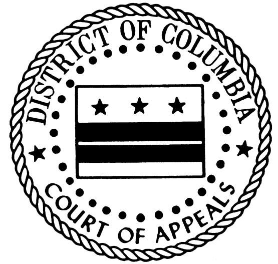

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No. 17-AA-731

DISTRICT OF COLUMBIA COURT OF APPEALS

JUDY BEMAH,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE OFFICE OF ADMINISTRATIVE HEARINGS

REPLY BRIEF OF PETITIONER JUDY BEMAH

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REPLY BRIEF OF PETITIONER JUDY BEMAH

INTRODUCTION

This case concerns the underpayment of safety-net benefits to a District of Columbia resident who was undisputedly eligible for a higher amount of benefits. The following facts are uncontested. Petitioner Judy Bemah's household has received Supplemental Nutrition Assistance Program (SNAP or food stamp) benefits since 2015. In December of that year, Ms. Bemah notified DHS that her daughter, Safara, had lost her job at Chick-fil-A and that the household's earned income had therefore dropped to zero, making it eligible for increased food stamps benefits.

Both Safara and Ms. Bemah repeatedly attempted to obtain verification of this job loss from Chick-fil-A and enlisted the help of a caseworker, but they were unsuccessful. DHS failed to document the fact that Ms. Bemah reported a change in income, and further failed to offer to assist Ms. Bemah's household in verifying Safara's loss of employment. From January through September 2016, DHS calculated the amount of food stamp benefits as if Safara continued to earn income, which she did not. Although DHS eventually contacted Chick-fil-A directly and verified Safara's loss of employment as originally reported by Ms. Bemah, DHS never corrected the underpayment to Ms. Bemah from January to September 2016.

Only three points of disagreement remain. First, the parties disagree regarding whether D.C. Code § 4-208.03(a) – which requires correction of underpayments for public assistance recipients who have received incorrect benefit amounts – is preempted by federal law. It is not preempted because it is fully consistent with federal law requiring reimbursement of improperly denied benefits and no federal law prohibits this type of correction.

Second, the parties disagree regarding whether federal law independently requires DHS to restore the benefits to which Ms. Bemah was entitled. DHS asserts that its underpayments to Ms. Bemah need not be restored because they are not its fault. But both 7 U.S.C. § 2020(b) and 7 C.F.R. § 273.15(s)(1) require the retroactive restoration of lost benefits regardless of DHS's fault. Moreover, the underpayments

at issue here *were* DHS's fault; they resulted from DHS's violations of federal law, including its admitted violation of 7 C.F.R. § 273.12(c) and its demonstrated violation of 7 C.F.R. § 273.2(c)(5).

Third, the parties dispute the availability of retroactive benefits. Under 7 C.F.R. § 273.17(b), retroactive benefits of up to a year may be awarded, and all of the benefits Ms. Bemah seeks fall within that period.

ARGUMENT

This Court reviews interpretations of District and federal law *de novo*, giving no deference to the Administrative Law Judge (ALJ). *See*, *e.g.*, *Vizion One, Inc. v. District of Columbia Department of Health Care Finance*, 170 A.3d 781, 791 (D.C. 2017). District and federal law independently entitle Ms. Bemah to the benefits she lost between January 2016 and September 2016, during which time DHS erroneously calculated her benefits amount as if her daughter, Safara, still had income from working at Chick-fil-A.

I. DISTRICT OF COLUMBIA LAW REQUIRES RETROACTIVE RESTORATION OF MS. BEMAH'S FOOD STAMP BENEFITS.

On pages 8 to 13 of her opening brief, Ms. Bemah explained that the plain text of D.C. Code § 4-208.03(a) entitles her to retroactive food stamp payments for January 2016 through September 2016. DHS does not contest that Ms. Bemah is "a recipient of public assistance [who] receive[d] a payment or series of payments in an amount less than for which [she was] eligible." D.C. Code § 4-208.03(a); *see*

DHS Br. 21 n.9 (conceding that Ms. Bemah "may have met the eligibility criteria for increased SNAP benefits during this period"); *id.* at 21 (noting that Ms. Bemah experienced a "loss of SNAP benefits"). Accordingly, under D.C. Code § 4-208.03(a), "the underpayment shall be corrected retroactively for not more than 12 months." As Ms. Bemah requested benefits for only nine months prior to her fair hearing request, she is entitled to the retroactive correction of her benefits based on District law alone.

DHS, represented by attorneys in the Office of the Attorney General, disagrees with none of the analysis above. Waiving any assertion that § 4-208.03(a), if valid, does not apply or does not require it to retroactively correct the underpayments to Ms. Bemah, DHS limits its arguments with respect to § 4-208.03(a) to an attack on that statute's constitutionality. *See* DHS Br. 27 (asserting only that § 4-208.03(a) "is preempted by federal law" and therefore violates the Supremacy Clause of the United States Constitution).

A. The Attorney General's Attack on the Validity of the District Statute is Unprecedented and Unwise, and Fails to Follow the Required Procedures.

We are aware of no precedent for the District of Columbia Attorney General (or, his predecessor, the Corporation Counsel) attacking the constitutionality of a District statute, properly enacted by the District legislature and allowed by Congress to become law. *See* D.C. Code § 1-206.02(c)(1). Conversely, there is a long history

of federal and District officials defending the validity of District laws even against valid constitutional attacks. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (unsuccessful defense of constitutionality of District statute); *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969) (same); *cf. In re Multi-Circuit Episcopal Church Property Litigation*, 76 Va. Cir. 942, 944 (Cir. Ct. 2008) (quoting Virginia Solicitor General's statement that, when the constitutionality of a state statute is attacked, "[t]he Attorney General has a duty to defend that statute").

Even assuming the District's own Attorney General *can* attack the validity of a District statute, it is astonishing that he has chosen to do so here. The District statute has been part of the D.C. Code for nearly 40 years. We are not aware of *any* prior attack on its validity. Yet now the Attorney General has launched a novel attack on the statute for the sole purpose of winning a single case against an impoverished District resident who seeks basic support for food. *Cf.* D.C. Code § 1-301.81(a)(1) ("The Attorney General for the District of Columbia . . . shall be responsible for upholding the public interest."). In doing so, the Attorney General has undermined the proper separation of powers among the branches of government, and apparently failed to give any notice to the Council as required by D.C. Code § 1-301.89a that he is actively seeking to undermine District law.

This last point is particularly important because respect for the proper separation of governmental powers strongly counsels against this Court's

consideration of the Attorney General's call to hold D.C. Code § 4-208.03(a) invalid without considering the views of the elected legislative body that enacted that statute. *See Hollingsworth v. Perry*, 570 U.S. 693, 709 (2013) (describing a case in which "state legislators . . . could intervene in a suit against the State to defend the constitutionality of a [state] law, after the [state] attorney general had declined to do so"). The Council has an independent interest in defending its statute that it can vindicate only if it is informed that the statute is under attack. When the Attorney General chooses to violate the law requiring him to notify the Council of his attack on the statute, the only means to ensure that the Council's interests are vindicated is for this Court to inform the Council that the Attorney General is attacking the statute and to provide the Council with the opportunity to defend the law.

B. No Federal Law Preempts D.C. Code § 4-208.03(a).

At any rate, the attack on the statute mounted by DHS (represented by the Attorney General) is ill-conceived. The DHS brief argues that D.C. Code § 4-208.03(a) is preempted because it "would authorize reimbursement in [two] additional circumstances beyond those authorized by federal law – circumstances where [1] there has been no wrongful denial by the State agency or [2] where the applicant has failed to comply with the program's requirements." DHS Br. 29.[1]

[1] To the extent that the District invokes the doctrine of field preemption, *see* DHS Br. 28, its argument fails, *see* Bemah Br. 12-13. Federal law does not occupy the field of food stamps, but rather establishes food stamps as an area of federal/state

Here, there is no real contention that Ms. Bemah "has failed to comply with the program's requirements"; at most she was unable, through no fault of her own, to obtain verification of her daughter's job loss. Accordingly, the only question is whether D.C. Code § 4-208.03(a) is preempted because, according to the District, federal law limits reimbursements to the "wrongful" or "improper" denial of benefits, and there was no wrongful or improper denial of Ms. Bemah's benefits here. DHS is wrong on both counts; as detailed below, federal law requires retroactive corrections in instances of wrongful or improper denial but does nothing to limit retroactive corrections to those circumstances, and, at any rate, Ms. Bemah was improperly and wrongfully denied the benefits at issue here.

The federal statutory provisions here mandate restoration of any benefits "improperly" or "wrongfully" denied. 7 U.S.C. § 2020(b) ("the State agency shall promptly restore any improperly denied benefits"); *id.* § 2020(e)(11) (state "shall provide . . . for the prompt restoration in the form of benefits to a household of any allotment or portion thereof which has been wrongfully denied or terminated"); *id.* § 2023(b) ("[A]ny allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year"). As noted above, all

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cooperation in which "[t]he State agency shall be responsible for the administration of the [food stamps] program within the State, including, but not limited to . . . [i]ssuance, control, and accountability of coupons." 7 C.F.R. § 271.4(a)(2).

underpayments are improper and wrongful because the household should have received a higher benefit.[2] Accordingly, federal law already does precisely what D.C. Code § 4-208.03(a) does: subject to a one-year limitation, it "clearly mandates that *any* underissuance be promptly restored" and "leaves no room for exceptions." *Lopez v. Espy*, 83 F.3d 1095, 1100, 1102 (9th Cir. 1996). And even assuming that a benefit can be incorrect – that is, can be an underpayment – without being "improper" or "wrongful," the federal statutory provisions are simply silent with regard to this situation, as are the related federal regulations.

Thus, DHS has not identified any provision of federal law that it would violate by restoring Ms. Bemah's benefits as it is expressly commanded to do by D.C. Code § 4-208.03(a). Nor would doing so constitute an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *CTS Corp. v. Waldburger*, 573 U.S. 1, 17 (2014) (internal quotation marks omitted), which is to provide benefits at a level commensurate with the household's actual income, *see West v. Bowen*, 879 F.2d 1122, 1142 (3d Cir. 1989) ("The Senate Agriculture Committee explained that this provision [now 7 U.S.C. § 2020(b)] reflected its strong concern 'that eligible households receive the full measure of food stamps to which they are entitled because of their circumstances,' through retroactive benefits,

[2] "Improper" means "not in accord with fact." Merriam Webster's Collegiate Dictionary 626 (11th ed. 2003). Similarly, "wrongful" is defined as "wrong," which means "the state of being mistaken or incorrect." *Id.* at 1447.

if necessary.") (quoting S. Rep. No. 100-397, at 25 (1988)). To the contrary, it is completely consistent with that purpose for DHS to retroactively correct its underpayment of benefits to Ms. Bemah, now that the agency knows unequivocally that her household had no earned income from January to September of 2016. Accordingly, D.C. Code § 4-208.03(a) is not preempted. Because DHS has waived all other arguments with respect to § 4-208.03(a), this matter must be remanded to OAH with instructions to retroactively correct the underpayment to Ms. Bemah.

II. MS. BEMAH IS ENTITLED TO RETROACTIVE REPAYMENT UNDER FEDERAL LAW.

As noted above, under 7 U.S.C. § 2020(b), "[w]hen a State agency learns . . . that it has improperly denied, terminated, or underissued benefits to an eligible household, the State agency shall promptly restore any improperly denied benefits to the extent required by [§§ 2020(e)(11) and 2023(b)]," which, in turn, require in relevant part the "restoration" of "wrongfully" underpaid benefits. Ms. Bemah's benefits were underissued and/or improperly or wrongfully underpaid because they did not reflect her decreased household income resulting from her daughter's job loss. Accordingly, she is entitled to restoration of those lost benefits. *Lopez v. Espy*, 83 F.3d, 1100, 1102 (9th Cir. 1996) ("[Section] 2020(e)(11) clearly mandates that *any* underissuance be promptly restored. The plain language of this provision leaves no room for exceptions."); *see* 7 C.F.R. § 273.15(s)(1) ("When the hearing authority determines that a household has been improperly denied program benefits or has

been issued a lesser allotment than was due, lost benefits shall be provided to the household in accordance with § 273.17.”).

The ALJ refused to correct the underpayments to Ms. Bemah, asserting that no DHS error caused the underpayments. Pet. App. 99. But DHS is required to correct underpayments regardless of whether they result from DHS’s errors, and, at any rate, the underpayments here were caused by several errors.

A. Underpayments Must be Corrected Regardless of Whether They Result from Specific Agency Mistakes.

The ALJ erred as a matter of law in concluding that DHS has no obligation to correct a food stamp underpayment in the absence of agency error. *See* Pet. App. 98-101 (citing 7 C.F.R. §§ 273.15(s)(1) and 273.17(a)(1)). In fact, federal law requires retroactive correction when a beneficiary is eligible for a higher amount, regardless of agency fault or error.

1. Federal law governing entitlement to lost benefits does not require agency error.

The applicable statute, 7 U.S.C. § 2020(b), requires restoration of lost benefits “[w]hen a State agency . . . has improperly . . . underissued benefits to an eligible household.” This statutory provision does not require that the agency be at fault; instead, it applies whenever an underpayment has occurred. Similarly, 7 C.F.R. § 273.15(s)(1) requires restoration when a household has been “improperly denied program benefits *or* has been issued *a lesser allotment than was due*.” (Emphases

added). The notion that underpayments should be corrected even in the absence of state agency fault is further proven by the legislative history. 134 Cong. Rec. S11740 (August 11, 1988) (Sen. Harkin) ("We feel strongly about the importance of providing restored benefits where they are due, with the *only limitation* that benefits would not be restored for periods of more than 1 year.") (Emphasis added).

In keeping with the statutory and regulatory language, other jurisdictions have provided retroactive food stamps even when the initial failure to provide benefits (or underpayment of benefits) was *not* the fault of the state agency. For example, in *Velez v. Coler*, 978 F.2d 647, 648 (11th Cir. 1992), a food stamp applicant's eligibility was established only by an April 1988 immigration decision that was retroactive to October 1987. Under these facts, starting in April 1988, the applicant "was entitled to apply for and receive food stamps for the period beginning October 30, 1987." *Id.* at 649. Although the state agency could in no way be faulted for not providing benefits before the resolution of the applicant's immigration status in April 1988, that resolution nonetheless established the applicant's eligibility for and entitlement to food stamps, retroactive to the earlier date. *Id.*; *see also, e.g.*, *DeBrown v. Trainor*, 598 F.2d 1069, 1070 (7th Cir. 1979) (state awarded retroactive food stamps for period during which beneficiary failed to reapply); *Lipton v. Juras*, 517 P.2d 337, 338 (Or. Ct. App. 1973) (retroactive award of food stamps where beneficiary failed to recertify due to circumstances beyond the control of either the

beneficiary or the state agency); *In re Chamizo*, 2014 N.Y. Misc. LEXIS 2390, at *13 (N.Y. Sup. Ct. May 1, 2014) (food stamps retroactive to August 2009 based on evidence that did not exist until November 2009).

DHS does not deny that 7 C.F.R. § 273.15(s)(1) requires that "lost benefits shall be provided to the household in accordance with § 273.17" upon a simple finding that the household "has been issued a lesser allotment than was due." DHS Br. 9, 18. DHS implies that § 273.15(s)(1) is irrelevant because 7 C.F.R. § 273.17(a) and (b) contain the only bases for restoring lost benefits. DHS Br. 18-19. Even assuming that DHS's premise is correct, Ms. Bemah remains entitled to restoration of her lost benefits. DHS concedes that § 273.17(a)(1) provides for restoration "if there is a statement elsewhere in the regulations specifically stating that the household is entitled to restoration of lost benefits." *See* DHS Br. 19 (paraphrasing § 273.17(a)(1)). And one such "statement elsewhere in the regulations" is § 273.15(s)(1), which requires restoration of lost benefits in all cases of underpayment – that is, whenever a household "has been issued a lesser allotment than was due."

Further supporting this plain-language reading of the regulations is the fact that the regulations must be read in a manner consistent with the governing statutory provisions, including 7 U.S.C. § 2020(b). Because that statute provides for restoration of lost benefits without reference to agency fault, it is improper to attempt

to stretch the regulatory language to require agency fault. *See Stern v. Department of Public Welfare*, 49 A.3d 26, 30 (Pa. Commw. Ct. 2012) (holding specifically that § 273.17 provides for "a retroactive award" to correct for a food stamp underpayment).

2. Ms. Bemah meets the statutory and regulatory criteria for a retroactive correction.

Because DHS concedes that Ms. Bemah was eligible for a higher food stamp payment during the relevant period, *see*, *e.g.*, DHS Br. 21 & n.9, the underpayments she received must be retroactively corrected. Congressional intent on this point is clear. *West v. Bowen*, 879 F.2d 1122, 1142 (3d Cir. 1989) ("The Senate Agriculture Committee explained that this provision [now 7 U.S.C. § 2020(b)] reflected its strong concern 'that eligible households receive the full measure of food stamps to which they are entitled because of their circumstances,' through retroactive benefits, if necessary.") (quoting S. Rep. No. 100-397, at 25 (1988)).

DHS asserts that although Ms. Bemah was "eligible" for greater benefits, those benefits were not "due" (because verification had not yet been obtained) and thus *never* need to be provided even though verification was subsequently obtained. DHS Br. 21 n.9 (citing 7 C.F.R. § 273.12(c)(1)(iii)).[3] There is no support for this

[3] The cited regulation – 7 C.F.R. § 273.12(c)(1)(iii) – does not support DHS's illogical argument. It allows a state agency to await verification before remedying an underpayment but says nothing about whether, when it does remedy an

cramped reading, which is contrary to the language of the statute, under which "eligibility" is dispositive. *See*, *e.g.*, 7 U.S.C. § 2020 (referring to "eligibility" dozens of times without mentioning the concept of benefits "due"); *id.* § 2013(a) (defining food stamps as a program to benefit "eligible households"). Therefore, congressional intent here can only be met by retroactive corrections to the amounts for which a household was eligible, regardless of any fault on the part of the state agency. *See Velez v. Coler*, 978 F.2d 647, 649 (11th Cir. 1992) (without allegation of agency fault, individual who was "retroactively eligible for food stamps" was, as a result "entitled to apply for and receive food stamps" retroactively); *DeBrown*, 598 F.2d at 1070 (retroactive food stamp benefits granted by state agency, although food stamps had been terminated due to household's failure to reapply when the oldest child turned 18); *cf. Victorian v. Miller*, 813 F.2d 718, 720, 721 (5th Cir. 1987) (en banc) (because legislative history of 7 U.S.C. § 2020 "indicates that households that meet uniform eligibility requirements are entitled to food stamps," household could seek "damages for sums wrongfully withheld" under 42 U.S.C. § 1983).

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underpayment, it must do so retroactively. That issue is addressed by 7 C.F.R. § 273.17, which provides for a 12-month period of retroactive correction.

B. The Underpayments at Issue Were DHS's Fault.

The parties agree that Ms. Bemah is entitled to restoration of her lost benefits if that loss "was caused by an error by [DHS]." 7 C.F.R. § 273.17(a)(1). The ALJ erred in concluding that DHS was not at fault for the underpayments at issue here.

DHS concedes that it violated 7 C.F.R. § 273.12(c) by failing to document Ms. Bemah's report that her daughter lost her job and that the household was therefore entitled to higher food stamp benefits. DHS Br. 22. This report triggered DHS's duty to inform Ms. Bemah of its obligation to assist her in obtaining verification, and the only reasonable inference is that DHS's failure to perform its duty in this regard was a result of its initial failure to document the report. In turn, DHS's failure to inform Ms. Bemah of its obligation to help obtain verification delayed DHS's provision of that assistance, resulting in the many months of underpaid food stamp benefits at issue here. These underpayments were thus "caused by an error by [DHS]," 7 C.F.R. § 273.17(a)(1), specifically DHS's admitted violation of 7 C.F.R. § 273.12(c). DHS's defense that its admitted violation of this regulation had nothing to do with the underpayments here, *see* DHS Br. 22-24, is unsupported and illogical; the underpayments resulted from DHS's failure to assist Ms. Bemah in obtaining verification, which occurred because DHS never *offered* that assistance to Ms. Bemah because its internal records did not show that she had reported a change for which verification was necessary.

DHS's violation of 7 C.F.R. § 273.2(c)(5) (requiring DHS to "inform the household of [DHS]'s responsibility to assist the household in obtaining required verification") was a separate agency error that led even more directly to the underpayments at issue. DHS's attempts to excuse this failure are unavailing. First, DHS half-heartedly denies its failure as a factual matter. *See* DHS Br. 25 (asserting that "there is no reason to believe from the record that [Ms. Bemah] did not receive this notice" in the form of "the District's Combined Application"). This assertion fails because it is supported merely by language from a website rather than from the record. *See* DHS Br. 4 n.2 & 5 n.3 (referring to different excerpts from the "Combined Application" available on the internet but not part of the administrative record in this case); Pet. App. 101 (ALJ decision, not referencing these extra-record statements); *see also Castro v. Security Assurance Management, Inc.*, 20 A.3d 749, 759 (D.C. 2011) ("basic norm of our system" is "that this court's review of the OAH decision [is] based on the administrative record alone").

Second, DHS asserts that the notification requirement did not apply here at all because this case involves a report of a change between certifications, and the requirement applies only at the time of a certification. DHS Br. 25-26. But the text of the regulations belies that argument. "Changes reported during the certification period shall be subject to the same verification procedures as apply at initial certification." 7 C.F.R. § 273.2(f)(8)(D)(ii). At initial certification, DHS must

"inform the household of [DHS]'s responsibility to assist the household in obtaining required verification." *Id.* § 273.2(c)(5). Under the plain language of these regulations, because DHS's obligation to notify a beneficiary of DHS's duty to assist in obtaining verification is a "verification procedure,"[4] that obligation applies to changes reported during the certification period, and therefore applies to this case.

DHS asserts that its obligation to notify beneficiaries of its duty to assist in obtaining verification cannot constitute a "verification procedure" for the sole reason that this duty is not contained within the regulatory subheading entitled "Verification." DHS Br. 6, 25-26 (citing 7 C.F.R. § 273.2(f)). But the subsection DHS cites – 7 C.F.R. § 273.2(f) – is not headed "verification procedures," and nothing within it suggests that it contains an exclusive listing of *all* verification procedures. To the contrary, the regulations provide specific citations when referring to verification procedures within § 273.2(f), *see*, *e.g.*, 7 C.F.R. §§ 273.2(f)(8)(B) & 273.2(j)(1)(iii), which strongly suggests that other verification procedures exist outside of that subsection. Regardless of the regulatory subheading under which it appears, the requirement to notify an individual of DHS's obligation to assist in obtaining verification *is* a verification procedure. *See Shalala v.*

[4] A "procedure" is "a particular way of accomplishing something," Merriam Webster's Collegiate Dictionary 990 (11th ed. 2003), and "[v]erification is the use of documentation or a contact with a third party to confirm the accuracy of statements or information," 7 C.F.R. § 273.2(f).

Whitecotton, 514 U.S. 268, 274 (1995) (statutory text prevails in any conflict with the language of a heading); *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad*, 331 U.S. 519, 528-29 (1947) ("[T]he title of a statute and the heading of a section . . . cannot undo or limit that which the text makes plain."). Therefore DHS's "responsibility to assist the household in obtaining required verification" is one of the "verification procedures [that] apply at initial certification," and by operation of 7 C.F.R. § 273.2(f)(8)(D)(ii) also applies to "[c]hanges reported during the certification period," like the change Ms. Bemah reported here.

Finally, DHS makes no attempt to explain why it would be sensible for the Court to read the regulations as requiring DHS to notify individuals of the agency's duty to assist in obtaining verification at certification and recertification but *not* when reporting a change of income during the certification period. The regulations require DHS to provide this assistance because employers are far more likely to verify a change of employment status directly to government agencies (including DHS) than to individuals (like Ms. Bemah). That fact is true whenever verification is needed from an employer, which may include not only certification and recertification but also reports of changes in employment status during a certification period, like Ms. Bemah's report of Safara's job loss here. It thus makes sense to impose on DHS an obligation to remind recipients that help is available whenever DHS chooses to require verification. The plain text of the regulation lends itself to

that commonsense reading, which this Court should adopt. *See Wall v. Babers*, 82 A.3d 794, 800 n.14 (D.C. 2014).

III. BENEFITS ARE AVAILABLE RETROACTIVE UP TO ONE YEAR.

The ALJ also erred in concluding that 7 C.F.R. § 273.12(c) limits the amount of retroactive benefits to which Ms. Bemah is entitled. Pet. App. 99-100. That regulatory provision sets a deadline for DHS to act on a reported change, but is silent as to whether action taken by that deadline can (or must) be retroactive. *See* Bemah Br. 17. Retroactive action is addressed by 7 C.F.R. § 273.17(a)(1), which provides that "benefits shall be restored for a period of not more than twelve months" from when the state agency is notified of, or discovers, the underpayment. *Accord* 7 U.S.C. § 2020(e)(11) (restoration of wrongfully denied benefits "except . . . for any period of time more than one year prior to the date the State agency receives a request for such restoration"); 7 C.F.R. § 273.17(b); 134 Cong. Rec. S11740 (August 11, 1988) ("only limitation" on award of retroactive benefits is "that benefits would not be restored for periods of more than 1 year") (Sen. Harkin); *Lopez v. Espy*, 83 F.3d 1095, 1102 (9th Cir. 1996) ("[Section] 2020(e)(11) normally gives recipients a year to recover underissuances."). DHS discovered the underpayments to Ms. Bemah in 2016 – the same year they occurred. Accordingly, there is no limitation on Ms. Bemah's eligibility for these lost benefits.

CONCLUSION

For the foregoing reasons, as well as the reasons provided in Ms. Bemah's opening brief, the ALJ's decision should be reversed, and this matter should be remanded to OAH for the issuance of an order requiring DHS to correct Ms. Bemah's underpayment retroactive to December 2015. Should this Court determine that it must decide the validity of D.C. Code § 4-208.03(a) in order to decide this matter, it should ask the Council of the District of Columbia whether it wants to be heard on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petitioner's Reply Brief to be delivered electronically, through this Court's e-filing system, this 1st day of February 2019, to:

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