No. 05-AA-629

DISTRICT OF COLUMBIA COURT OF APPEALS

VERA M. COTO,

Petitioner,

v.

CITIBANK FSB,

Respondent.

On Petition for Review of a Final Order
of the Office of Administrative Hearings

BRIEF FOR PETITIONER

Barbara McDowell (No. 414570)*
Jennifer Mezey (No. 462724)
Legal Aid Society of the District of Columbia
666 11th Street, N.W., Suite 800
Washington, D.C. 20001-04589
PH: (202) 628-1161
FX: (202) 727-2132

David Reiser (No. 367177)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
PH: (202) 778-1800

Counsel for Petitioner

* Presenting Oral Argument

STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties to this case are Vera M. Coto, the petitioner, and Citibank FSB, the respondent. The petitioner initially proceeded pro se before the Office of Administrative Hearings (OAH) and was subsequently represented by Tonya Love of the Claimant Advocacy Program, AFL-CIO. She is represented in this Court by Barbara McDowell and Jennifer Mezey of the Legal Aid Society of the District of Columbia and David Reiser of Zuckerman Spaeder LLP. No counsel entered an appearance for respondent either in OSH or, as of this date, in this Court.

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The Office of Administrative Hearings (OAH), which adjudicates challenges to decisions of District of Columbia agencies with respect to unemployment compensation and other safety-net benefits, promulgated a procedural rule that permitted litigants to file documents by fax and treated such documents as having been filed on the date of the fax, "provided that a hard copy is filed with the Clerk within three (3) business days of the transmission." 1 D.C.M.R. 2810.2. The questions presented are:

1. Whether, when a pro se litigant transmitted a hearing request by fax to OAH within the ten days provided by statute for appealing a denial of unemployment benefits, but neglected to submit the hard copy of the hearing request within three days, OAH was without subject-matter jurisdiction over the case.

2. Whether, provided that the pro se litigant's failure to file a hard copy of her hearing request did not deprive OAH of jurisdiction, the case should be remanded simply for an award of unemployment benefits, given that OAH has since eliminated the hard copy requirement and that the employer did not appear at the OAH hearing to attempt to meet its burden of proving "gross misconduct."

STATEMENT OF THE CASE

After she was discharged from her job at Citibank, Ms. Coto applied for unemployment compensation benefits with the Department of Employment Services (DOES). After a DOES claims examiner denied her claim for benefits, Ms. Coto, representing herself, sought review by OAH. Ms. Coto faxed a hearing request to OAH, as an OAH clerk told her she could do, within the ten days

allowed for filing an appeal. Ms. Coto was assured by an OAH clerk that the document had been received and that the case would be set for hearing. At the hearing, at which the employer did not appear, the administrative law judge raised the question whether the appeal was untimely because Ms. Coto had not complied with OAH Rule 2810.2, which treats a document as having been filed on the date it was faxed only if the party submits a hard copy of the document to OAH within three days. OAH subsequently dismissed Ms. Coto's appeal for lack of jurisdiction based solely on her failure to submit the hard copy of her faxed hearing request. OAH thus refused to reach the merits of Ms. Coto's case.

1. The Office of Administrative Hearings. The Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, vested OAH with authority over all "adjudicated cases under the jurisdiction of [specified] agencies," including unemployment compensation cases arising in DOES. Id., § 6(a) and (b) (codified at D.C. Code 2-1831.03(a) and (b)). The D.C. Council declared that its purpose in establishing OAH was to provide local residents and businesses with "a high-quality, fair, impartial, and efficient system of adjudicating cases at the administrative level." Id., § 2. The Council found that a unified administrative hearings tribunal such as OAH would "modernize and improve the quality of administrative adjudication in the District of Columbia" by, inter alia, "promoting due process," "bringing about an appropriate level of consistency and efficiency in the hearing process," and "expediting the fair and just conclusion of contested cases." Id., § 3(4).

In March 2004, as OAH prepared to start hearing cases, OAH promulgated its initial set of procedural rules. See 52 D.C. Reg. 2415 (March 5, 2004). Among them was Rule 2810.2, the provision at issue here, which stated:

> Unless otherwise provided by statute or these Rules, documents may be faxed to this administrative court in a manner prescribed by the Clerk, and any such document shall be considered filed as of the date the fax is received, provided that a hard copy is filed with the Clerk within three (3) business days of the transmission.

1 D.C.M.R. 2810.2. In June 2005, shortly after its dismissal of this case, OAH amended Rule 2810.2 to dispense with the hard copy requirement so long as the fax is complete and legible. See OAH, Notice of Emergency and Proposed Rulemaking, 52 D.C. Reg. 5951 (June 24, 2005)

2. Ms. Coto's Request For Unemployment Benefits Is Denied. In early 2005, Ms. Coto, a single mother with a teen-aged son, was discharged from her position with Citibank. She applied for unemployment compensation benefits. Without a source of income, Ms. Coto struggled to meet her family's basic living expenses, and was threatened with eviction from her home. See Amended Motion for Reconsideration 4 (Rec. 17).

On April 7, 2005, a DOES claims examiner issued a determination that Ms. Coto had been discharged for "gross misconduct" and, consequently, was ineligible for unemployment benefits. In a three-sentence ruling in support of that determination, the claims examiner stated that Ms. Coto had been discharged "for not following procedure," that Ms. Coto "knew this was not appropriate," and that the procedure "was consistently enforced by the employer." Determination of Claims Examiner 1 (Rec. 1).

3. Ms. Coto Seeks OAH Review. After Ms. Coto received the claims examiner's adverse decision, she telephoned DOES and asked how to appeal the decision. She was given the telephone number for OAH. Transcript of May 20, 2005 Hearing (5/20/05 Tr.) 7-8 (Rec. 13).

When Ms. Coto telephoned OAH, an OAH clerk told her that she could fax her hearing request to OAH and gave her the fax number. 5/20/05 Tr. 8. On April 11, 2005, Ms. Coto faxed to OAH a document that stated "I am appeal[ing] my unemployment benefits," and that provided the name and telephone number of a Citibank human relations officer. Appeal and Hearing Request (Rec. 2). Ms. Coto called OAH that day to ensure that the fax had been received. The OAH clerk said that the fax had been received and that Ms. Coto should simply wait for her hearing to be scheduled. The clerk did not tell Ms. Coto that that she needed to submit a hard copy of the faxed document or direct her to OAH's Rule 2810.2. 5/20/05 Tr. 8.

On April 21, 2005, OAH issued an Order directing Ms. Coto to file a copy of the claims examiner's decision and cautioning that her appeal could be dismissed if she did not comply promptly. Order (Rec. 3). Nothing in the Order suggested that Ms. Coto's appeal had not been timely filed. To the contrary, the Order stated that, "[o]n April 11, 2005 this administrative court received from you, the Appellant[,] an appeal of a Claims Examiner's Determination of unemployment insurance." Ibid.

On May 4, 2005, after Ms. Coto submitted the claims examiner's decision, OAH issued a Scheduling Order and Notice of In-Person Hearing, setting the

hearing for May 20, 2005. The Scheduling Order was served on Ms. Coto and Citibank at the address that appeared on the claims examiner's decision. The Order confirmed that OAH had received Ms. Coto's fax of April 11, 2005, and understood it as an appeal request, stating: "On April 11, 2005, Vera Coto filed a request for hearing to appeal a determination made by a Claims Examiner of the Department of Employment Services ('DOES') concerning unemployment compensation benefits." Although the Order concluded with the statement that the issues to be considered at the hearing would be "Jurisdiction, including Timeliness, and Misconduct," the Order did not explain what issue of "[j]urisdiction" or "[t]imeliness" might be presented by the case or suggest any deficiency in Ms. Coto's manner of filing the appeal. Scheduling Order (Rec. 4) (boldface omitted).

4. The OAH Hearing. On May 20, 2005, Administrative Law Judge Calonette MacDonald presided over the OAH hearing in Ms. Coto's case. Ms. Coto appeared at the hearing with her newly obtained counsel from the Claimant Advocacy Program, AFL-CIO. No representative of Citibank appeared at the hearing. At the outset of the hearing, the ALJ noted that the Scheduling Order had been sent to Citibank and had not been returned as undeliverable, and that Citibank had not contacted OAH to request a continuance or to indicate that it would not appear. The ALJ therefore stated that "[w]e're going to proceed in [Citibank's] absence." 5/20/05 Tr. 4.

The ALJ then identified the "question regarding jurisdiction" that she perceived in the case: "[I]f you appeal and you're filing your document by fax,

under Office of Administrative Rules, 2810.2, the faxed document must be sent to the office within three business days, the hard copy must be sent to the office, and the file does not contain a hard copy of the appeal form." 5/25/02 Tr. 6. The ALJ then permitted Ms. Coto to testify under oath about the circumstances of her filing of the hearing request.

Ms. Coto testified that no one had ever informed her of OAH Rule 2810.2 or its requirement that she provide a hard copy of her faxed appeal request to OAH. 5/20/05 Tr. 8. Furthermore, Ms. Coto testified that no one at OAH had ever asked her to provide a hard copy of that document -- including when she called to inquire whether her fax had been received and when OAH contacted her to request a copy of the claims examiner's decision. Id. at 8-12. When Ms. Coto was asked whether, "if someone had asked you to bring or mail in a hard copy of what you had faxed, could you have done so?," she replied, "Yes." And, when Ms. Coto was then asked, "Did anyone do so,?" she replied, "No." 5/25/05 Tr. 13-14. In the employer's absence, Ms. Coto elected not to present evidence on the issue of "misconduct." Id. at 14.

5. The Final Order. On May 23, 2005, OAH issued a final order dismissing Ms. Coto's appeal for lack of subject-matter jurisdiction because Ms. Coto had not submitted a hard copy of her appeal document pursuant to Rule 2810.2. The ALJ found that Ms. Coto had submitted her faxed hearing request to OAH within the ten days specified in the Unemployment Compensation Act for filing an appeal. Final Order 3 (Rec. 14). The ALJ also found that an OAH clerk had told Ms. Coto she could submit the hearing request by fax, that Ms. Coto had

called to confirm receipt of the fax, and that the clerk had not informed Ms. Coto of the need to provide a hard copy. Ibid. The ALJ further found that none of the subsequent orders from OAH directed Ms. Coto to file a hard copy of her hearing request. Ibid.

The ALJ nonetheless found that Ms. Coto's failure to provide OAH with a hard copy of the hearing request within three days of its transmission by fax deprived OAH of jurisdiction to hear the case. Final Order 6. In so ruling, the ALJ relied on the general principle that "[t]he ten-day period provided for agency appeals under the [Unemployment Compensation] Act is jurisdictional" -- a principle that had been announced in cases in which a party had not filed an appeal at all within the ten-day period, not when a party had filed an appeal in a manner that did not fully comply with a procedural rule. Ibid. The ALJ also observed that the hard copy requirement served to "avoid the situation where a party claims to have transmitted a fax but none was received," id. at 4 -- a situation that was not, of course, presented by this case, given the ALJ's finding that OAH had received Ms. Coto's hearing request by fax in a timely manner.

The ALJ noted that "a court may deem an untimely appeal timely" in certain "unique circumstances," such as when a party acted in "'reasonable reliance on some affirmative, misleading action of a trial court.'" Final Order 5 (quoting Frazier v. Underdue-Frazier, 803 A.2d 443, 444 (D.C. 2002)). The ALJ ruled that the "unique circumstances" exception had no application to Ms. Coto's case, however, because she claimed to have relied only on misinformation given by "nonjudicial court personnel." Ibid.

6. Requests for Reconsideration. After learning that OAH had amended Rule 2810.2 to eliminate the hard copy requirement, Ms. Coto moved for reconsideration. Amended Motion for Reconsideration (Rec. 17). The ALJ declined to apply the amended rule to Ms. Coto's case. Order Denying Motion for Relief and Motion for Reconsideration (Rec. 18). Although the ALJ noted that "procedural rule changes can be applied retroactively to pending appeals in certain circumstances," the ALJ ruled that Ms. Coto's appeal was no longer "pending," notwithstanding the timeliness of her pending motion for reconsideration. Id. at 6. The ALJ further observed that "the amended procedural rule does not state or imply that it is to be applied retroactively to closed cases." Ibid.

A subsequent motion for reconsideration was also denied. Order Denying Motion for Relief from Final Order (Rec. 24).[1]

SUMMARY OF THE ARGUMENT

This Court and other courts have enforced the "strong judicial and societal preference for the resolution of disputes on their merits rather than by default," Moore Energy Resources, Inc. v. Public Service Comm'n, 785 A.2d 300, 305 (D.C. 2001), by exercising jurisdiction over cases in which parties gave timely notice of their intent to appeal, but did not comply with a procedural rule specifying the form or content of that notice. As the Supreme Court has observed, "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate

[1] Ms. Coto filed a petition for review from the second order denying reconsideration. See Coto v. Citibank, No. 05-AA-1031. Ms. Coto's motion to consolidate the two matters has not been acted upon by the Court as of the date of this submission.

court." Becker v. Montgomery, 532 U.S. 757, 767 (2001). This Court has thus held, for example, that a failure to pay the filing fee at the time of giving notice, or to file the requisite number of copies of the notice, or to sign the notice is not the sort of error that deprives the Court of jurisdiction over the appeal.

OAH's decision in this case reflects a contrary preference: an insistence on strict compliance with technical filing rules, on penalty of dismissal of an appeal as jurisdictionally barred. Here, within the statutorily provided ten days for seeking review of a claims examiner's denial of unemployment benefits, Ms. Coto faxed an appeal request to OAH. As OAH has effectively conceded, that document would have been fully adequate to trigger the appeal process if, but only if, Ms. Coto had submitted a hard copy of the faxed document within three days, as required by OAH's Rule 2810.2. Because Ms. Coto omitted to comply with that hard copy rule -- an omission that OAH gave Ms. Coto no opportunity to correct -- OAH held that her appeal was untimely, and thus that OAH lacked jurisdiction over the appeal.

OAH erred in treating its hard copy rule as jurisdictional in character. Only a statutory command governing the time for filing an appeal -- or, conceivably, other matters equally central to a reviewing court's exercise of authority -- is properly characterized as jurisdictional. A court's own rules governing the manner of filing are not. Ms. Coto satisfied the only applicable jurisdictional requirement by submitting her appeal by fax to OAH within the ten-day filing period provided by statute. The rule that a party submit the hard copy of a faxed document is analogous to the technical filing rules that this Court and

other courts have held not to implicate their subject-matter jurisdiction. The understanding that such rules are not jurisdictional, so that strict compliance may be excused, comports with the directive that modern procedural rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action," a directive that appears in OAH's Rules as well. It also comports with fundamental notions of due process.

OAH's treatment of its hard copy rule as jurisdictional was especially inappropriate in light of OAH's distinctive docket and clientele. Many of the cases before OAH, including the present case, involve claims for safety-net benefits, such as unemployment compensation, Food Stamps, and Medicaid. It is inconsistent with the remedial purposes of such program to preclude a party from challenging a denial or termination of benefits for failure to comply with a technical filing rule. Moreover, like Ms. Coto, many of the parties who appear before OAH in such cases are too poor to afford counsel to represent them; they may also face various obstacles in attempting to represent themselves effectively, including limited literacy, limited English proficiency, and physical or mental disability. Because due process requires that procedures be "tailored to the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S. 254, 270 (1970), OAH should not penalize persons seeking safety-net benefits with the severe sanction of dismissal of their case merely because they have not complied with procedural rules such as the one at issue here. There is an additional unfairness in OAH's dismissal of this case: Ms. Coto contacted OAH about how to file her appeal, was assured that her faxed

filing was sufficient, and did not learn of any requirement to submit the hard copy until it was too late.

Finally, to the extent that this Court determines that OAH erred in treating Ms. Coto's non-compliance with the hard copy requirement as a jurisdictional defect, the appropriate remedy would be a remand for an award of unemployment compensation. Because OAH has amended its rules to dispense with the hard copy rule, thus recognizing that compliance with the rule serves no essential purpose, there would be no need for OAH to consider on remand whether to excuse Ms. Coto's non-compliance with the rule. And, because the employer failed to appear at the OAH hearing, and thus did not meet its burden of establishing Ms. Coto's disentitlement to unemployment benefits, the employer forfeited the opportunity to do so.

ARGUMENT

I. OAH WAS NOT DEPRIVED OF JURISDICTION OVER THIS CASE WHEN MS. COTO FAILED TO SUBMIT THE ORIGINAL OF HER TIMELY FAXED HEARING REQUEST

The administrative law judge erred in holding that OAH lacked jurisdiction over Ms. Coto's appeal when, although she submitted her hearing request to OAH by fax within the time allowed for filing appeals, she did not submit the hard copy of that request within three days. Final Order 7. Nothing in the governing statute makes an appellant's filing of the original of an otherwise timely hearing request a jurisdictional prerequisite to OAH's adjudicating the case. OAH's (since abrogated) rule that an appellant must file the hard copy of a timely faxed hearing request is analogous to other procedural rules relating to

the filing of appeals that the Supreme Court, this Court, and other courts have held are not jurisdictional in nature. OAH's own rules confirm that procedural requirements such as the one that Ms. Coto violated do not limit OAH's jurisdiction. Treating non-compliance with such requirements as an absolute jurisdictional bar to an administrative appeal is also contrary to the directive that OAH's rules (like the counterpart federal and local rules) be applied so as "to secure the just, speedy, and inexpensive determination of every case." 1 D.C.M.R. 2800.3. OAH's insistence on strict compliance with technical filing rules is especially inappropriate given the pro se status of many parties appearing before OAH in cases involving unemployment compensation and other public benefits, the remedial purposes of such benefit programs, and OAH's failure to advise persons in Ms. Coto's position of the need to comply with such rules.

A. Nothing In The Governing Statute Or Regulations Reflects Any Intent That The Filing Of The Hard Copy Of A Timely Faxed Hearing Request Be A Jurisdictional Prerequisite To An Appeal

Ms. Coto filed a notice of appeal that unambiguously conveyed her intention to seek OAH review and that provided all of the information that OAH needed to initiate the review process. That notice satisfied the only statutory requirement for seeing administrative review of the denial of unemployment compensation benefits: It was submitted within ten days of the adverse decision of the Department of Employment Services (DOES).

Section 51-111(b) of the D.C. Code addresses first-level administrative review of determinations by DOES claims examiners with respect to unemployment compensation. It states that a claims examiner's "determination shall be

final within 10 days after the mailing of notice thereof to the party's last-known address or in the absence of such mailing, within 10 days of actual delivery of such notice." D.C. Code 51-111(b). The implementing regulation promulgated by DOES states that, "[i]n accordance with [Section 51-111(b)], any party may file an appeal from a determination within ten (10) calendar days after the mailing of notice of the determination to the party's last known address or within ten (10) calendar days of actual delivery of the notice." 7 D.C.M.R. 306.1. Neither the statute nor the regulation requires that an appeal be filed in any particular manner -- for example, in person or by mail, rather than by fax, or by a document that contains an original signature. OAH did not suggest otherwise.

The ALJ relied on this Court's decisions stating that the "ten day period for . . . appeals under the Unemployment Compensation Act . . . is jurisdictional, and failure to file within the period prescribed divests [an administrative tribunal] of jurisdiction to hear the appeal." Final Order 6 (quoting Lundahl v. D.C. Dep't of Employment Servs., 596 A.2d 1001, 1002 (D.C. 1991)). That reliance was misplaced. The only jurisdictional requirement recognized by this Court is that a party file the appeal within the time specified by law. See, e.g., Zollicoffer v. D.C. Public Schools, 735 A.2d 944, 945-946 (D.C. 1999) ("The time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."); Barnett v. D.C. Dep't of Employment Servs., 491 A.2d 1156, 1159 (D.C. 1985) ("[W]e have held that the appeals periods for intra-agency reviews are 'jurisdictional,' in the sense that the agency may decline to review any petition that is not filed in a timely fash-

ion."). This Court has not suggested, much less held, that an administrative appeal is jurisdictionally barred if it fails to satisfy additional procedural requirements associated with filing. As discussed below, moreover, this Court and other courts do not treat a party's failure to comply with various procedural rules relating to the filing of a notice of appeal as a jurisdictional bar to review on the merits, so long as a party has sought review within the time required by law.

B. OAH's Hard Copy Rule Is Not The Sort Of Requirement That This Court And Other Courts Have Held To Be Jurisdictional

The ALJ's jurisdictional ruling actually rested not on the Unemployment Compensation Act or its implementing regulations, but instead on OAH's Rule 2810.2, titled "Filing of Papers; Certificate of Service Provided." Final Order 3-4. The Rule, as it then existed, stated that "documents may be faxed to this administrative court in a manner prescribed by the Clerk, and any such document shall be considered filed as of the date the fax is received, provided that a hard copy is filed with the Clerk within three (3) business days of the transmission." 1 D.C.M.R. 2810.2.

Nothing in the text of Rule 2810.2 compels the conclusion that any failure to supplement a fax filing with the hard copy is an error of jurisdictional proportions. After all, the Rule is directed at all "papers" or "documents," the late filing of which is ordinarily excusable, and not specifically at papers invoking OAH's jurisdiction. Especially in view of OAH's mission, a significant part of which is the adjudication of claims by unrepresented parties involving safety-net benefits in accordance with due process standards, the Rule's drafters should

not be assumed to have intended to create a trap of the unwary. No other generally available decision of OAH has construed the Rule to bar the appeal of a party who submits a timely fax appeal but neglects to follow up with the hard copy.[2] The ALJ's choice to treat Ms. Coto's failure to supply the hard copy as depriving OAH of jurisdiction over her appeal is thus without any firm foundation in statute, regulations, or case law, even OAH's own.

As the Supreme Court has recognized, a tribunal's own rules, even timing rules, are not "jurisdictional" in the strict sense of that term. See, e.g., Schacht v. United States, 398 U.S. 58, 64 (1970) (refusing to accept the view that the time limit contained in the Court's Rule 22 for filing petitions for certiorari in criminal cases "is jurisdictional and cannot be waived by the Court," and observing that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional");accord, e.g., Kontrick v. Ryan, 540 U S. 443, 453-454 (2004). Consistent with that understanding, OAH's Rule 2800.2, which is one of several provisions addressed to the "scope" of the Rules, states that "[t]hese Rules shall not be construed to extend or limit the jurisdiction of this administrative court." 1 D.C.M.R. 2800.2 (emphasis added). Yet, that is precisely what the ALJ did in this case.

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[2] In the only generally available decision involving a violation of the "hard copy" requirement of Rule 2180.2, OAH gave the respondent the opportunity to supplement the record to demonstrate good cause for its failure to file the hard copy of its answer within three days of its transmission by fax. See D.C. Dep't of Transp. v. D.C. Water & Sewer Auth., 2004 D.C. Off. Adj. Hear. LEXIS 50 (Sept. 27, 2004). Although the ALJ in this case stated that two other decisions on the subject "are being transmitted to LEXIS . . . for publication in the District of Columbia Office of Administrative Hearings database" (Final Order 4. n 3.), the decisions were not available on that database as of this filing.

1. As Long As A Party Gives Notice Of An Intent To Appeal Within The Prescribed Period, The Appeal Is Timely For Jurisdictional Purposes, Even If The Party Has Deviated From A Procedural Rule Governing The Form Or Manner Of Notice

The Supreme Court, this Court, and other appellate courts have repeatedly exercised jurisdiction over cases in which the appeal was not filed in full conformity with the procedural rules. As a general matter, so long as notice of the appeal was given within the time specified by law, the appeal is not jurisdictionally barred -- even if it the notice was filed in the wrong court, or without the necessary filing fee, or without the required signature of counsel, or otherwise in violation of a rule specifying the form or procedure for filing.

That approach has been understood to comport with the fundamental instruction that the federal and local rules of procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." E.g., Fed. R. Civ. P. 1; D.C. R. Civ. P. 1. The same instruction appears in OAH's own rules. See 1 D.C.M.R. 2800.3 ("These Rules shall be construed and administered to secure the just, speedy and inexpensive determination of every case."). Such an approach also comports with the Due Process Clause's "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (quoting Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958)).

a. The Supreme Court has not hesitated to reverse when a federal circuit court has applied technical filing rules so rigidly as to deny appellants the opportunity to litigate their case on the merits. In Parissi v. Telechron, Inc., 349 U.S. 46 (1955), for example, a party had filed a timely notice of appeal, but had "inadvertently failed to include the $5 fee required by 28 U.S.C. § 1917 to be paid 'upon the filing' of a notice of appeal." Although the Second Circuit dismissed the appeal as untimely, the Supreme Court directed that the appeal be reinstated. The Court explained that "the Clerk's receipt of the notice of appeal within the 30-day period satisfied the requirements of [28 U.S.C.] § 2107" -- i.e., that a notice of appeal must be filed within 30 days of the judgment, order, or decree at issue -- and that "untimely payment of the § 1917 fee did not vitiate the validity of petitioner's notice of appeal." Id. at 47.

Similarly, in Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court held that a litigant's defective notices of appeal were sufficient to bring up the underlying judgment for review -- even though the first notice was premature, because it was filed while a motion for relief under Federal Rule of Civil Procedure 59(e) remained pending, and the second notice identified only the denial of the Rule 59(e) motion and not the underlying judgment as the subject of the appeal. The Court observed that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." Id. at 181.

And, in Smith v. Barry, 502 U.S. 244 (1992), the Court reversed the dismissal of appeal on jurisdictional grounds, when the pro se appellant had not

filed a valid notice of appeal, but had filed his merits brief within the time for filing the notice. Observing that the rules governing the content of notices of appeal are "liberally construed," the Court explained that the appellant's brief could satisfy the notice requirement if it contained the information required by the rules, and thus was "the 'functional equivalent' of [a] formal notice of appeal." Id. at 248. The Court remanded for consideration of whether the brief contained the necessary information. Id. at 250.

The Supreme Court has since cited Smith v. Barry and Foman v. Davis as illustrative of the more general proposition that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." Becker v. Montgomery, 532 U.S. 757, 767 (2001) (holding that a pro se litigant's failure to sign the notice of appeal did not deprive the court of appeals of jurisdiction over the case).

b. The decisions of this Court are in accord. Expressly following Parissi, the Court denied a motion to dismiss an appeal as untimely when the appellants not only failed to include the required filing fee with the notice of appeal, but also failed to provide the clerk with the required number of copies of the notice. Montgomery v. Muldon, 578 A.2d 176, 177 (D.C. 1990). With specific reference to the requirement that an appellant file multiple copies of the notice of appeal, the Court observed that, "[w]hile we recognize that this added filing requirement is essential to the processing of an appeal, it is not a jurisdictional prerequisite." Ibid.

In Perry v. Sera, 623 A.2d 1210, 1215 (D.C. 1993), a case that resembled Foman, the Court held that the appellant's designation of a non-appealable order in the notice of appeal was not a jurisdictional error, when the notice otherwise made clear that the appellant was seeking review of the underlying judgment as well. The Court observed that it "has never indicated that an appellant must always be impeccably precise in meeting D.C. App. R. 3(a)'s requirement to designate the judgment or order appealed from in order for jurisdiction to exist." Ibid.

More recently, in Moore Energy Resources, Inc. v. Public Service Comm'n, 785 A.2d 300 (D.C. 2001), the Court held that a petition for review filed on behalf of a corporation was not jurisdictionally defective when, contrary to Rule 15(a), the petition was signed by the corporation's principal rather than by its counsel. "While compliance with the signature requirement of Rule 15(a) may appear to be mandatory," the Court observed, "certain requirements for filing a notice of appeal or petition for review are not jurisdictional prerequisites." Id. at 304. "Indeed," added the Court, "the only provision under Rule 15 that this court has thus far held to be jurisdictional is the timing requirement of subsection (a)." Id. at 305. The Court explained that allowing a party the opportunity to cure this sort of deficiency in its filing served the "strong judicial and societal preference for the resolution of disputes on their merits rather than by default." Ibid. (internal quotation marks omitted).[3]

[3] Accord, e.g., In re J.W., 763 A.2d 1129, 1131-1132 (D.C. 2000) (holding, in an appeal from a ruling suppressing evidence, that the government's failure to file a timely certification that "the appeal is not taken for purposes of delay and the

c. A number of provisions of this Court's rules and the federal rules reinforce that preference in connection with defects in the filing of a notice of appeal. The rules provide that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." D.C. App. R. 3(a)(2); accord Fed. R. App. P. 3(a)(2). The rules provide that "[a]n appeal may not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." D.C. App. R. 3(c)(4); accord Fed. R. App. P. 3(c)(4). Although the rules state that a notice of appeal will be stricken if it is not signed by counsel or by an individual who is proceeding pro se, the rules afford the opportunity to correct the omission "after [its] being called to the attention of counsel or the party." D.C. App. R. 3(c)(2). The rules also provide for a prematurely filed notice of appeal to be treated as having been filed after the entry of judgment. D.C. App. R. 4(a)(2) and (b)(2); accord Fed. R. App. P. 4(a)(2) and (b)(2). And the rules provide that, if the appellant erroneously files the notice in the court of appeals, the notice will be considered to have been filed in the trial court on the same day. D.C. App. R. 4(e); accord Fed. R. App. P. 4(d).

As a leading treatise has explained, "[t]he great hallmark" of such rules is that "a possibly meritorious appeal is not denied its day in court because the ap-

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evidence is a substantial proof of the charge pending against the defendant," D.C. Code 23-104(a)(1), was not a jurisdictional defect that prevented the Court from reaching the merits); Myrick v. D.C. Bd. of Zoning Adjustment, 577 A.2d 757, 762 n.11 (D.C. 1990) (holding that the petitioner's failure to serve the intervenors with the petition for review in a timely manner in accordance with Rule 15(e) did not deprive the Court of jurisdiction over the case).

pellant -- or more often the appellant's lawyer -- has left some i undotted or some t uncrossed." 16A Charles A. Wright et al., Federal Practice and Procedure, § 3949.6, at 84 (3d ed. 1999). In accordance with those rules, therefore, "[m]inor irregularities in complying with the filing requirements are generally disregarded in the interests of substantial justice, at least where the irregularity does not prejudice other parties' rights and does not reflect bad faith or dilatoriness." Id. at 86; accord, e.g., Alley v. Dodge Hotel, 163 U.S. App. D.C. 320, 501 F.2d 880, 884 (D.C. Cir. 1974) ("We think a filing requirement is met by a positive, substantial and unequivocal effort to discharge it, and that innocuous irregularities incidental to such an endeavor should be disregarded when considerations of fairness dictate that course.").

2. The Rule That A Party Submit The Original Of A Faxed Document Is Analogous To Other Procedural Filing Rules That Have Been Recognized Not To Be Jurisdictional

The provision of Rule 2810.2 that Ms. Coto violated -- the requirement that a party submit the original of a faxed document within three days -- resembles in all relevant respects the procedural rules that have been held not to be jurisdictional. While such rules may assist a court in the orderly transaction of its business, they are not central to the court's authority to adjudicate a case -- as distinguished, for example, from deadlines imposed by the legislature for seeking review of a lower court's or an agency's decision. See generally Schacht, 398 U.S. at 64; see also, e.g., Montgomery, 578 A.2d at 177 (observing that the requirement that an appellant file multiple copies of a notice of appeal, while "essential to the processing of an appeal," "is not a jurisdictional prereq-

uisite"). A court's jurisdiction is no more implicated by a party's failure to submit the original of a timely faxed appeal request, as in this case, than by a party's failure to file multiple copies of a notice of appeal, or to include the filing fee with the notice, or to have its counsel sign the notice, or to comply with other technical filing requirements, as in the cases discussed above. All of those omissions are ones that a court can, and should, give parties a reasonable opportunity to correct, consistent with the "strong judicial and societal preference for the resolution of disputes on their merits rather than by default." Moore Energy Resources, 785 A.2d at 305.[4]

A similar issue of faxed notice was addressed in United States v. Clay, 925 F.2d 299 (9th Cir. 1991). There, on the last day for filing a notice of appeal, the defendant's counsel transmitted the notice of appeal to the court clerk by fax, although no rule authorized fax filings. The court of appeals held that the appeal was timely filed. The court explained that "[a]n imperfect notice of appeal may be sufficient to show the party intended to appeal, despite an irregularity in the form or procedure for filing," and that "[i]n such a case we have discretion to disregard the irregularity." Id. at 301. The court went on to hold that the fax transmission in that case "was the functional equivalent of filing no-

[4] In contrast to the rules at issue in cases such as Montgomery, the "hard copy" requirement is not "essential to processing of an appeal." 578 A.2d at 177. As discussed below, shortly after OAH dismissed this case based on Ms. Coto's failure to comply with that provision, OAH amended Rule 2810.2 to dispense with the provision so long as the fax is complete and legible. Moreover, in various categories of cases involving safety-net benefits administered by the Department of Human Services, OAH allows a hearing request to be made orally, in person or by telephone. 1 D.C.M.R. 2805.9. (The current OAH rules are available at http://oah.dc.gov.)

tice of appeal," because it "contained all of the information required by Federal Rule of Appellate Procedure 3(c)" and provided "notice that [the defendant] intended to file the appeal." Ibid. In light of those circumstances, the court held that the requirements for filing a notice of appeal were satisfied, and "[w]e have jurisdiction over the appeal." Ibid.; see 16A Charles A. Wright et al., Federal Practice and Procedure, § 3949.1, at 39 (citing Clay as demonstrating that federal courts are permitted "to disregard informality of notice").

Here, therefore, Ms. Coto satisfied the only applicable jurisdictional requirement when she transmitted her hearing request by fax to OAH within the ten-day appeal period prescribed by the Unemployment Compensation Act and regulations. In so doing, Ms. Coto gave clear notice of her intent to appeal the claims examiner's decision. Indeed, the faxed document provided OAH with the identical information that it would have had if Ms. Coto had, in accordance with Rule 2810, delivered the document to OAH within three days. No prejudice could have resulted to OAH or the employer from Ms. Coto's failure to do so. OAH erred in treating Ms. Coto's non-compliance with the hard copy requirement as precluding its exercise of jurisdiction over her appeal.

C. OAH's Insistence On Strict Compliance With Technical Filing Rules Is Especially Unwarranted In View Of Its Large Docket Of Cases Involving Pro Se Parties Seeking Safety-Net Benefits

The understanding, reflected in the cases discussed above, that litigants should not be denied their day in court because of "innocuous irregularities" in their compliance with filing requirements, Alley, 501 F.21d at 884, has particular resonance when the tribunal is one specifically designed to hear cases in

which pro se litigants are challenging agency actions with respect to safety-net benefits. OAH is such a tribunal.

1. OAH was established to adjudicate appeals arising from specified agencies of the District of Columbia government, including the Departments of Human Services, Health, and Employment Services. D.C. Code 2-1831.03. A substantial portion of OAH's cases involve those agencies' denials or terminations of safety-net benefits, including unemployment compensation as in this case, as well as Temporary Assistance for Needy Families (TANF), Medicaid, Food Stamps, emergency shelter, and similar benefits. OAH's refusal to consider cases involving such benefits on the merits, merely because a claimant has not fully complied with technical filing rules, is inconsistent with the remedial purposes of such statutes. See Barnett, 491 A.2d at 1164 (noting the remedial nature of the Unemployment Compensation Act); accord, e.g., Lopez v. Espy, 83 F.3d 1095, 1101 (9th Cir. 1996) (Food Stamp Act); Detsel v. Sullivan, 895 F.2d 58, 62 (2d Cir. 1990) (Medicaid Act).

In analogous circumstances, federal appellate courts have recognized that the remedial nature of Title VII militates in favor of allowing a case to go forward despite the plaintiff's failure to comply with technical filing requirements. See, e.g., Gilardi v. Schroeder, 833 F.2d 1226, 1231 (7th Cir. 1987) (finding

that a plaintiff had timely filed her lawsuit even though her initial filing was not accepted because she did not file the requisite number of copies of her complaint, did not put the title of the case on her motion for appointment of counsel, and did not have her in forma pauperis application notarized, and her corrected filing was not made until nine days after the filing period had expired); Loya v. Desert Sands Unified School Dist., 721 F.2d 279, 280-281 (9th Cir. 1983) (reversing a dismissal on jurisdictional grounds when the plaintiff's initial filing was not accepted because it was on the wrong size paper and the plaintiff's corrected filing was not submitted until after the filing period had expired; holding that, for statute of limitations purposes, a complaint is timely when it arrives in "the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules").

2. As this Court has recognized, moreover, "resort to technicalities to foreclose recourse to judicial processes is particularly inappropriate" in the unemployment compensation scheme and other statutory schemes "in which laymen, unassisted by trained lawyers, initiate the process." Barnett, 491 A.2d at 1164; cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (observing that the pro se status of many persons asserting claims under Title VII of the Civil Rights Act of 1964 provided particular reason to conclude that administrative exhaustion was not a jurisdictional prerequisite); Goodman v. D.C. Rental Housing Comm'n, 573 A.2d 1293, 1299 (D.C. 1990) (stating that "it is appropriate for this court, in resolving procedural issues with respect to which reason-

able people might differ, to keep in mind the remedial character of the statute and the important role which lay litigants play in its enforcement").

Ultimately, the resort to technicalities in such cases may be not only "inappropriate," but also unconstitutional. The Due Process Clause requires that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 270 (1970); see Gray Panthers v. Schweiker, 652 F.2d 146, 166 (D.C. Cir. 1980) (explaining that the adequacy of process is determined "with reference to the characteristics of the group who have to use it"). Thus, the Supreme Court has recognized that procedural rules that may constitutionally be imposed upon other litigants, such as rules requiring "[w]ritten submissions," may be an "unrealistic," and thus unconstitutional, if imposed on "most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance." Goldberg, 397 U.S. at 270.[6] While claimants in unemployment compensation cases before OAH may vary widely in their "capacities and circumstances," claimants in cases involving other safety-net benefits disproportionately are persons with low literacy, limited English profi-

[6] See, e.g., LaBaron v. United States, 989 F.2d 425, 428 (10th Cir. 1993) (holding that due process required that Native Americans challenging termination of federal health services be afforded the opportunity to "state [their] position orally in a setting that insures fairness"); Gray Panthers, 652 F.2d at 166-173 (holding that, especially in view of "the significant percentage of Medicare claimants disadvantaged by disability, illness, and poverty," claimants had a due process right to "simplified, streamlined, informal oral procedures" to challenge denials of Medicare coverage involving less than $100).

ciency, limited access to transportation, and physical or mental disabilities.[7] Any of those factors may well impair a claimant's ability to request a hearing in full compliance with technical filing rules such as the one at issue here.

3. To deny an opportunity to challenge a denial of safety-net benefits because of such technical non-compliance is also inconsistent with the purposes of OAH's organic statute. OAH was intended to be "a high-quality, fair, impartial, and efficient system of adjudicating cases at the administrative level" -- one that would, among other things, "promot[e] due process" and "expedit[e] the fair and just conclusion of contested cases." Office of Administrative Hearings Establishment Act of 2001, Law No. 14-76, §§ 2, 3(4). Indeed, in transmitting the draft OAH legislation to the Council, the Mayor expressly recognized concerns that the deficiencies in the existing administrative adjudication system had resulted in "the apparent, if not the actual, denial of our citizens' fundamental constitutional rights to due process." Letter of Mayor Williams to Council Chair Cropp 1-2 (May 1, 2001) (citing Goldberg and Mathews v. Eldridge, 424 U.S. 319 (1976)). It is not "fair," "just," or consistent with "due process" for OAH to refuse jurisdiction over a case merely because a claimant, after having given clear notice by fax that she was requesting a hearing, then unwittingly neglected to submit the hard copy of her hearing request.

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[7] See, e.g., Gregory Acs & Pamela Loprest, Urban Institute, A Study of the District of Columbia's TANF Caseload, at iii, 17, 32 (Oct. 2003); David Wittenburg & Melissa Favreault, Urban Institute, Safety Net or Tangled Web? An Overview of Programs and Services for Adults with Disabilities, at 3 (Nov. 2003).

4. The dismissal of this case was particularly unfair because OAH made no attempt to advise Ms. Coto that her fax filing would be insufficient unless she also filed the hard copy within three days. If anything, OAH treated the case in a manner that would cause a person in Ms. Coto's position reasonably to believe that she had adequately initiated the appeal process. According to the ALJ's factual findings, when Ms Coto "called a clerk in this administrative court to see if her appeal document had been received," the clerk "informed [Ms. Coto] that the document had been received," but "did not inform her of the requirement to file a hard copy of the appeal within three business days of the faxed transmission of the appeal." Final Order 2-3; see id. at 4.[8] In addition, the ALJ found that "[n]one of the orders" that OAH subsequently sent to Ms. Coto -- including the order scheduling the case for hearing -- "requested or required [Ms. Coto] to file the hard copy of her appeal." Id. at 3; cf. ibid. (noting

[8] The ALJ faulted Ms. Coto for relying on the information that she received from the OAH clerk, noting that the Notice of Appeal Rights that Ms. Coto received from DOES, which stated that an appeal could be filed with OAH in person or by mail, also stated that "[n]o one is authorized to give you different instructions for filing a hearing request." See, e.g., Final Order 6 ("When Appellant took it upon herself to file her appeal in a manner not prescribed by the Notice of Appeal Rights, she became responsible for ensuring that she timely filed her appeal in a manner that was not inconsistent with the rules of this administrative court."); see also Determination of Claims Examiner 2. The ALJ's reasoning is incorrect. In the first place, as should have been apparent to the ALJ, the Notice of Appeal Rights was inaccurate, because it did not inform parties of their right to file an appeal by fax, as OAH allowed. Moreover, especially in a remedial scheme used by unrepresented parties, some of whom may have limited proficiency with written English, it is unrealistic to expect that parties will not seek oral guidance from OAH's clerks. Since, for all the record here reflects, OAH allowed its clerks to dispense advice on how to file an appeal, and did not adequately monitor that advice to assure that it was correct, the ALJ's faulting Ms. Coto for relying on such advice was unjustified.

that OAH requested other materials from Ms. Coto before the hearing). Ms. Coto testified at that hearing that she was not otherwise aware of Rule 2810.2. See 5/20/05 Tr. 7. Nor is there any indication that either OAH or DOES provided Ms. Coto with a copy of the relevant OAH Rules. Although Ms. Coto answered affirmatively at the hearing when asked "if someone had asked you to bring in or mail in a hard copy of what you had faxed, could you have done so?," the ALJ never requested the hard copy.[9] And, even after OAH eliminated

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[9] The ALJ also faulted Ms. Coto for not attempting to file the original of her appeal document at the hearing on May 20, 2005, or at some point thereafter. See, e.g., Final Order 3 ("No hard copy of [Ms. Coto's] appeal was ever filed with this administrative court."); Order Denying Motion for Relief from Final Order 3 ("[I]t is unfortunate that neither [Ms. Coto] nor her counsel offered the hard copy of the faxed request for hearing at the time of the hearing or before the appeal was dismissed."). Not only did OAH -- including the ALJ who presided over the case -- never request the hard copy, but the entire thrust of OAH's "jurisdictional" ruling is that a party's non-compliance with Rule 2810.2's hard copy requirement cannot be cured more than three days after the faxed submission. In such circumstances, Ms. Coto cannot be faulted for failing to appreciate the need to perform a task that OAH did not request and that would have been useless under OAH's own rationale in the case.

Ms. Coto and her then-counsel recall that they did, in fact, proffer the hard copy of the appeal document at the time of the May 20, 2005, hearing. But the transcript does not reflect that any such proffer was made on the record. The ALJ indicated in her Order Denying Motion for Relief from Final Order that she did not recall any such proffer. In any event, if there was any prospect that Ms. Coto could have cured her technical violation of Rule 2810.2 by belatedly filing the hard copy, the ALJ should have affirmatively requested that she do so. After all, this Court and other courts routinely inform litigants that they have omitted to comply with similar filing rules and afford then an opportunity to correct the omission. See, e.g., Moore Energy, 785 A.2d at 304 (noting that, when a corporation's petition for review was not signed by counsel as required by Rule 15, "this court ordered Moore Energy to identify its counsel," and "Moore Energy filed a signed notice by counsel in response to the court's order"); Montgomery, 578 A.2d at 176-177 (noting that the clerk of the court notified the appellants of their failure to pay the filing fee and to submit the requisite number of copies of the notice of appeal).

Rule 2810.2's hard copy requirement only weeks after Ms. Coto's case (and while a timely request for reconsideration was pending), OAH refused to apply the new rule to her case. See note 9, infra.

Almost certainly, if Ms. Coto had omitted to comply with a comparable technical rule in filing a timely notice of appeal in the Superior Court or in federal district court, the appeal would not have been dismissed on jurisdictional grounds and she would have been afforded an opportunity to correct the omission (or the omission would simply have been excused). If anything, given the distinctive characteristics of its docket and its clientele, OAH should be more accommodating of a party's failure to comply with technical filing rules. Instead, however, OAH insisted upon strict compliance with Rule 2810.2's hard copy requirement -- the sort of requirement that courts have not treated as jurisdictional -- and thereby denied Ms. Coto any hearing on the merits of her unemployment claim. That was error.

II. THIS CASE SHOULD BE REMANDED FOR ENTRY OF AN ORDER SUSTAINING MS. COTO'S CHALLENGE TO THE DENIAL OF UNEMPLOYMENT BENEFITS

At a minimum, when a lower court is held to have erred in ruling that an appellant's violation of a technical filing requirement deprived it of jurisdiction over the case, the appellant is entitled to a remand for the lower court to determine whether the violation should be excused and, if so, to adjudicate the case on the merits. See, e.g., Smith, 502 U.S. at 249. There is no reason for OAH to conduct either inquiry here. OAH's elimination of Rule 2810.2's hard copy requirement for fax filings such as Ms. Coto's is dispositive of the first inquiry.

The employer's failure to appear at the OAH hearing is dispositive of the second.

First, OAH would not be justified in refusing to excuse Ms. Coto's failure to supply the hard copy of her faxed hearing request, given that OAH has since dispensed with Rule 2810.2's hard copy requirement, except when the fax is illegible or incomplete. On June 16, 2005, less than a month after OAH issued the Final Order in this case, OAH amended Rule 2810.2 to read as follows:

> Unless otherwise provided by statute or these Rules, documents may be faxed to this administrative court in a manner prescribed by the Clerk, and such documents shall be considered filed as of the date the fax is received by the Clerk. Any incomplete or illegible fax will not be considered unless a hard copy of the fax is filed, or a complete and legible fax is received, within three (3) business days of the first transmission. Upon motion, the presiding Administrative Law Judge may extend this time.

OAH, Notice of Emergency and Proposed Rulemaking, 52 D.C. Reg. 5951 (June 24, 2005). The Notice described the amendments, including the amendments to Rule 2810.2, as "important and necessary procedural reforms," whose adoption on an emergency basis was "necessary to protect public health, safety and welfare." Ibid.

In this context, OAH could not reasonably refuse to excuse Ms. Coto from compliance with the hard copy requirement. OAH not only has recognized, by its amendment to Rule 2810.2, that the requirement is unnecessary (at least in cases, such as this one, in which the fax is complete and legible), but also has gone so far as to characterize its elimination or the requirement as an "important and necessary procedural reform." Having, in effect, excused compliance with the hard copy requirement in all similar cases that arose after the adoption of

the amended Rule, OAH would have no valid interest in insisting on compliance in Ms. Coto's case. Cf. Logan, 455 U.S. at 435 (observing that the State's elimination of a procedural rule that had been applied to bar adjudication of the petitioner's claim on the merits "demonstrat[es] that it no longer has an appreciable interest in defending the procedure at issue").[10]

Second, the employer forfeited its opportunity to challenge Ms. Coto's claim for unemployment compensation on the merits. The employer bears the burden of proving that a discharged employee is not entitled to unemployment benefits because he or she engaged in misconduct -- a burden that applies in a first-level administrative appeal, such as this one, in which an employee seeks review of a DOES claims examiner's denial of benefits on misconduct grounds. See, e.g., 7 D.C.M.R. 312.2 ("The party alleging misconduct shall have the re-

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[10] The ALJ abused her discretion in denying Ms. Coto's motion for reconsideration based on OAH's amendment to Rule 2810.2, reasoning that "the amended procedural rule does not state or imply that it is to be applied retroactively to closed cases." Order Denying Motion For Relief And Motion For Reconsideration 6. As a threshold matter, Ms. Coto's case was not "closed" since, as the ALJ recognized, a timely request for reconsideration was pending. Id. at 2. Moreover, when a new jurisdictional or other procedural rule has been adopted as a curative measure, courts have applied the new rule to cases that have been ordered dismissed but that are awaiting further review. See, e.g., Delmay v. Paine Webber, 872 F.2d 356, 358 (5th Cir. 1989) (observing, in applying a new jurisdictional statute that was enacted while the case was on appeal, that "where the retrospective application of jurisdictional statutes has been at issue, courts have been especially careful to give retrospective application to curative measures"); Ralpho v. Bell, 186 U.S. App. D.C. 3668, 569 F.2d 607, 616 n.52 (D.C. Cir. 1977) (applying the statute eliminating the amount-in-controversy requirement to a case pending on appeal based on the "implicit indicia of legislative intent" to eliminate "the injustice wrought by closing the federal courts to those with pecuniarily insignificant but important grievances against the Government"). As noted in the text, OAH's description of its amendments to Rule 2810.2 as "important and necessarily procedural reforms" indicates that the amendments were intended as a curative measure.

sponsibility to present evidence sufficient to support a finding of misconduct by the Director."); Chase v. D.C. Dep't of Employment Servs., 804 A.2d 1119, 1122 (D.C. 2002 ("[T]he burden always rests on the employer to prove misconduct."); McCaskill v. D.C. Dep't of Employment Servs., 572 A.2d 443, 446 (D.C. 1990) (recognizing that the employer bears the burden of establishing misconduct at the first-level administrative appeal). "In an appeal hearing, no misconduct shall be presumed," and "[t]he absence of facts which affirmatively establish misconduct shall relieve a claimant from offering evidence on the issue of misconduct." 7 D.C.M.R. 312.8; see 7 D.C.M.R. 312.9 ("In an appeal hearing, the persons who supplied the answers to questionnaires or issued other statements alleging misconduct shall be present and available for questioning by the adverse party."); 7 D.C.M.R. 312.10 ("In an appeal hearing, prior statements or written documents, in the absence of other reliable corroborating evidence, shall not constitute evidence sufficient to support a finding of misconduct by the Director.").

Here, because the employer did not even appear at the OAH hearing, much less present any testimony or other evidence, the employer did not meet its burden of proof on the question of misconduct. As the ALJ noted, OAH sent the employer the Scheduling Order and Notice of In-Person Hearing, which was not returned as undeliverable to the employer. 5/20/05 Tr. 4. That Order cautioned that "[f]ailure of a party to appear at the hearing may result in default, dismissal, or other unfavorable outcome." Order 1. The ALJ further noted that the employer had not contacted OAH to request a continuance or other relief.

5/20/05 Tr. 4. For that reason, the ALJ elected "to proceed in [the employer's] absence." Ibid. Without any evidentiary showing by the employer that Ms. Coto had engaged in "gross misconduct" -- or, for that matter, any misconduct at all -- OAH could not plausibly conclude on remand that the employer met its burden of proving that Ms. Coto was not entitled to unemployment benefits.

CONCLUSION

The Final Order of the Office of Administrative Hearings should be vacated and the case should be remanded for entry of an order awarding unemployment compensation benefits to Ms. Coto.

Respectfully submitted.

Barbara McDowell (No. 414570)*
Jennifer Mezey (No. 462724)
Legal Aid Society of the District of Columbia
666 11th Street, N.W., Suite 800
Washington, D.C. 20001-04589
PH: (202) 628-1161
FX: (202) 727-2132

David Reiser (No. 367177)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
PH: (202) 778-1800

Counsel for Petitioner

* Presenting Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for Petitioner to be delivered by first-class mail, postage prepaid, this 11th day of October, 2005, to:

Citibank FSB
Human Resources Department
P.O. Box 990043
Hartford, CT 06199

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Barbara McDowell