THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No.: 1601-0058-23
v.	)	
	)	Date of Issuance: December 18, 2025
OFFICE OF THE CHIEF	)	
TECHNOLOGY OFFICER,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employe worked as a Telecom Specialist with the Office of the Chief Technology Officer ("Agency" or "OCTO"). On June 9, 2023, Agency issued Employee a Notice of Proposed Separation charging him with failure/refusal to follow instructions in violation of Chapter 6-B, Section 1607.2(d)(2) of the D.C. Municipal Regulations ("DCMR"). In its notice, Agency asserted that between May 30, 2023, and June 1, 2023, Employee repeatedly and maliciously refused directives from his supervisor, the Deputy Chief Technology Officer, and the OCTO General Counsel, directing him to report to OCTO headquarters to discuss an unrelated administrative investigation.[2] A hearing officer conducted an administrative review of the charge and found that Agency provided sufficient

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] The administrative investigation concerned Employee's use of two parking spaces at work in January of 2023.

evidence to support the adverse action. A final decision was issued on June 30, 2023, and Employee's termination became effective on July 14, 2023.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 14, 2023. He argued that his removal was unlawful and highlighted his excellent work performance throughout his tenure with Agency. Employee asserted that Agency deliberately concealed pertinent sectionsof the DCMR in the charging documents and negated its legal obligations with respect to DCMR § 1620. Additionally, he opined that Agency's decision to terminate him lacked fairness, reason, and transparency. As a result, Employee requested to be reinstated and awarded compensatory and punitive damages.[4]

Agency filed its response on September 18, 2023. It contended that Employee received proper supervisory instructions in accordance with 6-B DCMR § 1607.2; the directives were issued by supervisors within the scope of their authority; and Employee was required to comply with all lawful directives. According to Agency, Employee repeatedly failed to respond to email and Microsoft Teams messages nine times over the course of three days in a deliberate and malicious manner. It further claimed that termination was within the scope of penalties permitted by the Table of Illustrative Actions. Therefore, Agency opined that Employee's separation was taken for cause and was in accordance with all applicable laws, rules, and regulations.[5]

An OEA Administrative Judge ("AJ") was assigned to this matter in September of 2023. On February 27, 2024, the AJ held a status conference and determined that an evidentiary hearing was warranted. Therefore, a hearing was held on November 19, 2024, wherein the parties submitted documentary and testimonial evidence in support of their positions.[6] Employee and Agency were

[3] *Agency's Answer to Petition for Appeal* (September 18, 2023).
[4] *Petition for Appeal* (August 14, 2023).
[5] *Agency's Answer to Petition for Appeal*.
[6] *Order Rescheduling Evidentiary Hearing* (October 7, 2024).

subsequently ordered to submit closing statements on or before February 13, 2025.[7] Both parties submitted responses to the order.[8]

The AJ issued an Initial Decision on August 11, 2025. She concluded that Employee did not first refuse a lawful supervisory instruction until May 31, 2023, at 1:13 p.m. when he failed to report to OCTO headquarters to discuss a separate disciplinary matter with OCTO's General Counsel, Todd Smith. The AJ explained that the May 30th and earlier May 31st Microsoft Teams messages from Attorney Smith demanding immediate acknowledgement of receipt of his messages and demanding Employee to respond did not constitute lawful supervisory instructions within the meaning of DCMR § 1607.2(d)(2). She reasoned that there was unclear testimony relative to whether Employee was aware that Attorney Smith had supervisory authority over him; Agency failed to establish that the Deputy Chief Technology Officer ("Lofton") or Employee's direct supervisor ("Noble") delegated such authority to Smith; and the evidence was insufficient to establish that Employee repeatedly, maliciously refused lawful directives nine times over the course of three days.[9]

Moreover, she opined that the severity of Employee's conduct was diminished because Agency could not establish Employee's continuous, intentional, or malicious refusal to respond to the Teams messages; there was a lack of established policy regarding an employee's duty to provide immediate responses to work-related inquiries; and Employee's duties as an offsite warehouse worker did not permit him to check his emails frequently. As a result, she ruled that Agency only established cause as it related to Employee's failure to report to OCTO after being directed to do so by Lofton on May 31, 2023, at 1:13 p.m. and failing to report to OCTO on June 1, 2023.[10]

[7] *Order for Closing Arguments* (January 3, 2025).
[8] *Agency's Closing Argument* (February 13, 2025) and *Employee's Closing Argument* (February 13, 2025).
[9] *Initial Decision* (August 11, 2025).
[10] *Id.*

As it relates to the penalty, the AJ concluded that removal exceeded what was reasonable under the *Douglas* factors.[11] She provided that Agency's narrative relied on inflated descriptions of conduct; mischaracterized the messages from Employee as evincing a malicious failure to follow direct orders; and improperly used unrelated considerations in determining the penalty. According to the AJ, some of the messages that were relied on by Agency in its assessment of the *Douglas* factors were related to a fact-finding investigation in a separate matter, not the misconduct forming the basis of the instant appeal. Thus, she found that Agency's flawed assessment did not support removal for the conduct cited in the advance notice of termination. The AJ further concluded that Agency failed to engage in a responsible balancing of the *Douglas* factors, which ultimately resulted in an abuse of discretion. As a result, Agency's termination action was reversed, and Employee was ordered to be reinstated to his position with back pay and benefits.[12]

Agency filed a Petition for Review with the OEA Board on September 15, 2025. It argues that contrary to the AJ's analysis, the holding in *Douglas* bestows agencies, not OEA, with the primary discretion to select penalties for employee misconduct. Agency maintains that OEA may only overturn a penalty in cases of a clear error of judgment, which did not occur in this case. It stresses that even a single instance of deliberate or malicious refusal to follow proper supervisory instructions

[11] *See Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) 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; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, ha rassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectivenessof alternative sanctions to deter such conduct in the future by the employee or others.

[12] *Id.*

is sufficient to warrant removal under the Table of Illustrative Actions and applicable case law. Consequently, Agency submits that the AJ erred by undermining its managerial authority and discretion.[13]

It further contends that the AJ misapplied the legal tenants of *Douglas* by focusing rigidly on the number of times Employee was alleged to have refused instructions rather than their overall seriousness and impact. Agency believes that the AJ ignored witness testimony relevant to workplace disruption; failed to provide it with an opportunity to submit a response brief regarding the *Douglas* factor analysis; and improperly confined her analysis to the reviewing hearing officer's conclusions instead of relying on the deciding official's independent judgment. Additionally, it argues that the AJ disregarded certain aggravating factors, including Employee's use of belligerent language. As such, Agency reasons that the AJ improperly substituted her own judgment for that of management, which constitutes a reversible error. Therefore, it requests that the Board reverse the Initial Decision and uphold Employee's removal.[14]

In response, Employee asserts that the AJ's findings are consistent with all applicable statutes and regulations. He believes that the evidentiary hearing was conducted in a fair and impartial manner. Additionally, Employee agrees with the AJ's conclusion that termination was improper because he lacked any prior disciplinary actions; served in his position for fourteen years; and received consistently high-performance ratings. He reiterates that Agency's assessment of the *Douglas* factors was flawed and disregarded pertinent information. It is Employee's position that the AJ's findings were more than substantiated and he asks that Agency's petition be denied.[15]

[13] *Petition for Review* (September 15, 2025).
[14] *Id.*
[15] *Response to Petition for Review* (October 27, 2025).

Substantial Evidence

The D.C. Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[16] In *Ferreira v. District of Columbia Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995), the D.C. Court of Appeals held that as long as there is substantial evidence in the record to support the decision, the decision must be affirmed "notwithstanding that there may be contrary evidence in the record (as there usually is)." Evidence is substantial if it is "more than a mere scintilla."[17] Accordingly, on Petition for Review, this Board is tasked with determining whether the AJ's decision to overturn Agency's selection of the penalty is supported by substantial evidence.

Relevant Factors

The AJ held that Agency met its burden of proof under 6-B DCMR § 1607.2(d)(2) only as it related to Employee's refusal to follow supervisory instructions on May 31, 2023, at 1:13 p.m. and on June 1, 2023. Since any previous communications between Attorney Smith and Employee could not be used to support the adverse action, the AJ ruled that Agency's selection of the penalty was not based on a balanced and conscious weighing of the relevant factors and exceeded the limits of what was reasonable. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any

[16] *See* Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[17] *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463 (D.C. 2008) (quoting *Office of People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d 719, 725-26 (D.C. 2002)).

applicable table of penalties; whether the penalty is based on relevant factors; and whether there was clear error of judgment by the agency. Moreover, in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), this Office held the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

Additionally, in *Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14, *Opinion and Order on Petition for Review* (July 11, 2017) (citing *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), the OEA Board held that an Agency's penalty will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion. Therefore, even if an agency's selected penalty falls within the range allowed by law, it is not entitled to deference if the reviewing authority determines that the agency exceeded its discretionary authority.

This Office has elected to reduce or reverse an imposed penalty in cases where an agency failed to properly consider the relevant *Douglas* factors. In *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0015-20, *Opinion and Order on Petition for Review* (January 4, 2024), the OEA Board held that the record was void of any evidence that the agency considered relevant factors when terminating the employee, which constituted an abuse of discretion. Similarly, in *Bryant and Love v.*

D.C. Department of Corrections, OEA Matter Nos. 1601-0034-08R14 and 1601-0038-08R14 (November 4, 2014), the OEA AJ found that the agency exceeded the exercise of its managerial discretion and failed to properly consider the relevant *Douglas* factors. In the matter of *Aronson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter 1601-0128-99, *Opinion and Order on Petition for Review* (January 26, 2007), the OEA Board found that the employee's ten-year history, coupled with no previous adverse actions and his strong potential for rehabilitation, supported a different penalty.[18] Finally, in *Jones v. D.C. Public Schools Division of Transportation*, OEA Matter No. 1601-0077-09 (January 7, 2020), the AJ ruled that although the agency argued that it presented sufficient evidence to establish that its selection of the imposed penalty action was not arbitrary or capricious, removal was too harsh and the record lacked a sufficient evidentiary basis for the penalty of termination.

In *Aguilar v. D.C. Office of Employee Appeals*, *et al.,* 2022 CA 003383 P(MPA) (D.C. Super. Ct. March 13, 2023), the Superior Court for the District of Columbia held that if a penalty was imposed based on numerous incidents of misconduct and some of those incidents of misconduct are not substantiated, the Court must "scrutinize carefully the appropriateness of the penalty imposed." Here, the AJ found Employee's conduct to be far less severe than what Agency originally cognized in its charging documents. In support thereof, the AJ found that Agency relied repeatedly on the incorrect assertion that Employee refused directives nine times over three days and concluded that his conduct on May 30, 2023, did not rise to the level of deliberate of malicious refusal to obey directives. Agency argues that the AJ should have upheld its selection of penalty after analyzing the overall substance and effect of Employee's misconduct. However, because Agency's *Douglas* narratives were based on instances of misconduct not proven, this Board finds that the AJ reasonably

[18] *See also* 2007 CA 001923 P(MPA) (D.C. Super Ct. April 22, 2008).

determined that Agency's assertion that "Employee's three day campaign of malicious insubordination"[19] constituted an exacerbated characterization of the misconduct at issue.

In *Tucker v. Department of the Army*[20] and *Bivens v. Tennessee Valley Authority*,[21] the Merit Systems Protection Board ("MSPB"), this Office's federal counterpart, held that when a deciding official fails to consciously consider relevant mitigating factors, an agency 's penalty is not entitled to deference. In this case, there is substantial evidence in the record to support a finding that Agency failed to meaningfully weigh certain mitigating factors. The AJ ruled that while there was no policy related to the deadline for employees to respond to Microsoft Teams messages, the general consensus was a twenty-four-hour response deadline. The Teams messages Attorney Smith characterized as direct orders were sent to Employee on May 30 th at 12:45 p.m., 12:47 p.m., and 1:02 p.m., respectively. Agency has acknowledged that Employee's warehouse, field-based duties created communication constraints which made it difficult to respond to emails or other messages in a time sensitive manner.

Additionally, Employee's disciplinary documents related to his termination provide insight pertinent to Agency's failure to weigh certain mitigating *Douglas* factors in a conscious manner. During a June 23, 2023, administrative review of the charge, the appointed hearing officer questioned the need for such immediacy for Employee to respond Attorney Smith's emails and chat messages. He noted that contrary to what Agency provided, *Douglas* Factor No. 3 (the employee's past disciplinary record), should have been characterized as a mitigating factor, not a neutral factor, because Employee lacked any disciplinary history. According to the officer, the proposing official also failed to address the nature of Attorney Smith's unrelated investigation or why Agency could not

[19] *Agency's Answer*.
[20] 2019 MSPB LEXIS 658 (M.S.P.B. March 12, 2019).
[21] 8 M.S.P.R. 458, 461 (1981).

arrange alternative accommodations for interviewing Employee.[22] Particularly concerning is Agency's assessment of *Douglas* factor No. 4, Employee's past work record. The hearing officer provided that the proposing official erroneously designated this factor as neutral and not mitigating even after highlighting Employee's fourteen-year work history with Agency as well as his consistent performance ratings of "4."[23]

He went on to state that Agency should have evaluated, analyzed, and documented each factor appropriately and accorded Employee the benefit of those factors which were mitigating. Contrary to Agency's position, the AJ did not confine her analysis to the Hearing Officer's assessment. Instead, she highlighted Agency's own concern that the proposing official failed to correctly weigh certain mitigating factors as part of her overall analysis of the record. Consistent with this Office's previous rulings and the holdings in *Tucker* and *Bivens*, the failure to properly accord factors their correct weight had the effect of invalidating Agency's *Douglas* factor analysis.

Agency further claims that the AJ disregarded certain aggravating factors, including Employee's use of belligerent language. In her decision, the AJ provided that Agency's charging documents did not clearly articulate when Employee responded with name calling and threats or how his language related to the charge of deliberate or malicious refusal to follow a proper supervisory instruction. She reasoned that while name calling was undoubtedly a punishable offense, it was not an element of the charge of failure/refusal to follow instructions, and she noted that the specific incidents of belligerent conduct were not clear from the record. Since the factual basis of Agency's assertions regarding Employee's use of belligerent language could not be sufficiently tied to the *Douglas* factor analysis, the AJ reasonably concluded that Agency's assessment was flawed. Both parties were provided with the opportunity to address, in full, their positions regarding the penalty

[22] *Administrative Review of Adverse Personnel Action* at p. 5.
[23] 4 is the highest performance rating that Employee was eligible to receive.

during the evidentiary hearing. Therefore, this Board finds no compelling basis for reman ding the matter to afford Agency a second opportunity to respond to the AJ's purported misgivings related to its *Douglas* factor narrative.

Based on the foregoing, relevant case law dictates that an imposed penalty becomes an abuse of discretion when it is based on inaccurate facts, unproven allegations, or an analytically defective *Douglas* factor assessment. There is substantial evidence in the record to find that Agency inflated Employee's instances of misconduct, erroneously labeled the conduct as malicious, and improperly referenced elements of insubordination in assessing the levied charge of deliberate or malicious refusal to follow instructions. We agree with the AJ's conclusion that removal was disproportionate to the sustained misconduct. Under the holdings in *Aguilar* and *Employee v. D.C. Public Schools supra*, the AJ was permitted to reassess Agency's selection of penalty after determining that the factual basis for the adverse action was based on conduct not proven or diminished misconduct.

While Agency met its burden of proof as to a portion of Employee's actions, a reduction in the severity of conduct required the AJ to carefully scrutinize the balance of each *Douglas* factor in this matter. Her finding that Agency failed to consciously consider the relevant mitigating factors is based on a reasoned and thorough review of the record. As a result, this Board concludes that Agency abused its discretion in selecting the penalty of removal. Consequently, the AJ's rulings are substantiated by the record. Therefore, we must uphold the Initial Decision and deny Agency's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED.**

FOR THE BOARD:

Pia Winston, Chair

Arrington L. Dixon

LaShon Adams

Jeanne Moorehead

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.