No. 09-AA-489

DISTRICT OF COLUMBIA COURT OF APPEALS

ROCHELLE V. SAVAGE-BEY,

Petitioner,

v.

LA PETITE ACADEMY,

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF PETITIONER

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April 30, 2010

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

The parties to this case are Rochelle V. Savage-Bey, the petitioner, and La Petite Academy, the respondent. Ms. Savage-Bey initially appeared *pro se* before the Office of Administrative Hearings but subsequently retained Tonya Love as counsel. Ms. Savage-Bey is represented in this Court by Bonnie I. Robin-Vergeer of the Legal Aid Society of the District of Columbia. Respondent appeared *pro se* before the Office of Administrative Hearings. In this Court, respondent was ordered to identify its counsel on May 27, 2009, but respondent failed to do so. No intervenors or amici have appeared in this case.

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QUESTIONS PRESENTED

1. Whether the Office of Administrative Hearings ("OAH") erred in dismissing petitioner Rochelle V. Savage-Bey's administrative unemployment compensation appeal as untimely, when (1) the Department of Employment Services ("DOES") failed to trigger the presumption of mailing because it did not certify that it mailed the claims determination to Ms. Savage-Bey's last-known address; (2) OAH credited Ms. Savage-Bey's sworn testimony that she never received her claims determination in the mail, calling into question the accuracy of the DOES certificate and rebutting the presumption of mailing; and (3) no additional evidence was presented concerning DOES mailing procedures generally or the mailing of Ms. Savage-Bey's determination in particular.

2. Whether OAH erred in requiring Ms. Savage-Bey to satisfy the "*Frausto* factors" described in *Frausto v. United States Dep't of Commerce*, 926 A.2d 151 (D.C. 2007), and *Thomas v. National Children's Ctr., Inc.*, 961 A.2d 1063 (D.C. 2008), before it would conduct a factual inquiry into whether and when the claims determination was *actually* mailed.

3. Whether, assuming that Ms. Savage-Bey must satisfy the "*Frausto* factors," OAH erred in concluding that Ms. Savage-Bey did not act promptly when she was diligent in calling DOES and leaving messages about her claim, was reassured by DOES in response to her inquiries that she would receive the determination in the mail, and then filed her administrative appeal the same day that she received the determination by fax from her claims examiner.

STATEMENT OF THE CASE

This case presents a familiar scenario: OAH dismissed an administrative appeal of an unemployment compensation claims determination as untimely, relying on the certificate of service to establish conclusively the fact and date of mailing despite the claimant's evidence that

she did not receive the determination in the mail within the appeal period, if ever. *See, e.g.*, *Thomas v. Nat'l Children's Ctr., Inc.*, 961 A.2d 1063 (D.C. 2008); *Chatterjee v. Mid Atl. Reg'l Council of Carpenters*, 946 A.2d 352 (D.C. 2008); *Rhea v. Designmark Serv., Inc.*, 942 A.2d 651 (D.C. 2008); *Bobb v. Howard Univ. Hosp.*, 900 A.2d 166 (D.C. 2006); *see also Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 215-16 (D.C. 2009) (discussing *Thomas*, *Chatterjee*, and *Rhea*).

What is new in this case[1] is that, despite crediting petitioner Rochelle V. Savage-Bey's testimony that she never received the claims determination denying her benefits in the mail, the Administrative Law Judge ("ALJ") concluded that, pursuant to this Court's decision in *Thomas*, as she understood it, Ms. Savage-Bey must satisfy additional evidentiary hurdles—the "*Frausto* factors"—to raise even a possibility of calling into question the accuracy of the certificate.[2] Because, after a brief analysis, the ALJ concluded that Ms. Savage-Bey did not meet this new burden, the ALJ treated the certificate of service as conclusive proof that the claims determination had been mailed on the date certified without engaging in any fact-finding regarding whether the claims determination had *in fact* been mailed to Ms. Savage-Bey on the date certified, if ever, and without seeking any evidence of DOES's internal mailing procedures.

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[1] A similar issue is presented in another petition for review pending before this Court: *Mason v. Red Coats/Admiral Security*, No. 09-AA-959 (D.C.).

[2] As discussed below, these factors, which generally relate to a motion for relief from judgment, are "whether an individual (1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense." *Thomas*, 961 A.2d at 1066 (citing *Frausto v. U.S. Dep't of Commerce*, 926 A.2d 151, 154 (D.C. 2007)). In addition, "prejudice to the non-moving party" is also considered. *Id.*

STATEMENT OF FACTS

1. The Department of Employment Services. On August 15, 2008, Ms. Savage-Bey applied for unemployment compensation benefits after she was discharged from her employment with La Petite Academy ("La Petite"). Transcript of Hearing at 13, Feb. 4, 2009 (hereinafter "Tr. I") (App. A22); Transcript of Hearing at 23, Feb. 26, 2009 (hereinafter "Tr. II") (App. A53). One month later, on September 15, 2008, DOES claims examiner Laverne Tate found Ms. Savage-Bey ineligible for benefits after concluding that Ms. Savage-Bey had engaged in "improper conduct . . . . not in the best interest of the employer," which constituted "misconduct." Determination by Claims Examiner at 1 (App. A65). The final paragraph of the determination letter consists of a typed certificate of service by the claims examiner, stating: "I certify that a copy of this document was mailed to the claimant and to the employer named herein at the above *address* on 09/15/2008." *Id.* (emphasis added). Above this language, however, the claims examiner listed not only DOES's address for its Central Adjudication Branch, but *two* additional addresses: (1) "ROCHELLE V SAVAGE-BEY, 1517 V STREET SE #1, WASHINGTON, DC – 20020-0000"; and (2) "LA PETITE ACADEMY INC, PO BOX 283, SAINT LOUIS, MO – 63166-0283." *See id.* The claims examiner signed the determination letter. *Id.*

By statute, Ms. Savage-Bey was required to file her administrative appeal "within 10 days after the mailing of notice" to her "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). As discussed below, Ms. Savage-Bey did not receive the claims determination and the accompanying notice of appeal rights within ten days of September 15, 2008, the date of alleged mailing indicated by the claims examiner's certificate of service; indeed, she never received her claims determination in the mail

at all. Rather, it was not until December 5, 2008, after Ms. Savage-Bey visited DOES's office in person, on both December 4 and 5, that Ms. Savage-Bey finally received her determination by fax from her claims examiner. Tr. I at 13-14 (App. A22-23); Tr. II at 14, 18 (App. A44, 48). That same day, Ms. Savage-Bey filed her administrative appeal in person with OAH. *See* Request for Hearing to Appeal a Determination by a Claims Examiner Involving Unemployment Benefits, Dec. 5, 2008 ("Request for Hearing") (App. A59-60); Tr. II at 14 (App. A44).

2. The Office of Administrative Hearings. On January 21, 2009, OAH issued a scheduling order for a hearing on Ms. Savage-Bey's administrative appeal, stating that "[b]ased on the DOES Claims Examiner's decision that has been appealed, the issues that will be considered at the hearing are: Jurisdiction (whether the appeal was filed within the deadline) and Reasons for Separation (misconduct, voluntary quit, laid off)." Scheduling Order and Notice of In-Person Hearing at 1, Jan. 21, 2009 (App. A57). As provided in the scheduling order, on February 4, 2009, ALJ Sharon E. Goodie held a hearing on Ms. Savage-Bey's administrative appeal; subsequently, on February 26, 2009, after a continuance so that Ms. Savage-Bey could obtain counsel, the ALJ held an additional hearing.[3] *See* Tr. I. at 35-39; Order Granting Continuance at 2, Feb. 5, 2009.

The ALJ addressed the timeliness of Ms. Savage-Bey's appeal during both hearings. Initially, the ALJ explained to Ms. Savage-Bey that she had "taken a preliminary look, and it look[ed] like [Ms. Savage-Bey] may have missed the deadline." Tr. I at 6 (App. A15). The ALJ then read into the record the language of the certificate of service: "I certify that a copy of this

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[3] During the first hearing, Ms. Savage-Bey appeared *pro se*; Valinda Farmer, the program assistant director for La Petite, testified on behalf of La Petite and also appeared *pro se*. During the second hearing, Ms. Savage-Bey was represented by Tonya Love of the Claimant Advocacy Program; Ms. Farmer, again, testified on behalf of La Petite and appeared *pro se*.

document was mailed to the Claimant and to the Employer named herein at the above *address* on September 15th, 2008." *Id.* at 9 (emphasis added) (App. A18). The ALJ did not, however, discuss or even mention that this language certified mailing the determination to only one of the two possible addresses listed. Instead, relying exclusively on DOES's certificate of service that a claims determination was mailed to an "address" on September 15, 2008, the ALJ explained to Ms. Savage-Bey that, because she filed her appeal on December 5, 2008, her appeal was "late." *See id.*

The ALJ noted, however, that there might be a way she could "make an exception," *id.* at 10 (App. A19), and questioned Ms. Savage-Bey further regarding the timeliness issue. *See id.* at 10-18 (App. A19-27); Tr. II at 12 (App. A42). In response, Ms. Savage-Bey provided sworn testimony that she never received her claims determination in the mail, and that, immediately after receiving it by fax on December 5, 2008, she filed her administrative appeal in person with OAH. *See* Tr. I at 13-14 (App. A22-23); Tr. II at 14, 18 (App. A44, 44, 48).

During both hearings, Ms. Savage-Bey testified that, prior to December 5, 2008, she called and left unreturned messages with DOES, inquiring about the status of her claim, *see* Tr. I at 14-16 (App. A23-25), Tr. II at 17, 21 (App. A47, 51), but it is unclear from the record exactly when Ms. Savage-Bey began her inquiry. During the first hearing, Ms. Savage-Bey explained that "[m]aybe four days" after she applied for benefits, she started receiving blue claim forms in the mail—presumably on or about the week of August 18, 2008. *See* Tr. I at 15 (App. A24). Ms. Savage-Bey stated that, upon receiving these claim forms, she "called up there on the phone . . . le[ft] a message for them." *Id.* at 14-15 (App. A23-24).

During the second hearing, Ms. Savage-Bey confirmed that she had attempted to call DOES but "wasn't getting through" and "was leaving messages" that DOES did not return. *See*

Tr. II at 17 (App. A47). Furthermore, not only did Ms. Savage-Bey call and leave messages for DOES generally, she also called her claims examiner, Ms. Tate, and left her a message that was also unreturned. *See id.* at 21 (App. A51). But at this subsequent hearing, Ms. Savage-Bey's testimony suggests that she did not begin attempting to contact DOES until "the end of October, maybe November, about what was going on." Tr. II at 17 (App. A47). In the final order, the ALJ did not resolve the matter, but instead indicated that Ms. Savage-Bey "candidly and credibly testified that she could not remember most of the specific dates on which she pursued her application for benefits." Final Order at 5 (App. A5).

Ms. Savage-Bey also testified that she eventually "talked to [DOES] over the phone, and they kept telling [her] that [she] would get something in the mail." Tr. I at 14 (App. A23). It is again unclear from the record exactly when this occurred, but Ms. Savage-Bey's testimony suggests that it may have been in "October, maybe," because this appears to have been when her blue claim forms indicated that she had been "denied benefits." *See id.* at 15-16 (App. A24-25). The ALJ appears to have resolved the issue by finding that "[i]n late October or early November 2008 . . . . [a] DOES staff person told [Ms.] Savage-Bey that she would receive something in the mail." Final Order at 3 (App. A3).

Despite this assurance from DOES, because Ms. Savage-Bey "never had to draw unemployment" and did not "know the procedure of it," *see* Tr. II at 19 (App. A49), she also spoke with other people "about the fact that [she] was getting unemployment," including her ex-sister-in-law, who herself receives benefits. *See* Tr. I at 16 (App. A25). These people counseled patience, explaining that "it would take some time," and that she should "just wait" for the determination because she could "get penalized." *See* Tr. II at 17, 19 (App. A47, 49). But by the

end of November, Ms. Savage-Bey had still not received the determination and thought "that was just too long." *See* Tr. II at 19 (App. A49).

Accordingly, on December 4, 2008, Ms. Savage-Bey again "called [DOES] and [she] finally got in contact with someone . . . [who] told [her] that it was best to come up there," and "that's what [Ms. Savage-Bey] did." *See id.* at 19-21 (App. A49-51). When Ms. Savage-Bey arrived in person at DOES, a DOES employee looked up her file and informed her that "something had already been mailed out to [her]." Tr. I at 14 (App. A23); Tr. II at 17 (App. A47). Ms. Savage-Bey responded that, although "everything else was coming" in the mail, she had not received the determination. *See* Tr. I at 14, 17 (App. A23, 26); Tr. II at 17 (App. A47). This DOES employee then contacted Ms. Savage-Bey's claims examiner and "told Ms. Tate what was going on." Tr. II at 18 (App. A48). And that day, December 4, 2008, Ms. Tate was "supposed to fax [the determination] to [Ms. Savage-Bey]." *Id.*

Ms. Savage-Bey "waited up there all day that day," but "never received" the fax. *Id.* So Ms. Savage-Bey went back to DOES in person the following day, December 5, 2008, and "that's when [she] received" her claims determination and accompanying notice of appeal rights by fax. *See id.* at 18, 21-22 (App. A48, 51-52); Submission with Request for Hearing, Exhibit 100 (Facsimile from Laverne Tate to DOES, Dec. 5, 2008) (App. A63-64). Right after Ms. Savage-Bey received the determination, that same day, she went to OAH in person and filed her administrative appeal. Tr. II at 14 (App. A44); Request for Hearing (App. A59-60).

During both hearings, because the ALJ was "not sure whether [she] ha[d] jurisdiction or not," Tr. I at 20 (App. A29), the ALJ also conducted an inquiry into the reasons for Ms. Savage-Bey's separation from La Petite. Ms. Savage-Bey contested the evidence against her and presented one witness in her defense. *See id.* at 21-35; Tr. II at 26-133. As the ALJ commented

during the second hearing, she was uncertain about the timeliness issue because of this Court's decision in *Thomas*, which had reversed ALJ Goodie's final order in that case. *See* Tr. II at 7-8 (App. A37-38). The ALJ acknowledged that OAH was "struggling to figure out what the Court of Appeals really wants us to do" with *Thomas*'s "brand-new law." *Id.* at 8 (App. A38).

3. The Final Order. On April 17, 2009, OAH issued a final order dismissing Ms. Savage-Bey's appeal as untimely. Final Order at 1 (App. A1). Relying exclusively on the claims examiner's certificate of service, the ALJ determined that, because Ms. Savage-Bey did not file her appeal with OAH within ten calendar days of September 15, 2008, OAH lacked jurisdiction to hear her administrative appeal. *Id.* at 1-3, 6 (App. A1-3, 6).

Crediting Ms. Savage-Bey's testimony, the ALJ expressly found that Ms. Savage-Bey "did not receive the Determination in the mail." *See id.* at 3 (App. A3); *see also id.* at 4-5 (App. A4-5). It was not until December 5, 2008 that Ms. Savage-Bey received, by fax, a copy of her claims determination and accompanying notice of appeal rights. *See id.* at 3-4 (App. A3-4). And the ALJ recognized that, upon receiving the determination, Ms. Savage-Bey "came to this administrative court in person to file her appeal letter" that same day. *Id.* at 4 (App. A4). Nevertheless, making no reference to the fact that the claims examiner certified mailing the determination to only one of the two possible addresses listed on the determination, *see* Determination by Claims Examiner at 1 (App. A65), the ALJ found that the claims examiner "mailed the . . . Determination . . . to [Ms.] Savage-Bey's correct last-known address" on September 15, 2008. *See* Final Order at 2-3 (App. A2-3).

The ALJ discussed the fact that, during the time she was awaiting her determination, Ms. Savage-Bey "talked to friends who had received unemployment compensation benefits in the past" and "the[se] friends advised her to wait for DOES to send the Determination." *Id.* at 3

(App. A3). And the ALJ found that "[i]n late October or early November 2008, [Ms.] Savage-Bey called DOES to inquire about the status of her application." *Id.* During this call, "[a] DOES staff person told [Ms.] Savage-Bey that she would receive something in the mail." *Id.* The ALJ did not mention that Ms. Savage-Bey testified that she had also called and left unreturned messages for DOES. *See* Tr. I at 14-16 (App. A23-25); Tr. II at 17, 21 (App. A47, 51)

The ALJ further found that by "early December 2008," Ms. Savage-Bey still "had not received the Determination" in the mail. Final Order at 3 (App. A3). Accordingly, on December 4, 2008, Ms. Savage-Bey personally "went to the DOES One-Stop Center . . . to inquire about the status of her application." *Id.* Ms. Savage-Bey was then advised that "DOES had mailed the Determination to her on September 15, 2008." *Id.* The following day, "[a] DOES staff person in another office faxed a copy of the Determination to the . . . One-Stop Center, which gave the faxed copy to [Ms.] Savage-Bey." *Id.* at 3-4 (App. A3-4).

After stating her factual findings, the ALJ discussed what she understood to be the applicable law according to this Court. She explained that "[t]he law presumes that a certificate of service on an appealable document is evidence of the mailing date, unless a party rebuts the date of the certification with reliable evidence." *Id.* at 4 (App. A4). She then noted that this Court, in *Thomas*, "recently changed the analysis this administrative court must use when a Determination is mailed to, but never arrives at, the correct address for the party who wishes to appeal the decision." *Id.* (citing *Thomas*, 961 A.2d at 1066; *Frausto*, 926 A.2d at 154). As the ALJ understood the decision, "[p]ursuant to *Thomas*, if the court credits an appellant's assertion that she did not receive an otherwise properly mailed Determination, this administrative court must further consider whether the appellant (a) had actual notice of the proceedings; (b) acted in good faith; (c) took prompt action; and (d) presented an adequate defense." *Id.* (describing the

Frausto factors discussed in *Thomas*). Accordingly, the ALJ concluded that the presumption of mailing could be rebutted only if the *Frausto* factors favored Ms. Savage-Bey. *See id.*

Briefly analyzing the *Frausto* factors, the ALJ went straight to the prompt-action factor, without addressing whether Ms. Savage-Bey had actual notice of the proceedings or whether Ms. Savage-Bey presented an adequate defense. *See id.* at 5 (App. A5). Concluding that Ms. Savage-Bey "ha[d] not met the 'prompt action' prong," the ALJ first stated that Ms. Savage-Bey "candidly and credibly testified that she could not remember most of the specific dates on which she pursued her application for benefits. However, she estimated that the first time she called DOES to check the status of her application for benefits was in late October or early November . . . ." *Id.* Although the ALJ acknowledged that this "first call did not yield her a copy of the Determination," the ALJ stated that Ms. Savage-Bey "waited another month, until approximately December 4, 2008, to follow up again." *Id.* The ALJ determined that "[t]hese two calls, made more than a month after the appeal period expired, do not constitute prompt action on her application." *Id.* And then, concluding her analysis of the *Frausto* factors, the ALJ stated that Ms. Savage-Bey "acted in good faith by seeking advice when she did not receive the Determination." *Id.* But Ms. Savage-Bey apparently erred, in the ALJ's view, because "she should have gone to the source, DOES, for her advice, instead of, or in addition to, consulting friends." *See id.*

Having considered and applied two of the *Frausto* factors, the ALJ concluded: "[T]his administrative court finds that [Ms.] Savage-Bey has not rebutted the presumption that the Determination was mailed on September 15, 2008." *Id.* The ALJ therefore dismissed Ms. Savage-Bey's administrative appeal because it was "untimely, and jurisdiction [was] not established." *Id.* at 5-6 (App. A5-6).

On May 13, 2009, Ms. Savage-Bey filed a timely *pro se* petition for review with this Court. She subsequently retained the undersigned counsel.

STATEMENT OF JURISDICTION

OAH issued its final order on April 17, 2009. Within thirty days, on May 13, 2009, Ms. Savage-Bey filed her petition for review with this Court. This Court therefore has jurisdiction. *See* D.C. Code § 2-1831.16; *id.* § 2-510; D.C. App. R. 15(a)(2).

STANDARD OF REVIEW

An OAH final order cannot stand unless "'(1) OAH made findings of fact on each materially contested issue of fact, (2) substantial evidence supports each finding, and (3) OAH's conclusions flow rationally from its findings of fact.'" *Thomas*, 961 A.2d at 1065 (quoting *D.C. Dep't of Employment Servs. v. Vilche*, 934 A.2d 356, 360 (D.C. 2007)). "It is well-settled that substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Washington Metro. Area Transit Auth. v. D.C. Dep't of Employment Servs.*, 683 A.2d 470, 476-77 (D.C. 1996) (quotations and citation omitted). Moreover, an OAH final order must, of course, be "in accordance with law." *Thomas*, 961 A.2d at 1065 (quoting D.C. Code § 2-510(a)(3)(A)). OAH's legal rulings are reviewed de novo. *See Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009).

SUMMARY OF ARGUMENT

For four reasons, OAH erred in dismissing Ms. Savage-Bey's administrative unemployment compensation appeal. This Court should therefore reverse OAH's final order and remand this case for further proceedings.

First, DOES failed to meet its threshold burden of presenting proof of mailing to Ms. Savage-Bey's last-known address. By statute, if DOES fails to properly mail a claims

determination to a claimant's last-known address, then the claimant's ten-day appeal period does not begin to run until the actual delivery of her claims determination. D.C. Code § 51-111(b); *Kidd Int'l Home Care, Inc. v. Dallas*, 901 A.2d 156, 158 (D.C. 2006). Furthermore, even if DOES in fact properly mails a determination to a claimant's last-known address, DOES must also provide "satisfactory proof" of having done so. *See Dallas*, 901 A.2d at 158.

Here, the *only* evidence of mailing—a bare certificate of service—was "'confusing and . . . inadequate.'" *See Rhea*, 942 A.2d at 654 (quoting *Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1085 (D.C. 2007)). The claims examiner listed *two addresses* at the top of the claims determination, but she certified mailing a claims determination only to a single "address." *See* Determination by Claims Examiner at 1 (App. A65). DOES has therefore not established (or even certified) that it in fact mailed a claims determination to *Ms. Savage-Bey*. *See Rhea*, 942 A.2d at 654; *Prince*, 917 A.2d at 1085 & n.1. And at the very least, DOES has not satisfied its burden of proof. Accordingly, by statute, Ms. Savage-Bey's ten-day appeal period did not begin to run until she actually received the determination by fax on December 5, 2008. *See* D.C. Code § 51-111(b). Because Ms. Savage-Bey filed her administrative appeal that same day, her appeal was timely.

Second, OAH's final order is not supported by substantial evidence because Ms. Savage-Bey rebutted the presumption of mailing (even if triggered by the confusing and inadequate certificate) with her testimony. Although a certificate of service presumptively establishes the fact and date that DOES mailed a claims determination to a claimant, this Court has repeatedly held that a certificate is insufficient proof of the date DOES mailed the determination when a party fairly calls into question whether or when DOES in fact mailed the determination, as Ms. Savage-Bey did with her testimony. *See, e.g.*, *Thomas*, 961 A.2d at 1065-66; *Burton v. NTT*

Consulting, LLC, 957 A.2d 927, 929 n.3 (D.C. 2008); *Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 654-55. This is because only *actual* mailing is significant; regardless of the date provided on a certificate of service, by statute, it is only on the date that DOES *in fact* properly mails a claims determination to a claimant (if ever) that her ten-day appeal period actually begins to run. *See* D.C. Code § 51-111(b).

It is well established that DOES need not prove actual receipt of a claims determination. *See Carroll v. D.C. Dep't of Employment Servs.*, 487 A.2d 622, 623-24 (D.C. 1985). But where, as here, a claimant credibly testifies that she did not receive her claims determination in the mail, that testimony "fairly call[s] into question the accuracy of the certificate of service" and casts doubt on whether the determination was in fact mailed on the date certified, if ever. *See Chatterjee*, 946 A.2d at 356. Accordingly, OAH was required to engage in a factual inquiry to determine the fact and date of mailing, and a dismissal on untimeliness grounds "'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *Id.* (quoting *Rhea*, 942 A.2d at 656); *see also Burton*, 957 A.2d at 929 n.3.

Third, rather than engage in the required factual inquiry, OAH imposed additional evidentiary hurdles for Ms. Savage-Bey to clear, requiring her to satisfy the *Frausto* factors—actual notice, good faith, prompt action, and adequate defense—before she even had a possibility of calling into question the accuracy of the certificate of service. Under *Chatterjee*, *Rhea*, and other cases, Ms. Savage-Bey's credited testimony burst the presumption of mailing raised by the certificate of service, leaving the question of mailing open to additional fact-finding. *See Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 656. The *Frausto* factors discussed in *Thomas* are inapposite where, as here, OAH has already credited a claimant's testimony of nonreceipt.

Fourth, even assuming *Thomas* requires Ms. Savage-Bey to satisfy the *Frausto* factors, Ms. Savage-Bey's actions met this burden, and she has therefore rebutted the presumption raised by the certificate of service. Accordingly, DOES must provide additional proof to establish the fact and date of mailing.

ARGUMENT

I. DOES FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF MAILING TO MS. SAVAGE-BEY'S LAST-KNOWN ADDRESS.

Pursuant to statute, a party seeking to challenge DOES's unemployment compensation claims determination must file an administrative appeal "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); *see Wright-Taylor*, 974 A.2d at 212-13. Although the Court has affirmed the rule that this ten-day period is jurisdictional,[4] it has held

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[4] Ms. Savage-Bey is entitled to a reversal and remand of OAH's final order regardless of whether the deadline imposed by D.C. Code § 51-111(b) is considered "jurisdictional." Nonetheless, Ms. Savage-Bey suggests that in an appropriate case this Court, sitting *en banc*, should revisit its previous rulings that the ten-day deadline is jurisdictional. Those rulings were based on the now-outdated notion that time limits automatically impose subject-matter jurisdiction limitations, rather than serving as claims-processing rules subject to equitable exceptions. Although this Court recently discussed Supreme Court decisions clarifying the use of the term "jurisdictional" in these deadline contexts, it suggested, without deciding, that, because the ten-day time limit for unemployment compensation appeals is statutory, the filing deadline may still be considered jurisdictional. *See Wright-Taylor*, 974 A.2d at 212-14 (citing *Bowles v. Russell*, 515 U.S. 205 (2007)). Ms. Savage-Bey submits that the Court's assumption that statutory time limits are necessarily jurisdictional is wrong. *See Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246 (2010) ("A statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.' Rather, the jurisdictional analysis must focus on the 'legal character' of the requirement, . . . discerned by looking to the condition's text, context, and relevant historical treatment.") (citations omitted) (emphasis in original); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596-97 (2009) (discussing examples of time limits imposed by statute that are not "jurisdictional"). And even if the ten-day deadline constrained *OAH's* jurisdiction, the time limit would not necessarily affect *this Court's* jurisdiction to consider challenges to adverse claims determinations. *See* D.C. Code § 2-1831; *id.* § 2-510.

repeatedly that "[a] prerequisite to invoking the jurisdictional bar imposed by the statutory ten-day filing period is [DOES's] obligation of giving notice which was reasonably calculated to apprise petitioner of the decision . . . and an opportunity to contest that decision through an administrative appeal." *Wright-Taylor*, 974 A.2d at 217 (internal quotations and citation omitted); *see Thomas*, 961 A.2d at 1065; *Chatterjee*, 946 A.2d at 354-55.

Notice by mailing, authorized by statute, has been held to satisfy the constitutional requirement of due process. *See Carroll*, 487 A.2d at 623-24. But DOES does not satisfy its threshold burden of proving notice unless (1) DOES in fact mails the notice to the claimant's last-known "correct address," and (2) DOES "provide[s] satisfactory proof" of having done so. *See Dallas*, 901 A.2d at 158; *Bobb*, 900 A.2d at 167; *see also Town Ctr. Mgmt. v. D.C. Rental Hous. Comm'n*, 496 A.2d 264, 265 n.1 (D.C. 1985). If DOES fails to satisfy either obligation, then a dismissal on untimeliness grounds cannot stand. *See Thomas v. D.C. Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985) (holding that agency failed to "demonstrate proof of notice" and therefore "declin[ing] to conclude that petitioner was jurisdictionally barred from appealing"); *Chatterjee*, 946 A.2d at 355-56. Here, because DOES certified mailing the claims determination only to a single address—either Ms. Savage-Bey's or La Petite's—at the very least, the agency failed to provide satisfactory proof that it mailed the determination to Ms. Savage-Bey's last-known address. Moreover, the agency failed to prove that it mailed the determination on the date certified. Accordingly, this Court should reverse OAH's final order dismissing Ms. Savage-Bey's administrative appeal and remand for further proceedings.

A. DOES Failed to Present Proof That It in Fact Mailed a Claims Determination to Ms. Savage-Bey's Last-Known Address.

In its Final Order, OAH credited Ms. Savage-Bey's sworn testimony and expressly found that Ms. Savage-Bey never received her claims determination in the mail. Final Order at 3-4 (App. A3-4). Nevertheless, without requiring any further proof of mailing from DOES, OAH found that "DOES mailed the Claims Examiner's Determination . . . to [Ms. Savage-Bey's] correct last-known address" on the date certified, and therefore dismissed Ms. Savage-Bey's administrative appeal as untimely. *See id.* at 3, 6 (App. A3, 6).

Here, however, the *only* evidence of mailing—a bare certificate of service—plainly does not establish that DOES mailed a determination to Ms. Savage-Bey. The claims examiner's certificate of service reads: "I certify that a copy of this document was mailed to the claimant and to the employer named herein at the above *address* on 09/15/2008." Determination by Claims Examiner at 1 (emphasis added) (App. A65). But in addition to DOES's own address, the claims examiner listed *two addresses* at the top of the determination: (1) Ms. Savage-Bey's, and (2) La Petite's. *See id.* Accordingly, on its face, the certificate of service does not establish that DOES actually mailed a determination to Ms. Savage Bey. In *Rhea*, where the certificate of service stated that the determination "was mailed to the claimant/employer at the above address," the Court reasoned that "[r]ead literally, the certificate of service means that a single copy of the examiner's decision was sent only to a single address. That address in the present case could have been either the claimant's or the employer's, and no differentiation is made in the certificate between the two parties." *Rhea*, 942 A.2d at 654. "If that copy was sent to the employer, this would explain, and would be consistent with, [the claimant's] claim that she did not receive the . . . mailing . . . ." *Id.* at 654 n.9. The exact same thing can be said in this case.

Thus, as in *Rhea*, DOES has not established (or even certified) that it *in fact* mailed the claims determination to Ms. Savage-Bey. *See id.* And at the very least, DOES did not satisfy its burden of proof. So, by statute, Ms. Savage-Bey's ten-day appeal period did not begin to run until the actual delivery of her determination by fax on December 5, 2008. *See* D.C. Code § 51-111(b). Because Ms. Savage-Bey filed her administrative appeal that same day, her appeal was timely.

B. Ms. Savage-Bey's Credited Testimony Fairly Called into Question the Accuracy of DOES's Certificate of Service, Therefore Requiring Additional Fact-Finding on When DOES in Fact Mailed Her Claims Determination, if Ever.

The unemployment compensation statute affords no special status to (and indeed does not even mention) a certificate of service. The Court, however, has come to "normally rely upon a certificate of service" as raising a rebuttable presumption of "the date and fact of mailing." *See Chatterjee*, 946 A.2d at 355. But the Court has held repeatedly that a certificate of service is insufficient proof of the date DOES mailed the determination when a party credibly testifies that she did not receive the determination within the appeal period, therefore calling into question whether or when DOES in fact mailed the determination. *See, e.g., Thomas*, 961 A.2d at 1065-66; *Burton*, 957 A.2d at 929 n.3; *Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 654-55; *see also Wright-Taylor*, 974 A.2d at 215-16 (discussing and summarizing holdings in *Thomas*, *Chatterjee*, and *Rhea*).

Underlying this Court's rule is a logical, simple proposition: As Dean Wigmore reasoned, "Whether [a] letter was *mailed*, becomes often the issue under the substantive law . . . . [S]uppose that the addressee testifies in *denial* of the *receipt?* If this denial be believed, then is not the non-arrival of the letter some evidence that it was never mailed?" 9 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law

§ 2519, at 432 (3d ed. 1940) (emphasis in original) (hereinafter "A Treatise on Evidence"). Dean Wigmore continued: "[I]f . . . the efficiency [of the postal service in delivering letters duly stamped, addressed, and mailed into its custody] is operating, does not the non-arrival of an alleged letter indicate that such a letter was never given into the postal custody?" *Id.* § 2519, at 433; *see also Duder v. Shanks*, 689 N.W.2d 214, 218 (Iowa 2004) ("Despite the fact that service is accomplished upon mailing and consequently it is not necessary to show receipt, proof that an addressee did not receive a piece of mail is competent evidence that it was not mailed.") (citing *Liberty Mut. Ins. Co. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 858 (Iowa 1984)); *Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 91 A. 913, 914 (N.H. 1914) ("[P]roof that no letter was received warrants a finding that it was never posted.").

In *Chatterjee*, for example, the Court made clear that "even a properly executed certificate of service is not conclusive." *Chatterjee*, 946 A.2d at 355. There, OAH credited the claimant's testimony that he had not received a claims determination until two weeks after it was allegedly mailed. *Id.* In reversing and remanding OAH's dismissal on untimeliness grounds, the Court held that the claimant's testimony "raised two possibilities": (1) that the U.S. Postal Service failed to deliver the mail for two weeks; or (2) that DOES failed to mail the claims determination on the date certified. *See id.* ("Perhaps, as Mr. Chatterjee suggested, 'whatever they indicate that they're posting, they don't really post them on that particular date.'"). Accordingly, because the claimant's testimony "fairly called into question the accuracy of the certificate of service," the Court ruled that more fact-finding was required and that a dismissal "'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *Id.* at 356 (quoting *Rhea*, 924 A.2d at 656); *see also Thomas*, 961 A.2d at 1065-66 ("[W]hen a party offers sufficient evidence to call the date of mailing into question, the

ALJ must conduct a factual inquiry in order to evaluate the timeliness of an appeal."). Indeed, as the accuracy of the certificate was in dispute, it was "incumbent upon OAH to resolve this question of fact" by relying on additional evidence apart from the certificate. *Chatterjee*, 946 A.2d at 355; *see also Burton*, 957 A.2d at 929 n.3 (citing *Chatterjee*, 946 A.2d at 355; *Dallas*, 901 A.2d at 158).[5]

In *Rhea*, the Court similarly vacated and remanded OAH's dismissal of an appeal as untimely, observing that the claimant's appeal to OAH was a single day late, if measured by the date in the claims determination's certificate of service, and that the "record also contain[ed] no description of agency procedures from which we could be confident that no such one-day error was made." *Rhea*, 942 A.2d at 654-55. In particular, the Court noted that "[t]he record does not disclose whether, on [the date noted in the certificate of service], the claims examiner's determination was placed in a DOES outbox from which mail is collected, or whether it was physically placed in the United States Mail." *Id.* at 655. And, as discussed above, *Rhea* also involved a "confusing and . . . inadequate" certificate of service that failed to certify mailing a determination to both the claimant and the employer. *Id.* at 654 (quotations and citation omitted). Here, the certificate of service not only was inadequate, but the record lacks the same information—regarding how Ms. Savage-Bey's claims determination was handled as well as

[5] The rebuttable presumption raised by a certificate of service is at best a "bursting bubble" type of presumption, where, once the opponent of the presumption (here, Ms. Savage-Bey) "offers evidence against the fact presumed, the presumption vanishes." *Cf. Green v. D.C. Dep't of Employment Servs.*, 499 A.2d 870, 874 (D.C. 1985) (describing the "bursting bubble" theory of presumptions as the "prevailing view, to which jurists preponderantly have subscribed") (quotations and citation omitted). Under this Court's cases, credited testimony by a claimant that casts doubt on the accuracy of a certificate of service is sufficient to make this presumption "vanish[]" and therefore require additional fact-finding.

DOES mailing procedures more generally—that precipitated the reversals and remands in *Chatterjee* and *Rhea*.

This Court's requirement that DOES present more than a bare certificate of service when the fact or date of mailing is contested by credible testimony is grounded in experience. First, a certificate of service—unsworn and *ex parte*—represents simply a present intention to perform a future action. *See Scheeler v. The Employment Sec. Dep't*, 93 P.3d 965, 968 & n.14 (Wash. Ct. App. 2004) ("[B]y itself, the language is insufficient to establish that the letter was properly sealed, stamped, and deposited in the United States mail on that date because the notation may have been typed before the letter was purportedly mailed."). More specifically, though, the spate of recent appeals from unemployment compensation claimants and employers alike insisting that they had not received DOES claims determinations within ten days of the date on the certificate of service or had not received DOES scheduling orders suggests the possibility of systemic problems with DOES's internal mailing procedures—certainly enough to make it unreasonable to treat the certificate of service in this case as conclusive. *See, e.g.*, *Thomas*, 961 A.2d at 1065-66; *Burton*, 957 A.2d at 928-31; *Chatterjee*, 946 A.2d at 354-56; *Rhea*, 942 A.2d at 652-55; *Prince*, 917 A.2d at 1084-88; *Dallas*, 901 A.2d at 156-58; *Bobb*, 900 A.2d at 167-68; *McDowell v. Sw. Distrib.*, 899 A.2d 767, 767-68 (D.C. 2006); *see also Allen v. D.C. Dep't of Employment Servs.*, 578 A.2d 687, 688 (D.C. 1990) (employer, the District of Columbia, asserting nonreceipt of a claims determination).

Indeed, making reference to this recurring issue, the Court noted that "[i]n several recent cases, we have had occasion to remand unemployment benefit dismissals that involve the issue whether a notice of a claims examiner's decision has been 'mailed' so as to start the running of the ten-day period." *Wright-Taylor*, 974 A.2d at 215. In doing so, the Court explicitly

"cautioned against over-reliance on the so-called presumption of mailing arising from the execution of a certificate of service." *Id.* (citing *Thomas*, 961 A.2d at 1066; *Chatterjee*, 946 A.2d at 356; *Rhea*, 942 A.2d at 656). These repeated calls for caution are especially appropriate given that final orders by OAH in other recent cases filed in this Court reveal multiple instances in which DOES did *not* mail claims determinations on the dates certified. *See, e.g.*, *Westview Med. & Rehab. Servs. v. Price*, No. 09-AA-1135, Final Order at 1-2 (Sept. 10, 2009) (twenty-four day error) (App. A68-69); *Holiday v. Edward C. Mazique Parent Child Ctr.*, No. 09-AA-1402, Final Order at 2 (Oct. 21, 2009) (four-day error) (App. A73); *Whitman-Walker Clinic v. Mischka*, No. 09-AA-1397, Final Order at 2-3 (Nov. 12, 2009) (four-day error) (App. A83-84); *Rojas v. PBE Walter Reed, Inc.*, No. 09-AA-1316, Final Order at 2 (Oct. 2, 2009) (one-day error) (App. A88); *Hicks v. Nat'l Assocs., Inc.*, No. 09-AA-1059, Final Order at 2 (July 30, 2009) (three-day error) (App. A95).

This Court's line of cases counseling restraint and cautioning against over-reliance on certificates of service requires reversal and remand here. Indeed, *Chatterjee* is on point: After crediting Ms. Savage-Bey's testimony, OAH found that Ms. Savage-Bey never received an actual copy of her determination in the mail. *See* Final Order at 3-4 (App. A3-4); *cf. Chatterjee*, 946 A.2d at 353 (OAH "'credit[ed] [petitioner's] testimony that [he] did not receive the [notice of ineligibility for unemployment compensation] until after it was too late for him to file a timely appeal . . . .'"). Nevertheless, like in *Chatterjee*, OAH concluded, relying exclusively on the certificate of service, that Ms. Savage-Bey "ha[d] not rebutted the presumption that the Determination was mailed on September 15, 2008." Final Order at 5 (App. A5); *cf. Chatterjee*, 946 A.2d at 353 (OAH concluded that petitioner's "'testimony [did] not provide a basis for overcoming the presumption . . . .'").

Just as in *Chatterjee*, this was error. *See supra* pp. 18-19. Additionally, here, unlike in *Chatterjee*, DOES plainly did not establish (or even certify) mailing a determination to Ms. Savage-Bey's last-known address. *See* Determination by Claims Examiner at 1 (App. A65). And DOES provided Ms. Savage-Bey with erroneous advice: After Ms. Savage-Bey's appeal period had expired, a DOES staff person told Ms. Savage-Bey over the phone "that she *would* receive something in the mail." Final Order at 3 (emphasis added) (App. A3); *see* Tr. I at 14 (App. A23). This Court has repeatedly recognized that a claimant for unemployment benefits is entitled to relief when she has relied on ambiguous or erroneous advice from DOES employees. *See, e.g.*, *Coto v. Citibank FSB*, 912 A.2d 562, 565 (D.C. 2006); *Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 345-47 (D.C. 2006); *McDowell*, 899 A.2d at 768-70 (collecting cases); *Ploufe v. D.C. Dep't of Employment Servs.*, 497 A.2d 464, 465-66 (D.C. 1985). Here, this erroneous advice provided reassurance to Ms. Savage-Bey that she would receive her claims determination in the mail—despite the fact that her appeal period, if determined by the date on the certificate of service, had already expired. *See McDowell*, 899 A.2d at 770 (because DOES's misleading advice had in part caused a claimant to file his appeal more than ten days after the date certified in the certificate of service, OAH was not entitled to invoke untimeliness as a basis for dismissing the claim). And whether DOES's advice was simply erroneous or reflected knowledge that no claims determination had yet been mailed is unknown, because OAH—without engaging in any additional fact-finding—concluded that the bare certificate of service was sufficient to prove that DOES had *in fact* mailed a determination to Ms. Savage-Bey on the date certified. *See* Final Order at 2-3.

"Under these circumstances, it was incumbent upon OAH to resolve this question of fact." *Chatterjee*, 946 A.2d at 355. Because OAH failed to do so, instead treating the certificate

of service as conclusive, OAH's final order is not supported by substantial evidence. *See id.* at 355-56. This Court should therefore reverse OAH's final order and remand this case, requiring OAH to "engage in a factual inquiry" regarding if and when DOES mailed the claims determination to Ms. Savage-Bey. *See id.* at 356. And, upon remand, a dismissal of Ms. Savage-Bey's "appeal on jurisdictional grounds 'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *See id.* (quoting *Rhea*, 942 A.2d at 656); *see also Burton*, 957 A.2d at 929 n.3.

II. OAH ERRED IN IMPOSING AN ADDITIONAL REQUIREMENT THAT MS. SAVAGE-BEY SATISFY THE *FRAUSTO* FACTORS AFTER CREDITING HER TESTIMONY OF NONRECEIPT.

In dismissing Ms. Savage-Bey's administrative appeal as untimely, the ALJ neither discussed nor cited *Chatterjee* or *Rhea*. Instead, the ALJ noted that this Court in *Thomas* "recently changed the analysis" that OAH "must use when a Determination is mailed to, but never arrives at, the correct address for the party who wishes to appeal the decision." Final Order at 4 (citing *Thomas*, 961 A.2d at 1066) (App. A4). Although the ALJ, during Ms. Savage-Bey's hearing, acknowledged that OAH was "struggling to figure out what the Court of Appeals really wants us to do" with *Thomas*, Tr. II at 8 (App. A38), in the final order, the ALJ treated *Thomas* as controlling and concluded, in effect, (1) that *Thomas* overruled *Chatterjee*; and (2) that *Thomas* imposed, at least, four additional evidentiary hurdles that Ms. Savage-Bey must clear before she can even raise the possibility of calling into question the accuracy of the certificate.

OAH's reading of *Thomas* is wrong. *Thomas* does not displace or change *Chatterjee*. Indeed, *Thomas* cited *Chatterjee* with approval and made no attempt to distinguish or limit it. *See Thomas*, 961 A.2d at 1065-66. Nor does *Thomas* change the clear trend in this Court's case

law addressing the appropriate amount of reliance on certificates of service—less, not more. Since *Thomas*, this Court has cited both cases for the same proposition: that OAH must exercise "caution[] against over-reliance on the so-called presumption of mailing arising from the execution of a certificate of mailing." *Wright-Taylor*, 974 A.2d at 215-16 (citing *Thomas*, 961 A.2d at 1066; *Chatterjee*, 946 A.2d at 356).

Thomas, after pointing out that the unemployment statute is "remedial in character . . . and . . . must be construed accordingly," 961 A.2d at 1066 (quotations and citation omitted), suggested that OAH "explor[e]" the *Frausto* factors—actual notice, good faith, prompt action, adequate defense, and prejudice to the non-moving party—in making a credibility determination. *See id.* For example, a claimant's prompt action may show that she is being diligent about her appeal and would not have let the ten-day appeal period lapse without filing an appeal. Similarly, a claimant's strong claim on the merits also bolsters the claimant's credibility by tending to show that she would not pass up the opportunity to appeal an adverse claims determination. *Thomas* thus provides OAH with guidance, specifically a set of factors, for purposes of "inform[ing] *whether* . . . a petitioner's *testimony* is sufficient to rebut the presumption that DOES mailed a determination letter on the date certified." *See id.* (emphasis added). But *Thomas*'s applicability ends where, as here, OAH credits a claimant's testimony, fairly calling into question the accuracy of the certificate. In short, the *Thomas* inquiry duplicates a determination OAH made in a different way; it is not an independent basis for denying relief.

In Ms. Savage-Bey's case, OAH credited her testimony of nonreceipt. *See* Final Order at 3-4 (App. A3-4). Two other factors—the confusing and inadequate certificate of service and the erroneous advice that DOES provided to Ms. Savage-Bey—provide additional reasons to credit

Ms. Savage-Bey's testimony and to challenge the sufficiency of the notice provided by DOES. At this point, cases such as *Chatterjee* and *Rhea* apply, and OAH may no longer rely on the certificate of service alone to establish the fact and date of mailing. *Compare Thomas*, 961 A.2d at 1066 (holding that the *Frausto* factors will inform whether the claimant's "claims" and "assertions" were sufficient to require further fact-finding), *with Chatterjee*, 946 A.2d at 356 (holding that the claimant's "credited" testimony "fairly called into question the accuracy of the certificate" and therefore required further fact-finding). No further evidence on the part of the claimant is necessary; DOES must come forward with further proof of the fact and date of mailing or, at the very least, evidence regarding its internal mailing procedures. *See Chatterjee*, 946 A.2d at 356; *Rhea*, 942 A.2d at 654-56.

Furthermore, as the Court has recognized in the context of unemployment compensation benefits, "[i]t cannot be questioned that the due process clause is applicable where, as here, a property interest is at stake." *Sterling v. D.C. Dep't of Employment Servs.*, 513 A.2d 253, 254 (D.C. 1986). When credible evidence of nonreceipt casts doubt on a bare certificate of service, as here, the Due Process Clause at a minimum requires the kind of factual inquiry into mailing called for in *Chatterjee*, without imposing additional requirements applicable to seeking relief from a final judgment.

The Due Process Clause is not satisfied by certificates of service, except insofar as they may be evidence that DOES in fact mailed proper notice. So once a claimant testifies or presents other evidence that calls into question whether or when DOES has actually mailed a claims determination, then it is a violation of due process for OAH to disregard that testimony and simply insist, in the face of contrary evidence, that the letter was mailed to the claimant on the date certified and that notice accordingly had been provided. *See Jones v. Flowers*, 547 U.S.

220, 226-30 (2006) (holding that due process imposes further obligations on the government when the government becomes aware, prior to a property deprivation, that its attempt at notice has failed); *Thomas*, 490 A.2d at 1162 (alleged failure of claimant to receive notice does not itself constitute a deprivation of due process, but only as long as "the record evidence before the court [is] sufficient for it to conclude" that the agency "did in fact mail" the notice) (quotations and citation omitted).

Although in the context of a motion to dismiss, *Meachem v. Wing*, 77 F. Supp. 2d 431 (S.D.N.Y. 1999), held that such type of action stated a valid class action claim for due process violations. In *Meachem*, class action plaintiffs alleged that their due process rights had been violated by a state welfare agency's "excessive reliance" on mailing affidavits, submitted by the agency to demonstrate that it had a procedure in place for mailing notice. *Id.* at 444. The plaintiffs contended that "a systemic failure exist[ed], put in place by defendants, which prevent[ed] plaintiffs from marshaling evidence to challenge the presumption of mailing and receipt," and "hearing officers routinely fail[ed] to determine whether the mailing affidavits [were], inter alia, internally inconsistent or out of date . . . ." *Id.* Instead, these "fair hearing officers generally deem[ed] the mailing affidavits to establish a presumption in favor of mailing and to satisfy the City agencies' burden of proof." *Id.* Denying the defendants' motion to dismiss, the district court held: "These claims are sufficient to survive this motion to dismiss because they involve alleged systemic failures of the State's administrative scheme for conducting fair hearings to meet the standards required by federal constitutional law and statutory law." *Id.*[6]

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[6] *See also U.A.W. v. Giles*, 1982 U.S. Dist. LEXIS 17945, *35 (N.D. Ohio July 2, 1982) (holding that even though mailing, as a general matter, may be reasonable, "sending notice by

Yet, under OAH's erroneous interpretation of *Thomas*, even if OAH credits a claimant's testimony of nonreceipt—previously sufficient under *Chatterjee* to make the presumption vanish, triggering the need for further fact-finding—a claimant must also satisfy the *Frausto* factors: actual notice, good faith, prompt action, adequate defense, and prejudice to the non-moving party.[7] *See* Final Order at 4 (App. A4). In short, OAH used the *Frausto* factors against Ms. Savage-Bey, concluding that, despite her credited testimony, Ms. Savage-Bey failed to satisfy the *Frausto* factors and thus could not rebut the presumption of mailing. OAH's interpretation, however, cannot stand. The *Thomas/Frausto* factors are inapposite here where *Chatterjee* and *Rhea* apply and require that this Court reverse OAH's final order and remand for further proceedings.[8]

III. ASSUMING THAT *THOMAS* REQUIRES MS. SAVAGE-BEY TO SATISFY THE *FRAUSTO* FACTORS, SHE DID SO.

Even if Ms. Savage-Bey were required to satisfy the *Frausto* factors, she did so, and OAH's conclusion to the contrary was in error.

A. Actual Notice. OAH failed to address whether Ms. Savage-Bey "had actual notice of the proceedings." *See Thomas*, 961 A.2d at 1066. Because the Court "will not sustain

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ordinary mail, coupled with a brief statutory period allowed for filing an appeal, and the establishment of a conclusive presumption that mailing notice results in its receipt by plaintiffs" violates due process); *Bennett v. Lopeman*, 598 F. Supp. 774, 782 (N.D. Ohio 1984) (adopting the reasoning of *Giles*).

[7] The ALJ neither discussed nor mentioned prejudice to the non-moving party. The Court in *Thomas*, however, indicated that it would also consider this factor. *Thomas*, 961 A.2d at 1066.

[8] OAH's implicit interpretation of *Thomas* as overruling *Chatterjee* is wrong for an additional reason. This Court has "adopted the rule that no division of this court will overrule a prior decision of this court . . . and that such result can only be accomplished by this court en banc." *Smith v. United States*, 601 A.2d 1080, 1082 (D.C. 1992) (quotations and citation omitted).

an order on grounds not relied upon by the agency," this factor should not be used to deny Ms. Savage-Bey relief. *See Frausto*, 926 A.2d at 157.

Nevertheless, this factor weighs in favor of Ms. Savage-Bey. The only clear date in the record by which Ms. Savage-Bey acquired actual notice of both the substance of her claims determination and how to appeal that determination was December 5, 2008, the same day that she filed her appeal in person with OAH. Ms. Savage-Bey did testify that, prior to this date, she had received claim forms indicating that she had been found ineligible for benefits. *See* Tr. I at 15-16 (App. A24-25). But these forms neither indicated a reason for her ineligibility nor were accompanied by a notice of appeal rights—both of which are prerequisites for sufficient notice. *See Wright-Taylor*, 974 A.2d at 217 (notice must be "reasonably calculated to apprise petitioner of [1] the decision of the claims deputy and [2] an opportunity to contest that decision through administrative appeal") (quotations and citation omitted); *id.* ("[N]otice must unambiguously set forth the conditions for filing an appeal.").

Instead, Ms. Savage-Bey explained that December 4, 2008 was the "first occasion that [she] learned that a decision had been made." Tr. II at 21 (App. A51). On that date, Ms. Savage-Bey went to DOES in person and was informed by a DOES employee that her determination "had already been mailed." Tr. I at 14 (App. A23); Tr. II at 21 (App. A51). Ms. Savage-Bey "waited there all day that day" to receive the determination and accompanying notice of appeal rights by fax, but the fax never came. Tr. II at 18 (App. A48). So Ms. Savage-Bey returned the following morning, on December 5, 2008, and that was when she finally received, by fax, both the determination and notice of appeal rights. *Id.*

B. Good Faith. OAH found that Ms. Savage-Bey "acted in good faith by seeking advice when she did not receive the Determination." Final Order at 5 (App. A5). OAH noted,

however, that Ms. Savage-Bey "should have gone to the source, DOES, for her advice, instead of, or in addition to, consulting friends." *Id.* But Ms. Savage-Bey did in fact "go to the source," and that is where she received erroneous advice. *See id.* at 3 (App. A3). As OAH found, Ms. Savage-Bey "called DOES to inquire about the status of her application" and "[a] DOES staff person told [Ms.] Savage-Bey that she *would receive something in the mail*"—despite the fact that her appeal period had already expired. *See id.* (emphasis added). And, of course, Ms. Savage-Bey did not receive that "something in the mail." *See id.*

C. **Prompt Action.** OAH concluded that Ms. Savage-Bey "ha[d] not met the 'prompt action' prong of the *Thomas/Frausto* test." *Id.* A complete analysis of the record, however, shows that OAH erred—Ms. Savage-Bey's actions were sufficiently prompt.

OAH viewed the end of the appeal period—as determined by the date on the certificate of service—as the appropriate time frame in determining whether Ms. Savage-Bey's actions were sufficiently prompt. OAH determined that Ms. Savage-Bey's "two calls, made more than a month after the appeal period expired, do not constitute prompt action on her application." *Id.* This was error. When examining whether actions were sufficiently prompt, the Court has looked at when a party learned of the matter at issue. *See Frausto*, 926 A.2d at 155 (reviewing OAH's order and noting that "[t]he order does not suggest that Frausto failed to act promptly to reopen her case *after she learned of the OAH's order*") (emphasis added); *Brown v. Kone, Inc.*, 841 A.2d 331, 334 (D.C. 2004) (considering whether a party acted promptly from the date the party "discovered . . . that her complaint had been dismissed"); *Venison v. Robinson*, 756 A.2d 906, 911 (D.C. 2000) ("We recognize that the focus of this [prompt action] factor is on the promptness with which the party against whom the default judgment was entered took action to

challenge it after learning about it."). And this makes sense: A party cannot take appropriate action until that party knows action is necessary.

Here, as discussed above, the only clear date in the record by which Ms. Savage-Bey acquired actual notice of both the substance of her claims determination and how to appeal that determination was December 5, 2008. That same day, Ms. Savage-Bey filed her administrative appeal in person with OAH. No delay at all must be sufficiently prompt.

Even assuming, though, that the prompt-action-clock starts running on the date that DOES allegedly mailed the claims determination and ends when a claimant files her appeal with OAH, the record shows: (1) that Ms. Savage-Bey called and left unreturned messages for both DOES generally and her claims examiner specifically, inquiring about the status of her claim, *see* Tr. I at 14-15 (App. A23-24), Tr. II at 17, 21 (App. A47, 51); (2) that a DOES employee informed her that she *would* receive her determination in the mail after her appeal period had already expired, *see* Final Order at 3 (App. A3); Tr. I at 14 (App. A23); (3) that, upon reaching a DOES employee who advised her to come to DOES, she immediately did so, spending two days awaiting her determination by fax, *see* Tr. II at 17-19, 21-22 (App. A47-49, 51-52); and (4) that, when the fax finally arrived, she filed her administrative appeal in person with OAH that same day, *see* Tr. II at 14, 18, 21-22 (App. A44, 48, 51-52); Submission with Request for Hearing, Exhibit 100 (Facsimile from Laverne Tate to DOES, Dec. 5, 2008) (App. A63-64); Request for Hearing (App. A59-60). In short, Ms. Savage-Bey's actions were sufficiently prompt.

D. Adequate Defense. OAH failed to address whether Ms. Savage-Bey "presented an adequate defense." *See Thomas*, 961 A.2d at 1066. Again, because the Court "will not sustain an order on grounds not relied upon by the agency," this factor should not be used to deny Ms. Savage-Bey relief. *See Frausto*, 926 A.2d at 157.

Nevertheless, this factor weighs in favor of Ms. Savage-Bey. As the Court explained in *Frausto*, this factor is not demanding: "All that is required is that the moving party provide reason to believe that vacating the judgment will not be an empty exercise or futile gesture." *Frausto*, 926 A.2d at 157 (quotations and citation omitted). "It is not required that the moving party show a likelihood of success on the merits." *Id.* Here, La Petite bore the burden of establishing that Ms. Savage-Bey had been discharged for reasons that would disqualify her from receiving benefits. And, as summarized by her counsel, Ms. Savage-Bey "question[ed] the documents offered [against] her . . . with respect to the issue or the incident discussed in each document as being true . . . den[ying] each incident as well as notification of being written up based on the incident," and also challenged the authenticity of the documents used against her. Tr. II at 135. Moreover, Ms. Savage-Bey had one witness testify in her defense. *See id.* at 65-80; *id.* at 136-37. It is therefore clear that Ms. Savage-Bey satisfied this *Frausto* factor.[9]

Relatedly, one more factor supporting reversal here is that La Petite has failed to identify its counsel or otherwise participate in proceedings before this Court. Although not a *Frausto* factor, the Court has considered an opposing party's "non-participation in the proceedings" in reversing an OAH final order. *Prince*, 917 A.2d at 1088 ("[W]e think it appropriate to include in our calculus Ms. Prince's failure to file a brief, to appear for oral argument, and to participate at all in the proceedings before this [C]ourt.").

In sum, even assuming *Thomas* requires Ms. Savage-Bey to satisfy the *Frausto* factors, OAH's final order cannot stand because Ms. Savage-Bey's actions met this burden, "requir[ing] further proof of the accuracy of the certificate" from DOES. *See Thomas*, 961 A.2d at 1066.

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[9] OAH failed to address (or even mention as a factor) whether La Petite would suffer any prejudice. *See Thomas*, 961 A.2d at 1066 ("We will also consider prejudice to the non-moving party.").

CONCLUSION

For the foregoing reasons, this Court should reverse OAH's final order dismissing Ms. Savage-Bey's administrative appeal for lack of jurisdiction and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Petitioner to be delivered by first-class mail, postage prepaid, this 30th day of April, 2010, to each of the following:

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