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No. 18-AA-453

DISTRICT OF COLUMBIA COURT OF APPEALS

RAVI K. SOBTI,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF FOR-HIRE VEHICLES,

Respondent.

On Appeal from the District of Columbia
Office of Administrative Hearings

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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RULE 28(a)(2)(B) DISCLOSURE STATEMENT

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INTERESTS OF AMICUS CURIAE

The Legal Aid Society of the District of Columbia was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented numerous individuals living in or close to poverty in the District. Legal Aid's Barbara McDowell Appellate Advocacy Project was formed in 2004, and since that time Legal Aid has participated in over 100 cases before this Court.

Legal Aid has an interest in ensuring that administrative tribunals afford proper notice to all parties so that they have the opportunity to be heard on the merits. Legal Aid is particularly concerned about proper notice to low-income individuals, for whom regular mail is often unreliable and who often lack the capacity and resources to navigate administrative and judicial systems, as well as the resources to pay steep penalties resulting from defaults.

By Order dated February 11, 2019, this Court invited Legal Aid to file an *amicus* brief in this case.

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INTRODUCTION

This case involves a financial penalty levied against a taxicab driver, Ravi Sobti, who claims that he did not receive notice of the administrative proceedings against him. The administrative record lacks any evidence of service on Mr. Sobti and contains a misaddressed notice. Nonetheless, the Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ) entered a default order against Mr. Sobti for allegedly violating taxicab regulations by operating without a

functioning meter and manually calculating a customer's fare. The ALJ imposed the maximum fine for those infractions ($1,100) and then tripled that fine based on Mr. Sobti's failure to file an answer. When Mr. Sobti sought relief after learning of the proceedings, the ALJ denied his motion for reconsideration.

The ALJ's decisions entering default and denying Mr. Sobti's motion for reconsideration were legally erroneous and unsupported by substantial evidence in the record. Accordingly, the Legal Aid Society of the District of Columbia requests that this Court reverse the ALJ's decisions and remand the matter with instructions that Mr. Sobti be given a hearing on the merits of the alleged infractions (on which Legal Aid takes no position). Alternatively, Mr. Sobti should be given a hearing before OAH on the issue of whether he received proper notice.

STATEMENT OF THE CASE

Ravi Sobti is a taxicab driver who, during the time period relevant to this case, resided at 3361 Beechcliff Drive, Alexandria, VA 22306. R. Tab. 5, at 1. On February 27, 2015, the District of Columbia Department of For-Hire Vehicles (at that time known as the Taxicab Commission) issued a Notice of Infraction against Mr. Sobti for two closely related alleged violations of its regulations: (1) operating with a non-functioning meter and credit card reader in violation of 31 DCMR § 602.10, and (2) manually entering the customer's fare in an unauthorized device in violation of 31 DCMR § 801.3. R. Tab 9, at 1. The "Total Fines and Penalties"

for these alleged infractions was listed at $1100. *Id.* The Notice also included the statement, without citation to any authority, that "[i]f you fail to answer each charge . . . you will be subject to a penalty equal to twice the amount of the fine, in addition to the fine itself." *Id.* The Notice incorrectly listed Mr. Sobti's street name as two words: "Beech Cliff" instead of one word: "Beechcliff." *Id.*

A Certificate of Service was attached to the Notice. R. Tab 9, at 2. It was not specifically generated for Mr. Sobti and instead is a form that must be completed, which includes checking certain boxes (and not others) and filling in missing information. *See id.* (including directions to "[c]omplete" the form). The Certificate of Service was incomplete or inaccurate in the following ways:

- None of the boxes indicating a type of service (personal delivery, conspicuous posting, or mail delivery) was checked. *Id.*
- Under the unchecked box captioned "Mailed or caused to be mailed a true copy of this Notice to the Respondent[s] at the mailing address shown below:"), Mr. Sobti's street name was incorrectly listed as "Beech Cliff." *Id.*
- Despite instructions on the Certificate to circle one of the three types of mail service (First Class Mail, Certified Mail/RRR, Delivery Confirmation), no option was circled. *Id.*

- The Certificate failed to list the process server's Badge/Identification number. *Id.*

On November 16, 2015, OAH issued a Show Cause Order. R. Tab 8. Although the Order noted that Mr. Sobti had not filed an answer to the Notice of Infraction, the Order was directed against the Department based on its failure to provide proof of service on Mr. Sobti in compliance with OAH requirements. *Id.* In particular, the Order directed the Department to show cause why the case against Mr. Sobti should not be dismissed given the Department's failure to submit an affidavit verifying that the United States Postal Service did not return the Notice sent to Mr. Sobti as required by OAH Rule 2803.11 (requiring such an affidavit to be submitted to OAH at the same time as the Notice). R. Tab 8, at 1-4. The Department responded with an affidavit from its Assistant General Counsel, which claimed that the Notice of Infraction was mailed to Mr. Sobti but did not specify any address to which it was allegedly mailed. R. Tab 7, at 1. The Affidavit did not state that the Assistant General Counsel had personal knowledge of this mailing or otherwise explain the basis, if any, of the Assistant General Counsel's purported knowledge regarding the mailing. *Id.* The Affidavit also provided that the Postal Service had not returned this Notice, explaining that the Assistant General Counsel had reviewed the agency's mail log for returned mail. *Id.*

The ALJ entered a default order against Mr. Sobti on December 7, 2015. R. Tab 6, at 1. The Order found, without explanation, that the Notice of Infraction was "valid on its face," and that Mr. Sobti "had adequate notice of the charges" because the Department filed a Certificate of Service "stating that the [Notice of Infraction] was mailed to [Mr. Sobti]." *Id.* Because Mr. Sobti failed to answer the Notice, he was fined $3300 – triple the "Total Fines and Penalties" listed in the Notice. *Id.* at 1-2. The Order was not accompanied by a Certificate of Service or any other indication of if, when, or how it was ever sent to Mr. Sobti.

Although it is unclear when or how, Mr. Sobti ultimately became aware of this default order. Petitioner's Br. 1 (claiming Mr. Sobti received the Order after the time to "appeal" had passed). He retained counsel and, on February 16, 2016, filed a motion for reconsideration. R. Tab 5, at 1-4. He explained that he had not received the original Notice of Infraction because it was mailed to the incorrect address ("Beech Cliff" Drive instead of "Beechcliff" Drive) and sought a hearing on the merits, denying the alleged infractions. *Id.* at 1, 4. On April 8, 2016, he filed a motion for expedition, again explaining that he had not received the original Notice, denying the infractions, and seeking a hearing because he had not been given "the opportunity to defend himself against the allegations." R. Tab 4, at 1, 3.

On March 30, 2018, the ALJ denied Mr. Sobti's motion, concluding that Mr. Sobti had not shown good cause for failing to answer the Notice and had not stated

"an adequate claim or defense" as required by OAH Rule 2828.10(g). R. Tab 3, at 1-3. The ALJ's opinion was short but confusing. First, it repeated the Department's error as to Mr. Sobti's street name and compounded this error by listing his house number incorrectly, stating that Mr. Sobti's "actual address is 3611 Beech Cliff Drive," R. Tab 3, at 2, even though Mr. Sobti explained in his motions for reconsideration and expedition that his street name is a single word and his real address is 3361 Beechcliff Drive, R. Tab 4, at 1; Tab 5, at 1. Second, the ALJ made two different, but equally wrong assertions regarding where the Notice was sent. Although the certificate of service accompanying the Notice contains the address "3361 Beech Cliff Drive," R. Tab 9, at 2, the ALJ's decision first says that the Notice "was mailed to 3361 Beechcliff Drive," using the correct house number and the correct one-word version of the street name, but the very next paragraph of the ALJ's opinion said that the Notice "was served at the address of 3611 Beech Cliff Drive," with a wrong house number and the incorrect two-word version of the street name, R. Tab 3, at 2. The ALJ then relied on the Department's Affidavit to conclude that the Notice was not returned. *Id.* Finally, the ALJ concluded (without explanation) that Mr. Sobti did not "provide an adequate claim or defense." *Id.* The Certificate of Service attached to the Order, stating the Order was mailed on April 2, 2018, lists Mr. Sobti's address incorrectly (again using the two-word street name) but his

counsel's address correctly, R. Tab 3, at 5, which may explain how he learned of this misaddressed Order.

Mr. Sobti, proceeding *pro se*, timely filed a petition for review with this Court. The District filed a motion for summary affirmance, with an alternative request to consider the motion as its brief. On February 11, 2019, this Court denied the motion for summary affirmance, granted the alternative request, and invited Legal Aid to file an *amicus* brief.

SUMMARY OF THE ARGUMENT

Both the default order and the denial of reconsideration here were based on legal errors and must be reversed. The default order was erroneous both because the Notice was facially invalid and the attached Certificate of Service was insufficient. The Notice was facially invalid because it threatened an additional penalty of double the original fine (which the ALJ then imposed), even though the relevant law authorizes at most a penalty equal to the fine. And the Certificate of Service is inadequate because it does not state that Mr. Sobti was served by *any* method, let alone prove that the Department satisfied its statutory and regulatory obligation to serve Mr. Sobti by first-class mail at his correct address. Because a default cannot be entered without *both* a facially valid Notice and sufficient evidence of proper service, the Petition for Review should be disposed of by reversing the ALJ's default order and remanding for further proceedings.

The ALJ's erroneous entry of default was compounded by the erroneous denial of Mr. Sobti's request for reconsideration on the incorrect basis that Mr. Sobti failed to provide good cause for his failure to answer and also failed to provide an adequate claim or defense. The ALJ's conclusion that Mr. Sobti failed to provide good cause for failing to answer the Notice is wrong because not knowing about a hearing or charge constitutes good cause for failing to respond. Mr. Sobti's claim that he did not receive notice is not "inherently incredible," particularly in light of the facially defective Certificate of Service, and the ALJ provided no rational basis for disregarding that claim (or ignoring those facial defects).

Mr. Sobti's reconsideration request also included the required "claim or defense." He denied the infractions, which form the basis for the original $1,100 fine. He further requested a hearing at which the ALJ was required to consider any mitigating evidence Mr. Sobti wished to provide in seeking to have less than the *maximum* original fine of $1,100 imposed. And the fact that Mr. Sobti never received the original Notice of Infraction is also a complete defense to the ALJ's tripling of that original amount through an unlawfully large penalty. Accordingly, if this Court does not reverse the default order, it must reverse the denial of reconsideration and remand for further proceedings.

STANDARD OF REVIEW

This Court will not affirm an OAH decision if it is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Stephenson v. District of Columbia Department of Public Works*, 102 A.3d 749, 750 (D.C. 2014) (alteration in original). The decision will be affirmed "when (1) OAH made findings of fact on each materially contested issue of fact, (2) substantial evidence supports each finding, and (3) OAH's conclusions flow rationally from its findings of fact." *Id.*

ARGUMENT

I. BOTH THE DEFAULT ORDER AND ORDER DENYING RECONSIDERATION ARE ON REVIEW BEFORE THIS COURT.

Mr. Sobti's petition for review challenges both OAH's December 7, 2015 default order and its March 30, 2018 Order denying reconsideration. In his *pro se* brief, Mr. Sobti disputes the charges against him and requests a hearing on the merits, explaining that he did not get a "fair chance to appeal" the default order. Petitioner's Br. 1. Accordingly, Mr. Sobti appears to be challenging both the default order and the order denying his motion for reconsideration (which he refers to as his "appeal"). Given this Court's "obligation" to construe *pro se* pleadings liberally, Mr. Sobti's petition for review should be construed as challenging both orders. *Flax v. Schertler*, 935 A.2d 1091, 1100 (D.C. 2007) (construing *pro se* notice of appeal liberally); *see also Pearson v. Soo Chung*, 961 A.2d 1067, 1077-78 (D.C. 2008) (same).

The Department argues that, despite Mr. Sobti's arguments, the petition should be construed narrowly to apply only to the denial of his motion for reconsideration. Department's Br. 6 & n.4. But the two bases it gives for such a construction are invalid. First, the Department suggests that the petition does not challenge the default order because the *pro se* petition did not include the date of the default order or attach it. *Id.* at 6 n.4. But this Court has "never indicated that an appellant must always be impeccably precise in meeting [the Rule's] requirement to designate the judgment or order appealed from," *Perry v. Sera*, 623 A.2d 1210, 1215 (D.C. 1993), even where the litigant does not attach all orders he is appealing or specify all issues he wishes to address, *Associated Estates LLC v. Bankatlantic*, 164 A.3d 932, 937-38 (D.C. 2017).

Second, the Department asserts that the Petition is "well out of time" with respect to the default order. Department Br. 6 n.4. That is wrong because a motion for reconsideration renders the underlying order non-final. D.C. Code § 2-1831.16(a); *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (per curiam). Mr. Sobti filed a motion for reconsideration here, which was timely filed "[w]ithin ten (10) calendar days after [the] final order [was] served," 1 DCMR § 2828.3, because the default order has no certificate of service and there is no evidence that it was ever served. The time period for seeking judicial review was thus not triggered until April 2, 2018, the first time the ALJ informed Mr. Sobti that his motion was denied (either

as a matter of law or on the merits). Mr. Sobti then timely filed his petition for review on April 30, 2018. *See* D.C. App. R. 15(a)(2).

II. THE ALJ'S DEFAULT ORDER IS NOT IN ACCORDANCE WITH LAW.

"In order to initiate a proceeding" regarding a civil infraction, the agency "shall serve a notice of infraction upon a respondent" including, among other things, the respondent's name and address. D.C. Code § 2-1802.01(a) & (b)(1); *see* 31 DCMR §§ 704.2, 704.3, 714.1. Before entering a default, OAH must determine whether the agency has "submitted evidence of proper service" and "[t]he Notice of Infraction . . . meets all legal requirements on its face." 1 DCMR § 2805.5.

A. The Notice of Infraction is facially invalid.

As an initial matter, the default order is legally erroneous and fundamentally unjust because it imposes a substantial fine in excess of what is authorized by law. The Notice threatened that Mr. Sobti would face a penalty double the amount of the original fine (in addition to the fine) if he defaulted, without citing any authority. R. Tab 9, at 1. The ALJ then improperly concluded (without any explanation) that the Notice "is valid on its face" and carried out that threat, imposing a total monetary sanction of $3,300 – triple that on the face of the Notice. R. Tab 6, at 1-2. But the Department's regulations provide that the fines can be *doubled* (not tripled) upon a default. *E.g.*, 31 DCMR § 704.2(e)(3) (requiring the Notice ("NOI") to include a statement that "[i]f the respondent fails to pay the fine or request a hearing within

thirty (30) calendar days of the date the NOI is served on the respondent, *a penalty equal to the amount of the fine* may be imposed") (2014 & 2019) (emphasis added); *id.* § 704.10(b) ("If a respondent does not answer the NOI within thirty (30) calendar days: (a) OAH shall issue a default order; and (b) A civil penalty *equal to the amount of the fine* imposed by the NOI shall be imposed by OAH in the default order.") (2014 & 2019) (emphasis added).

As a result of the facially invalid Notice[1] and the ALJ's decision, Mr. Sobti was fined $1100 more than is allowed by law. Accordingly, the default order must be reversed.

B. The Department did not prove proper service on Mr. Sobti.

Alternatively, the default order should be reversed because the ALJ incorrectly found Mr. Sobti was properly served the Notice of Infraction. The burden of proving service is on the government as the proponent of the proceeding, 1 DCMR § 2822.1. For proper mail service, a notice must be sent "by first class mail to the respondent's last known home or business address." D.C. Code § 2-1802.05(a); *see* 31 DCMR § 714.1(c) (describing service by "first-class U.S. Mail, addressed to the last known home or business address of the respondent"); 1 DCMR

[1] The Notice is also facially invalid because, as discussed below, it incorrectly listed Mr. Sobti's street name as two words ("Beech Cliff") instead of one, R. Tab 9, at 1, violating D.C. Code § 2-1802.01(b)(1).

§ 2811.5 ("Service by mail means mailing a properly addressed copy with first-class postage by depositing it with the United States Postal Service."). Additionally, the notice "must include a signed statement that the paper was served on the parties. Such a statement is known as a 'certificate of service.' The certificate of service shall identify the individual serving the paper, the parties served and their addresses, the way it was served, and the date served." 1 DCMR § 2811.9.

The Department did not provide sufficient evidence of proper notice here, and the ALJ conclusion otherwise was unsupported by substantial evidence and did not "flow rationally" from the record. *Stephenson*, 102 A.3d at 750.

1. The Certificate of Service does not establish that Mr. Sobti was served.

The ALJ erred in finding that the Department proved that it properly served Mr. Sobti. The sole basis for her conclusion was that "[t]he Government filed a certificate of service stating that the NOI was mailed to Respondent." R. Tab 6, at 1. This finding is unsupported by substantial (or any) evidence. The Certificate does not actually state that the Notice was mailed to Mr. Sobti or served on him in any way. *See* R. Tab 9, at 2; *Rhea v. Designmark Service*, 942 A.2d 651, 654-56 (D.C. 2008) (reversing OAH decision finding appeal untimely where Certificate of Service was "questionable"); *In re Herman*, 619 A.2d 958, 962 & n.7 (D.C. 1993) (holding when a box on a form is not checked, the representations associated with that box are not made by signing the document).

And at any rate, the ALJ's conclusion that Mr. Sobti was properly served does not "flow rationally" from the Certificate of Service, which is incomplete and does not satisfy regulatory requirements. The form that the Department used is designed to accommodate different modes of service, none of which is indicated unless and until the corresponding box is checked. *See* R. Tab 9, at 2. And where mail service is used, the process server must indicate what method was used (i.e., first-class). *See id.* But here, none of those boxes was checked, *id.*, and thus the person signing the form did not indicate that service was attempted by any means, let alone "the way it was served," 1 DCMR § 2811.9. And, on top of that, even if one of the boxes listing a means of service had been checked, the address listed was wrong ("Beech Cliff" instead of Beechcliff"), so the form would, at most, indicate a notice *not* "properly addressed." *Id.* § 2811.5. Such "[a] perfunctory certificate at its best is meaningless and at its worst is misleading." *Lister v. England*, 195 A.2d 260, 263 (D.C. 1963) (where certificate said transcript was complete, but it was not).

The Certificate of Service here is similar to the evidence of notice provided in *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985). There, this Court held that the agency failed to prove it provided proper notice, because "[a]lthough printed on [the Notice of Hearing and examiner's decision] are the words 'Dated and Mailed,' followed by a date, the mere existence of these forms in the agency file does not constitute proof, in the absence

of any certification or description of agency mailing procedures, that any notice was actually mailed." *Id.* Similarly here, the "mere existence" of the incomplete and inaccurate Certificate – which includes a date of service and the wrong address but does not even purport that anything was sent (whether by mail or otherwise) – does not prove notice. And as discussed below, nothing else in the record demonstrates that notice was sent (and if so, was properly addressed).

Accordingly, the Certificate of Service in this case cannot bear the weight the ALJ placed on it. *See Wright-Taylor v. Howard University Hospital*, 974 A.2d 210, 215 (D.C. 2009) ("caution[ing] against over-reliance on the so-called presumption of mailing arising from the execution of a certificate of mailing"); *Chatterjee v. Mid Atlantic Regional Council of Carpenters*, 946 A.2d 352, 355 (D.C. 2008) ("Even a properly executed certificate of service is not conclusive.") (collecting cases). Because the Certificate was the sole basis the ALJ offered for finding proper service, the default order must be reversed. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Bowles v. District of Columbia Department of Employment Services*, 121 A.3d 1264, 1269 (D.C. 2015) ("An administrative order can only be sustained on the ground relied on by the agency.").

2. No other record evidence supports the ALJ's conclusion that the Department properly served Mr. Sobti.

The ALJ did not offer any other basis for concluding that Mr. Sobti was properly served, and there is none. The other evidence cited on pages 6 to 7 of the Department's Brief (the Affidavit and the Notice of Infraction itself), do not establish proper service. The Affidavit states that the Notice was mailed to Mr. Sobti by first-class mail, but it does not include any basis for this statement. R. Tab 7. The affiant, Assistant General Counsel for the Department, does not purport to have personal knowledge of the mailing (and it seems unlikely that a person with such a job title would have addressed and sent out the notice himself). It appears that the Assistant General Counsel simply relied upon the Certificate of Service without noticing that it was incomplete and without checking the accuracy of the address, and, of course, that would mean that the Affidavit adds nothing to the Certificate, which, itself is inadequate for the reasons noted above. *See Rhea*, 942 A.2d at 654 (record lacked any evidence of agency mailing procedures); *Thomas*, 490 A.2d at 1164 (same). While the Affidavit goes on to assert that the notice was not returned, this representation is irrelevant because there is no evidence that the notice was mailed in the first place. *See CCD-SAT, Inc. v. Pratt*, 972 A.2d 322, 324 (D.C. 2009) (reversing trial court where District "was unable to produce a certified mail receipt or any other evidence that it actually sent CCD-SAT timely notice (or, indeed, any notice)").

Moreover, if the Notice of Infraction was sent out, despite the problems with the Certificate, the Certificate indicates that an incorrect address was used, yet again negating any possible proof of proper service. *See* D.C. Code § 2-1802.01(b)(1) (notice must list respondent's address); *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 427 (D.D.C. 2005) ("Inaccurate notice is equivalent to no notice at all."); *Moghaddam v. Bone*, 142 Cal. App. 4th 283, 288 (Cal. Ct. App. 2006) (notice mailed to incorrect address not legally adequate).

Given the defects in the Certificate of Service and the lack of other record evidence showing proper service, the ALJ's finding of proper service did not "flow rationally" from the record evidence. Accordingly, the default order against Mr. Sobti should be reversed and he should be given a hearing on the merits. *See McLaughlin v. Fidelity Security Life Insurance*, 667 A.2d 105, 106 (D.C. 1995) (per curiam) ("We reverse because there is no evidence in the record to show that McLaughlin was properly served, and without proper service the default order is void."); *Dozier v. Department of Employment Services*, 498 A.2d 577, 579-80 (D.C. 1985) (where record had no proof of mailing, reversing decision denying benefits based on failure to appear and remanding for a new hearing on the merits).

III. OAH'S ORDER DENYING RECONSIDERATION IS NOT IN ACCORDANCE WITH LAW.

A motion for reconsideration will be granted if "[t]he party filing the motion did not file a required answer to a Notice of Infraction, . . . has a good reason for not

doing so, and states an adequate claim or defense." 1 DCMR §§ 2828.5(b) (reconsideration); 2828.10(g) (same standard for motion for relief from final order). In reviewing denials of motions challenging default orders, this Court takes into account "the policy favoring resolution of litigation on the merits." *Frausto v. United States Department of Commerce*, 926 A.2d 151, 155 (D.C. 2007) (discussing an OAH decision); *see Wylie v. Glenncrest*, 143 A.3d 73, 82 (D.C. 2016); *District of Columbia Department of Public Works v. Lord*, 2018 D.C. Off. Adj. Hear. LEXIS 8349, *3 (Oct. 10, 2018). It is undisputed that Mr. Sobti did not answer the Notice of Infraction, but the ALJ erred in finding that he lacked good reason for doing so and did not provide an adequate claim or defense.

A. The improper notice of infraction afforded Mr. Sobti constitutes good reason for his failure to answer.

In his motions for reconsideration and expedition, Mr. Sobti explained that he never received the Notice of Infraction. R. Tab 4, at 1, 3; Tab 5, at 1, 4. An individual's lack of knowledge of alleged infractions "constitute[s] good cause for failing to respond." *Stephenson v. District of Columbia Department of Public Works*, 102 A.3d 748, 750 (D.C. 2014) (citing *District of Columbia Department of Consumer and Regulatory Affairs v. Williams*, 2011 D.C. Off. Adj. Hear. LEXIS 53 (Oct. 6, 2011)); *see District of Columbia Department of Consumer and Regulatory Affairs v. Bunch-Bey*, 2017 D.C. Off. Adj. Hear. LEXIS 3, *8-*9 (Jan. 19, 2017).

Mr. Sobti's representation that he did not receive the Notice of Infraction was sufficient to establish good cause. An individual's claim that he did not receive notice sent by mail is not "inherently incredible." *Wylie*, 143 A.3d at 86; *Carrasco v. Thomas D. Walsh, Inc.*, 988 A.2d 471, 475 (D.C. 2010). Indeed, OAH has repeatedly found good cause exists where a respondent represented that he or she did not know about alleged infractions until after the default order issued. *See, e.g.*, *District of Columbia Department of Public Works v. Pietros*, 2018 D.C. Off. Adj. Hear. LEXIS 7184, *3 (Nov. 30, 2018); *District of Columbia Department of Public Works v. Lord*, 2018 D.C. Off. Adj. Hear. LEXIS 8349, *2-*3 (Oct. 10, 2018); *District Columbia Department of Public Works v. Strong*, 2018 D.C. Off. Adj. Hear. LEXIS 3051, *2 (July 17, 2018); *District of Columbia Department of Public Works v. Arrington*, 2018 D.C. Off. Adj. Hear. LEXIS 1984, at *3 (Apr. 27, 2018). This makes sense, given that "[s]ervice by posting and mail . . . is 'disfavored' because it is known to be 'less reliable' than other methods." *Carrasco*, 988 A.2d at 475 n.14 (quoting *Jones v. Hersh*, 845 A.2d 541, 547 (D.C. 2004)); *see Watson v. Scheve*, 424 A.2d 1089, 1091 (D.C. 1980) (party did not receive first two notices but received third mailed to same address).

At the very least, if the ALJ were not prepared to believe Mr. Sobti, she should have conducted an evidentiary hearing to make a credibility determination and determine if he was afforded proper notice. An adjudicative body "must hold an

evidentiary hearing when it needs to make credibility determinations and resolve material disputes of fact" regarding notice. *Wylie*, 143 A.3d at 84; *Carrasco*, 988 A.2d at 475-76. In *Stephenson v. District of Columbia Department of Public Works*, 102 A.3d 748, 750 (D.C. 2014), the ALJ found that the defaulting party had not provided a good reason for failing to answer the Notice of Violation, even though he claimed never to have received the Notice. This Court held that the ALJ abused its discretion in refusing to set aside the default order and hear the merits of the party's defense, finding that the party's "failure to act after receiving the NOV is not so much 'unexplained' as 'uncredited'" and that not knowing about a violation is "a circumstance that other ALJs have found to constitute good cause for failing to respond." *Id.*

This Court re-emphasized the importance of credibility determinations when an individual contests notice in *Wylie v. Glenncrest*, 143 A.3d 73 (D.C. 2016). There, the defendant explained to the trial court that she was unaware she had to attend one hearing and did not know about another, about which she was sent notice by first-class mail. *Id.* at 85-86. Without taking testimony, the trial court entered a default order. *Id.* at 76, 85-86. This Court reversed and remanded, holding that the trial court should have "take[n] sworn testimony" and made "explicit credibility determinations" instead of crediting plaintiff's counsel's assertions regarding the first hearing. *Id.* at 85, 89. As to the second hearing, the Court explained that "'[i]f

the court was not prepared to accept the truth of' [the defendant's] claim that she was unaware" of the ex parte proof hearing, which plaintiff's counsel did not contest, "'it should have afforded [her] the chance to prove it in an evidentiary hearing.'" *Id.* at 86 (quoting *Carrasco*, 988 A.2d at 475 and citing *Hawkins v. Lynnhill Condominium Unit Owners Association*, 513 A.2d 242, 244-45 (D.C. 1986)) (third alteration in original).

Here too, the ALJ did not credit Mr. Sobti's representations, even though the Department did not file an opposition to his motions or otherwise challenge his positions, and she failed to take sworn testimony and make credibility determinations. This failure is particularly concerning here where, unlike in *Wylie*, there is no evidence that notice was mailed at all, let alone by first-class mail or to the correct address.

Even if a hearing were not necessary, the ALJ's determination that Mr. Sobti did not establish good cause did not "flow rationally" from the record and her finding that he was served at his address was unsupported by substantial evidence. As discussed above in Section II, there is no evidence in the record that Mr. Sobti was provided adequate notice, and he contests notice. *See Thomas v. National Children's Center, Inc.*, 961 A.2d 1063, 1066 (D.C. 2008) ("Given petitioner's assertions regarding his non-receipt of notice of the initial determination, as well as the surrounding circumstances reflected in the record, the reliance on the evidentiary

presumption provided by mailing the notice, in this instance, falls short of the substantial evidence needed to support the OAH ruling.") (citing *Chatterjee v. Mid Atlantic Regional Council of Carpenters*, 946 A.2d 352 (D.C. 2008)); *Kidd International Home Care, Inc. v. Prince*, 917 A.2d 1083, 1087 (D.C. 2007) (address missing unit number in Certificate of Service and unrefuted representation from appellant's counsel that order not received "raises at least a plausible possibility that the Order was misdelivered"). [2]

B. Mr. Sobti stated an adequate claim or defense regarding the Notice of Infraction.

The ALJ concluded without explanation that "Respondent . . . does not provide an adequate claim or defense." R. Tab 3, at 2. The ALJ did not acknowledge that Mr. Sobti did in fact deny the alleged infractions, R. Tab 4, at 1; Tab 5, at 1, nor explain why this denial is insufficient. Moreover, the ALJ's ruling ignores the fact that the default order includes two addition rulings – beyond mere liability for the alleged infractions – to which Mr. Sobti has been deprived of the opportunity to present defenses. First, the default order imposed, as a base, the *maximum* possible

[2] And when the ALJ did engage with record evidence, she was inconsistent as to what Mr. Sobti's address was and where the Notice was delivered (3611 vs. 3361, Beech Cliff v. Beechcliff). R. Tab 3, at 2. "In light of this inconsistency, substantial evidence does not support the ALJ's findings." *Jackson v. District of Columbia Department of Employment Services*, 955 A.2d 728, 735 (D.C. 2008) (Nebeker, J., concurring).

fine – $1,100. *See* 31 DCMR § 2000.8 (including schedules with "Maximum Fines Based on Circumstances"). But had Mr. Sobti been granted the requested hearing, he would have been entitled to present mitigating evidence so that, even if the ALJ persisted in finding liability for the infractions, she would have had discretion to impose a lower fine. *See* 31 DCMR § 704.11(c); *see also Berkley v. District of Columbia Transit, Inc.*, 950 A.2d 749, 758 (D.C. 2008).

Second, the default order tripled that maximum initial fine based on the failure to answer. But Mr. Sobti's reconsideration request included a complete defense to that tripling: he did not answer because he did not receive notice. Moreover, as explained above, a tripled fine is unauthorized by law. Accordingly, the request for reconsideration met the regulatory requirements and should have been granted. At a minimum, the ALJ's explanation for denying the request is incorrect and therefore the denial must be reversed.

CONCLUSION

For the foregoing reasons, the ALJ's decisions entering default and denying reconsideration should be reversed and the case remanded to afford Mr. Sobti a hearing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Amicus Brief of the Legal Aid Society of the District of Columbia to be delivered electronically, through this Court's e-filing system, this 12th day of March 2019 to:

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