee falsified time logs by submitting entries for hours not worked between August 4, 2021, and February 11, 2022, which

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

resulted in the overpayment of $53,391.66 to him in wages. Additionally, it alleged that during its investigation, Employee provided conflicting answers and refused to answer questions related to the overpayment of funds. Consequently, Employee was terminated effective September 2, 2022.[2]

On September 30, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He asserted that he did not knowingly or intentionally submit false time logs. Employee contended that he was unaware that PeopleSoft was automatically inputting his time.[3] He claimed that he and several of his colleagues, including his supervisor, were unaware of the automatic update in PeopleSoft. Further, Employee argued that he did not notice the overpayment because his paychecks were directly deposited into his bank account. As it related to his refusal to answer questions, Employee contended that it was only after investigators badgered him and asked the same questions to which he had already provided an answer. Thus, it was Employee's position that he did not misrepresent, falsify, or conceal any material facts or records related to Agency's investigation. Additionally, he argued that Agency failed to follow the progressive discipline guidelines provided under 6-B DCMR § 1607.2. As a result, he requested that the termination action be rescinded and that he be reinstated to his previous position.[4]

Agency filed an Answer to the Petition for Appeal on October 31, 2022. It provided that Employee admitted that he manually input his time for days he reported to work in-person, which was a direct violation of its Exception Time Reporting ("ETR") policy.[5] Moreover, Agency asserted that Employee received ETR training and was aware that manually entering his regular

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[2] *Petition for Appeal*, p. 7 (September 30, 2022).
[3] PeopleSoft is a software application used by District employees, where they are able to input time, submit a leave request, review paycheck and benefits, request training, and update their personal information.
[4] *Petition for Appeal*, p. 2 and 5 (September 30, 2022).
[5] Agency is an exception-based time reporting agency, which means that employees only report time exceptions on their time sheet — i.e., annual leave, routine telework, jury duty, etc. According to Agency, employees were not to report regular time when they worked in-person; they were required to leave the day blank because the system would automatically enter their time for those days.

hours constituted a violation of its policy and that his actions could have resulted in an overpayment of wages. Agency also argued that Employee misrepresented, falsified, or concealed material facts during an official investigation.[6] Moreover, it contended that based on the Table of Illustrative Actions in 6-B DCMR § 1607.2, removal was appropriate given Employee's conduct. Agency explained that it considered the *Douglas*[7] factors when selecting the penalty of removal.[8] Therefore, it requested that the Petition for Appeal be dismissed.[9]

The Administrative Judge ("AJ") issued an Initial Decision on July 18, 2023. She held that Employee accurately submitted his time manually into the PeopleSoft system, which was approved

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[6] Agency argued that when it inquired about the overpayment of wages, Employee provided that he was unaware of the overpayment because his wife handled their finances. However, it contended that Employee admitted to routinely withdrawing money from the bank account in which he received direct deposits of the overpayment. Agency also claimed that Employee refused to answer relevant questions and provided conflicting explanations as to why the overpayment wages were no longer in his bank account.

[7] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide 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.

[8] Agency reasoned that Employee's conduct of consistently submitting false time sheets over a six-month period adversely impacted its reputation; betrayed his position of public trust; showed his inability to be rehabilitated; and necessitated an adequate disciplinary action to deter others.

[9] *Agency's Answer*, p. 4-11 (October 31, 2022).

by his supervisor. The AJ noted that PeopleSoft automatically recorded the time for the same period that Employee submitted his time; thereby, prompting the payroll system to consider the additional time entered by Employee as overtime pay. Moreover, she determined that although Employee's lengthy history of complying with the ETR policy proved that he was aware of how to accurately report the time, Agency failed to consider the impact that the Covid-19 Public Health Emergency had on to its time recording policy.[10] The AJ explained that Agency submitted a document dated March 10, 2022, approximately seven months after Employee returned to work in August of 2021, to support its assertion that Employee was placed on notice of its time entry policy. Thus, she reasoned that Agency failed to prove that Employee knowingly submitted, or allowed the submission of, falsified time logs into the payroll system. Furthermore, the AJ held that Employee did not misrepresent, falsify, or conceal material facts or records in connection with Agency's investigation. According to the AJ, Employee maintained his offer to repay the overpayment with one $25,000 installment, followed by smaller installments. Consequently, she concluded that Agency lacked cause to terminate Employee. As a result, she ordered that Employee be reinstated and that Agency reimburse Employee all back and benefits lost, less the overpayment amount of $53,391.66.[11]

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on August 23, 2023. It argues that the AJ did not issue her Initial Decision within 120 business days, in accordance with OEA Rule § 604.1. Agency opines that because the AJ violated the mandatory deadline, this Board should find the Initial Decision is without legal effect and

[10] The AJ noted that during the pandemic, Agency's time reporting policies changed. Employees were required to manually enter their time using the time reporting code: "ST[TW] for Telework (Situational)." According to the AJ, Agency did not provide any evidence to dispute this assertion. This Board notes that the AJ inadvertently used the incorrect acronym "STWP" to denote situational time reporting. The correct acronym is "STTW."
[11] *Initial Decision*, p. 8-13 (July 18, 2023).

uphold its termination action. Furthermore, it contends that the AJ's decision regarding its misrepresentation and falsification charges are based on an erroneous interpretation of the regulations and its policy. It claims that its ETR policy remained the same throughout, and after, the pandemic. It further maintains that employees were required to use PeopleSoft to manually enter time when working out of the office and could not enter time for hours worked in the office.[12] Thus, Agency argues that the AJ incorrectly determined that Employee accurately submitted his time manually; that Agency failed to consider the impact of the pandemic on its ETR policy; and that Agency did not meet its burden of proof to establish that Employee knowingly submitted false time logs. Accordingly, Agency requests that the Board grant its petition because the Initial Decision was issued past the mandatory deadline; the AJ's conclusions of law are unsupported by the record; and the decision was based on an erroneous interpretation of OEA's regulations and Agency's policies.[13]

On September 27, 2023, Employee filed a Response to Agency's Petition for Review. He argues that Agency's Petition for Review was untimely filed. Employee explains that pursuant to the mandatory language of 6-B DCMR § 637.2, any party may file a Petition for Review of an Initial Decision with the Board within thirty-five calendar days of the issuance of the Initial Decision. He contends that Agency's petition was filed one day late. Employee also proffers that counter to Agency's argument, the 120 business-day rule for adjudicating an OEA matter is discretionary.[14] Furthermore, Employee argues that Agency failed to account for the fact that this matter was in mediation in December of 2022 and was not assigned to the AJ until January of

[12] Agency submits that it did not instruct its employees to switch to manual time reporting from situational telework to regular pay. It argues that Employee entered REG manually, which was incorrect and a direct violation of the ETR policy.
[13] *Agency Petition for Review*, p. 1-13 (August 23, 2023).
[14] In support of his position, Employee cites to *Anjuwan v. D.C. Department of Public Works*, 729 A.2d 883 (D.C. 1998), wherein the District of Columbia Court of Appeals determined that OEA's delay did not impair the fairness of the proceedings or the correctness of the action taken.

2023. Additionally, he opines that the AJ correctly determined that Agency failed to offer proof of Employee's intent to falsify his time logs. Employee argues that the AJ took judicial notice that all District employees were required to use the time reporting code "STTW" while teleworking during the Covid-19 Public Health Emergency, which represented a change in policy for reporting time prior to the pandemic. Finally, he contends that Agency lacked proof that Employee offered inconsistent statements or concealed evidence during its investigation. Therefore, Employee requests that Agency's Petition for Review be denied.[15]

120 business-day deadline

Agency argues that because the AJ issued the Initial Decision after the 120 business-day deadline, the decision is of no legal effect and that its termination action should be undisturbed.[16] D.C. Code § 1–606.03(c) provides that ". . . any decision by a Hearing Examiner shall be made within 120 days, excluding Saturdays, Sundays, and legal holidays, from the date of the appellant's filing of the appeal with the Office." The section goes on to provide that ". . . the Office may promulgate rules to allow a Hearing Examiner a reasonable extension of time if extraordinary circumstances dictate that an appeal cannot be decided within the 120-day period." To provide some historical context, the 120 business-day deadline was first introduced by the D.C. City Council on February 13, 1990. According to the Council, the following was the rationale provided for the 120-day period:

> . . . an absolute requirement for all appeals to be decided within 120 days of filing will hamstring the office in the case of appeals which require the gathering and review of extraordinary amounts of information, or in which the issues are complex and require a greater amount of research. This amendment will allow the Office . . . to have more time to decide appeals in extraordinary circumstances.[17]

[15] *Employee's Response to Agency Petition for Review*, p. 5-20 (September 27, 2023).
[16] *Agency's Petition for Review,* p. 1-3 (August 23, 2023).
[17] *See* p. 7-8 of Amendment #2 to Bill 8-482 at https://lims.dccouncil.gov/downloads/LIMS/379/Other/B8-0482-HANDWRITTENVOTESHEETSANDAMENDMENTS.pdf?Id=85945.

Thus, the legislative intent was never to make the 120 business-day deadline an absolute or mandatory requirement for all cases. The Council understood that OEA should have been allowed to grant reasonable extensions of time during the adjudication of appeals.[18]

To further illustrate the point that the 120 business-day deadline is not mandatory, as Agency contends, in *Baldwin v. D.C. Office of Employee Appeals and D.C. Department of Youth Rehabilitation Services*, 226 A.3d 1140 (D.C. 2020), the D.C. Court of Appeals held that it is not enough that legislatures articulate a deadline using mandatory language but that the legislature must plainly mean for noncompliance to have consequences.[19] Similarly, in *Teamsters Local Union 1714 v. Public Employee Relations Board*, 579 A.2d 706 (D.C. 1990), the D.C. Court of Appeals held that the general rule is that a statutory time period is not mandatory unless it expressly requires agency to act within a particular time period *and* specifies a consequence for failure to comply (emphasis added).[20] The Court reasoned that if it is determined that a statutory provision is not mandatory, then ". . . the interpreting agenc[y] must . . . engage in a balancing test to determine whether any prejudice to a party caused by agency delay is outweighed by the interest of another party or the public in allowing agency to act after the statutory time period has elapsed."[21]

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[18] In accordance with D.C. Code § 1–606.03(c), OEA Rule 613.4 was promulgated and provides that ". . . the Administrative Judge may grant a motion for extension to deadlines only where extraordinary circumstances prevent the meeting of the deadline, and the need for the extension outweighs any prejudice to a party." By promulgating OEA Rule 613.4, OEA allows its AJs to balance the need for the extension against the prejudice to a party, when considering motions to extend.

[19] *See Mathis v. District of Columbia Housing Authority*, 124 A.3d 1089 (D.C. 2015).

[20] OEA has consistently relied on *Teamsters Local Union 1714*, as evidenced in *Employee v. Department of Corrections*, Opinion and Order on Petition for Review, OEA Matter Number 1601-0034-22 (September 7, 2023); *Employee v. D.C. Fire and Emergency Medical Services Department*, OEA Matter Number 1601-0025-22 (January 10, 2023); and *Kyle Quamina v. Department of Youth Rehabilitation Services*, Opinion and Order on Petition for Review (April 9, 2019).

[21] *Citing Vann v. District of Columbia Board of Funeral Directors & Embalmers,* 441 A.2d 246 (D.C.1982); *Wisconsin Avenue Nursing Home v. District of Columbia Comm'n on Human Rights,* 527 A.2d 282 (D.C.1987); and *JBG Properties, Inc. v. D.C. Office of Human Rights,* 364 A.2d 1183 (D.C.1976).

D.C. Code § 1-606.03(c) does provide that OEA Administrative Judges issue decisions within 120 business days. However, the statute is void of any mention of consequences if the deadline is not met. Therefore, contrary to Agency's assertion, the statute is directory and not mandatory.[22]

Agency argues that the Initial Decision was issued seventy-seven days past the 120 business-day deadline. However, the need for the extensions outweighed any prejudice to either party in this case. During the course of adjudication of this case, the AJ issued an order on February 17, 2023, requesting that Agency file a brief addressing several issues. In accordance with the order, Agency's brief was due by March 9, 2023. Subsequently, Employee's response to Agency's brief was to be filed by March 30, 2023.[23] On March 13, 2023, four days after Agency's briefing deadline, Agency's counsel emailed the AJ to request an extension of time in which to file her brief. She contended that she was on bereavement leave from March 6-10, 2023, and she did not receive the order until March 13, 2023. Therefore, Agency requested that it have until March 23, 2023, to file its brief.[24] Given the circumstances that prevented Agency from adhering to the deadline, the AJ granted Agency's motion and adjusted the briefing deadlines to March 23, 2023, for Agency and April 10, 2023, for Employee.[25] However, even with the extension, Agency did not file its brief until March 27, 2023 – four days past its requested extension date. Moreover, on April 24, 2023, Agency filed a document titled "Additional Evidence in Response to Post Status/Prehearing Conference Order." Thus, Agency did not fully adhere to the order requesting

[22] The Board must note that although there is no consequence for rendering decisions beyond the deadline, OEA makes its best effort to issue legally sound decisions in a timely manner, while balancing parties' requests for reasonable extensions of time.
[23] *Post Status/Prehearing Conference Order* (February 17, 2023).
[24] *Email from Agency to the Administrative Judge and Employee* (March 13, 2023).
[25] *Id.*

briefs until thirty-one business days past the AJ's original deadline. Agency's late filings added to the Initial Decision being issued beyond 120 business days.[26]

Substantial Evidence and Material Issues of Fact

OEA Rule 637.4 provides the following:

> The Petition for Review shall set forth objections to the Initial Decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> > (c) The findings of the Administrative Judge are not based on substantial evidence; or
> >
> > (d) The Initial Decision did not address all material issues of law and fact properly raised in the appeal.

According to OEA Rule 637.4(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.[27] Agency contends that the Initial Decision was not based on substantial evidence.[28] This Board agrees. Moreover, we find that the Initial Decision did not address all material issues of fact in this case. Although the AJ requested briefs from both parties, the briefs offered conflicting facts and the documents submitted

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[26] This Board also notes that Agency's Petition for Review was untimely filed with the Board one business day past the statutory deadline, as Employee provided in its response to Agency's Petition for Review. However, the D.C. Court of Appeals in *Baldwin v. D.C. Office of Employee Appeals and D.C. Department of Youth Rehabilitation Services*, 226 A.3d 1140 (D.C. 2020), found that the 35-day limit in which to file a Petition for Review is not jurisdictional. It reasoned that the deadline is a claim-processing rule, which means that it may be tolled, relaxed, or waived. Therefore, this Board will consider the Petition for Review.

[27] *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).

[28] *Agency's Petition for Review,* p. 3 and 10 (August 23, 2023).

created more questions than answers. Thus, rendering it even harder for the Board to rule that the Initial Decision was based on substantial evidence.

Agency argues that its time reporting system was the same before, during, and after the Covid-19 pandemic. According to Agency, prior to the pandemic, the Peoplesoft system would automatically input the code "REG" for regular hours payable to Employees.[29] However, Employee claimed that before the pandemic, he entered his time with the code "REG" in Peoplesoft and that the system automatically sent a timesheet to his supervisor for approval.[30] Thus, the parties' positions regarding the pre-pandemic time reporting contradict each other.

During the pandemic, Employee claimed that he had to submit a manual timesheet instead of Peoplesoft automatically submitting it to his supervisor. Additionally, he claimed that he had to use the situational telework code, instead of the regular code when submitting his time.[31] Agency agreed that Employee correctly coded his time as situational telework during the pandemic. However, it argues that its time entry system operated as it always did.[32] This Board is not clear if this meant that Agency disputed Employee's position regarding his manual submission of reporting time because Peoplesoft continued to automatically submit time during the pandemic. Therefore, these are facts that require further clarification.

After the pandemic, Employee contends that Agency held a meeting and offered instruction regarding time reporting when he returned to work. Employee provided, via written declaration, that Agency held a meeting where supervisors instructed him and his colleagues on the coding to be used on their timesheets. He contends that there were no instructions regarding if the timesheets were going to be manually or automatically submitted. As a result, Employee argues that some

[29] *Agency Response to Post Status/Prehearing Conference Order*, p. 3 (March 27, 2023).
[30] *Employee's Post Status/Prehearing Conference Brief*, p. 6 (April 14, 2023).
[31] *Id.*
[32] *Agency Response to Post Status/Prehearing Conference Order*, p. 3 (March 27, 2023).

employees continued the practice of manually submitting their timesheets.[33] However, Agency argues that, contrary to Employee's assertion, its reporting system did not begin to automatically input time, but it operated as it had been, and Employee's compliance with the system was the only change that occurred after the pandemic.[34] Again, this Board is unsure if this means that Agency disputes that Employee was ever required to manually submit his timesheets because Peoplesoft continued to automatically submit them. Therefore, these are facts that require further clarification.[35]

As it relates to the misrepresentation, falsification, or concealment of material facts in connection with an investigation, it is Agency's position that Employee refused to answer questions during its investigation. In the Initial Decision, the AJ held that Agency did not provide evidence that Employee made conflicting or non-responsive statements.[36] However, this Board believes that a review of Agency's investigation offered evidence of Employee being evasive or providing no response to several questions.[37] Furthermore, Employee seemed to concede that he refused to answer questions during the investigation because he felt that the investigator was "badgering" him.[38]

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[33] *Employee's Post Status/Prehearing Conference Brief*, p. 7 (April 14, 2023). The Board will note that the declaration included statements made by Employee that were not taken under oath.
[34] *Agency Response to Post Status/Prehearing Conference Order*, p. 4 (March 27, 2023).
[35] In addition to conflicting facts regarding time reporting, there is also conflicting information about the number of other employees who incorrectly entered their time. Agency claims that there were twenty employees in Employee's unit. It argued that within the entire agency, only Employee and one other person violated its time reporting policy, which resulted in double billing and an overpayment of wages. *Id.* at 5. However, Employee disagrees that twenty employees were within his unit. Employee does not offer an alternative number because he did not know how many of his colleagues were contactors opposed to Agency employees. According to Employee, contractors did not enter their time into Peoplesoft. *Employee's Post Status/Prehearing Conference Brief*, p. 8 (April 14, 2023).
[36] *Initial Decision*, p. 10 (July 18, 2023).
[37] *See* flash drive submitted in *Additional Evidence in Response to Post Status/Prehearing Conference Order* (April 24, 2023). Agency asked Employee the following questions, to which no response was provided:

1. Who owned the bank account to which the overpayment was deposited?
2. What happened to the deposited funds?
3. Are there still funds available in the deposited account?
4. When did the funds leave the account?
5. What is the balance of funds in the deposited account?

[38] *Petition for Appeal*, p. 5 (September 30, 2022).

Moreover, Agency argued that Employee offered conflicting statements regarding the repayment of the funds.[39] In the Initial Decision, the AJ held that Employee maintained that he could repay one $25,000 installment followed by smaller payments.[40] However, this Board disagrees with this holding. During the first recorded interview of Agency's investigation, Employee made the offer referenced by the AJ. However, in his second interview, Employee provided that his original offer to pay the $25,000 payment was made prior to him speaking to his wife. Instead, his subsequent offer was to only pay $125 per pay period until the overpayment amount was satisfied.[41]

In *Yordanos Sium v. Office of the State Superintendent of Education*, 218 A.3d 228 (D.C. 2019)(citing *Dupree v. District of Columbia Office of Employee Appeals*, 36 A.3d 826 (D.C. 2011)), the D.C. Court of Appeals held that "[t]o make findings regarding disputed facts in the absence of a hearing is the essence of arbitrary and capricious decision-making." We agree and believe that the AJ must hold an evidentiary hearing to adequately address the material issues of facts in dispute.[42] An evidentiary hearing will also help the AJ to render a decision based on substantial evidence. Accordingly, we remand this matter to the AJ for further consideration.

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[39] *Petition for Review,* p. 11 (August 23, 2023).
[40] *Initial Decision*, p. 11 (July 18, 2023).
[41] Both interviews are provided on a flash drive submitted in *Additional Evidence in Response to Post Status/Prehearing Conference Order* (April 24, 2023). It is also unclear if Agency ever attempted to collect Employee's initial offer of a $25,000 payment, followed by smaller installment payments.
[42] From the beginning, Employee requested that an evidentiary hearing be held. *Petition for Appeal*, p. 35 (September 30, 2022). Additionally, he complained that there was a lack of discovery in this matter which prevented him from adequately responding to two questions raised by the AJ in her Order Requesting Briefs. *Employee's Post Status/Prehearing Conference Brief*, p. 9 (April 14, 2023). Similarly, Agency contended that Employee refused to cooperate during its investigation which resulted in its inability to fully develop a factual record. *Agency Response to Post Status/Prehearing Conference Order*, p. 6-7 (March 27, 2023).

## ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further findings.

**FOR THE BOARD:**

Clarence Labor, Jr., Chair

Peter Rosenstein

Dionna Maria Lewis

Arrington L. Dixon

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.