STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

City of Cranston	:	
	:	
v.	:	**A.A. No. 2018 - 183**
	:	
State of Rhode Island	:	
(RITT Appeals Panel)	:	
(Richard Aybar)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is VACATED and the instant case is REMANDED to the Appeals Panel for further proceedings consistent with this opinion.

Entered as an Order of this Court on this 25th day of March, 2020.

By Order:

___/s/_____
Stephen C. Waluk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

City of Cranston	:	
	:	
v.	:	**A.A. No. 2018-183**
	:	**(T18-015)**
State of Rhode Island	:	**(18-402-503227)**
(RITT Appeals Panel)	:	**(18-402-503226)**
(Richard Aybar)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. On May 13, 2018, an officer of the Cranston Police Department issued two traffic summonses to Mr. Richard Aybar. Four months later, a separate trial was conducted for each summons by a judge of the Cranston Municipal Court; Mr. Aybar was found guilty on all charges.

Mr. Aybar then appealed his conviction in one summons; however, he failed to file an appeal in the second. Nevertheless, when he appeared before an Appeals Panel of the Traffic Tribunal (RITT), Mr. Aybar was allowed to amend his appeal to include the second summons;

his appeal was then granted as to both matters.

Thereafter, the City of Cranston filed the instant appeal, in which it urges that the Appeals Panel erred when it allowed Mr. Aybar to add the second summons to his pending appeal, because the appeal period had already expired.

Jurisdiction for the instant appeal is vested in the District Court by G.L. 1956 § 31-41.1-9; the applicable standard of review is found in § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to G.L. 1956 § 8-8-8.1. And, for the reasons I will explain in this opinion, I have concluded that the decision of the Appeals Panel should be VACATED, and the case REMANDED to the Appeals Panel for further proceedings; I so recommend.

I
Facts and Travel of the Case

From the record certified to us by the RITT and the memoranda of the parties, I have been able to formulate the following narrative of the travel of the instant case. I believe the factual averments made within it to be uncontested by either party.

A
The Citation and Initial Proceedings

On May 13, 2018, near the intersection of Wellington Avenue and Park Avenue, Mr. Richard Aybar was cited by Officer Christopher LeClair of the Cranston Police Department for the following civil traffic violations: in Summons No. 18-402-503226, he was charged with violations of G.L. 1956 § 31-16-5 (Turn Signal Required), G.L. 1956 § 31-24-12 (Stop Lamps Required), and G.L. 1956 § 31-22-22(g) (No Seat Belt – Operator); in Summons No. 18-402-503227, he was cited for a violation of G.L. 1956 § 31-22-24 (Interior Lighting During Police Stop).

Mr. Aybar entered pleas of not guilty at his arraignment before the Cranston Municipal Court on June 26, 2018 and separate trials as to each summons were conducted by Chief Judge Matthew Smith as to each summons on September 20, 2018. In each case the City presented the testimony of Officer LeClair. Mr. Aybar was found guilty on each of the enumerated charges. As to Summons No. 18-402-503227, *see Final Disposition Report,* created by the Cranston Municipal Court, which may be found in the Electronic Record (*ER*) attached to this case, at 58.

On September 28, 2018, Mr. Aybar filed a Notice of Appeal of the judgment rendered against him in Summons No. 18-402-503227 *only*. *See Notice of Appeal. ER*, at 53-55. No appeal was filed from the judgment rendered in Summons No. 18-402-503226.

B

Review by the Appeals Panel

On October 1, 2018, after Mr. Aybar's appeal was filed, a Clerk of the RITT sent a memorandum, referencing Summons No. 18-402-503227, to the Cranston Municipal Court requesting that the following materials be forwarded to her: two copies of the audio recording of the trial, the original summons, and other records in its possession. *ER*, at 49.[1] In response, the Tribunal received a memorandum from the Municipal Court, also referencing Summons No. 18-402-503227, which indicated that the audio file of the trial was irretrievable. *ER*, at 46.

Thereafter, the matter was scheduled to be heard before the Appeals Panel on November 14, 2018. *See Notice*, Oct. 25, 2018. *ER*, at

[1] Copies of this Memorandum were sent to the Cranston Police Department and Appellant Aybar. *Id*.

41.[2] Mr. Aybar attended the hearing, but the City was unrepresented. *Id*. The proceeding was brief; indeed, its typed transcript is contained on one page. *Appeals Panel Transcript,* Nov. 14, 2018; *ER*, at 1.

After the case was called, a Magistrate (presumably, the Chair) informed Mr. Aybar that, since the Municipal Court was unable to provide a recording of the trial, the case would be dismissed. *Id*. At this juncture, Mr. Aybar requested, orally, that he be allowed to add the other summons, No. 18-402-503226, to his appeal, since he had omitted it by "mistake." *Id*. And, after a bit more discussion, the Magistrate announced that the Panel would allow him to amend his appeal to do so — and that a written decision would be issued. *Id*.

The judgment of the Appeals Panel came in the form of an Order, signed solely by its Chair, on November 27, 2018. *See Order*, at 1-2; *ER* at 38-39. As promised, the Panel granted Mr. Aybar's appeal and dismissed the charges against him in both summonses, Nos. 18-402-503227 and 18-402-503226, because the recording was unavailable. *Id*. In its Order, the Panel did not discuss Mr. Aybar's oral motion to amend

---

[2] This Notice was directed to Mr. Aybar; copies were sent to the Cranston Municipal Court and the Police Department. *Id*.

his appeal or explain its rationale for considering both summonses. *Id*.

C

The City's Appeal to this Court

Then, on December 5, 2018, the City of Cranston filed a Notice of Appeal as to Summons No. 18-402-503226. *ER*, at 4-5.[3]

Within the part of that form reserved for the Appellant to provide its reasons for appeal, the City declares that, since no appeal had been filed in 226 in a timely manner, the RITT had never requested an audio transcript of the trial of 226.[4] More broadly, the City urges that since no appeal had been filed in 226, it was not properly before the Panel for consideration. *Id*. Indeed, in the City's view, the Panel had no jurisdiction to hear or adjudicate Mr. Aybar's convictions in 226. *Id*. Specifically, the Panel had no authority to allow Mr. Aybar to orally amend his appeal to include 226, as it was time-barred. *Id*.

In sum, the City alleges that the Appeals Panel committed both

---

[3] At this juncture, having referenced Mr. Aybar's summonses by their full numbers on multiple occasions, I shall begin to cite them by their last three digits — that is, "226" and "227." I believe this will promote and not diminish the clarity of the narrative.

[4] The City did not represent in its Notice of Appeal whether an audio transcript in the trial of 226 is, in fact, available.

a *substantive* error (that is, its finding that the audio record was unavailable) and a *procedural* error (by allowing Mr. Aybar to amend his appeal to include Summons No. 226).

This matter was transmitted to the District Court by a Clerk of the RITT. Since it arrived, it has been the subject of a settlement conference conducted by the undersigned; and, when settlement efforts proved fruitless, a briefing schedule was set. Memoranda have been received from the City (seeking reversal of the Panel's dismissal of 226) and the State (defending the decision of the Panel). Despite notice, Mr. Aybar has not participated in these proceedings.

D

The Positions of the Parties

1

The Appellant — City of Cranston

In its Memorandum, the City asserts that the Appeals Panel lacked jurisdiction to consider and rule upon 226. *City's Memorandum,* at 2 (citing G.L. 1956 § 31-41.1-8(d)). It bases this declaration on the principal that the pertinent appeal statute, § 31-41.1-8, like others of its kind, must be strictly construed. *Id*. (citing *Sousa v. Town of Coventry,* 774 A.2d 812, 815 (R.I.2001)). And so, since the motion to amend was

granted many weeks *after* the trial in 226 was conducted, the City urges that Mr. Aybar failed to comply with § 31-41.1-8(d)'s mandate that an appeal from a traffic adjudication must be "filed" within ten days. *City's Memorandum,* at 2-3.[5]

The City also argues that Mr. Aybar failed to show that his omission was caused by *excusable neglect*, as is necessary to justify a late appeal under § 31-41.1-8(d). *Id*. at 3. The City urges that *unexplained* neglect is insufficient to permit refuge under that provision. *Id*. at 4 (citing *Jacksonbay B'lders, Inc. v. Azarmi,* 869 A.2d 580, 584 (R.I. 2005)).

2

The Appellee — The State of Rhode Island

The State, on behalf of the Appeals Panel, has adopted the position that the actions of the Appeals Panel were entirely appropriate. *See State's Memorandum* (February 3, 2020), at 1-2.[6] In support of its position, the State reminds the Court that the City was unrepresented at

---

[5] In its Memorandum, the City places quotation marks around the word *filed*, ostensibly in an effort to remind us that Mr. Aybar never filed a written Notice of Appeal in 226 — late or otherwise.

[6] The State had previously filed another Memorandum in which it, for all intents and purposes, had confessed error on behalf of the Appeals Panel. It later had reconsidered that position. By separate order, issued this date, the State's Motion to Withdraw its previous submission is GRANTED.

the hearing before the Panel, and that, as a result, the City waived its right to challenge the Panel's ruling. *Id*. at 2. It also asserts that, since the audio of the trial is unavailable, the Panel acted appropriately. *Id*.

II

Standard of Review

The standard of review which must be employed in this case is enumerated in G.L. 1956 § 31-41.1.-9(d), which states as follows:

> (d) *Standard of review*. The judge of the district court shall not substitute his or her judgment for that of the Appeals Panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the Appeals Panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the Appeals Panel's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the Appeals Panel;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This provision is a mirror-image of the standard of review found in G.L. 1956 § 42-35-15(g), a provision of our Administrative Procedures Act (APA). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this process.

III
Applicable Law
A
Section 31-41.1-8(d)

According to the City, the underlying issue in this case is whether, by allowing Mr. Aybar to amend his appeal at his oral argument in summons 227 so as to include summons 226, the Appeals Panel improperly circumvented the ten-day appeal period set forth in § 31-41.1-8(d):

> (d) **Time limitations.** No appeal shall be reviewed if it is filed more than ten (10) days after notice was given of the determination from which it was appealed, unless it is determined that failure to file was due to excusable neglect. Notice shall be complete upon mailing.

To my knowledge, this provision has not yet been interpreted by our Supreme Court.

B

Guidance from Cases Interpreting Section 42-35-15(b)

While the appeal from the Cranston Municipal Court to the RITT Appeals Panel proceeds from one judicial body to another, such appeals proceed in a manner similar to that prescribed for appeals of administrative decisions under the APA — which is entirely understandable, since both statutes were *modeled on* § 42-35-15.

And so, it is to be expected that § 42-35-15, like § 31-41.1-8, would have a provision setting forth the time limitation in which appeals must be filed; and so it does. That provision is § 42-35-15(b), which establishes the appeal period for administrative appeals at thirty days:

> (b) Proceedings for review are instituted by filing a complaint in the Superior Court of Providence County or in the Superior Court of the county in which the cause of action arose, or where expressly provided by the general laws, in the sixth division of the district court or … within thirty (30) days after mailing notice of the final decision of the agency … (Emphasis added).

And, there are, fortunately for us, a substantial number of cases which have interpreted § 42-35-15(b); taken together, these cases can provide much guidance to us as we endeavor to construe § 31-41.1-8(d).

Specifically, I believe that we can discern from the Court's recent late-appeal jurisprudence three main themes.

1

Late Appeals at a Conceptual Level

The first of these themes concerns the conceptual basis for the dismissal of late appeals. Quite simply, our Supreme Court's recent late-appeal decisions have completely overturned our previous thinking in this area. For many years, Rhode Island's trial bench labored under the misapprehension that we were *without jurisdiction* to hear late appeals,[7] and so ruled on many occasions.[8] But this bit of conventional wisdom was declared to be erroneous, if not heretical, by the Supreme Court in

---

[7] This concept was, and is, accepted nationally. *See* 2 AM. JUR. 2d *Administrative Law* § 507 (Feb. 2020 Update) *and* 73A C.J.S. *Public Administrative Law and Procedure* § 470, (Feb. 2020 Update).

[8] Among the many cases which could be cited to demonstrate the ubiquity of this approach are the Superior Court decisions in *Rivera v. Employees' Ret. Sys. of Rhode Island,* 2011 WL 997150, at *4-*5 (R.I. Super. 3/16/2011), *quashed* 70 A.3d 905, 906 (R.I. 2013) (appeal from denial of disability pension) *and McAninch v. State of R.I. Dep't of Labor and Training,* 2010 WL 7746439, at *2-*4 (R.I. Super. 10/5/2010) *rev'd* 64 A.3d 84, 86 (R.I. 2013) (appeal from ruling of DLT's Div. of Labor Standards). The District Court also embraced this theory in many unemployment-benefit appeals, including *Trinidad-Martinez v. Dep't of Labor and Training, Bd. of Review,* A.A. No. 12-161 (Dist.Ct. 9/21/2012), *Gallo v. Dep't of Labor and Training, Bd. of Review,* A.A. No. 2011-071 (Dist.Ct. 8/03/2011), *and Dub v. Dep't of Employment Security, Bd. of Review,* A.A. No. 90-383, (Dist.Ct. 1/23/1992).

Rivera v. Employees' Retirement System of Rhode Island, 70 A.3d 905, 911-12 (R.I. 2013) *and McAninch v. State of Rhode Island Dep't of Labor and Training,* 64 A.3d 84, 86 (R.I. 2013).[9]

In *McAnich,* the Court declared —

> This Court has held that, based on the language of this statute, "[c]ertainly, the Superior Court has *subject matter jurisdiction* over proper administrative appeals." *Rivera v. Employees' Ret. Sys. of R.I.,* 70 A.3d 905, 911-12 (R.I.2013). However, "the real issue before the Superior Court was whether that tribunal, which unquestionably had subject matter jurisdiction, '*should have exercised that jurisdiction.*' " *Narrag'tt Electric Co. v. Saccoccio,* 43 A.3d 40, 44 (R.I.2012) (quoting *Trainor v. Grieder,* 23 A.3d 1171, 1174 (R.I.2011)). To be sure, and as this Court has noted in the past, "the distinction between the 'appropriate exercise of power and the absence of power' may at times be 'blurry.' " *Id.* (quoting *Mesolella v. City of Providence,* 508 A.2d 661, 665 (R.I.1986)).

McAninch, ante, 64 A.3d at 87.[10] And so, it is incorrect to say that this Court, like the Superior Court, has no jurisdiction over tardily-filed appeals. Instead, in particular cases, we should say that it is *inappropriate* for us to exercise that power.[11]

---

[9] *Rivera* was issued on 4/8/2013; *McAninch* followed eleven days later.

[10] The citation to *Rivera* has been updated from the original Westlaw cite.

[11] As we shall see *post*, under § 42-35-15(g), it can be said that we should

2

Strict Construction of Appeals Statutes

The second theme developed by the Court in this area relates to the proper interpretation of § 42-35-15's prerequisites to appeal, including the time limit found in § 42-35-15(b); the Rhode Island Supreme Court has repeatedly declared that —

> [s]tatutes prescribing the time and procedure to be followed by a litigant attempting to secure appellate review are to be strictly construed. *Sousa v. Town of Coventry,* 774 A.2d 812, 814 (R.I. 2001) (holding that the plaintiffs' challenge to the validity of an ordinance was time barred when the challenge was filed four months after the time period began to run, rather than within thirty days as required by statute); *see also Seibert v. Clark,* 619 A.2d 1108, 1111 (R.I.1993); *Potter v. Chettle,* 574 A.2d 1232, 1234 (R.I. 1990).[12]

Rivera, 70 A.3d at 912. *Accord, McAninch,* 64 A.3d at 88.

3

The Availability of Equitable Tolling

Finally, the Court has indicated that, while we are commanded to interpret appeals statutes strictly, they are not inviolate. For instance,

---

hear a late-filed appeal based upon the application of the doctrine of equitable estoppel. When applying § 31-41.1-8, we may add the concept of "excusable neglect."

[12] *Seibert* was an appeal from a ruling of the Division of Taxation; *Sousa* and *Potter* were appeals from decisions of a town zoning board.

in *Rivera,* the Supreme Court held that the requirement to construe § 42-35-15 strictly is subject to the principles of equitable tolling. *Rivera, ante,* 70 A.3d at 912 (citing *Iselin v. Retirement Board of Employees' Retirement System of Rhode Island,* 943 A.2d 1045, 1051 (R.I.2008) *and Johnson v. Newport County Chapter for Retarded Citizens, Inc.,* 799 A.2d 289, 292 (R.I. 2002)).

IV
Analysis

In my view, the instant case illuminates the ceaseless tension which exists in our high-volume courts between the need for the expeditious adjudication of cases and the obligation to maintain fidelity to the procedures established in the Court's governing statutes and rules. We shall now review the decisions made by the Panel in this case.

A
The Appeals Panel's Dismissal of Summons 226

In two swift strokes, the Appeals Panel added summons number 226 to Mr. Aybar's appeal and then set aside both convictions based on a determination that an audio tape of the trial was not retrievable from the Municipal Court's recording system. Unfortunately,

there is no factual basis upon which to conclude that there was no audio available for the trial of 226.

It appears that the Panel may have assumed that both citations (226 and 227) had been tried jointly — as they could have been under Rule 9 of the RITT Rules of Procedure. And so, when the Municipal Court reported that the audio of 227 was unavailable, the Panel may well have assumed that the statement applied to both summonses. However, we know that these cases were tried separately.[13] And there is simply no correspondence (from the Municipal Court to the Tribunal) in the record showing that there is no audio record available of the trial in 226.[14] It simply does not follow, from the fact that the audio of the trial in 227 was lost, that the audio record of 226 is also unavailable. It may or may not be lost. Therefore, the Panel's finding as to Summons No. 18-402-503226 must be vacated; and, the instant case is

---

[13] Had 226 and 227 been tried together, I believe the instant case would stand on an entirely different footing. In that situation, the omission of 226 from the Notice of Appeal form might well have been viewed as nothing more than a clerical error on Mr. Aybar's part.

[14] I have reviewed the electronic record associated with summons 226; it *does not* include a docket entry that there is no audio record of the trial, as does the electronic record associated with summons 227.

remanded for a proper inquiry to be made on the availability of the audio record of that trial.[15]

B

The Appeals Panel's Decision to Allow the Late Appeal

We may now turn to the procedural issue which has been raised by the City — whether the Appeals Panel possessed the authority to grant Mr. Aybar's request to add 226 to the appeal (in 227) then pending. While this argument has many implications for Appeals Panel practice and procedure, the City, in its Memorandum, bypasses these preliminary questions,[16] and focuses instead on whether Mr. Aybar

---

[15] This directive is without prejudice to the City's right to argue at the post-remand hearing that the Appeals Panel should adopt a less draconian remedy than dismissal of the summons, if it should be confirmed that an audio recording of 226 is indeed unavailable. *See Appellant-City's Objection to the State's Motion to Withdraw Its Brief,* at 3-4 (citing Traffic Tribunal Rule 21 (h)).

Of course, by its failure to appear, the City waived this argument with respect to 227.

[16] Among the questions triggered by the Panel's action (in granting what was, in effect, a motion to amend his prior Notice of Appeal), are the following:

First, whether an appeal under § 31-41.1-8 can be taken, or amended, orally. *See* § 31-41.1-8(e), which does not seem to permit it. In this aspect subsection 8(e) parallels Rhode Island practice under the APA. *See* § 42-35-15(b).

Second, whether a Notice of Appeal (be it written or oral) can be amended at all. Rhode Island's pertinent statutes do not expressly permit it. *See* § 31-41.1-8(e) *and* § 42-35-15(b). Other states' APA's do have such provisions. *St. Joseph's Hospital v. Cain,* 937 N.E.2d 903, 307 (Ind.Ct.App.2010), *opinion*

proved excusable neglect for violating the 10-day appeal period. *See* § 31-41.1-8(d). But, while the City identified one of the potential hurdles to granting the motion to amend, the Panel identified and discussed none.

In fact, the Panel's sole pronouncement on this issue was the following statement made at the oral argument/hearing:

> We'll allow you to amend it to include all of them and we will issue a decision, a written decision. Okay?

Appeals Panel Hearing Transcript, ER at 1. This bare-bones comment specifies neither the Panel's *authority* to permit the amendment nor the *discretionary standard* it applied in permitting the amendment. Quite simply, from the point of view of this Court, the Panel's decision is

---

vacated, 971 N.E. 2d 668 (Ind.2012), *opinion reinstated,* 975 N.E. 2d 359 (Ind.2012) (interpreting Trial Rule 15 in conjunction with several provisions of Indiana's Administrative Orders and Procedures Act (AOPA)); *Jackson v. Labor and Industry Review Commission,* 715 N.W.2d 654, 660-61 (Wisc. App. 2006) (citing W.S.A. § 227.53(1)(b), providing for amendments by leave of court, even if the time for filing has expired); *DeCastro v. Wambua,* 979 N.Y.S.2d 466, 468 (Sup. 2013) (declaring that C.P.L.R. § 3025(b) permits amendments to a petition "as long as they do not unfairly surprise or otherwise substantially prejudice respondents."). In addition, the Arkansas Supreme Court, commenting in dicta (since the issue had not been preserved), indicated its receptivity to the concept in the absence of an express provision allowing it, since amendments were not specifically barred by APA. *Arkansas Beverage Retailers Association, Inc. v. Moore,* 256 S.W.3d 488, 496 (Ark. 2007).

Third, whether providing notice of the motion to the City should have been deemed a prerequisite to the hearing of the motion and the granting of relief. *See* Traffic Tribunal Rules of Procedure 24 (Time) and 25 Motions.

virtually unreviewable.[17] And so, I find that this ruling must also be remanded to the Appeals Panel for a new finding to be made, presumably under the § 31-41.1-8 standard of excusable neglect (unless the Panel believes there is an alternative legal basis for its decision).[18] The Panel must also decide, preliminarily, whether Notices of Appeal may be amended (at all), whether the motion could be heard in the absence of notice, whether it could be made orally, and whether it is barred by expiration of the appeal period.

---

[17] *Cf. Considine v. Rhode Island Dep't of Transportation,* 564 A.2d 1343, 1344-45 (R.I. 1989).

[18] It is perhaps worth indicating at this juncture that I believe that the theory advanced by the State in its Memorandum — *i.e.,* that the City waived any argument it might have made in opposition to the motion to amend by its absence — is of questionable application in the instant case. In principle, I would agree that if a party fails to appear, there may be adverse consequences, including, in appropriate circumstances, the ultimate sanctions of dismissal or default. But this doctrine is viewed as comporting with fundamental fairness because the opposing party was given notice that the particular *case* would be before the Court for a particular type of *event* — a trial, a hearing, a motion, dispositive or non-dispositive — and nonetheless failed to appear.

However, this is not the situation in the instant case. The City had not been notified that 226 would be before the Panel for any purpose.

Nevertheless, it might, perhaps, have been better if the City had brought a Motion to Reconsider/Vacate to the Panel filing the instant appeal. It would have given the City and the Tribunal an opportunity to fill in gaps in the record and issue a more comprehensive opinion — which might have obviated this appeal entirely (or our present need to remand the instant case).

V
Conclusion

Upon careful review of the record and the positions of the parties, I conclude that the Order issued by the Appeals Panel in this case was contrary to the substantial evidence of record (regarding the issue the unavailability of an audio record for 226) and contrary to law and proper procedure regarding the granting of the oral motion to amend.

Accordingly, I recommend that this Court VACATE the decision rendered by the Appeals Panel and REMAND the case for further proceedings consistent with this opinion.

/s/
Joseph P. Ippolito
MAGISTRATE

MARCH 25, 2020