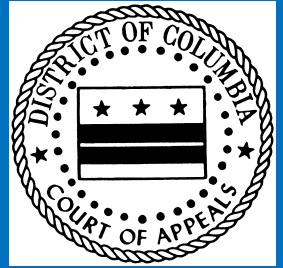


23-CV-607



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
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JOHN T. MCFARLAND

Appellant,

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS and DISTRICT OF COLUMBIA DEPARTMENT
OF HUMAN RESOURCES**

Appellees.

ON APPEAL FROM JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 2019-CA-008298-P(MPA)

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from Orders of Judge Robert R. Rigsby of the Superior Court of the District of Columbia (hereinafter “D.C. Superior Court”, “Superior Court”, or “Trial Court”) in the matter 2019-CA-008298-P(MPA).

Appellant John T. McFarland (hereinafter “Appellant” or “Mr. McFarland”) timely filed a Notice of Appeal on July 20, 2023, Joint Appendix (“JA”) 0114. Mr. McFarland appeals Trial Court’s Order Denying Appellant’s Petition For Review Of Agency Decision, entered June 22, 2023. *Id.*; JA0088, JA0111.

STATEMENT OF THE ISSUES

I. Whether the Superior Court erred in Denying Appellant's Petition For Review Of Agency Decision.

II. Whether the Superior Court erred in Denying Appellant's Petition For Review of Agency Decision and failing to Sanction the District for its Multiple False Statements to the Superior Court and this Court which resulted in both Courts issuing Erroneous Decisions.

STATEMENT OF THE CASE

Appellant John T. McFarland is employed at District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”) and requested a desk audit on March 8, 2011. Initially, Peter Delate of the District of Columbia Department of Human Resources (“DCHR”) was assigned to conduct Appellant’s desk audit. The DCHR claims that Mr. Delate left before completing the audit’s conclusion, and Lewis Norman from DCHR completed the desk audit on October 28, 2013, and concluded that Appellant was correctly classified as a Grade 9. JA0034-43. Appellant filed a Classification Appeal and later appealed the decision to the Superior Court of the District of Columbia (“Superior Court”) (*McFarland v. Government of the District of Columbia et al.*, No. 2014-CA-5775-P(MPA) (D.C. Super. Ct. March 24, 2016) and to this Court. On February 16, 2017, this Court held that Appellant did not show the existence of a signed Classification Desk Audit Decision. *McFarland v. District of Columbia Department of Human Resources*, No. 16-CV-399 (D.C. Feb. 16, 2017).

Appellant subsequently submitted FOIA requests, and as part of the response, Appellant received evidence that Mr. Delate completed Appellant’s desk audit before his departure and recommended Appellant be upgraded to a Grade 11. JA0021-28. Based on this new information previously withheld by the DCHR throughout the appeals, Appellant requested that the DCHR reconsider its October 28, 2013 Classification Desk Audit Decision on August 28, 2017. The DCHR

concluded “there is insufficient evidence to warrant reconsideration.”

Appellant appealed the decision to the Superior Court. *McFarland v. Dist. Of Columbia Dept. of Human Resources*, 2017-CA-007722-P(MPA) (D.C. Sup. Ct. September 17, 2019). The DCHR submitted a 223-page administrative record to the Superior Court in reference to the case on February 22, 2018, which was incomplete and did not contain Mr. Delate’s decision. The Superior Court held that the exclusion of the May 2011 Classification Appeal Decision was clearly erroneous. As the Agency’s decision in the instant case was dependent upon an erroneous Agency record, the Superior Court vacated and remanded the decision. *See Id.* In reaching its decision, the Superior Court found the Agency’s argument challenging the standard of Mr. Delate’s 2011 determination irrelevant. *Id.*

The Agency later selected Dr. Keisha Hawkins to review the desk audits and she affirmed the decision of Lewis Norman. On December 18, 2019, Appellant filed a Petition for Review of the DCHR Final Decision dated November 5, 2019, and issued on November 18, 2019. JA0010-20. On June 21, 2021, Appellant filed an opening brief. JA0046-57. Appellees District of Columbia Department of Consumer and Regulatory Affairs and District of Columbia Department of Human Resources (hereinafter collectively “Appellees”) later filed their opposition brief on September 3, 2021. JA0058-68. Judge Rigsby issued an Order denying Appellant’s Petition for Review on June 22, 2023. JA0069-72. The Superior Court ruled that the Agency’s

decision regarding the Appellant's classification followed the appropriate process outlined in the Factor Evaluation System ("FES"), and also that Appellant's request for sanctions against the respondent did not request any specific sanctions and lacked a statutory legal basis. *Id.* Because of this, the Court denied Appellant's Petition for Review of Agency Action. *Id.*

STATEMENT OF FACTS

Appellant John McFarland is employed as a Program Support Specialist, CS-0301-09 with the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”). He began employment with DCRA in November 2008. For approximately three years, Mr. McFarland worked in the Occupational and Professional Licensing Division (“OPLD”) for DCRA and was responsible for managing the licensing and business administration affairs of the Board of Accountancy, the Board of Professional Engineering and the Board of Funeral Directors. During the 2011 fiscal year, Mr. McFarland worked in the OPLD with Leon Lewis. Both were responsible for performing licensing duties for three boards and had the same responsibilities.

On January 30, 2011, Mr. McFarland requested a desk audit because he was performing the same duties as Leon Lewis, who was a CS-0301-12. Peter Delate, then-Interim Associate Director, Compensation and Classification Administration, District of Columbia Department of Human Resources, was assigned to perform a desk audit for Mr. McFarland’s position. Mr. McFarland met with Mr. Delate in March 2011, and Mr. McFarland was asked to complete a job questionnaire, which he did. Mr. Delate submitted a Memorandum to Staci M. Mason, the Administrative Officer at DCRA on March 30, 2011, advising that Mr. McFarland was performing the duties of a Grade 11 Program Support Specialist. JA0021-22.

On April 11, 2011, Mr. Delate of DCHR advised Mr. McFarland that the desk audit was done. Mr. Delate shared the results of the desk audit with Mr. McFarland's supervisors on or around May 3, 2011. JA0023-28. Mr. McFarland did not receive the results of the desk audit in 2011 or 2012. No action was taken by DCHR on Mr. McFarland's desk audit request from 2011 through 2013.

On October 28, 2013, DCHR issued a Classification Desk Audit Decision signed by Karla Kirby, Associate Director, DCHR, Administration for Recruitment and Classification Services. JA0029-31. Attached to the Classification Desk Audit Decision was a Position Classification Review Decision for the Program Support Specialist, CS-0301-09, position held by Mr. McFarland and dated October 28, 2013, and signed by Lewis C. Norman, Supervisory Human Resources Specialist (Classification). JA0032-33.

On June 17, 2014, Mr. McFarland submitted a classification appeal to the Director of DCHR, Shawn Y. Stokes. In his appeal, Mr. McFarland attached a position description given to him while working at the Permit Center and indicated that he submitted a desk audit request and Job Analysis Questionnaire on March 8, 2011 and Pete Delate, a DCHR Human Resources Specialist from the Compensation and Classification Administration, completed the desk audit on March 21, 2011. Mr. McFarland explained that he had not received equal pay for fulfilling the same type of work performed by another DCRA/OPLD employee, Leon Lewis, and both

he and Mr. Lewis handled job responsibilities for three Boards.

On July 16, 2014, the Director of DCHR, Shawn Y. Stokes, issued a Classification Appeal Decision in Mr. McFarland's appeal. JA0034. Ms. Stokes stated in the Classification Appeal Decision that "[w]e decided this appeal by considering our desk audit findings and all other information of record furnished by you and your agency, including your official position description. Based upon a thorough review of the information made available to us in this appeal, we have made a determination that your position is properly classified as Program Support Specialist (CS-0301-09)." *Id.* Attached to the Decision was a Classification Appeal Decision notification signed by Karla Kirby, Associate Director, DCHR, Administration for Recruitment and Classification Services, dated July 16, 2014, and a Position Classification Appeal Decision, dated July 16, 2014 and signed by Lewis C. Norman, Supervisory Human Resources Specialist (Classification). JA0035-48. DCHR also included a D.C. Optional Form 8, which purports to be a re-certification of the Program Support Specialist CS-0301-09 position.

Appellant filed a Classification Appeal and later appealed the decision to the Superior Court. *McFarland v. Government of the District of Columbia et al.*, No. 2014-CA-5775-P(MPA) (D.C. Super. Ct. March 24, 2016). On March 24, 2016, Judge Holeman denied the Petition for Review. *Id.* In his opinion, Judge Holeman noted the standard for review and based on the false statements from the District of

Columbia that Mr. Delate ended his employment before completing the Classification Decision, commented that: “[t]he record indicates that Mr. Delate ended his employment with DCHR prior to completing the Audit and the Audit was ultimately completed by Lewis C. Norman, another Human Resources Specialist employed by DCHR. (Record at 36.). Petitioner’s attempt to place at issue the circumstances surrounding Mr. Delate’s departure, suggesting that the completing of the initial review by Mr. Norman was under dubious circumstances, is unavailing.” *McFarland v. Government of the District of Columbia et al.*, No. 2014-CA-5775-P(MPA) (D.C. Super. Ct. March 24, 2016) at 7. Again, based on false information provided to Judge Holeman, he reasoned that: “[a]rguably, any work performed by Mr. Delate was subsumed by Mr. Norman upon Mr. Delate’s departure while the Audit was still pending, and only the fully completed Audit could properly be considered by DCHR. (See R. at 36.) Regardless, Petitioner had the responsibility to introduce his purported ‘material evidence’ into the record, including any documents reflecting the work performed by Mr. Delate, during proceedings before DCHR. Hoage, 714 A.2d at 781; (Pet. Brief at 5-7.) As previously stated by the Superior Court, there is simply no evidence, let alone ‘substantial evidence,’ proving that Respondent deliberately withheld or otherwise engaged in misconduct resulting in omission of material evidence from the record before DCHR and on appeal to this Court.” *McFarland v. Government of the District of Columbia et al.*, No. 2014-CA-

5775-P(MPA) (D.C. Super. Ct. March 24, 2016) at 8.

Appellant timely appealed Judge Holeman’s decision to the District of Columbia Court of Appeals. *McFarland v. District of Columbia Department of Human Resources*, No. 16-CV-399 (D.C. Feb. 16, 2017). Before the Court of Appeals, the District filed a Motion for Summary Affirmance, and made false representations to the Court of Appeals. Specifically, the District stated that Mr. McFarland’s position classification review was assigned to Peter Delate and “Mr. Delate left DCHR prior to completing the classification review.” *McFarland v. District of Columbia Department of Human Resources*, No. 16-CV-399 (D.C. Feb. 16, 2017), Appellee’s Motion for Summary Affirmance at 2. The District continued in arguing that “nothing Mr. Delate himself prepared-- whether these notes or even something more formal-could have been a final decision of DCHR.” *Id.* at 7. Based on the District’s false representations to the Court of Appeals, the Court of Appeals granted the District's Motion for Summary Affirmance on February 16, 2017. *McFarland v. District of Columbia Department of Human Resources*, No. 16-CV-399 (D.C. Feb. 16, 2017). In its Judgment, the Court of Appeals ruled that: “[p]etitioner’s declaration and exhibits were properly struck from his brief in support of his petition for review of respondent’s classification decision because they were not included in the record. *See Mack v. D.C. Dep’t of Employment Servs.*, 651 A.2d 804, 806 (D.C. 1994) (noting that when reviewing the final decision of an agency,

the court ‘cannot consider issues or evidence not presented to the agency’); *see also* Super. Ct. R. P. Agency Review Rule 1(g) (requiring that the court ‘base its decision exclusively upon the agency record’).” *Id.* at 1. The Court of Appeals also held that “Petitioner failed to demonstrate that there existed a relevant signed Classification Desk and Audit Decision that was not included in the agency record.” *Id.* at 2.

After the Court of Appeals issued its judgment, Mr. McFarland submitted a FOIA request to DCHR requesting copies of all Desk Audits and responses to Job Classification Questionnaires completed by DCHR for Department of Consumer and Regulatory Affairs employees. AR at 00218. In response to the FOIA request, the District produced a DCHR Classification Appeal Decision signed by Peter Delate as a Human Resources Specialist and the Interim Associate Director, Compensation & Classification Administration, dated May 3, 2011, which concluded that “appellant (Mr. McFarland) was working within the parameters of the Program Support Specialist, 0301, grade 1I.” JA0021-28. After receiving the Classification Appeal Decision, Mr. McFarland requested that DCHR reconsider its October 2013 Classification Decision. DCHR denied his request for reconsideration, and Mr. McFarland again filed a Petition for Review to the Superior Court. *McFarland v. Dist. Of Columbia Dept. of Human Resources*, 2017-CA-007722-P(MPA) (D.C. Sup. Ct. September 17, 2019).

On December 21, 2018, the District submitted a Declaration from Lorraine Green and exhibits, where she asserted that Mr. Delate did not follow the classification guidelines to properly determine the appropriate grade level for Mr. McFarland's position. The Superior Court vacated the Agency's decision and remanded the matter. *Id.*

DCHR thereafter directed Dr. Keisha Hawkins, Associate Director of the HRSA to advise the DCHR on "which decision [Peter Delate or Lewis Norman's decision] was made in accordance with approved position classification standards." Dr. Hawkins did not receive the entire 223-page administrative record and instead received 23 pages picked from the administrative record. Dr. Hawkins selected Lewis Norman's decision based on the requested comparison of the 23 pages, and DCHR affirmed Lewis Norman's decision in its Final Decision. The DCHR's final decision dated November 5, 2019, and issued on November 18, 2019, did not address the critical failings noted by the Superior Court. JA0010-20. The DCHR cited no legal authority that authorizes it to make Appellant's classification appeal decision based on a comparison of which classification decision better conforms with standards - even though it is entirely possible that neither abide by the standard - based on ten percent of the administrative record.

On December 18, 2019, Appellant filed a Petition for Review of the DCHR Final Decision. On June 21, 2021, Appellant filed an opening brief. JA0046-57.

Appellees District of Columbia Department of Consumer and Regulatory Affairs and District of Columbia Department of Human Resources (hereinafter collectively “Appellees”) later filed their opposition brief on September 3, 2021. JA0058-68. Judge Rigsby issued an Order denying Appellant’s Petition for Review on June 22, 2023. JA0069-72. The Superior Court ruled that the Agency’s decision regarding the Appellant’s classification followed the appropriate process outlined in the Factor Evaluation System (“FES”), and also that Appellant’s request for sanctions against the respondent did not request any specific sanctions and lacked a statutory legal basis. *Id.* Because of this, the Court denied Appellant’s Petition for Review of Agency Action. *Id.*

SUMMARY OF THE ARGUMENT

The Trial Court erred when it denied Appellant's Petition For Review Of Agency Decision because the Agency's November 4th, 2019 Opinion on Previous Classification Appeal Decisions should have been struck, and the District should have been sanctioned for making false representations to the Court.

ARGUMENT

I. The Trial Court Erred in Denying the Petition for Review.

The Trial Court denied Appellant’s Petition for Review of Agency Decision and held that the Agency’s November 4, 2019 Opinion (“2019 opinion”) regarding the Appellant’s classification is reasonable and followed the appropriate process outlined in the Factor Evaluation System (“FES”). JA0069-72. The Trial Court concluded that Mr. Delate’s 2011 evaluation (“2011 memo”) had already been reviewed during the court’s remand to DCHR and that the Agency’s 2019 opinion considered Mr. Delate’s 2011 memo but reached a different, yet reasonable, conclusion. *Id.* These findings were made in error, and the underlying reasoning is faulty for a number of reasons. While the Agency’s 2019 opinion may have followed the FES guideline, that alone does not make it “reasonable”. Indeed, even though the 2019 opinion considered Mr. Delate’s memo, the conclusions it came to were not “reasonable”. For an Agency opinion to be reasonable, it has to be supported by substantial evidence. (*Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966)). Substantial evidence is “relevant evidence such as a reasonable mind might accept as adequate to support a conclusion.” *Mills v. District of Columbia Dep’t of Empl. Servs.*, 838 A.2d 325, 328 (D.C. 2003). Here, the Agency’s 2019 opinion is not reasonable because it incorrectly concluded, without substantial evidence, that Mr. Delate’s memo was not on par with established standards. There is no evidence in

the record to demonstrate that Mr. Delate did not follow the normal practice of the Agency when he issued the classification decision in 2011. In fact, there is a presumption that he did follow the normal Agency policies and practices in issuing the decision. The Agency claims that Mr. Delate did not use the point factor system, but there is no evidence, substantial or otherwise, that demonstrates conclusively whether or not Mr. Delate used a point factor system. Further, even if Mr. Delate did not use the point factor system, there is not substantial evidence in the record that this was not the normal Agency practice at this time or even if the point factor system was utilized by the Agency at the time. Thus, the Agency's opinion cannot be considered reasonable as it lacks a substantial evidentiary basis. Accordingly, the Trial Court should have stricken the 2019 opinion and erred when it failed to do so.

In addition, the Trial Court erred when it permitted the Agency to submit into the record a Memorandum supporting the 2014 classification decision as support for their 2019 opinion. This Memorandum should have been stricken from the record, as the Court of Appeals has already held in the appeal from the prior Petition for Review that a declaration and exhibits which were not presented to the Agency cannot be considered by the reviewing court. *See Mack v. D.C. Dep't of Employment Servs.*, 651 A.2d 804, 806 (D.C. 1994) (noting that when reviewing the final decision of an agency, the court "cannot consider issues or evidence not presented to the agency"); *see also* Super. Ct. R. P. Agency Review Rule 1(g) (requiring that the court

“base its decision exclusively upon the agency record.” *Id.* at 1. The Declaration should have been stricken.

More broadly, the Trial Court cannot “set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law.” Super. Ct. Agency Rev. R. 1(g). Here, the Agency rendered a final decision on Appellant’s position classification audit when Mr. Delate determined that Appellant should have been classified at a grade 11. JA0021-28. This was the District’s final decision in 2011. Two years later, the District conducted a second classification audit by Lewis Norman and concluded that the position should be a grade 9. JA0034-43. After denying the existence of Mr. Delate’s 2011 memo for several years and even to this Court which resulted in this Court rendering an erroneous decision, the Agency finally acknowledged Mr. Delate’s 2011 decision after Appellant discovered the report through a FOIA request. The Trial Court remanded the matter back to the Agency and the Agency rejected its own prior decision. *McFarland v. Government of the District of Columbia et al.*, No. 2014-CA-5775-P(MPA) (D.C. Super. Ct. March 24, 2016); JA0010-20. The Trial Court later affirmed the Agency’s decision and thereby set aside the decision by Mr. Delate. *McFarland v. Dist. Of Columbia Dept. of Human Resources*, 2017-CA-007722-P(MPA) (D.C. Sup. Ct. September 17, 2019). There was no evidence presented to the Trial Court that Delate’s 2011 decision was erroneous as a matter of law, or that

the evaluation standards used by Lewis Norman were in effect and binding on the Agency in 2011. As a result, the Trial Court was obligated to accept the decision issued by Delate. The Trial Court did not make any attempt to analyze the Mr. Delate's 2011 memo, and just concluded that there was a valid basis for the Norman report and affirmed the Agency's decision.

II. The Trial Court Erred in Concluding that The District Should not be Sanctioned.

The Trial Court denied Appellant's request that the District be sanctioned for various false representations to the Court's and held that Appellant failed to cite specific sanctions and failed to provide the legal basis for such sanctions. JA0072. This finding was in error. According to D.C. Super. Ct. Civ. R. 11, which governs sanctions for false representations to the court, there is nothing requiring parties to request "specific" sanctions or to even cite to a "specific" statute as the basis for the sanction. *Id.* Courts are even empowered to impose sanctions on parties sua sponte. *Id.* Given the numerous false representations by the District in this case, sanctions should have been imposed by the Trial Court. The following will serve as a brief summary of the various false representations made by the District.

After Appellant requested a position classification review, Mr. Delate prepared and signed a Classification Appeal Decision on May 3, 2011, finding that Appellant was working within the parameters of a Grade 11 Program Support Specialist position. JA0021-28. The District later falsely claimed that Mr. Delate left

his position without completing the audit or issuing a signed Decision, and later issued a second Classification Decision in 2014, finding that Appellant was properly graded at Grade 9. JA0034-43. Appellant filed a Petition for Review and the case was assigned to Judge Holeman, who denied the Petition for Review, and Appellant's appeal to this Court was affirmed. *McFarland v. Government of the District of Columbia et al.*, No. 2014-CA-5775-P(MPA) (D.C. Super. Ct. March 24, 2016); *McFarland v. District of Columbia Department of Human Resources*, No. 16-CV-399 (D.C. Feb. 16, 2017). Throughout the litigation, the District made multiple false statements to the Superior Court and this Court that the Delate Classification Decision was not completed, and thereby committed fraud on the Courts. After this Court issued its Judgment, Appellant submitted a FOIA request to the District, and the District finally produced the Delate signed Classification Appeal Decision, which it had previously denied existed. At this point, the District had an obligation to alert the Superior Court and this Court that it had made material false statements to the Courts, which resulted in erroneous judgments being issued by the Courts. Rather than acknowledge its error, the District "double-downed" and has continued to take the position that it will attempt to invalidate Mr. Delate's 2011 memo. The Trial Court erred in failing to sanction the District for its false representations to the Courts.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Trial Court's decisions be reversed and remanded for further proceedings.

Date: February 29, 2024

Respectfully submitted,

/s/ David A. Branch

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of February 2024 a copy of the foregoing Appellant’s Opening Brief was served electronically via the Court’s e-filing system on counsel for Appellees listed below.

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District of Columbia Court of Appeals

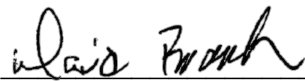
REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual’s social-security number
 - Taxpayer-identification number
 - Driver’s license or non-driver’s’ license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym “SS#” where the individual’s social-security number would have been included;
 - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
 - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
 - (4) the year of the individual’s birth;
 - (5) the minor’s initials; and
 - (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

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Email Address

23-CV-607

Case Number(s)

February 29, 2024

Date