THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0037-21
EMPLOYEE[1]	
Employee	Date of Issuance: September 6, 2023
v	
DISTRICT OF COLUMBIA	LOIS HOCHHAUSER, Esq.
DEPARTMENT OF TRANSPORTATION	Administrative Judge
Agency	

Joseph Davis, Employee Representative
Shawn Brown, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a petition with the Office of Employee Appeals ("OEA") on July 16, 2021, appealing the final decision of the District of Columbia Department of Transportation ("Agency"), to suspend him without pay for ten days, effective July 12, 2021. On September 28, 2021, OEA Executive Director Sheila Barfield, Esq., sent Agency Director Everett Lott a copy of the Petition for Appeal ("POA"), and informed him that, pursuant to OEA Rule 607.2, Agency's response was due by October 28, 2021. Agency filed its Answer on December 17, 2021. The matter was assigned to this Administrative Judge ("AJ") on or about March 30, 2022.

The prehearing conference (PHC) took place on June 9, 2022[2] at OEA. At the PHC, Employee was directed to correct and/or complete certain sections of the PFA, and the hearing was scheduled for September 22, 2022.[3] It was rescheduled for October 27, 2022 due to budgetary constraints, and then continued at Employee's request.[4]

[1] This Office does not identify employees by name in Initial Decisions published on its website.
[2] The PHC, originally scheduled for April 12, 2022, was initially continued at the request of the parties. The AJ subsequently granted Employee's unopposed request for additional time to allow him additional time to obtain representation after Mr. Davis withdrew his appearance. Mr. Davis returned as Employee representative prior to the hearing.
[3] *See, Summary of Prehearing Conference and Hearing Order* (June 21, 2022)
[4] *See, Hearing Order,* (December 12, 2022)

The evidentiary hearing took place at OEA on January 11, 2023 at OEA. At the hearing, the parties presented evidence and argument. *See* OEA Rule 629.2.[5] The parties agreed to submit written closing arguments by March 6, 2023. The deadline was extended to April 4 at Agency's request and then to May 5 at Employee's request. The record closed on May 5, 2023.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03. (2001).

ISSUES

Did Agency meet its burden of proof regarding its decision to suspend Employee for ten days without pay? If so, is there any basis to disturb the penalty?

SUMMARY OF EVIDENCE

Summary of Undisputed Facts[6] ("SUF")

1. Agency is the District of Columbia ("DC") Government entity that regulates the use of public space in DC. Agency's Public Space Regulation Division ("PSRD") is responsible for the review and approval of applications for permits related to public space; e.g., construction, traffic and pedestrian patterns, and street closures.

2. Employee began working for Agency as an Engineering Technician ("ET") in the PSRD in 2009. (Ex A-1). At the time of this adverse action, he was a CS-12 and in permanent career status.

3. The Position Description ("PD") for the CS-802-11 ET states that the employee must have six to seven years of "relevant experience, one year of which" is comparable to a CS-10 level." The ET is responsible for "a variety of general technical engineering assignments and projects pertinent to the design or operation of systems, structures, processes, and equipment. The ET provides "contractors and other agencies with technical guidance and assistance regarding related engineering issues and problems which may be difficult and/or complex."

The PD states that the ET must have "[c]omprehensive knowledge of and extensive experience in the application of a wide range of technical engineering concepts…techniques… practices [and] requirements… as required to provide comprehensive management advisory and related services on substantive matters." The ET is required to interact and communicate with individuals in both the public and private sectors in order to "explain polices…resolve service requests…and/or other requests for information or assistance." (*Id*).

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[5] Witnesses testified under oath and the proceeding was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits ("Ex") are cited as "A" for Agency followed by the number of the exhibit. (Tr, 15-28). *See* OEA Rule 629.6. Employee did not introduce any exhibits into evidence.

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[6] A fact is undisputed if there is " no controversy surrounding it." *The Law Dictionary*. These facts in SUF were gleaned from documentary and testimonial evidence.

The ET works under the "general supervision of a supervisor who makes assignments in terms of overall employee parameters related to assignment planning, scope of objectives, deadlines, and priorities. Within established parameters, the incumbent determines the most appropriate approach to complete assignments…interprets regulations or policy frequently on own initiative in terms of established objectives; coordinates the work with others appropriately; and resolves most of the conflicts that arise... The supervisor is kept abreast of progress and of potentially controversial matters or policy questions. Completed work is reviewed for adequacy of overall approach and technical soundness, feasibility…effectiveness of recommendations…and adherence to requirements. (Ex A-1)

4. Tiffany Tenbrook worked at Agency between 2007 and 2022. During the relevant time period, she was the Surface Permitting Manager in the PSRD and in that capacity supervised Employee and four other employees or contractors.

5. Courtney Williams has worked at Agency since 2008, and was Employee's supervisor until about 2014. During the relevant time period, he was Citywide Program Support Supervisor. (Tr, 174-175).

6. During the relevant time period[7], Elliott Garrett was Public Space Manager; and both Ms. Tenbrook and Mr. Williams reported to him. (Tr, 209, 242).

7. By memorandum dated August 10, 2020, Agency assigned Employee and Mr. Williams to provide "support "to the 2021 Presidential Inauguration Committee ("PIC"), which included the Joint Task Force ("JTF"). (Ex A-4). Employee's responsibility was to process applications filed by or associated with the PIC. His duties were the same as his regular duties. He also continued his regular assignments, but PIC assignments had priority.

8. Applications are processed through the Transportation Online Permitting System. ("TOPS"). (Tr, 178).

9. Employee's "Annual Performance Document" for the period October 1, 2020 through September 30, 2021 was last revised by Ms. Tenbrook on November 23, 2020. The "Core Competencies" and "Smart Goals" for which Employee was evaluated included, in pertinent part:

> Core Competency 1-Communication: Presents ideas and information verbally and in writing in a clear, concise manner. Shares information with others on a timely basis …
> Core Competency 2– Customer Service: Partners with internal and external customers to provide quality service. Demonstrates consistent and continual adherence to all prescribed District customer service goals and standards. Treats all customers in a professional manner.
> Core Competency 4 – Accountability: Demonstrates personal responsibility for ensuring the completion of work assignments…

The section entitled "Use of TOPS notes and Communications with Customers" states that Employee will use "internal notes" to explain in detail how permit conflicts are resolved, including

[7] The relevant time period is between 2019 and 2021.

conversations with customers, as well as "notes to applicant" regarding conflicts and/or required revisions.

The document requires Employee to return voicemail messages and emails within 48 hours or two business days. Agency's position is that it had "sufficient basis to impose" the ten day suspension. (DDOT's Written Closing Argument, p. 3).

Summary of Charges: Advance Notice of Proposed Suspension ("Advance Notice") and Notice of Final Decision for Proposed Adverse Action ("Final Decision")[8]

1. On May 10, 2021, Agency issued the Advance Notice[9], notifying Employee of its intention to suspend him for 15 days without pay. (Ex A-21). Tiffany Tenbrook, Employee's supervisor and proposing official, stated that the proposed suspension was based on two causes, and provided supporting incidents for each cause:

> **Cause 1**
> **Failure or refusal to follow instructions: Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions, pursuant to DPM §1605.4(d) and DPM § 1607.2(d)(1).**
>
> **Negligent Customer Service and Failure to meet Department Responsiveness Standard**:
> On January 11, 2021[10] at 11:44 AM…[Contractor] Leon Paul…sent you an email to inform you that he received the approval of the construction permit…[and] requested to have the [end] date [changed]… [Y]ou failed to [respond]…As a result of your lack of response, Mr. Paul sent another email on January 26… at 10:31 AM, requesting to have the [end] date adjusted…You immediately replied …at 10:34 AM and informed [him] that the application had locked due to nonpayment and [that] a new application [was] required…Mr. Paul followed up with an email expressing his frustration because [you did not respond to] his two attempts to contact you with requests to adjust the dates…Your lack of response and poor customer service resulted in the application being timed-out and required [its] resubmittal. Due to your repeated failure to respond to Mr. Paul's requests…I had to apologize on behalf of [Agency] for your lack of response and lack of customer service, and waived the application fee.
>
> **Negligent Customer Service, Lack of Accountability and Deficient Goal Attainment**
> …You were assigned…to assist with permit issuance for the [2021] inauguration…As a team, the [PRSD] role and support with inauguration activities was a critical

[8] Citations in the Advance and Final Notices are omitted, but italics, boldface and other descriptives in those documents were maintained. Throughout this decision, the omission of the year from a date means that the year is 2021. The AJ was unable to cite to the Advance and Final Notices because they did not include page numbers, and therefore had to reproduce much of those documents in this decision. She notes that Employee did not include page numbers in his closing argument. The AJ strongly recommends that parties include page numbers on documents submitted to this Office.

function…for…DDOT. You were assigned to process…permit applications, submitted in TOPS in a timely and coordinated fashion. All reviews must be sent within 48 hours (2 business days) of the assignment of the application. Once reviews are completed the technician must change the status within 24 hours or the next business day. The service level requirement for timeliness of review was reminded to you and all other team members by email of April 8, 2020…On January 8, 2021…at 10:42 AM, Mr. Williams instructed you to approve…applications…by close of business that day or the following Monday at the latest…Later that same day at 1:46 PM, Mr. Williams followed-up with you to see if any applications were approved. You failed to process several Inauguration applications…despite Mr. Williams' directive. You are required to send assigned applications out for review within 48 hours or the next business day after assignment…You failed to process several JTF applications…assigned…on December 16, 2020. You were required to have processed [them by]December 18, 2020.

…Matthew Marcou, PRSD Associate Director [was contacted] on January 8, 2021 after 5:00 PM…because the applications assigned to you were not processed or issued…Your failure to [respond] and advance those applications placed DDOT in jeopardy of failing to obtain responsibility of properly managing the public space through effective permitting for the 2021 inauguration and associated events. Public Space Manager Elliott Garrett acted to remedy your failure; he intervened in the review process for [the] three…permits… you neglected to process. Mr. Garrett assessed the viability of the applications…and immediately issued the permits that Friday evening. These permit applications were your responsibility…but they sat for …20 days in your queue without advancement…These permits were applied for at a critical time of national focus on the District: your negligence…is all the more aggravating as a result.

Negligence in Customer Service and Failure to Follow Supervisory Instructions
On January 7, 2021 at 9:09 AM, Luz Acosta, Project Manager with City Permit ("CP"), sent an email [asking if] changes could be made to her permit…You responded…at 10:12 AM affirming that changes were permissible but that the application may only be adjusted twice…The next day…at 12:25 PM, Ms. Acosta contacted you…again requesting that the application be adjusted…as well as inquiring [about] the price difference between a three…month and a six…month permit…Shortly thereafter at 2:16PM, Ines Corvalan, [CP] Project Manager sent you a follow-up email…[informing] you that the requested changes were needed as soon as possible:

> *Curtis… Hope this email finds you well*
> *Can you please change the dates on this application…*
> ***Start Date: 01/18/2021***
> ***End Date: 03/07/2021***
> *We need this change as soon as possible please.*
> *Please let me know if you have any questions. Thank you*

The permit application was due to expire on January 8…so it was imperative to [CP] that you respond…without undue delay. At that juncture [CP] contacted you three times within just over 24 hours to make the change, yet the dates remained unchanged.

At 2:56 PM in January 8…Ms. Corvalan escalated the request to me, marking the subject line *URGENT.* [CP] was justifiably concerned…because you had not [responded] to them and the dates were not changed as requested in TOPS, and the permit was about to lapse, imposing [an] avoidable, burdensome and costly re-application process [for] the customer. On January 8…at 3:10 PM, I emailed you a

courteous and unambiguous…directive to change the permit dates by 4:45 PM [that day] to prevent the application from moving into a "*not paid*" status…However, you disregarded my written instruction and failed to update the Permit as directed.

Therefore…at 5:07 PM, I followed up with an email…inform[ing] you that you clocked out at 4:52 PM without complying with my …instruction to perform a regular duty for the DDOT customer…That duty, changing the dates of a pending permit in TOPS, is squarely within your scope of regular responsibility and could have been [done] within minutes. Your inexcusable negligence…is further aggravated by your awareness of [the] customer's repeated requests for the changes and your careless attitude revealed …disregard of their needs…Your negligence…was…avoidable and borders on insubordination. You displayed…disregard and disengagement from your role as an [ET] by failing to support a…customer. Your negligence reveals inadequate customer service, lack of personal accountability, and disengagement from goal attainment.

Failure to Follow Supervisory Instruction, Negligent Customer Service and Lack of Accountability

On January 8, 2021 via email at 12:24 PM , Contractor Jeremy Tetreault contacted us regarding a program he oversaw and provided logistical data…I responded on January 8…at 12:42 PM.. I instructed you to inform [him] how to obtain the proper signage…I followed up with another email at 3:25 PM with specific directives to follow-up with Mr. Tetreault no later than 4:45 PM...You did not respond until 4:52 that day, as follows… *Good day, Stephanie Coffey and I will speak on this matter.*

At 3:25 PM…I directed you to follow-up with Mr. Tetreault by 4:45 PM. You responded after the assigned time…had passed...You failed to follow my…instruction, neglected your duty to support a…customer…and attempted to deflect attention by invoking discussion with a colleague, without substantiation for the need or relevance of such discussion…On January 22 at 1:17 PM, I followed up with you and Mr. Tetreault to see if the…issue had been resolved. Mr. Tetreault responded at 1:21 PM, …that he had not heard from anyone since January 8, which was when we last spoke. This is yet another example of your persistent failure to follow supervisory instruction and neglect of duty to provide responsive customer support…

On December 17, at 9:18 AM Contractor Stanley Douglas II [emailed] me…that his company was trying to get an update on a…permit application and to see if….it can be expedited…Mr. Douglas was compelled to contact me directly because he was unable to get in contact with you. I responded to Mr. Douglas and you on December 17 at 9:25 AM. I directed you to provide [him] an update by close of business…that day. However, you did not follow-up…as I directed. You therefore failed to follow my supervisory instruction again and left the matter unresolved for the customer…

Summary of Cause 1 Specifications:

The instances of negligence described above under Cause 1 expose your persistent and unacceptable failure to follow supervisory instructions, disengagement from customer needs and lack of accountability. Your failure to conduct deficits which are directly related to your sub-standard performance of regular duties as an [ET] in the Surface Permitting branch. Your documented instances of negligence expose misconduct which is linked to core competency deficits in the following performance areas: *communication*-your failures to respond to my written instructions as your supervisor constitute insubordination, and your disregard of customer requests for

updates and information is discourteous and unprofessional negligence. Through your ten (10) years of experience…as an [ET]…and from your annual performance plan…and written instructions from management, you are aware of the importance [of] *customer service* – yet you have shown yourself to be discourteous and disengaged from … customers and the projects they have in Public Space requiring your commitment and timely attention. You have failed to respond to customers, even when directed in writing with specific deadlines by me, your supervisor. In terms of *goal attainment*- your failure to support customers negatively impacts DDOT's commitment to operational economy, timeliness and overall efficiency and improvement of engineering projects, and your delayed and negligent work by you as an [ET] compromises the safety and well-being of District residents and visitors. You are failing to demonstrate commitment to your role…as an [ET]. Your role has significant scope and effect on projects in public space which are assigned to you. In terms of *accountability* – your negligence, careless delays and disengagement from duty demonstrate that you are unreliable and have garnered criticisms from DDOT customers, relayed directly to me because of your negligence…

Your repeated and deliberate disregard of my written instructions is misconduct with adverse impact on PSRD…operations. Your misconduct has required me to step in and manage tasks which you should have completed, demanding…my time to ensure that you perform your duties as specified in your [PD] and as laid out in your performance plan for FY2021. Your performance-related misconduct constitutes *Failure or refusal to follow instructions: Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions,* which is cause for disciplinary action pursuant to DPM §1605.4(d) for which agency's Table of Illustrative Actions DPM §1607.2(d)(1) provides a range of penalties from Counseling to Removal. I hereby propose that you should be suspended for 10-days to elicit immediate and lasting improvement in your conduct which is directly linked to your sub-standard performance of duties as an [ET].

Cause 2: Conduct prejudicial to the District of Columbia government: Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct, quarreling; creating a disturbance or disruption; or inappropriate horseplay, pursuant to DPM §1605.4(a) and DPM §1607.2(a)(16).

Specification 2: On December 9, 2020 at 3:36 PM, I received a complaint via email…from CDKM Consulting LLC Permits Manager, Kim Mitchell…The complaint centered on changes made to [the] application …Ms. Mitchell indicated the application was reviewed and approved by DDOT City-wide Program Support Supervisor Hamza Masud, on November 30, 2020. Ms. Mitchell outlined her concerns by stating the application had been altered to add sidewalk, travel lane, curb/parking lane without meters, none of which [was part] of the original application. She identified the specific alterations…which were made without written notification to CDKM or reference to "Management of Traffic"… regulations. The matter of unnotified change was brought to Ms. Mitchell's attention when she sent a copy of the application to her client, without having been informed by DDOT of the changes….

In her complaint to me, Ms. Mitchell noted that any changes made to an application by [an ET]…or supervisor should have been documented with reference to the regulations. In addition she noted the applicant should be advised of any changes made on the application…However, in this case, there were no notes in the system. As an

[ET] , you are required as a regular duty consistent with you [PD] …and furthermore as established in your performance plan for FY 2021, under Smart Goal 2 which required to as an [ET] to ensure that notes are committed to TOPS and changes and updates and conflict resolution communicated to DDOT customers…You clearly deviated from those requirements in this case.

Ms. Mitchell noted that changes which were not clearly communicated could lead to problems or liability and questions as to the…quality of her work…She [identified] you as the [ET] who made these changes on the application. Ms. Mitchell requested…changes…to restore the original application, as she had filed…I forwarded you the email from Ms. Mitchell [on] December 9 at 4:07 PM [stating]:

> *Curtis…See customer concern below. Can you explain your actions taken on the application? Please explain why there are no notes to the applicant explaining why you added these dimensions. I am directing you to not only to respond to this email, but you must provide a detailed explanation via the "notes to applicant" section by 9:30am. 12/10/20…"*

You responded by email approximately five (5) minutes later at 4:12 PM:

> *Called you didn't answer. Do you contact the customers when they input false information???Don't send me directives if you're not checking all the information needed…*

Your email response was…inappropriate and disrespectful and exposes a readiness to engage in counter-productive…and unwarranted argument which is time-wasting and insubordinate…Telling your…supervisor "don't send me directives" is contrary to the hierarchy of our reporting structure...I do not condone this kind of baseless and demoralizing disrespect amongst any staff members. In contrast to the reasonable expectation of respect, cooperation and professionalism as a government employee, your argumentative and insubordinate misconduct became progressively worse ins subject communications.

You sent an email less than five (5) minutes later on December 9…at 4:17 PM stating:

> *Can you explain why you approve applications with false information provided? Just because I do my job thoroughly do not attempt to chastise and*
>
> *single me out. You are showing you are targeting and have an attitude towards me. You dropped the ball on our evaluations copying and pasting information and not providing an accurate review. When you were away, we had less problems*

I responded…on December 9…at 4:16 PM, indicating that my directive remained in effect and that you had until the next business day to provide an answer to the issue…Undeterred, you continued with disrespectful and unprofessional language, when you responded on December 9 [at] 4:17 PM:

> *I do my job do yours*

I responded back to you on December 9…at 4:45 PM, stating:

> *Curtis, Your responses are not professional, and I no longer feel that a phone conversation be productive. I look forward to your response to my directive"*

In a span of ten…minutes, between 4:07 PM and 4:17 PM, you sent me…three…

unprofessional and unacceptable email responses to my reiterated legitimate supervisory directives. In each case your response was argumentative, obstructive and insubordinate…In addition to your deliberate failure to comply with my supervisory instruction, and to compound the disrespect that you showed me as a supervisor, you demonstrated a similar lack of professional courtesy to…Ms. Mitchell…Consulting…On December 9… at 4:22 PM within minutes of your unacceptable communication to me, you contacted Ms. Mitchell by email, as follows:

> *Kim, You send managers emails before contacting me on my own permit application...*

Your question to Ms. Mitchell was inappropriate as government employee. Your posturing introduced an accusatory element of personal antagonism to a professional relations. As a DDOT employee, your communication to a…customer should have been courteous and supportive…Your question to Ms. Mitchell…was insolent…Furthermore, your email to [Ms.] Mitchell at 4:33 PM demonstrated blatant insubordination: I directed you in writing only …[15] minutes [earlier] to respond to my email and to provide a detailed explanation of the changes in the "notes to applicant" section in TOPS by 9:30 AM the next day…You disregarded that directive, which was …repeated at 4:16 PM., instead choosing to send inappropriate…and argumentative correspondence to me and [the] customer…Ms. Mitchell responded to you promptly on December 9…at 4:27 PM explaining – with evident frustration at your communications and conduct – why she sought management's assistance and intervention. The aggravated tone of her email is clear:

> *Curtis…This is a HUGE liability to me,…my client is questioning if I entered the application correctly… I placed the application with DDOT and I am owed an explanation….In matters such as this that become legal I email the managers to get this handled as my integrity is becoming in question…*

You subsequently sent another email to…Kim Mitchell [and included] Stefan Kronenberg and Jaime Weinbaum of Mid-city Financial Group. You included Supervisory Civil Engineers Hamza Masud and Levon Petrosian, as well as Associate Director…Marcou. You solicited the support of these senior managers for a matter [caused] by your failure to properly annotate the changes in TOPS…communicate effectively and resolve conflicts…because you were now embroiled in a disagreement – of your own making – with [Ms.] Mitchell. Your email to the group was also an additional act of insubordination, in defiance and disregard of my instruction to respond to me directly...At 4:39 PM…, you sent correspondence to Kim Mitchell inappropriately criticizing the application which CDKM submitted and which you edited without informing CDKM or annotating properly in TOPS. Your posture was unprofessional and antagonistic. Your disagreeable posture and unproductive correspondence was finally enough for Ms. Mitchell. She justifiable responded at 4:45 PM, stating:

"I AM NOT DOING THIS WITH YOU. OVERALL THIS IS A HOT MESSS
DO NOT SEND ME ANOTHER EMAIL. I HEREBY REQUEST MANAGEMENT OVERSIGHT AND REVIEW."

It was clear that Ms. Mitchell was frustrated with your…conduct, and poor customer service. Your persistent and unprofessional engagement with [her] -contrary to my instructions – precipitated her request for management intervention…Ms. Mitchell's original complaint – that you made changes to an application…without properly communicating those changes in the notes section in TOPS and without citing to regulations…Your response to a customer's legitimate concerns was to send erratic

and overly personal emails questioning the customer's actions – erroneously conveying that she was wrong to have engaged me. Your response to Ms. Mitchell is unacceptable conduct as an [ET] to a public customer… Your emails were sent to censure Ms. Mitchell from a position of authority which is not vested in you as an [ET].

On the contrary, you are required as a duty of your position as [ET] to resolve problems with individuals or groups working toward mutual goals…Contrary to your duty of your [PD] , you failed to interpret policy and regulations and communicate those as the basis for the change of the application with Msl. Mitchell. You failed to offer explanation or to acknowledge any shortfall in communication about your failure to add notes in TOPS and properly annotate the changes you made in the application. Your emails did not convey willingness to resolve the problems your failures posed to Ms. Mitchell and CDKM…Your emails were unhelpful, antagonistic in tone and displaying lack of courtesy and understanding of her well-reasoned complaint to me…The timbre of your emails to me was unacceptable and insubordinate. The timbre of your emails to Ms. Mitchell and the motivation behind them was also unacceptable and outside of the reasonable expectations of professional courtesy from an [ET] functioning for DDOT in support of a public customer.

The series of emails reveals your repeated readiness to engage in misconduct which exposes PSRD and DDOT to criticism for your behavior and customer service. In this instance, as in others described under Cause 1, your on-duty misconduct has garnered justified complaint from …DDOT customers, about your…unprofessional engagement. Your misconduct interferes with the efficiency and integrity of…operations because it distracts from the business process and interrupts…workflow. Your unprofessional behavior was directed at me and…Kim Michell…You were given a directive to respond to me, but you contacted Ms. Mitchell, repeatedly, showing insubordination to me as your supervisor. Your final correspondence with Ms. Mitchell caused further frustration…In that communication, you adopted a strategy of wider inclusion of your open criticism of Ms. Mitchell, by addressing customers…,Kronenberg and …Weinbaum of Mid-city Financial Group [and] senior PSRD managers…This is unacceptable and publicly discourteous treatment to DDOT business process partners, by questioning the competence of Ms. Mitchell and others..

Your unacceptable discourteous communication is behavior which constitutes Conduct prejudicial to the [DC] government: Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct. Your behavior is cause for disciplinary action pursuant to DPM §1605.4(a), for which the Table of Illustrative Actions DPM §1607.2(a)(16) provides a range of penalties from Counseling to 15-days suspension for a first occurrence. I have considered all relevant aggravating and mitigating factors, as outlined below, in determining the appropriate penalty to correct your performance deficiencies and misconduct as an [ET]. I propose that you should be placed on ten (10) days suspension for Cause 2…

Consideration of the Appropriate Penalty

In determining the appropriate penalty, I have considered the recommendations of the Table of Illustrative Actions DPM § 1607.2 and… each factor provided in DPM § 1606.2, as follows:

Aggravating *(a) The nature and seriousness of the misconduct or performance deficit, and its relationship to the employee's… position, and responsibilities, including whether the offense was intentional, technical or inadvertent; was committed maliciously*

*or for gain; or was frequently repeated; y*ou have demonstrated negligence and deficient customer service repeatedly. Your negligence is repeated and persistent to the extent that it constitutes avoidable misconduct. Your negligence is directly related to the core of your duties…requiring you to display acceptable productive, courteous communications which lead to customer satisfaction and demonstrate your accountability to your duties. Your negligence has been brought to your attention on several occasions…yet you did not respond with the expected and required action. Your willful disregard of my supervisory instructions [were] deliberate and avoidable actions to defy [me]…and to assert authority over a…customer. You disparaged…[Ms.] Mitchell…[in] reaction to [her] reasonable response…[T]he root of the issue was your negligence [in] failing to [enter] notes on the changes in TOPS. Your negligence is contrary to a SMART goal #2…articulated in your Performance Plan for FY2021…These are normal responsibilities as an [ET] and you have willfully neglected them.

Aggravating *(b) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;* as an [ET], you have contact with the public daily, and in your…from standards and expectations, and failure to follow instructions, as described under Causes 1 and 2, you have failed to communicate effectively, failed to meet established goals, failed to follow instructions and shown lack of courtesy and responsiveness to…customers. These… violations… are contrary to the duties and expectations of your [PD]...You have failed to provide adequate information, to resolve matters and to demonstrate adequate support for DDOT's public customers.

Mitigating *(c) The employee's past disciplinary record*; you have not been issued formal disciplinary action in the past three (3) years [was] considered in proposing a mitigating adverse action of ten…day suspension for each proposed cause and for both proposed causes.

Aggravating *(d) The employee's past work record, including length of service, performance on the job, ability to get along with follow workers and dependability;* you have „„11 years' service…and your present performance [suffers] from your negligence, your failure to communicate, failure to add notes to TOPS, your discourteous email[s], and your insubordination [which] undermine your dependability and connotes deficient performance. ... our performance has been deteriorating and the instances described in this action of inadequate communication, inadequate customer service, marginal goal attainment and marginal accountability indicate continuation of this unsatisfactory performance trend.

Aggravating (e) *The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;* your disposition to me as your supervisor has been adversarial and you have disregarded my instruction to you to respond directly to me, choosing instead to argue and engage in side-chain emails to the DDOT customer. You have disregarded reminders to take action on permit applications from customers and from me as your supervisor…I have had to step in after your failure to respond make amends to DDOT's customer to customer enquiries and Public Space Manger Elliott Garrett has had to process permit applications which you have neglected to advance according to prescribed timelines and within reasonable expectations of duty as an ET…

Neutral *(f) Consistency of the penalty with those imposed upon other employees for the same*

or similar offenses; the proposed penalty of ten (10) days suspension has been issued to other DDOT employees for negligence, failure to follow instructions and conduct which is prejudicial to the District government.

Neutral *(g) Consistency of the penalty with the table of illustrative penalties (§1607).* The proposed penalty of ten (10) days suspension is within the range provided in the Table of Illustrative actions for each, Cause 1 DPM §1607.2(d)(1) and Cause 2 DPM §1607.2(a)(16).

Aggravating (h) *The notoriety of the offense or its impact upon the reputation of the agency or the District government*; your [emails to] Kim Mitchell were antagonistic and unwarranted…[She] provided a reasonable explanation to your insolent question as to why she contacted me directly…You responded by criticizing the application…with her clients included in the email, further exacerbating the problems which your un-notified changes to the application had created. Your antagonism on a group email is misconduct which draws adverse attention to…PSRD…Your misconduct and negligence reflects poorly on DDOT's customer service commitment…and casts shadow on the reputation of the agency's Permit Branch…Your discourteous response to Ms. Mitchell is an unacceptable deviation from DDOT standards which could easily have led to a complaint with the Office of the Mayor against DDOT.

Neutral (in) *The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;* as a ten (10) year employee, you are well-versed on the requirements of your [ET] duties and the disciplinary consequences for failure to perform. In addition, I reminded you to act on permit applications yet you failed to do so.

Aggravating *(j) Potential for the employee's rehabilitation;* your misconduct-particularly your argumentative responses to reasonable supervisory instruction -and the associated deterioration in your performance has undermined my confidence and calls into question your potential for rehabilitation

Neutral (k) *Mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter*; there are no known mitigating factors which would excuse your negligence, insubordination and argumentative discourtesy.

Neutral (I*) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others;* the proposed ten (10) day adverse action is intended to deter any recurrence of your discourtesy to DDOT customers and to focus your attention on the need for reliable and consistent customer service, timely attainment of goals and responsiveness to management instruction. This action is issued proposed consistent with actions taken against other employees, in which a mitigated adverse action is expected to be sufficient to elicit immediate and lasting improvement in conduct and performance. This progressive disciplinary action is proposed to ensure you have an opportunity to demonstrate significant improvement while recording to your official personnel file the serious deficits which have led to this action…

2. The Final Decision was issued on July 9, 2021. (Ex A-22). The Deciding Official ("DO"), Matthew Marcou, PSRD Associate Director, stated that in reaching his decision, he reviewed Employee's response and all supporting documentation as well as the Advance Notice and supporting documentation submitted by Agency. The DO discussed each cause:

CAUSE 1
I find that Failure or refusal to follow instructions: Negligence including the careless failure to comply with rules, regulations, written procedures or proper supervisory instructions, pursuant to DPM §1605.4(d) and DPM §1607.2(d)(1) is supported by a preponderance of evidence.:

Negligent Customer Service and Failure to meet Department Responsiveness Standard
In the matter involving Mr. Paul… [t]he record demonstrates that Mr. Paul communicated with you on January 11 via email requesting a change to the permit dates. The record further documents that it took a second request from Mr. Paul on January 26 to solicit a response from you. In your response you assert that you contacted Mr. Paul by telephone to inform him of the process…However, other than this claim, you failed to provide any evidence to support your claim. Sufficient evidence you could have provided would include any notes you provided in …TOPS documenting your call to Mr. Paul…[since you are] required to document such a conversation in TOPS…It is not credible that Mr. Paul would wait to protest your lack of response on January 26…if you had communicated the status and consequence to his permit application on January 11…Furthermore, Mr. Paul had an incentive to reply to any outreach from you, since, as his email demonstrates, the delay in changing the start dates resulted in another rescheduling of the work crew.

I find your explanation is not compelling, particularly in the light of your own statement…that Mr. Paul contacted you on January 26 and that you responded to him that day by email. In that statement, you note Mr. Paul was unhappy he was made to wait. In your response you criticize [Ms.] Tenbrook for her methods of rectifying the confusion you caused, and you assert that she should have contacted you to find out details about the circumstances, because, you claim you "*met all procedures for handling the process*" …This is not accurate: you failed to document your asserted conversation and failed to record a formal and reasoned denial of Mr. Paul's timely request to revise the start date in TOPS. There is no evidence that you contacted Mr. Paul at all between January 11…until January 26…, but there is a preponderance of evidence that you left him inadequately informed and without reasonably expected customer service in the PSRD permitting process.

Your response asserts that Ms. Tenbrook should have communicated with you about Mr. Paul…I disagree…[Ms. Tenbrook-who has the authority to engage at any time in any surface permitting matter – was making up for your negligence by your failure to manage Mr. Paul's permit revision request and in your failure to document in TOPS a claimed conversation. Your failure to do so indicates a neglect of the needs of a DDOT customer by inadequate communication and lack of accountability. I find your failure to follow up with Mr. Paul and recognize the priority of his needs constitutes Negligence: Negligent Customer Service and Failure to meet Department Responsiveness Standards exposing your communications, customer service and accountability deficits.

Negligent Customer Service, Lack of Accountability and Deficient Goal Attainment
The record demonstrates that multiple [PIC] permits were assigned to you on a series of dates, including December 16, 2020. You were aware of these applications and their effective dates on Friday, December 18, 2020…These applications remained open to the comments of the [PIC] when the effective dates of January 7th and 8th approached or were passed…[O]n the morning of January 8th, you were directed by management to act on these applications by close of business that day and "at the latest Monday ..Your failure to act on

the permits "set to begin on January 7 and 8 led to these permits being escalated to [Mr.] Garrett on January 8."

You claim in your response…that only one [was] assigned to you, yet it is clear from the list that [Mr.] Williams emailed you on January 8…that these were assigned to you as tasks to prioritize that day. Furthermore, TOPS documents that these applications were all assigned to you within one business day of their submission. I find that [Mr.] Williams notified you of the task request and created a clear sense of priority, despite which, you failed to prioritize and process the permit tasks based on the time you had available that day of January 8…It is clear from the effective date applied for that three…of the permits expected to be approved by January 8. I find that Supervisor Williams' request to you at 10:42 AM…was more than reasonable in requesting that you on those permits that day. I note that the first four…permits …were…priority matters when considering the effective dates. I also note, [Mr.] Williams included the reason . . for the permit [next to] each permit number.. Such permit applications should draw your…attention to ensure approval is not delayed I find you failed to follow the instruction to advance those permits by the close of business on January 8.

In failing to process the permits, you revealed a careless disregard for PSRD's duty to advance DDOT's priorities in the critically important high-profile, multi-agency preparations for the Presidential Inauguration. In your response, you assert you had until Monday, January 11…to process the permits and that overtime was not approved for you to work on …January 8…I do not agree that overtime was warranted or necessary, and certainly do not provide an excuse for failing to carry out assigned tasks. Supervisor Williams' allowance of time until Monday, January 11, 2021 – at the latest – allowed you some latitude to carry some work over. However, you did not process the above noted permit applications despite being prioritized a the first in the list provided to you, and with thee effective dates included in the email to you on January 8…

A reasonable employee in your position would have acted to further the important activities …support [PIC] and the agency's good standing to support of the complex logistics for [this] event. You had ample time to carry out the duties assigned to you, which a reasonable individual would have achieved in the time allotted. To compound matters: [Mr.] Williams contacted you approximately three…hours later…at 1:52 PM to enquire [if] any permits [had been] processed…[Y]ou did not respond and did not process the permits. You have not provided any compelling justification for having neglected the assigned …tasks. By your failure you delayed logistics to support the …Inauguration, you compromised the efficiency of PSRD operations and you exposed DDOT to criticism by federal and District government agencies for avoidably delaying the advancement of Inauguration preparations…I find your failure to process the permits with consideration for all priorities constitutes negligence by failure to complete tasks and demonstrates your lack of accountability.

Negligence in Customer Service and Failure to Follow Supervisory Instruction
The record demonstrates that you failed to respond promptly to repeated contacts from City Permits and to follow-up on direction from your supervisor, [Ms.] Tenbrook. I find your response presents to compelling reason to overlook your failure to recognize and address a matter that was of urgent concern to a DDOT customer. An excuse you offer is that DDOT does not issue permits on the same day, but there are factors which undermined your assertion: (1) the permit already existed and a change was being requested; (2) the change was being request for the next day, not the same day, and (3) construction and occupancy permits are issued for the same day and the next day. Furthermore, PSRD's goal of customer service excellence is not supported by a rigid

organization strategy of denial and neglect such as failure to act on or respond to urgent or repeated customer service requests.

> The [Advance Notice] also demonstrated that [Ms.] Tenbrook instructed you to change the permit dates at 3:10 PM on January 8…yet you did not carry out her instruction. At 4:57:58 PM, she took the task in hand and in less than a minute the dates were correct [and] prevent[ed] the application from moving into "Not Paid" status, thereby saving the customer from avoidable cost and hassle of being issued a permit re-application fee…As noted by [Ms.] Tenbrook, you clocked out at 4:52 PM more than an hour and a half after her direction to you. You had ample time to consider the customer's request and the directive…to you by Ms. Tenbrook, yet you neglected your duty to follow her proper supervisory instruction. In doing so you neglected to follow a reasonable direction from your immediate supervisor. I find your failure to follow up on the requests from Luz Acosta and Inez Corvalan of City Permits constitutes negligence and your failure to follow up on the direction from [Ms.] Tenbrook demonstrates failure to follow proper supervisory instructions.

Failure to Follow Supervisory Instruction, Negligent Customer Service and Lack of Accountability

The record demonstrates that on January 8…you were instructed through multiple emails to follow up with Mr. Tetreault about obtaining signage on his including direction to follow up with Mr. Tetreault by 4:45PM. You responded at 4:52 PM to [Ms.] Tenbrook and included Mr. Tetreault as a CC recipient, stating that "Stephanie Coffey and I will speak on the matter." This is not responsive to the direction given to you by your supervisor. Furthermore, you did not include specific information advising Mr. Tetreault how to obtain the proper signage, as instructed earlier that day at 12:42 PM by Ms. Tenbrook. In your response you claim to have spoken with Mr. Tetreault earlier that day… Again you did not include any notes in the section of TOPS to document conversations with the applicant. [*ft. 1: This represents a pattern in your responses to the complaints documented by customers that has led to the proposed action…[T]his is a SMART goal and has been part of processing applications in TOPS. Failing to document these conversations in TOPS, if they took place, undermines your defense against this proposed action…TOPS does include other notes from you, demonstrating that you are aware of this function…The multiple times you raise this defense and failed to follow the process erodes confidence that these conversations ever took place…*]. As part of that conversation, you note that Mr. Tetreault acknowledged this was a false alarm and included a quote, presumably attributable to Mr. Tetreault, that "Curtis Pearson is very consistent with contacting customers back." However, there isn't anything in the record you provided, including the email exchange with Mr. Tetreault where he includes the statement "False alarm"…to document that Mr. Tetreault ever made this statement regarding your consistency with contacting customers back.

One other defense you offer to your delayed response is Wi-Fi issues. You do not provide any information [that] you…communicate Wi-Fi or other connectivity issues to your supervisor. Without any documentation…this remains simply a baseless statement…I find your failure to follow up with Mr. Tetreault constitutes negligence and your disregard of direction from your immediate supervisor…constitutes failure to follow proper supervisory instructions.

With regard to your failure to respond to contractor Stanley Douglas…at 9:26 AM on December 17, 2020, [Ms. Tenbrook] instructed you by email to contact Mr. Douglas after his request for service at 9:18 AM that morning because he was unable to contact you.

This is further documentation by a customer of your failure to follow up in a timely manner to…requests for assistance. In your response, you provided evidence that you sent a communication at 8:51 AM that…morning, shortly before Mr. Douglas reached out to [Ms.] Tenbrook. While this indicates that you [responded] that morning, Mr. Douglas' communication to Ms. Tenbrook …indicates that he had been trying to contact you and was not getting a response from you. You did not provide any further evidence that you had followed up with Mr. Douglas, whether by email… phone call…It is worth noting that you included notes to Mr. Douglas in TOPS…but these notes are dated 12/30/2020 and 1/4/2021, well after Mr. Douglas' escalated request for assistance to Ms. Tenbrook. This indicates that you neglected to respond to his outreach to you. This failure is consistent with you pattern of neglecting priorities and customer's needs…and as established by the preponderance of evidence in the [Advance Notice].

Summary for Cause 1
I agree with the Proposing Official's summary of the cause for discipline under Cause 1…Your documented actions constitute negligent conduct in your role as [an ET]. You have failed to act as and when instructed in a timely manner in support of PSRD customers, and without need for avoidable supervisory intervention. You have disregarded documented priorities and repeated requests from permit applicants. Your negligence has an adverse impact on the efficiency of projects and on the reputation of PSRD and DDOT. You reasonably should be aware of the impact of your duties on DDOT customers. Your negligence is misconduct which is cause for disciplinary action. Furthermore, the various elements of your negligence expose your performance deficits in terms of deficient customer service, inadequate communications, failing goal attainment and lack of accountability. I have considered mitigating and aggravating factors which were articulated in the [Advance Notice]…and are incorporated with my additions…I have considered your response and the documents you provided… I have considered the Union's opinion as to mitigating and aggravating factors. I find there was no defect in the factors as articulated by the Proposing Official. I sustain the proposed adverse action of ten (10) workdays suspension without pay for Cause 1.

CAUSE 2
I find that Conduct prejudicial to the District of Columbia government: Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures or other conduct; quarreling, creating a disturbance or disruption…pursuant to DPM § 1607.2(a)(16), is supported by a preponderance of the evidence.

The Proposing Official provided compelling documentation of…communications in which your attitude and statements to [Ms.] Tenbrook and …Kim Mitchell, devolved from uncooperative into overtly disrespectful and accusatory…You disregarded instructions to communicate directly with Ms. Tenbrook and engaged in unacceptably argumentative and antagonistic posturing…against Ms. Mitchell and CDKM. The Union response…never addresses the central concern of this cause of action: The demonstrated unprofessional and argumentative language used in your emails…These emails reveal your repeated readiness to engage in unprofessional language and quarreling, which exposes PSRD and DDOT to reasonable and expected criticism for your unacceptable language and poor customer service. In this instance, as in others… described under Cause 1 above, your on-duty misconduct and deficient communication garnered justified complaint from a DDOT customer…about your quarrelsome and unprofessional language. I find your communication on December 9, 2020 to [Ms.] Tenbrook and a DDOT customer were discourteous, argumentative and disparaging

communication which constitutes *Conduct prejudicial to the District of Columbia government: Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures or other conduct; quarreling.* Under the circumstances, which include the unnecessary, deliberate and avoidable nature of your misconduct, and the total lack of accountability you have shown for your open criticism of Ms. Mitchell, in her role as a representative of DDOT customer, CDKM…you have besmirched the reputation [of] PSRD and DDOT strive to uphold with all stakeholders and the public we serve.

I agree with the Proposing Official's assessment that your communications did not convey willingness to resolve the problems posed to Ms. Mitchell and CDKM; that your emails were unhelpful, antagonistic in tone and displayed lack of courtesy and understanding of Ms. Mitchell's well-reasoned complaint to [Ms.} Tenbrook…I agree with the Proposing Official that the timbre of your emails was unacceptable and insubordinate and outside the reasonable expectations of professional courtesy from an [ET] functioning for DDOT in support of a public customer. I find your conduct as a DDOT employee described under Cause 1 warrants the proposed adverse action. I sustain the proposed adverse action of ten (10) workdays suspension without pay for Cause 2.

Consideration of the Appropriate Penalty

In determining the appropriate penalty, I have considered the recommendations of the Table of Penalties, DPM §1607.2…and the Proposing Official's representation of mitigating, neutral and aggravating factors…in the [Advance Notice] in accordance with DPM § 1606.2. I have also considered the points of view offered by the Union…In the response on your behalf, the Union offered its opinion on these factors, in your favor, by revising several aggravating factors (A,B,D, and J) to mitigating factors and neutral factors…There was no compelling rationale offered by the Union and [it] did not adequately prove any defect in the Proposing Official's consideration of the factors…I have adopted and adapted the Proposing Official's considerations in this notice…as follows:

Aggravating *(a) The nature and seriousness of the misconduct or performance deficit, and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical or inadvertent; was committed maliciously or for gain; or was frequently repeated*; you have demonstrated negligence and deficient customer service repeatedly. Your negligence is repeated and persistent to the extent that it constitutes avoidable misconduct. Your negligence is directly related to the core of your duties for DDOT as an [ET], requiring you to display acceptable productive, courteous communications which lead to customer satisfaction and demonstrate your accountability to your duties. Your negligence has been brought to your attention on several occasions…yet you did not respond with the expected and required remediation of your actions. Your willful disregard of supervisory instructions and your group censure of persons by email cannot be deemed inadvertent or technical

Aggravating *(b) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.* As an [ET], you have contact with the public daily, and in your instances of deviation from standards and expectations, and failure to follow instructions, as described under Cause 1 and Cause 2, you have failed to communicate effectively, failed to meet established goals, failed to follow instructions and shown lack of courtesy and responsiveness to DDOT customers. These are violations which are contrary to the duties and expectations of your position description, which provides for major duties and job knowledge as well as the purpose of contacts and

the extent of supervisory controls. You have failed in some instances to contact customers and in other to provide adequate information; you have failed to resolve matters and to demonstrate adequate support for DDOT's public and internal customers. In your response, the Union suggests that you have superior experience and expertise in conducting business with permit applicants. Rather than mitigating this factor, your asserted experience and expertise stand in stark contrast to the demonstrated failures to carry out appropriate contacts with the public and undermined the prominence of your position.

Mitigating *(c) The employee's past disciplinary record;* you have not been issued formal disciplinary action in the past three (3) years.

Aggravating *(d) The employee's past work record, including length of service, performance on the job, ability to get along with follow workers and dependability*; you have [been] an employee [at Agency] since 2010 and your present performance is suffering from your negligence, your failure to communicate, failure to add notes to TOPS, your discourteous emails, and your insubordination undermine your dependability and connotes deficient performance. Your response indicates that you still do not accept or acknowledge your responsibility for having caused problems for customers through your negligent, unprofessional, and deficient performance of your duties.

Aggravating *(e) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;* your demonstrated disposition to your supervisor is adversarial and you have disregarded your supervisor's instructions, choosing instead to argue and engage in irrelevant and distracting emails with the DDOT customer. You have disregarded reminders to take carry out duties on permit applications. Management has had to step in repeatedly after your failure to respond, making amends to DDOT's customer on PSRD's behalf.

Neutral *(f) Consistency of the penalty with those imposed upon other employees for the same or similar offenses*; the proposed [suspension] of ten…workdays suspension has been issued to other DDOT employees for negligence, failure to follow instructions and conduct which is prejudicial to the District government.

Neutral *(g) Consistency of the penalty with the table of illustrative penalties (§1607);* The proposed penalty of ten (10) , workdays is within the range provided in the Table of Illustrative actions for each, Cause 1 DPM §1607.2(d)(1) and Cause 2 DPM §1607.2(a)(16) for initial offenses.

Aggravating *(h) The notoriety of the offense or its impact upon the reputation of the agency or the District government*; your lack of communication with applicants and the manner, tone and content of your written engagement with Kim Mitchell of CDKM was notorious, antagonistic and unwarranted. Your failure to follow managerial direction, your persistent failure to follow up with customers, and your antagonistic tone and responses internally and externally reflect poorly on DDOT's customer service commitment among permitting professionals and casts shadows on the reputation of the…Permit Branch.

Neutral (i) *The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question*; as a ten (10) year employee, you are well-versed on the requirements of your [ET] duties and the disciplinary consequences for failure to perform. In addition, I reminded you to act on permit

applications yet you failed to do so.

Aggravating (j) *Potential for the employee's rehabilitation*; your misconduct-particularly your argumentative responses to reasonable supervisory instruction -and the associated deterioration in your performance has undermined my confidence and calls into question your potential for rehabilitation

Neutral (k) *Mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter*; there are no known mitigating factors which would excuse your negligence, insubordination and argumentative discourtesy.

Neutral (I) *The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or other*s; the proposed ten (10) day adverse action is intended to deter any recurrence of your discourtesy to DDOT customers and to focus your attention on the need for reliable and consistent customer service, timely attainment of goals and responsiveness to management instruction. This action is issued proposed consistent with actions taken against other employees, in which a mitigated adverse action is expected to be sufficient to elicit immediate and lasting improvement in conduct and performance. this progressive disciplinary action is proposed to ensure you have an opportunity to demonstrate significant improvement while recording to your official personnel file the serious deficits which have led to this action, in the event that you persist in conduct violations or performance deficits.

Therefore, it is my decision to sustain the proposed [s] for Cause 1 and Cause 2. Accordingly, you are hereby Suspended Without Pay for ten (10) workdays…effective…July 12, 2021… In making this decision, managerial discretion has been legitimately invoked and properly exercised.

Positions of the Parties and Summary of Evidence

Agency's position is that it properly charged Employee with failing to comply with directives and procedures and with using unprofessional, inappropriate and at times abusive language to customers and supervisors. Agency contends that despite his years of experience and subject matter expertise, Employee failed to comply with basic requirements well known to him, such as responding to customers in a timely manner, entering information in TOPS, complying with directives from supervisors, and responding to supervisors within the time instructed. Agency further alleged that Employee used inappropriate and unprofessional language in emails to a customer; and either did not respond or responded inappropriately to supervisors and failing to comply with their directives; all of which negatively impacted on the reputations of Agency and the District of Columbia Government.

Tiffany Tenbrook, Agency's first witness and Employee's supervisor during the relevant period, testified that she worked at Agency for 15 years before leaving to in the private sector. She testified that her final assignment was as Surface Permitting Manager at PRSD, where she supervised Employee and four other individuals (Tr, 43-45). Ms. Tenbrook testified that she proposed suspending Employee for his "failure to follow instructions and…[his] use of abusive, offensive and unprofessional behavior, overall conduct." (Tr, 47). In support of this charge, the witness testified about a number of matters involving Employee and customers. The first matter involved Leon Paul, a customer, who emailed Employee on January 11, 2021, requesting an

adjustment of the start date. (Ex A-17). She testified that there was no evidence that Employee responded; and that Mr. Paul emailed Employee again on January 26 reiterating his request for the date adjustment. Ms. Tenbrook stated that Employee responded several minutes later, telling Mr. Paul that "the application was locked due to nonpayment" and the customer was required to submit a new application is required." She testified that on January 27, Mr. Paul emailed both Employee and the witness, stating, in pertinent part:

> It has been brought to my attention by Curtis that this permit application is no longer valid because the status has gone to "not paid"…and that a new application must be submitted. I have completed a new application…however…I do not understand how a permit could be timed out as we are trying to contact staff to… [change] the dates [but] received no response until the permit timed out in the system. At this point frustration has set in…the work crew will have to again reschedule, which it has done twice due to no response…(Ex A-17)Ms. Tenbrook testified she then emailed Mr. Paul, apologizing for the "lack of response" and waiving the application fee because Employee had not acted "in a timely fashion." (Tr, 49-51; Ex A-17). The witness testified that would have taken "20 minutes at most" for an ET to change the date, as Mr. Paul requested. She noted that the District lost revenue because of Employee's "failure to respond." (Tr, 51-53).

The witness was then questioned about the PIC applications, testifying that Employee was responsible for processing all applications associated with PIC. (Tr, 54). She reviewed an email thread that began on December 18, 2020, at which time Mr. Williams sent Employee a list of ten applications that needed to be completed. (Ex A-18). She said that Mr. Williams next emailed Employee at 10:41 AM on Friday, January 8,2021, telling him to "move to approving these today and at the latest Monday." She said that later that day at 1:49 PM, Mr. Williams sent Employee another email, asking if any of the permits was for approval. She said that Mr. Williams sent a final email to Employee on January 11 at 1:58 PM, stating that he had assumed Employee issued the permits until he was told by Mr. Garrett that he processed them because they were not completed. Ms. Tenbrook testified that as a result of Employee's failure to complete these applications, the matter was "escalated" to Mr. Garrett who completed the work. (Tr, 55-57). She testified that Employee was required to complete the process and issue permits within 15 business days from December 18, when they were assigned to him. (Tr, 58-59).

Ms. Tenbrook then testified about the matter involving Luz Acosta and Ines Corvalan, employees of City Permits, stating that Ms. Acosta first emailed Employee on January 7, 2021, asking for his assistance in changing dates on a permit to avoid a lapse. She said that about an hour later, Employee responded writing "sure." Ms. Tenbrook stated that on January 8 , Ms. Acosta emailed Employee at 12:25 PM asking if the permit could start that day and extend for six months, and at 2:16 PM that day, Ms. Corvalan emailed him. asking for the changes in the start and end dates "as soon as possible." The witness testified that Employee did not respond to those emails, and that Ms. Corvalan emailed her directly at 2:56 that day, requesting her assistance in changing the dates because the application would lapse that day. (Tr, 62). The witness said that she emailed Employee to "respond and provide assistance to the client by …4:45 PM, to avoid the permit going to non-paid status." She testified that when he failed to respond, she changed the dates herself to avoid the lapse, and that it took her about 15 minutes to complete that process. She said that Employee never explained why he failed to follow her instructions. . (Tr, 63).

Ms. Tenbrook was then asked about the matter involving customer Jeremy Tetreault. (Tr, 64; Ex A-14). She testified that after she received Mr. Tetreault's email on January 8, she emailed Employee, telling him to contact Mr. Tetreault and try to resolve the matter by 4:45 p.m. that day. She said that he responded at 4:52 p.m., stating that he would contact Stephanie Coffey about the matter. The witness said that she never told him to communicate with Ms. Coffey, and that Employee never informed her that he had followed her directive. She stated that there were no notes in TOPS that Employee telephoned Mr. Tetreault.. (Tr, 66-72).

The witness was next questioned about the matter involving customer Stanley Douglas. She testified that Mr. Douglas contacted her in December 2020, asking for her assistance in getting a parking permit. She noted that in his email Mr. Douglas stated that Employee was assigned to the matter but that he was unable to get in touch with him. (Tr, 74, Ex A-13).

Ms. Tenbrook then testified about matters related to the second charge. She testified that on December 9, 2020, she received an email from customer Kim Mitchell stating that Employee had changed application that she submitted, without her knowledge and with no explanation. The witness testified that Employee should have informed Ms. Mitchell of the changes he made. Ms. Tenbrook testified that she emailed Employee, directing him to respond to Ms. Mitchell with an explanation for his actions. (Tr, 79-80, Ex A-8). She said that Employee responded:

> *Called you didn't answer. Do you contact the customers when they input false information??? Don't send me directives if you're not checking all the information needed.*

The witness testified that she considered his response "very aggressive [and] unprofessional." She also explained that she had texted Employee that she was on a call and would call him when she completed the call so he knew that she could answer his call. She then read Employee's response:

> *Tiffany, can you explain why you approved applications with false information provided? Just because I do my job thoroughly, [do]not attempt to chastise and single me out. You are showing you are targeting and have an attitude towards me. You dropped the ball on your evaluations, copying and pasting information, and not providing an accurate review. When you were away, we had less problems. (Ex A-9).*

Ms. Tenbrook testified that his response was "unprofessional [and] disrespectful," and that its "aggressive tone" made here "fearful." She said that Employee did not demonstrate "any willingness to explain [his] actions," and denied that she was attempting to "chastise or single him out." She testified that Employee was the only employee that she supervised who "spoke" to her that way. (Tr, 83-85).

With regard to the matter involving Ms. Mitchell, the witness testified that Ms. Mitchell wanted Employee to explain the changes. She stated that instead his response to her of "*Kim, you send managers emails before contacting me on my own permit applications,* was "unprofessional and bullying." (Tr, 86-87; Ex A-10). She said that Ms. Mitchell's response was "appropriate":

> [*T]his is a huge liability and it has gotten into a big argument whereas my client is questioning if I entered the application correctly…I am owed an explanation.. as my integrity is becoming in question. (Ex A-10).*

Ms. Tenbrook stated that Employee had added Ms. Mitchell's client as well as Agency managers to his response to Ms. Mitchell. (Tr, 89-90, Ex A-11). The witness testified that it was not "normal" for an ET to "question the client in such a confrontational way" or to include senior leadership in emails., and she could not recall any other employee responding in that manner. (Tr, 92). She testified that Ms. Mitchell's emails demonstrated her "obvious frustration," and noted that the customer stated that Employee was "inconsistent compared to the other technicians" and that she did not want Employee to send her any more emails. (Tr, 94).

The witness described her relationship with Employee as "really difficult," asserting that he showed "no respect" for her as a woman in her position. She maintained that she did not have problems with the other employees she supervised, and that three of the five employee under her supervision were men. (Tr, 108-109). The witness stated that Employee had subject matter expertise, and did well "when he's on board." She maintained that his responses to her were disrespectful and argumentative and that he was "not very responsive to customers:"

> [W]hen I communicate with him…and ask questions…it's always met with an argumentative tone or disrespectful response when I just want to get clarity. (Tr, 99).

Ms. Tenbrook stated that as Proposing Official, she had reviewed the *Douglas Factors*[11] in reaching her decision about the penalty. She reviewed the Advance Notice and her reasoning. She testified that she considered the ten day suspension was appropriate, and that the ten day suspension would be appropriate even if only one of the two causes was sustained. (Tr, 101-102).

On cross examination, the witness said that she did not report her concerns about Employee and her safety to Agency's security office, noting that most of these matters took place while they were working remotely. She stated that her emails to Employee did not merit his "aggressive" responses. (Tr, 115-117). The witness was asked about emails she sent Employee at 3:10 PM and 3:25 PM in which she told him to respond by 4:45 PM. She agreed that there is no policy requiring employees to check their emails before signing out for the day, but stated that there is a policy requiring employees to be available while on duty. She maintained that her directives to Employee, including her instruction to respond before 4:45 PM, when his tour-of-duty ended, were reasonable.. (Tr, 125-148; Exs A-16, A-19):

> [A]t a minimum I merit a response. Whether it's… to say hey, I'm working on something else, I will get back to them, or a response that says the next day…(Tr, 149)

With regard to the matter involving Mr. Tetreault, the witness testified that she emailed Employee at 12:42 PM instructing him to contact Mr. Tetreault by 4:45 PM; and that his response at 4:52 PM. that he would speak with Ms. Coffey did not comply with her directive. (Tr, 153; Ex A-19). She agreed that some ETs communicate with customers by telephone, but she did not know of any telephone contact between Mr. Tetreault and Employee between January 8 and

[11] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

January 22,2021, noting that all communications must be documented in TOPS and there were none of telephone contacts between the two. (Tr, 154, 158).

Ms. Tenbrook testified that she had coached Employee about these issues "on a number of occasions" and counseled him about them more than once. She discussed one session with him about dealing with customers who Employee considered "bothersome," and said that she told him that he could refer those individuals to her. Ms. Tenbrook testified that she also counseled Employee about his behavior toward her. She denied Employee's accusations, stating that that she did not single him out, retaliate against him or target him. She asserted that her criticisms of him were constructive. She noted that she was supportive of the employees she supervised and had an "open-door policy" so they could express concerns to her. She testified that her performance reviews of Employee were accurate. (Tr, 124, 158-163). She agreed that customers may lie, but testified that there was no evidence that Mr. Paul, Ms. Acosta, Ms. Corvalan, Mr. Douglas or Ms. Mitchell lied to her about the matters at issue. (Tr, 171).

Agency's next witness, Courtney Williams, testified that Employee's responsibility at PIC was to review and approve applications, which was the same as his regular duties. He noted that the PIC applications were also processed through TOPS. Mr. Williams stated on PIC matters, he shared supervision of Employee with Ms. Tenbrook.. The witness testified that Employee did not always complete his responsibilities at PIC in a timely manner. (Tr, 177-180). He testified that he assigned Employee ten PIC applications listed in his December 18, 2020 email, and that Employee should have begun working on them immediately. He stated that PRSD requires applications to be completed within 15 days. (Tr, 181-187; Ex A-18). The witness testified that Employee never told him that he was having a problem with any PIC application. (Tr, 188). He testified that Employee failed to complete any of the applications by January 8, and he did not know if Employee completed any of the applications. (Tr, 190).

The witness stated that in his first email to Employee at 10:42 AM on Friday, January 8, 2021, he told Employee to complete the stated permits "that day or at the latest" on Monday, January 11. He testified that he expected Employee to "get the ball rolling," and to issue the permits for those he completed that day, stating that he thought that Employee would "at least attempt to get some completed" that day. (Tr, 182-183). He said that in his next email to Employee at 1:41 p.m. that day, he asked Employee for an "update on any [permits] that he would be approving," but that Employee did not respond.(Tr, 185). Mr. Williams testified that Employee's failure to complete those applications created difficulties between Agency and other members of the PIC. He stated that Tanya Mitchell, a PIC official, expressed concerns about Employee's unresponsiveness to him, Ms. Tenbrook and Mr. Garrett because she wanted to be certain that these problems would not arise at future inaugurations. (Tr, 191).

On cross-examination, Mr. Williams testified that he had a good relationship with Employee, but that had "some problems" with Employee's "responsiveness" as well as hi time and attendance when he supervised Employee. (Tr, 218). He testified that he not explicitly direct Employee to complete the PIC applications by a specific time because he did not consider it necessary, since all matters associated with the Inauguration, were "fast paced." (Tr, 198). Mr. Williams stated that he had no basis to think that any of the ten applications were assigned to anyone but Employee. (Tr, 201-204, Ex A-18). He stated that while 15 days is normally allowed to complete applications, the PIC applications had "high priority," and that Employee, who had

worked on previous PICs, knew this. Mr. Williams testified that between December 18, 2020 when he assigned the PIC applications to Employee and his January 8, 2021 email to Employee, he was in "constant contact" with Employee, by telephone and in person, and that Employee never raised any concern about any of the applications. (Tr, 203-207).

Mr. Williams testified that Ms. Mitchell, PIC executive, contacted him to find out why Employee had not completed the three applications. (Tr, 207-208). He said that on or about January 11, 2021, Mr. Garrett told him that Ms. Mitchell and the PIC Chief of Staff contacted him on the evening of January 8, concerned that three applications needed for Monday, were not yet completed. The witness said that since it was essential for them to be completed, he processed them and issued the permits that weekend. Mr. Williams said Mr. Garret told him that he did not know " why he had to do that when that's a technician's responsibility to do this work. " (Tr, 209-210). The witness stated that there was "no indication" that any of the ten applications listed on the December 18 email were assigned to anyone but Employee or that Ms. Tenbrook assigned herself any of them. He testified that Employee failed to meet his responsibilities with regard to the PIC applications, which, barring a problem, should have been completed by January 8. He stated that there was no indication of any problems processing these applications. (Tr, 230-231).

Mr. Williams testified that when Employee failed to respond to both his 10:45 AM and 1:49 PM emails on January 8, he checked TOPS to see if anything had been done with the applications. He testified that Employee knew to notify him if there was a problem or if he could not meet a deadline, so that even though Employee respond to his emails or contact him during this time, he assumed that "everything was on track" with Employee's processing of the applications. He stated that it was not until he spoke with the Mr. Garrett and Ms. Mitchell on January 11 that he became aware that Employee had not completed the assignment and someone else had to process the permits. He testified that he was troubled that Employee failed to complete the assignment. Noting that Mr. Garrett did not identify any problems with any of the applications. (Tr. 253-258).

Elliott Garrett, Agency's final witness, testified that his supervisor, Matthew Marcou, called him at home on the evening of January 8, 2021, and was "upset" because PIC applications were "still in TOPS unprocessed," and that the applications had to be completed and permits issued immediately because they were needed for events already scheduled. Mr. Garrett said that although he did not usually process applications, he completed them from home that evening. (Tr, 245-249, 272-273). He testified that this matter was relevant to the suspension, stating that there were times from December 2020 through January 2021, when Employee could not be reached regarding PIC matters, and this reflected in his performance (Tr, 250-251):

> [W]e asked him to…have his indicator light on that he was…available during [his] tour-of-duty hours. We would call him…but could not reach him. I would call and could not reach him. [I would] reach out to him on Teams because the staff had to have it open. He would not be available, would not respond. There were times I just couldn't find him. So, for me that's poor performance. (Tr, 251-252) .

The witness stated that he never observed Ms. Tenbrook "singling [Employee] out in an unfair way," or being "disrespectful" toward him. He testified that he had witnessed Employee "behaving in a disrespectful way" toward Ms. Tenbrook. (253-254). He stated that he thought that this might be based on gender because he observed that Employee "had a

different…interaction" with men than with women." (Tr, 255). He related that at a meeting he had with Employee and Ms. Tenbrook, he observed that Employee did not address Ms. Tenbrook in the same manner that he addressed the witness, and that when interacting with Ms. Tenbrook :

> [Employee] was more…hostile and… more irritated…[He] would cut her off and not allow her to speak…Whenever he turned towards her it was a very different personality. (Tr, 254)

On cross-examination, Mr. Garrett stated that Employee continued his regular assignments while with the PIC, and Ms. Tenbrook remained his supervisor but that Mr. Williams shared some supervisory responsibilities with Employee's PIC assignments. The witness said that Employee knew the importance of completing PIC applications and that priority was given them. Mr. Garrett stated that the ten PIC applications referenced in Mr. Williams' December 18, 2020 email to Employee, were already in the system and assigned to Employee prior to that date, but he was uncertain of the exact dates they were assigned. (Tr, 268-269). He testified that by January 8, the 15 day deadline had expired, so Employee should have already completed the tasks. He noted that there was nothing unusual or difficult about the applications. (Tr, 270-271).

Mr. Garrett testified that he spoke with Employee both about problems with his performance and his communications with Ms. Tenbrook, before the Pandemic, but that Employee "wouldn't stop and listen." He said that he told Employee "that's not the way to talk" to Ms. Tenbrook "many times. (Tr, 274-275). The witness testified that some time before the Pandemic, he wanted to assign Employee to a special project so that he would report directly to him instead of Ms. Tenbrook. He said that he sent Employee multiple messages asking to meet with him, and when Employee responded it was to tell him that he would have to bring a Union representative. The witness said that even though he told Employee the matter was one involving a Union issue, Employee still would not meet with him:

> I'm his boss's boss. He would not come to my office. And he lost out on a great opportunity that I had set aside just for him (Tr, 275-276).

Employee's position is that the charges underlying the adverse action are baseless and that the suspension should be reversed. (Tr, 287). He presented multiple reasons to support his position and refute the charges. He maintained that he completed assignments and responded to customers in a timely manner. He explained that his responses to customers might not be on the email threads because at times he responded by telephone. He also challenged the authenticity of the email threads, claiming some appeared incomplete and others may have been altered. He denied using inappropriate or unprofessional language to customers or Ms. Tenbrook.

Employee testified that he received most PIC assignments through the "normal" TOPS process, but also received assignments from Mr. Williams and Mr. Garrett. (Tr, 293-296). Asked if there was anything different about the three applications that were completed by Mr. Garrett, he responded:

> [T]hey highlighted these applications because these were the only applications that were initially assigned to me by [Mr. Williams]. But these applications were not assigned to me until the 30th of December. The rest of the applications were assigned

to either [Ms. Tenbrook] or [Mr.] Garrett. (Tr, 299).

Employee stated that during his time working with PIC, there were security concerns with TOPS, involving DHS and MPD, that delayed processing applications. (Tr, 322). He asserted that COVID and the January 6 insurrection also contributed to the delay in processing applications:

> [They] created a different climate in terms of permitting and security. [S]ome of the perimeters that we were managing and reviewing in terms of secure perimeters we have a heart and soul we were pushing those out a little bit more to make sure that we had secure kind of isolated area for the President during the procession. (Tr, 324).

Employee testified that after he received the applications on December 30, he had to revise and resubmit them, because he needed other documents in order to process them. (Tr, 299-300). He testified that he could not complete the review by January 8, noting that they were "still getting reports about the insurrection" during that time. He stated:

> So, it was very difficult for me to get in touch with key members of the PIC …that I needed to speak to especially the U.S. Secret Service, the Capitol Police…So I couldn't really process these. So what I was doing was making phone calls. I was sending emails. I was trying to get the reviewers that were needed so that we could approve these. I was still working on it. (Tr, 303-304).

Employee addressed the allegations about his interactions and response with customers. He stated that he and Leon Paul were friends, and spoke regularly by telephone, so it was more typical for him to respond to Mr. Paul by telephone than by email. (Tr, 305-306). He said that he was "in a good place" with Ms. Mitchell who was also a friend. (Tr, 308, 310). He denied that he added Ms. Mitchell's client and Agency officials on his email to her in an effort to embarrass her, explaining:

> I was trying to get us all on the same page. So, rather than have like a Zoom meeting, because I knew everybody has things to do, I.. email[ed] so that we all can…speak together. I was trying to provide clarity, so Ms. Mitchell didn't think that I was trying to target her or tamper with her position…But …I felt like either she didn't understand, or she wanted to reduce costs…So, what I do is I make the corrections…and if you have a problem you can speak with them. If you think that I did something in error, I'm a human being…I'm not perfect. You can come speak to me. We can open your plans up…We can measure everything...So, I was really trying to assist her with clarity and understanding because…I didn't think that she understood…(Tr, 309-310).

Employee stated that he had added Mr. Marcou and another Agency official, Mr. Petrosian, to the email, but neither responded to him. He asserted that this was an ongoing problem for him:

> [T]hat was always my problems with working at DDOT. I would reach out to supervisors like I did during the inauguration, hey, Courtney, hey, Elliott, these assignments are given to Tiffany…Tiffany will send an email, Curtis, don't touch applications in my queue. So I can't process or work on things… Elliot gave me the

> same directive don't touch things that he's working on when Matthew is saying hurry up and get things done that are not even assigned to me…So that was always the issue. Just like this email reflects that nobody ever contacted back. (Tr, 311).

Employee testified that he and Ms. Tenbrook became "good friends" before she became his supervisor, and that the work environment and his relationship with Ms. Tenbrook were good:

> I'm going to be honest with you…since we worked together every day a lot of us in that office are like family. And I'd like to say me and her are like family. (Tr, 302)

Employee maintained that Ms. Tenbrook never counselled him or told him that she felt "intimidated" or "uncomfortable" around him." He testified that he is very direct with customers and does not "fluff things up" with them, and that Ms. Tenbrook did speak with him about "soften[ing] up things a little bit" his communications with customers. He denied that that his emails to Ms. Mitchell and Ms. Tenbrook were inappropriate or unprofessional. (Tr, 302). Employee also disputed the charge that he failed to respond to emails from Ms. Tenbrook and Mr. Williams. He maintained that he was not required to check emails at "specific intervals." He also asserted that the deadline for responding to supervisors was the same as the deadline for responding to customers. (Tr, 302-303).

Employee claimed that Mr. Marcou was "biased" against him, stating that they had a "pretty good relationship," until about 2013, when he was questioned by the Office of the Attorney General ("OAG") about allegations that someone in their office was "taking money under the table [and] giving out… permits." He said that when he returned from the meeting, Mr. Marcou and three supervisors asked him about the OAG meeting; and that after, there was "some little bit of friction" with Mr. Marcou. (Tr, 312-316). Employee said there was another reason for Mr. Marcou's bias, explaining that he had reported a co-worker to management after she called someone a "monster," and as a result, she was fired. Employee asserted that the co-worker was a friend of Mr. Marcou and had been hired by him. He said that Mr. Marcou rehired the friend and "made sure that…me and [the friend] were around each other so he can show me." He stated that Mr. Marcou called him to his office after everyone left and would ask him why he was still there and what he was doing on his computer. (Tr, 316-317).

On cross-examination, Employee denied Agency's claim that he failed to respond to Mr. Paul's first email, on January 11, stating that he was uncertain if it was the first email since the emails "are cut off " so he could not "corroborate that that's true." He said that by then, he had already approved the permit, but agreed that he did not include that information in his January 24 email to Mr. Paul. (Tr, 326-327; Ex A-17).). He did not dispute that in his January 26 email, Mr. Paul did not mention speaking with Employee by telephone but rather stated that that he was unable to reach Employee and that Employee had not responded to his January 11 email. Employee testified that Mr. Paul may have been motivated to make these claims for another reason:

> I'm being honest, Leon and as well as Ms. Mitchell, being expediters they kind of try to push to get things done. So they manipulate situations often. (Tr, 336).

Employee asserted that the email thread was incomplete, and that there were more emails

between himself and Mr. Paul about the matter. (Tr, 337, Ex A-17). Asked why he did not introduce supporting evidence of this claim, he testified that he had "email[ed] OEA a package of emails as well as evidence." (Tr, 340). The AJ advised Employee that there were no such documents in the file and no record that they were received by OEA. Employee said that he sent them sometime after he filed his appeal and before the AJ was appointed. He then claimed that he had the supporting information on his cell phone. (Tr, 341). Employee was given time to look for the information, but found nothing. (Tr, 341-343).

Employee testified that he had responded to Mr. Paul's January 11 email by telephone. He agreed that there was no record of the call in TOPS, but maintained that telephone calls are not required to be entered into TOPS.(Tr, 347). He agreed that he did not present evidence to support his contention that he was first assigned the PIC applications at issue on December 30, asserting that he "started working" on them on January 8, and had "completed his review." He said that he was uncertain if they were completed by January 11 because he did not have "the exact dates," and agreed he did not submit any evidence to support that assertion. (Tr, 353).

With regard to the January 7 email from Ms. Acosta, Employee testified that he was unsure if he responded to her request to make the change, stating he would "have to look at the details." (Tr, 354). Asked if he agreed that he did not respond to Ms. Corvalan's email on January 8 about the same matter, he said that he "[did not] believe that to be true" and "would have to see the details. (Tr, 355). After reviewing the emails, Employee stated that the emails "looked tampered with." (Tr, 356-357). Employee testified that he did not make the changes by 4:45 PM as directed by Ms. Tenbrook, because he did not receive her email. (Tr, 357).

Employee disagreed with Agency's contention that he failed to respond to Ms. Tenbrook's first email about the matter with Mr. Tetreault, claiming that the exhibit of the email thread was just "a piece of paper [and] not the actual full printout" so there could have been other emails. (Tr, 361; Ex A-19). He agreed that Ms. Tenbrook directed him to respond to Mr. Tetreault, and not to resolve the matter with Ms. Coffey. (Tr, 365). Employee also disputed Ms. Mitchell's claim that he failed to inform her of the reasons for the changes that he made. Asked if he entered the changes in TOPS, he replied that "[n]otes were left" in TOPS, but agreed that he had no evidence that he entered the notes before being directed to do so by Ms. Tenbrook.. (Tr, 367).

Employee testified that his comment to Ms. Tenbrook*, i.e. "I do my job do yours"* could have been phrased better, but denied that it was inappropriate. (Tr, 372-373, Ex A-9). He asserted that his emails to Ms. Mitchell were not disrespectful. He denied adding her client and his managers to the email in order to embarrass her. (Tr, 375-379, Ex A-10).

Employee disputed Agency's contention that he was assigned the PIC applications listed in the December 18, 2020 email, testifying that Ms. Tenbrook assigned herself PIC applications. Asked if he had evidence to support his claim that PIC applications were "improperly assigned," Employee responded in the affirmative:

A There's evidence to speak to that, yes, sir.
Q Did you present any of that today?
A I have it sitting right there. And I have it on my phone.
Q. Did you present any of that today?

A I was working on my attorney, so he didn't get it till now.
Q Did you present any of that today
A No. I didn't have the opportunity. (Tr, 381-382)

On redirect, Employee testified that Mr. Marcou and Mr. Garrett did not include him in meetings, and that Mr. Garret assigned PIC applications to Ms. Tenbrook:

> It seemed…[Matthew and Elliot] didn't want me to be as actively involved. So they would purposely not include me in meetings and assign applications to themselves. Elliot was assigned many applications as well as Tiffany. (Tr, 386).

Employee testified that he told Mr. Williams that Ms. Tenbrook was assigned permits incorrectly, but Mr. Williams did not to resolve the matter:

> The applications just sat dormant waiting for him to make a response to what he wanted me to do… I did reach out to Ms.…. Tenbrook [and] Mr.…Garrett and they told me don't touch any applications in their queue. (Tr, 388) .

Employee testified that his claim of being "confused" in his email to Ms. Tenbrook on December 9, 2020 supported his position. He explained that he was not confused, but rather the "confusion was between management:" (Tr, 389, Ex A-11)

> Tiffany Tenbrook…never knew how to review plans. She doesn't know how to read plans. So, when I would go to her with specific questions seeking help, she never could help me...So that's why applicants would go to her often, because she changed the dimensions back to exactly what Ms. Kim Mitchell wanted and she didn't review the plan at all. (Tr, 390).

Employee testified that he may not have received some emails because his brother worked for another D.C. Government agency and had a similar email address so it was possible that emails meant for him were erroneously sent to his brother. He said this was relevant to claims by customers that he had failed to respond to emails. (Tr, 395-396).

Employee testified that he thought that Mr. Garrett was prejudiced against him, and that he had "viewed [Employee's] interaction with [Ms. Tenbrook] wrongly." He denied having any hostility toward Ms. Tenbrook, stating that there was "some friction" but that he "never tried to disrespect her at all." (Tr, 398-401). He testified that he understood his "role" and her position as supervisor, and asserted that he may have been "direct" with her, but was not "inappropriate." (Tr, 403)

> I just felt like I was…comfortable with her, and I could speak to her and we… resolve things. It was never an intent to be disrespectful or condescending towards her…[M]e and her had had back and forth because she would never review the plans. So…that's why she always appreciated my expertise because I would review the plans, and she said it herself. So, we were always kind of bump[ing] heads. (Tr, 404).

Asked if he was contending that Ms. Tenbrook was incapable to performing her duties as his

supervisor, he responded:

> She didn't supervise me. She was…a human resource person…Then she became a supervisor over what I… was already doing…what I was hired for at DDOT. (Tr, 405).

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The District Personnel Manual ("DPM") states that an adverse action is "warranted" when an employee violates standards of conduct, fails to meet performance measures or disregards rules of the workplace Employee was charged with violating §1605.4(d)(1), *i.e*. "failure or refusal to follow instructions: negligence including the careless failure to comply with rules, regulations, written procedures or proper supervisory instructions;" and §1605.7(a)(16), *i.e*., "conduct prejudicial to the District of Columbia government: use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language." Agency has the burden of proof in this matter and must meet this burden by a "preponderance of evidence." *See*, OEA Rules 6301 and 699.1.

In this matter, Employee disputed not only the charges but also the supporting testimonial and documentary evidence introduced by Agency. The credibility of a witness is critical in determining if the evidence presented by that witness can be relied upon in reaching a decision. Therefore, it was imperative for the AJ to assess the credibility of the witnesses. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985. The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the individual who sees the witness "first hand." *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d 440 (D.C. 1985). In resolving issues of credibility, the AJ considered not only demeanor, but also the inherent improbability of the witness's version, as well as prior inconsistent statements. *Hillen v. Department of Army*, 35 M.S.P.R. 453 (1987). Some inconsistencies in testimony is certainly not uncommon,. and the AJ was mindful that even if some parts of a witness's testimony is discredited, other parts can be accepted as true. *DeSarno, et al. v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985).

Based on these considerations, the AJ determined that Agency witnesses were credible and that she could rely on their evidence in reaching a decision. They presented testimony that was consistent but did not appear rehearsed. More important, their testimony was supported by significant documentary evidence. The AJ did not find any evidence of *animus* by these witnesses. To the contrary, each of the witnesses seemed to have had a positive opinion of Employee's intelligence and expertise. From their testimony and demeanor, the AJ had the impression that they were saddened that the point was reached where Agency made the decision to suspend Employee. However, they uniformly agreed that the action was appropriate and necessary.

The AJ found Employee to be knowledgeable and articulate, but did not find him credible and therefore could not rely on his testimony The AJ reached that conclusion for several reasons. First, Employee offered a myriad of reasons the charges and supporting allegations were untrue, but offered no documentary or testimonial evidence to support these very bare assertions. At the hearing, he claimed to have documents to support his claims. He also had the opportunity to obtain supporting documentation through discovery. He was given time during the proceeding to locate evidence that he thought was on his phone, but he did not find anything. In addition, it does not appear that he made any effort to obtain supporting evidence. If Employee had

requested, the AJ could have admitted evidence even after deadlines had closed and/or directed by Order or *subpoena* that evidence be produced. Employee never raised the issue or requested any assistance in obtaining supporting evidence. This becomes a credibility issue because Employee testified multiple times about having such evidence. Employee was put on notice by the Deciding Official on July 9, 2021, that he had to provide supporting evidence for his assertions to be considered. (Ex. A-22, *Infra* at 13). Employee is quite intelligent and at the hearing advocated on his own behalf. In addition, he had representation throughout these proceedings. It is reasonable to assume that he would have heeded the Deciding Official's advice and made every effort to obtain the supporting evidence in the intervening 18 months before the hearing. The AJ finds that it is most likely that Employee's failed to introduce any evidence to support his assertions because such evidence does not exist.

Employee challenged the authenticity and completeness of the emails threads entered into evidence by Agency. He asserted, for example, that the email thread regarding Mr. Paul was "cut off" those concerning Mr. Tetreault were "not an actual printout," and the emails involving Ms. Acosta were "tampered with." (*Infra* at 30-31). These email threads were an essential part of Agency's case not only at this evidentiary hearing, but also in the DO's analysis. Employee failed to introduce any evidence to support his bare claim. He had the opportunity to investigate the completeness and accuracy of the emails during the discovery process; but if he did so, his efforts did not result in any evidence introduced to support his claim. In addition, Mr. Paul and Mr. Tetreault, both of whom Employee said were his friends, could have supported his claims by providing testimonial or documentary evidence. It is also notable, that Employee did not object to these documents prior to, or at the proceeding, although he had an opportunity to do so.

Employee claimed that he responded to emails by telephone which would not appear on an email threads. The fact that they did not appear in TOPS does not establish that the calls do not exist. However, Employee had ample time to obtain supporting evidence and failed to do so. This is another instance in which customers, who he claimed as friends, could have offered testimonial or documentary evidence. Employee also failed to explain why customers he claimed to have spoken with did not reference those calls in the emails they sent complaining about his failure to respond, except in a few cases he implied that Mr. Paul and Ms. Mitchell may have had ulterior motives, testifying that both "manipulate situations often" since as " "expediters [they] to push to get things done. So they manipulate situations often. (*Infra* at 28).

Employee offered multiple reasons for not completing the PIC applications, all without any support. First, he disputed Agency's claim that they were assigned to him on December 18, 2020, as Agency claimed, testifying instead that they were assigned to him until December 30, 2020. He also contended that he was waiting for Mr. Williams' to respond to his questions about Ms. Tenbrook and Mr. Garrett assigning themselves applications. Employee testified that "the applications just sat dormant" while he waited for Mr. Williams to respond. However, Employee did not establish that those applications were the ones at issue in this matter. His claim was not supported by Ms. Tenbrook, Mr. Garret and Mr. Williams, all of whom testified to the contrary. His testimony that he reached out" to Ms. Tenbrook and Mr. Garrett or that he was told not to "touch any applications in their queue" was disputed by the testimony of all of Agency witnesses.

Employee also claimed that the January 6, 2021 Insurrection and the Pandemic negatively impacted the ability to complete applications because of security concerns. He testified that he

had not completed the applications because he needed to contact individuals for clarification. He did not explain who had to be contacted or the clarification needed. Further his testimony was contradicted by the fact that Mr. Garrett was able to complete the applications at home without any problem on January 8, 2021. The AJ agrees that the Pandemic and January 6 insurrection could negatively impact on an individual's ability to complete work. But Employee had to present more than a mere assertion, and he did not. The AJ did not need to count the number of days between the assignment and the completion, because even if they were assigned on December 30, 2021 as alleged by Employee, he still had at least three days to complete these priority applications before the Insurrection. He presented no evidence that he did so.

Employee testified that he had submitted supporting evidence of his challenges to Agency's contentions to OEA. He had not previously made this claim. The AJ told him that there were no such documents in the file and that she had not received any. Employee then contended that he transmitted them by email to OEA after he filed the appeal but before the AJ's appointment. Employee stated that he thought he had proof of this filing on his cell phone. This Office processes every document it receives and records the date of its receipt. Although the AJ did not think Employee's assertion was likely, errors can happen, and the AJ stopped the proceeding so Employee could go through his cell phone. Employee did not find anything on his cell phone to support his contention. The AJ also notes that if these important documents had been transmitted by email, the Employee would have had the hard copies and they would have been available to be introduced into evidence on his behalf. They were not. After the assertion that he had the documentation failed, Employee responded that he was reviewing matters with his representative, when asked about specific allegations. However, he offered no additional information. He did not ask, individually or through his representative, for additional time to obtain the information. He did not seek to get the documents through discovery or subpoena.

Employee disputed the charges and supporting evidence, but offered no evidence to support his claims. In the Final Decision, the DO referenced Employee's challenges to Agency's claims, and stated that evidence was needed to support those assertions. Therefore Employee knew by July 9, 2021 when the Final Decision was issued, that he needed to present evidence to support these bare assertions. Employee is an educated and articulate, and advocated for himself at the proceeding. In addition, he was represented throughout this proceeding, and there is no reason to challenge the quality of the representation. It is reasonable to assume that Employee, through his representative, would have heeded the DO's advice and obtained the necessary supporting evidence in the 17 months between the Final Decision and the evidentiary hearing. The AJ finds it is more likely that Employee failed to introduce any supporting evidence because such evidence does not exist. Employee's continued claims of supporting evidence does not appear credible under these circumstances.[12] The AJ did not need such evidence to find that Employee's "uncontradicted, uncontroverted [and] undisputed' testimony was not credible. *Ruggin v. United States,* 524 A2d 685 (D.C. 1987), *cert. den*., 846 U.S. 1057 (1988). *See also, Pupis v. U.S. Postal Service*, 2007 M.S. P.B. 47 (2007).

[12] Agency could not, and was not expected, to provide evidence refuting each of Employee's claims, there were simply too many and it is difficult to prove the existence of something that does not exist. Further, Employee had the opportunity to examine the witnesses about some of his assertions, e.g., that he was excluded from PIC meetings, but did not do so..

The AJ concludes that Agency met its burden of proof with regard to Cause 1, presenting more than sufficient evidence establishing that Employee failed to comply with the requirement stated in his PD and Performance Evaluation, as well as the applicable rules, regulations, written procedures or proper supervisory instructions consistent with DPM §1605.4(d) and DPM §1607.2(d)(1). (SUF 3, 9, *infra* at 3-4). The standard is whether Employee carried out his responsibilities as would be expected by a reasonable individual in his position, which in this matter, "in his position," means as an employee who had held the position for more than ten years; and interacted on behalf of Agency with customers and other third parties. The AJ concludes that Employee failed to do so.

With regard to Mr. Paul, it was unnecessary for the AJ to count days to determine if Employee met the 48 hour or next business day deadline for returning emails to customers since he did not respond to Mr. Paul's January 11, 2021 email at all, and only emailed him in response to his January 26 email. Employee did not provide a credible reason for his failure to respond to the January 11 email. There is no evidence of any telephone calls.

Employee failed to respond to emails from Mr. Williams on January 8, 2021, and failed to complete the PIC applications promptly. Although Mr. Williams did not specifically instruct Employee to respond to the first email, sent at 10:42 AM, it was implicit that any directive involving the PIC matter required immediate action. This was Employee's second appointment to work with PIC, so he was well aware that the work had to be completed promptly. In PIC matters, Mr. Williams was in a co-supervisory position with Employee, so not only was the matter related to a PIC application which required immediate attention, but the email was from a supervisor, who is entitled to an immediate response. The 10:42 AM email directed Employee to complete the applications that day or no later than January 11. The AJ does not accept Employee's contention that the 48 hour rule for responding to customers, also applied to supervisors. An employee is expected to respond to a supervisor while on-duty. Employee also maintained that he is not required to continually review emails. However, since he is required to respond to a supervisor, he can put alerts on his computer or do whatever he needs to do so that he is aware of supervisor emails. Mr. Williams' 1:41 PM email did require a response from Employee since he asked for an update, Employee offered no reason for failing to respond to Mr. Williams. Although Agency met it's burden of proof that Employee was assigned the applications on December 18, assuming *arguendo* that he received them on December 30 as he contends; he should have been working on them since he was well aware of the obligation to prioritize PIC applications. He knew on January 8, that these applications had to be completed that day or January 11, the latest; and that his supervisor needed a status report on his progress. The Pandemic and the January 6 insurrection notwithstanding, it was unreasonable for Employee to fail to respond to Mr. Williams and to fail to undertake, if not complete, the applications. Employee maintained he needed additional time to talk with individuals and revise the documents, but offered no evidence of any efforts to complete the applications. In addition, it is apparent from the time it took Mr. Garrett to complete the task, the work did not take a substantial amount of time to complete. In any event, Employee offered no reason for failing to work on these applications prior to January 8, and it is reasonable to assume that if he started them on December 30, it is likely that they would have been completed within a few days.. In sum, a reasonable employee in Employee's position, would know that he was required to comply with directives from his supervisor and respond to inquiries from his supervisor whether they came to his attention by email, telephone or in person. Employee failed to do so with regard to Mr. Williams,

He also failed to act promptly to complete the PIC applications that were the subject of Mr. Williams' email, despite his knowledge that these applications must be acted on promptly. Employee did not provide good cause for failing to respond to Mr. Williams or acting on the applications promptly.

Employee also failed to comply with Ms. Tenbrook's directive on January 7, 2021, to respond to Ms. Corvalan and provide her with the necessary assistance by 4:45 PM that day. This matter required immediate attention since the application was scheduled to lapse by that time. The customers had emailed Employee earlier that day, and failing to get a response from him, contacted Ms. Tenbrook at 2:16 PM. She immediately emailed Employee with that directive. He did not respond to Ms. Tenbrook or the customer, and Ms. Tenbrook took the necessary actions, which she said took about 15 minutes so the application would not go into non-paid status. failed to respond, she Agency also established that his failure to respond to customers and supervisors had a negative impact on the reputations of PSRD and Agency. This is another instance where the 48 hours rule for responding to customers in inapplicable. In this matter, Employee was directed to respond by a time certain by his supervisor. In addition, the matter required immediate action. An employee with Employee's considerable knowledge and experience, knew that immediate action was necessary. Employee failed to respond to a reasonable directive from his supervisor without good cause.

Employee failed to act comply with a reasonable directive of his supervisor with regard to Mr. Tetrault, and also failed to respond to a customer in a reasonable amount of time. On January 8, 2021, after receiving an email from Mr. Tetrault, Ms. Tenbrook emailed Employee at 12:42 PM, instructing him to contact Mr. Tetrault and inform him on how to obtain signage. She did not hear from Employee, and sent him another email at 3:25 PM telling him to contact Mr. Tetrault by 4:45 PM. Employee responded at 4:52 telling her that he would speak with Ms. Coffey about the matter. He offered no reason for failing to comply with his supervisor's directive. On January 22, when Ms. Tenbrook contacted Mr. Tetrault to find out if the matter was resolved, he told her that he had not heard from Employee or anyone about the matter since January 8.

Based on his grade and tenure, Employee had considerable autonomy, and was expected to meet deadlines and work with customers in professional and courteous manner as required by his PD, his Annual Performance Document, instructions from his supervisor and requirements for an employee. The evidence lead to the conclusion that Employee failed to comply with proper supervisory directives, and failed to comply with rules and requirements in the matters pertaining to Cause 1. He failed to comply with directives from supervisors and failed to respond to them in a timely manner. His failure had a negative impact on Agency's reputation with members of the public and other governmental entities, including PIC member agencies and customers.

The AJ further concludes that Agency met its burden of proof regarding Cause 2, establish listing by a preponderance of evidence that Employee used "abusive, offensive, unprofessional…or otherwise unacceptable language" in the incidents as charged as Agency. Employee maintained that he and Ms. Tenbrook were good friends before she became his supervisor, and that he was comfortable with her and was not intentionally disrespectful. However, the words and tone of Employee's emails to Ms. Tenbrook, supported her testimony that he treated her with disrespect, ignored her instructions, and created a negative work environment. In addition, her evidence was supported by Mr. Williams and Mr. Garrett. Mr.

Garrett testified that at a meeting with just the three of them, he observed that Employee cut off Ms. Tenbrook and would not allow her to speak, treating her very differently than the way he treated Mr. Garrett. Mr. Williams also testified that he observed problems with Employee's treatment of Ms. Tenbrook. Neither witness attributed any blame to Ms. Tenbrook, and based on her observations, the AJ finds that she did not instigate or contribute to Employee's unacceptable actions. Even at the hearing, Employee was dismissive of and demeaning toward Ms. Tenbrook, testifying that that she "*didn't supervise me [and was] a human resource person [who] became a supervisor over what I was already doing…what I was hired for at DDOT*. (Tr, 405, *infra* at 30). While Employee may have had more experience and perhaps more subject matter expertise that Ms. Tenbrook having worked in PSRD longer, there was no evidence that she was not qualified to serve as his supervisor. She worked at Agency for 15 years, and her final assignment was as Surface Permitting Manager at PRSD, not in HR. In that capacity, she supervised Employee and four other individuals. There was no evidence that she was not qualified to serve in that position. The AJ found her professional, knowledgeable and credible.

Employee denied Agency's claim that the language and tone in the emails to Ms. Tenbrook and Ms. Mitchell were inappropriate, maintaining that "[n]ot everyone is comfortable with everyone else's tone, but that does not make the individual's tone an offense," citing *Employee v. D. C. Department of Corrections,* OEA Mater No. 1601-0013-21 (January 7, 2022) in his closing argument. The AJ agrees that people have different views on what language or tone is offensive. The AJ adhered to Justice Potter Stewart's guidance in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) when he said that although he could provide no definition of obscenity, he "[knew] when [he saw] it." However, she finds that Employee's December 9, 2020 emails to Ms. Tenbrook, were offensive, and inappropriate, especially when directed at a supervisor. The AJ does not know a circumstance when telling a supervisor, "I do my job do yours" or "*Don't send me directives if you're not checking all the information needed.is acceptable"* would be appropriate. The AJ finds Employee's language in the emails to Ms. Tenbrook was inappropriate, disrespectful and offensive.[13]

Agency also met its burden of proof that Employee's language in the emails to Ms. Mitchell was inappropriate, unprofessional, and did not reflect well on Agency or the District of Columbia Government. Employee knew that as an ET, he was expected to maintain professional and productive relationships with customers. In the matter with Ms. Mitchell he failed to do so. Writing her "*That is incorrect. Review all phases of the traffic control plan you uploaded. You are in the parking lane and travel lanes…Did you input account for this*???" and ensuring that those who pay for her services and others saw that she had failed in her work, was inconsistent with his duties to act professionally and amicably with customers. If she had made errors, he was responsible for explaining the problems to her in a professional and amicable manner. Instead, he added names of individuals who retained her services and PSRD managers to the email in which he chastised her in an embarrassing and demeaning manner, and also criticized her for contacting Ms. Tenbrook. This incident had a negative impact on Agency's reputation with customers and other members of the public.

Employee alleged that customers, particularly Mr. Paul and Ms. Mitchell, "manipulated situations" and acted at the "last minute" as a way of challenging their charges. But his accusation

[13] Employee's testimony at the hearing that Ms. Tenbrook "didn't supervise" him and was a "a human resource person" demonstrated a lack of respect for her position. (Tr, 405).

was not supported by evidence. However, assuming *arguendo* that his assertion was true, it would not excuse Employee from responding to these customers professionally and courteously, or if he felt he could not, referring them to Ms. Tenbrook, as she suggested. Employee is a DS-12 and had been an ET for more than ten years at the time of this suspension. He holds a position which allows him to interact with the public with little supervision. Based on his experience and expertise, he is expected to act professionally and appropriately with customers and others he is in contact with as part of his duties. Although Employee was displeased that Ms. Tenbrook became involved in these matters, she only became involved because customers contacted her after becoming frustrated that Employee failed to respond to them. The requirement that as an ET, Employee had 48 hours or the next business day to respond to customers does not mean that Employee should wait for the 48 hours to elapse. Employee had the requisite skill and experience to know if contact should be made earlier because of the nature of the inquiry, *e.g.,* an application that is about to expire. The AJ concludes that Agency met its burden of proof that Employee's emails to Ms. Mitchell were inappropriate and antagonistic; and had a negative impact on the reputation of PSRD and Agency.

Agency's earlier confidence in Employee was demonstrated by his appointment to the PIC, where he had been assigned four years earlier. He was responsible for processing applications related to the 2021 Inauguration, a duty he already held. The only difference was that the processing was given priority. Employee testified that it is "[o]f primary importance [related] to this charge [that] the 2021 Presidential Inauguration is not an evaluation goal for [ETs]," and therefore "it is improper to indicate that [Employee] failed to attain assigned goals, since the goals were not in his evaluation plan as required by the DPM. (*Employee's Closing Argument*). The AJ does not agree. As stated in his PD, Employee's regular duties required him to process applications, and interact with individuals in the public and private sectors during that process. (*Infra*, at 3). Indeed, Agency maintained that it was ready to provide support to Employee if he asked for help, which he did not. Agency met its burden of proving that Employee was assigned these applications by December 18, 2020. There was no evidence supporting Employee's contention that Ms. Tenbrook or anyone else assigned themselves any of these applications. Although Mr. Williams' emails did not provide a specific deadline for completing the task, it was undisputed that PIC applications had to be processed expeditiously and that Employee was aware of this requirement. It is reasonable to assume that it was reasonable for Mr. William, who had worked with Employee before, to assume that Employee would respond promptly to his emails, request clarification or assistance if needed, and process the applications promptly

Employee maintained that he could not complete his review by January 8, 2021 because they were "still getting reports about the insurrection," and that he was unable to process the applications because it was "very difficult" for him to get it contact with "key members of the "PIC" that he needed to speak with, "especially the U.S. Secret Service and, the Capitol Police". He testified that he was "making phone calls [and] sending emails" and "trying to get the reviewers that were needed so that we could approve these." However, Employee did not contradict Agency's position that these were not complicated applications and were completed expeditiously by Mr. Marcou without a problem. (Tr, 303-304). Employee did not explain why he did not respond to either of Mr. Williams' January 8 emails. Mr. Williams was supervising his PIC work, had requested updates, and Employee had ample time to respond to both. He failed to do so and to complete processing the applications in a timely manner. The AJ finds that Employee knew of the assignments by December 18, 2020, however assuming arguendo, he was even if

Employee did not . However, it was undisputed that PIC matters were expedited and prioritized. Employee had been selected to work with the previous PIC, and the AJ assumes that he must have done a good job since Agency selected him again. Therefore, when Mr. Williams emailed him twice about the applications, Employee, at a minimum, should have contacted him to find out if the matter required immediate attention. PIC officials; displeasure with Employee, and with Agency, was made clear by Agency witnesses and established that PRSD's reputation was tarnished by Employee's unprofessional conduct.

The AJ carefully reviewed and considered all of the evidence and arguments offered by the parties.[14] She also reviewed and considered the thorough analysis by the Deciding Official who, although he did not testify, did provide a thoughtful and detailed analysis of the charges and his reasons for finding cause for each. She carefully considered Employee's contentions and arguments. Based on these factors, the AJ concludes that Agency met its burden of proof that Employee engaged in the charged conduct and that this action was taken for cause.

The final inquiry is whether there is any basis for disturbing the penalty imposed by Agency. The selection of a penalty is a management prerogative, and is not subject to discretionary review by the AJ. *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011). The role of the AJ is limited to ensuring that the penalty reflects a "responsible balancing of relevant factors" in a fair and unbiased manner. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). The AJ cannot alter the penalty if it is within the range allowed by law, regulation, and any applicable table of penalties; if it was based on a consideration of the relevant factors; and/or if there is a clear error of judgment by Agency. *Stokes v. District of Columbia,,* 502 A.2d 1006 (D.C. 1985).

Chapter 16 of the DPM provides a Table of Illustrative Actions ("TIA") that lists the range of penalties for specific causes based on whether it was a first occurrence. In this matter, all charges were first occurrences. The penalty for the charge of using "abusive, offensive, unprofessional…or otherwise unacceptable language" ranges from counseling to 15 day suspension. The penalty for failing to follow proper supervisory instructions or written procedures and careless or negligent performance ranges from counseling to removal. Thus the ten day suspension comes within the permissible range.

The AJ finds that Agency met its burden of proof that Employee receiving counselling in the past about these issues. The evidence established that Mr. Garrett counselled Employee for his disrespectful conduct toward Ms. Tenbrook. It also established that that Ms. Tenbrook counselled Employees about his treatment of her and interactions with customers. Agency also presented evidence that Agency tried other methods to work with Employee to improve his performance issues. Mr. Garrett presented evidence that it was difficult to reach Employee during his tour-of-duty, and that Agency directed him to keep his indicator light during those hours to ensure his availability, but that Employee continued to be difficult to reach and did not respond. (Tr, 251-252).

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[14] Agency submitted ample documentary and testimonial evidence supporting each charge; and Employee offered a plethora of reasons why the charges were unjust and the adverse action should be reversed, The AJ reviewed each thoroughly in reaching her decision. However, including a discussion of each would have at least double the length of the decision, and would not have had any impact on the outcome. *Antelope Coal Company/Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014).

Employee's testimony at the hearing that Ms. Tenbrook was an HR person who did not supervise him and came to him for assistance because she lacked subject matter experience, was not supported by evidence. His assertions support the conclusion that he did not respect for her in her position and did not treat her with respect. He failed to respond to her directives, and his emails were disrespectful communications to a supervisor. His attitude may have been based on her gender, as Agency contends; or perhaps he resented being supervised by someone he considered had less experience in the division and less subject matter expertise. (Tr, 405). He was dismissive of her experience and expertise, and claimed she did not supervise him. (*Infra* at 30). However, there is no evidence that Ms. Tenbrook was in any way unqualified to serve as his supervisor. She presented as a very knowledgeable and competent individual at the proceeding, and there was no challenge to her appointment to this position. In fact, Ms. Tenbrook completed work that Employee failed to complete, which is further evidence of her subject matter competency. Agency established that Employee's responses to her as well as his failure to respond to her, were disrespectful and inappropriate.

Employee claimed that this adverse action was a result of retaliation and bias, raising these allegations against Ms. Tenbrook, Mr. Garrett and the Deciding Official. However, he failed to support his claims with any evidence other than his bare assertions. These claims, like all claims of affirmative defenses, must be proven by the accuser. *Shockro v. Federal Communications Commission*, 5 M.S.P.B. 181 (1981). The AJ finds that Agency witnesses commended Employee's experience and expertise. They did not impose this suspension without first counselling him about performance and conduct issues. Mr. Garrett tried to assign Employee to work with him, to remove him from the problems he had working with Ms. Tenbrook. He did so because he felt positive about Employee's performance. Mr. Williams said he had a positive view of Employee, having previously supervised him. Employee testified about his positive relationship with Ms. Tenbrook, although the evidence supports the conclusion that the relationship deteriorated after she became his supervisor. There is no evidence, other than Employee's unsupported assertions, that this adverse action was the result of bias and reprisal. *Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324, a*ff'd* 545 F.2d 222 (1st Cir 1976).

The Proposed Notice and Final Decision were thorough and analytical, demonstrating that the Proposing Official and Deciding Official considered the evidence. The AJ has cited both documents in this decision for that reason. Ms. Tenbrook, as the proposing official, offered testimonial evidence in support of her decision. Although the Deciding Official did not testify, he provided a comprehensive and thoughtful analysis that demonstrated his familiarity of the allegations, the documents submitted by Agency's supporting documents and the arguments advanced by Employee in the Final Decision. The DO explained how he reached his decision for each *Douglas Factor.* The AJ did not find evidence of bias, arbitrariness, or error of judgment. In sum, the AJ concludes that Agency met its burden of proof regarding the penalty.

Based on a thorough review of the documentary and testimonial evidence, as well as the arguments presented by the parties, and for the reasons discussed in this decision, the AJ concludes that Agency met its burden of proof regarding the charges and the penalty, and that this appeal therefore should be dismissed.

ORDER

Agency's decision is sustained. The appeal is hereby dismissed.

FOR THE OFFICE: LOIS HOCHHAUSER.