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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ANDRE POWELL,)	
Employee)	OEA Matter No. 1601-0126-15
)	
v.)	Date of Issuance: August 21, 2017
)	
DISTRICT DEPARTMENT OF)	
TRANSPORTATION,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	
Christopher Hawthorne, Employee Representative)	
Michael F. O'Connell, Esq., Agency Representative)	

INITIAL DECISION

PROCEDURAL BACKGROUND

Effective July 21, 2015, Andre Powell (“Employee”) was removed from his position with the District Department of Transportation (“DDOT” or the “Agency”) as a Construction Representative (DS-0809-10) for: Cause 1: Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Neglect of duty, pursuant to 16 District Personnel Manual (“DPM”) § 1603.3(f)(3) and § 1619.1(6)(c); and Cause 2: Any other on-duty or employment-related act or omission which is cause for disciplinary action that is not arbitrary or capricious: Intimidation and harassment of members of the public, pursuant to 16 DPM § 1603.3(g) and 16 DPM § 1619.1(7); and Cause 3: Any other on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, providing misleading, inaccurate information to management, pursuant to 16 DPM § 1603.3(f)(6) and 1619.1(6)(f). More specifically, the bulk of his alleged transgressions stemmed from a series of disagreements that occurred on March 30, 2015, wherein Employee had pivotal encounters with certain members of the public and with work crews commissioned by DDOT to effectuate road and walkway repairs. Consequently, on August 17, 2015, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting Agency’s removal action. A Prehearing Conference (“PH”)

was held on February 4, 2016. During the PH, the Undersigned determined that an Evidentiary hearing was required in order to parse through the competing facts as alleged by the parties. An Evidentiary hearing was held on August 26, 2016. Thereafter, the parties submitted their written closing arguments. After reviewing the documents of record, the Undersigned dahs determined that no further proceedings are required. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states:

“The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. ‘Preponderance of the evidence’ shall mean:

“That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.”

OEA Rule 628.2, *id.*, states:

“The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.”

ISSUES

1. Whether the Agency’s adverse action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

SUMMARY OF RELEVANT TESTIMONY

Darryl Sulekoiki Tr. 20-81

Darryl Sulekoiki (“Sulekoiki”) was the President and Project Manager of Kady Group. He stated that the company built condominiums on Twelfth Street in Northeast, D.C. The project commenced in 2013; however, it was not completed. Sulekoiki stated that on March 30, 2015, he was informed that Inspector Andre Powell (“Employee”) was on site. He stated that he attempted to speak with Employee, but Employee became confrontational. Sulekoiki stated that he called the police and Inspector Stacey Collins (“Collins”) because Employee was directly in his face and he felt threatened. He provided Collins with the names of the employees who

witnessed Employee marking and walking through the concrete. Sulekoiki provided that he wrote a statement on April 2, 2015 regarding the incident in question. He stated that he took photographs of the markings and forwarded them to Collins. Sulekoiki believed that the D.C. government paid for the repairs of the concrete.

Sulekoiki testified that concrete was poured on the two sides of the road on the sidewalk and that his employees told him that Employee walked through the concrete and that he carved in some markings with a stick.

On cross-examination, Sulekoiki testified that the statement that he submitted to Collins provided that when Employee got in his face, he contacted the police. He explained that Employee assaulted one of his workers before he arrived at the site. He stated that Employee had already done the majority of the defacing of the concrete before he arrived.

Sulekoiki stated that it was not his first time meeting Employee. When he met with Employee at the site, Employee informed him that he did not have the proper permits. Sulekoiki had permits, but Employee stated that they were not the correct ones. Sulekoiki provided that he did not have any permit violations because the Department of Transportation (“Agency”) and the Department of Consumer Regulatory Affairs (“DCRA”) did not state that they were in violation or that their permits were invalid.

Sulekoiki stated that Agency believed that he had invalid permits, but it was not able to prove that the permits were invalid. He explained that he was informed that a neighbor contacted DCRA every day regarding their work. He claimed that in the three years that they worked there, they did not have an illegal or expired permit or receive a citation.

Sulekoiki stated that Employee was not arrested when the police arrived. He explained that the officer stated that Employee should have identified himself and issued a stop work order if something was wrong with their permits.

Sulekoiki testified that the concrete was poured before Employee made his markings, but the concrete was still wet. He stated that his workers did not immediately repair the concrete because they were upset that Employee told them to leave the work site. While he was able to observe Employee writing in the concrete, he did not have an opportunity to look at Employee’s boots to see if there was concrete on them. He stated that he had photographs of the footprints in the concrete, but not of Employee’s boots. Sulekoik explained that although Employee stepped in the concrete, he could have wiped it off in the grass because his footprint was four inches and the indentation in the concrete was half of an inch.

On redirect, Sulekioki explained that he contacted the police because he personally felt threatened by Employee. He stated that he did not use profanity or threaten Employee.

Charles “Chappy” Vowell Tr. 82-140

Charles Vowell (“Vowell”) worked for Kady Group. In 2015, he was the superintendent and was required to oversee the project. He stated that he knew Sulekoiki because he was his boss and the owner of the company.

Vowell explained that he interacted with Employee on March 30, 2015. Vowell explained that he did not see Employee write his name in the concrete. However, he thought that only his initials were imprinted in the concrete. As Vowell walked to the front of the building, he testified that Employee told them to move or they would receive a three hundred dollar fine. At first, Vowell did not know that Employee was an inspector because he was not in uniform. Employee asked about the parked vehicles and Vowell stated that he only recognized one vehicle that belonged to one of his employees.

Vowell explained that Employee snapped and stated that they did not have the proper permits. Vowell told Employee that they did have permits and everything that was required for the project. He stated that he asked Employee if he was having a bad day. At first Employee said no, but then he said "Well, yeah, as a matter of fact, I am. If you did your fucking job, I wouldn't be down here." *Tr. 91*. Vowell explained that after Employee made that comment, he thought there was a bigger issue and felt that Employee was trying to goad him into a confrontation. Vowell subsequently walked to Rhode Island Avenue to the backside of the project. When he reached the end of the fence, he turned around and saw Employee who followed him there. Vowell immediately turned and went back towards his vehicle. He stated that he wanted to get away from that area because it was not normal and in his thirty years of construction he was never threatened. As Vowell was walking to his vehicle he noticed that Employee was following him. Vowell reached for the door, but Employee ran up and slammed the door on his shoulder. When Vowell drove off, he heard Employee call him a "pussy".

Vowell asserted that Employee dragged the stick through the concrete. He stated that Employee pulled the stick from the orange caution mesh around the trees. Vowell explained that Sulekoiki arrived at the site fifteen minutes after his initial contact with Employee. Shortly after, the police were called.

On cross-examination, Vowell testified that Employee identified himself as an inspector when he was visiting the site. Vowell stated that he did not use profanity against Employee. When the police arrived, Vowell provided them with a statement and informed the police that Employee hit him with the door. The police did not arrest Employee because they said that it was not an assault. Vowell stated that there was an electrician on the roof who saw the entire altercation.

Vowell testified that Employee did not provide an Identification Card ("ID") stating that he was with Agency. He stated that Employee told him that they did not have a permit and Vowell informed that they did and that it was posted on their board. Vowell confirmed that the permits were valid, but Employee did not question him about the validation of the permits. He further explained that he had a parking permit for the staging area, but not the alley. Agency informed Vowell that authorized vehicles could be parked in the staging area and per the description of authorized vehicles, work vans were permitted to be parked in the staging area.

Vowell stated that he did not take photographs of Employee's boots after he defaced the concrete. He recalled that Stacy Collins arrived on site and that he informed her of the events that transpired.

Adriano Esteves Tr.142-172

Adriano Esteves (“Esteves”) was employed by Fort Myer Construction and worked on the project near 2110 Third Street, Northeast. Esteves recalled the incident that occurred on March 30, 2015. He explained that he poured Class F concrete on the sidewalk, but when Employee found out that he used the wrong type of concrete, he was told that he needed to stop working.

Esteves testified that Employee asked him to produce his permit, but he could not because he did not have the permit on him. He told Employee that he would contact his office and bring it to the site within twenty minutes. He was told that he could no longer work at the site and was instructed to remove the cones and tape and clean up everything. Esteves said that Employee picked up a stick and walked through the freshly poured concrete. He did not see what Employee wrote in the concrete because he was trying to get his co-workers to leave.

On cross-examination, Esteves stated that he did not know who drafted the letter that he signed.¹ He stated that his supervisor, Mario Sosa, brought the document for him to sign. Esteves testified that he knew that Employee was an inspector because they met before. He explained that Employee told him that he did not have the right type of concrete, nor did he have a permit. Esteves admitted that he did not have a permit with him, but informed Employee that he would contact his office to have them bring the permit. Esteves called his office for the permit, but the office did not bring him the document. He provided that no one delivered him a permit that stated that he was able to work.

Esteves believed that he was asked to leave because he poured the wrong concrete. He testified that Employee became very angry with him. Employee verbally gave Esteves a stop work order. Esteves admitted that he refused at first because he tried to convince him to let him finish his work with the concrete because it was still wet. Esteves stated that he did not receive a written stop work order document from Employee. Esteves stated that Employee did not use profanity. He was not present when Employee spoke with Vowell and Sulekoiki.

Gregg Boyd Tr. 172-185

Officer Gregg Boyd (“Boyd”) worked for the Metropolitan Police Department (“MPD”). He was assigned to the Fifth District. He was on his routine patrol when he was dispatched to the site of the incident. When he arrived at the scene, Boyd was approached by an African-American gentleman who stated that someone destroyed their property. Boyd looked at the sidewalk and saw little drawings in the concrete. He could not recall what the drawings were, but explained that they were little markings. Boyd subsequently identified the individual who defaced the concrete.

Boyd testified that he spoke with Employee separately from the other workers. Employee informed him that the workers did not have the proper permit, so he told them to leave the site. Boyd could not recall if Employee admitted to writing on the concrete, but he explained that the

¹ Agency Exhibit 4 was written on Fort Myer Construction Corporation letter head accounting events recalled by foreman, Adriano Esteves.

workers were adamant that he was the individual who ruined the property. Boyd stated that Employee provided him with his ID and had his uniform on.

Boyd explained that a police report was not generated because the project manager that he spoke with stated that he was not in charge of the sidewalk. Boyd stated that Fort Myers would have needed to file a complaint because only the owner of the property could file a complaint and the workers were a third party. After Boyd explained this to the project manager, he told him to call DCRA. If the owner wanted to file a complaint, the owner could call him or email the station and report where the destruction of the property was.

The construction workers told Boyd that Employee was harassing them about parking and doing their work. He saw permits for plumbing and electric, but there were other permits and he could not identify the permit for the sidewalk.

On cross-examination, Boyd testified that no one mentioned being assaulted by Employee or that he slammed a door and caused damage to one of the construction worker's vehicle. He stated that if someone was assaulted by Employee he would have been arrested. He recalled both parties having a heated verbal argument but did not remember if any profanity was used. Boyd stated that the construction workers did not ask for a written statement or state that they wanted to press charges against Employee.

Sondra Morris Tr. 186-195

Sondra Morris ("Morris") lived on the 2100 block of Third Street. She stated that her car was parked on the street and the construction workers blocked her in. Morris explained that the construction workers did not have the proper permits to block the street. One of the construction work vehicles pulled up next to where she parked and asked her to move. When she told them that she was not moving, the foreman's vehicle parked in front of her vehicle and a construction work vehicle pulled up on the left side of her and blocked her. She contacted 311 for assistance when the vehicles did not move.

Morris stated that Employee arrived and she explained the events that transpired. She saw that Employee spoke with the foreman, but stated that she could not hear what was discussed. Morris explained that she remained in her vehicle with her girlfriend when they suddenly saw the foreman get loud with Employee. She remained in the vehicle while her girlfriend got out to look. Morris stated that she heard Employee ask the foreman to produce his permit. The foreman repeatedly stated that he did not have to produce anything. She described the foreman as a Caucasian man about five feet, nine inches tall that was husky and had a bald head. Morris testified that the foreman drove a white vehicle.

On cross-examination, Morris stated that she saw Employee write "reject" in the concrete with a stick. She explained that the construction workers did not use the right concrete because it did not match the concrete that was already on the ground.

Necole Yancey Tr. 195-201

Necole Yancey ("Yancey") stated that she resided at 2111 Third Street. She explained that she was with Morris when Employee arrived at the location. Yancey stated that they asked Employee if he came because they called 311 earlier. Employee told them that he had received

an email about them being blocked in. Employee spoke with the foreman and requested that he produce the permits. She did not hear Employee use any profanity, but heard the foreman curse and shout that he did not have to provide any permits. She provided that she saw Employee write “reject” in the concrete, but did not see that he stepped in the wet concrete.

On cross-examination, Yancey reiterated that she saw Employee write “reject” in the concrete with a stick. She believed that he could have found the stick on the ground because many of the trees were torn down on that block.

Stacey Collins Tr. 201-282

Stacey Collins (“Collins”) worked as a Supervisory Construction Representative for Agency. She was required to assist her team, oversee public space, private use as public space, review permits, and ensure all work was completed according to District Department of Transportation regulations and specifications. She explained that inspectors were required to inspect permitted locations because occasionally inspectors would run across a job site that was not permitted and they would have to issue a Notice of Violation (“NOV”).

In March 2015, she was the manager for the Fourth and Fifth Wards. She explained that the incident in question fell between the Wards. Collins testified that she supervised Employee. On March 30, 2015, Sulekoiki contacted her regarding an incident that occurred on his job site. She explained that Sulekoiki told her that Employee was belligerent and verbally assaulted one of the workers and destroyed the concrete in front of the property.

Collins testified that she briefly spoke with Employee after the incident and he explained that he took a stick and wrote “reject” in the concrete. When she questioned him on why he wrote in the concrete, he stated that he rejected the concrete because the construction workers used pervious concrete, which was improper. Collins asked Employee to write a statement. Initially, he refused, but Employee’s Union Representative had him provide Collins with a statement.

Collins met with Vowell, Sulekiok and Atsu from Fort Myer; along with Washington Gas representative, Johnny King, at the job site the day after the incident took place. They all explained to her how Employee did not identify himself when he arrived at the site and he was not in uniform. Collins was informed that Employee was rude, and they showed her how the concrete was ruined by his foot prints and markings.

Collins explained that Washington Gas stated that they were not going to re-do the sidewalk. Ultimately, Agency paid to have Fort Myers repair the sidewalk. Collins provided that she submitted a cost estimate for the repairs along the block on both sides and submitted it to her Director.

Collins explained that Agency had a protocol if they were to accept or reject concrete and that had to be submitted in writing. If Agency was to reject a job on the jobsite, a stop work order would need to be issued to the developer or contractor. She affirmed that it was not common policy to write “reject” in the concrete.

Collins also testified regarding the process for how Agency accepts work. She explained that Agency would review the work that was ongoing and make sure that it was compliant with

the actual permit that the construction workers were issued. If the workers perform work outside of what Agency has permitted or do not use Agency approved materials, then a stop work order would be issued. If the work was done properly and in accordance with the permits it would be considered accepted. She affirmed that she has never instructed an inspector to mark “rejected” in the concrete. She did not know of any other supervisors or managers who instructed such, nor was she aware of any training courses where Employee would have been instructed to write “rejected” in the concrete.

Collins provided that inspectors were required to carry their ID, inspector’s badge, and wear their uniform at all times when they are in the field. She stated that it would be unacceptable for an inspector to use profanity or threaten a construction worker or a member of the public when they are in the field.

On cross-examination, Collins testified that she was Employee’s supervisor for seven months. She explained that Sulekoiki provided her with pictures from the incident. The following day, Collins met with Employee and informed him that a complaint was filed against him for walking through the concrete. She stated that she originally was unaware that the police were called. She was also unaware of any threats made by Employee until she went to the work site the following day.

Collins stated that she researched to see if there was a stop order issued by Employee. Collins testified that she never saw an official stop work order and she believed that one was never written. She explained that a stop work order should be handwritten and that there would be carbon copies attached to it. When a stop work order is issued, the inspector provides the original copy to the violator, provides a carbon copy to the administrative staff for it to be logged into their system, and the inspector also keeps a copy for their records. Collins never contacted Employee informing him that she did not receive a copy of the stop work order.

Collins was not able to question Employee about rejecting the concrete because Employee was hostile and she felt that it was best to let him walk off. Collins explained that while there was no disciplinary action taken, she met with Employee on numerous occasions regarding his overall attitude and behavior.

Karen Calmeise Tr. 283-303

Karen Calmeise (“Calmeise”) was the Hearings Officer for Agency in the Office of the General Counsel. She recommended that Employee’s termination proposal be upheld. Calmeise explained that the basis for supporting the termination recommendation was because Employee was charged with multiple infractions: neglect of duty; intimidation and harassment; misfeasance; and providing misleading and inaccurate information. She found that on all three counts, that:

The adverse action would have been warranted based on the proposed action, witness statements, the correspondence, and cost impact notes and supervisory notes that were written—the supervisory notes predated the cause of action. Basically, those were notes taken by supervisors that were submitted from the Employee’s personnel file or personal notes from the supervisors that indicated some conversations they had

with the Employee. I also took into consideration the Employee's statement and the union representative's statement in defense of the Employee's actions. *Tr.* 285-286.

Calmeise stated that multiple witness statements were submitted by Agency. She explained that Employee's statement was written several months after the proposed removal action. She also found that Employee's statements did not match the evidence that was submitted into the record and provided that his statement was self-serving and not credible. She found that the witness statements provided were consistent with the events that transpired. Ultimately, those events led to Calmeise recommending that the removal action be upheld.

On cross-examination, Calmeise could not recall which *Douglas Factors* were used to determine her final decision.

Robert Boyer *Tr.* 305-330

Robert Boyer ("Boyer") resided on the 2100 block of Third Street Northeast. He testified that he tweeted Agency a picture of construction workers blocking his vehicle at 7:00 a.m. He explained that he contacted Agency, Collins, and the Mayor's and Counselor's office.

Boyer stated that Employee did not use profanity towards Vowell, but witnessed Vowell using profanity towards Employee. Employee asked Vowell if they had permits and Vowell stated that he did, but shortly after, Employee found out that they did not.

Boyer contacted Collins and told her that he saw a man named Oscar, whom he believed was an employee of Sulekoiki. Boyer testified that he watched Oscar take a metal pole and poke holes into the concrete, which was directly next to his home. He stated that he was on his porch when he saw the concrete being poured.

On cross-examination, Boyer originally was outside in the front of his home when equipment was sitting in front of his house. He stayed outside to observe Fort Myers working. He stated that he remained outside the entire time to document every account and to make sure that any issues were documented. He stated that he did not see Employee write "reject" in the concrete. He stated that his partner wore a size eight shoe. Boyer, his partner, and Collins measured his shoe size against the footprints in the concrete. The footprints were smaller than his partner's shoe size.

Boyer explained that he knew that the permits for site were not proper because he went online and pulled the permit numbers. He stated that Agency has an interactive application that can view every permit that was pulled in the District in addition to DCRA.

Boyer recalled that Employee arrived at the site at 10:00 a.m. When Employee arrived, Boyer was outside talking to Collins. He eventually returned to his home to document what transpired. Boyer testified that he was not outside when the police arrived.

On redirect examination, Boyer testified that he sent Collins photos of Employee damaging the concrete.

Arthur Thomas Tr. 330-334

Arthur Thomas (“Thomas”) resided on the 2100 block of Third Street, Northeast. He recalled that around 10:30 a.m., when he returned from the store, he noticed Employee writing on the sidewalk. As he moved towards Employee, he noticed that he wrote “reject” in the concrete that was just poured. Thomas stated that he spoke with Employee regarding some of this issues that the neighborhood had with contractors. He further explained how the contractors threw out parking permits and just worked without giving the neighbors of the community ample notice. Thomas did not see Employee walk or drag a stick in through the concrete.

Andre Powell (“Employee”) Tr. 335-364

Employee testified that he was dispersed to the site at 2100 block of Third Street, Northeast by Collins via telephone and email. Employee went into the alley where there were three trucks. He showed his badge and ID to one of the workers. He told one of the workers to move his truck, but the worker told Employee that he was not moving it. Employee stated that he walked towards the building where they were working and saw a heavy-set gentleman who told him that he would find the owners of the vehicles and have them move it.

Employee stated that he got into his vehicle and proceeded to the corner of Rhode Island and Third Street, where he observed Fort Myers Construction workers. He asked the foreman, Esteves, to verify their permits and the foreman was unable to do so. He gave Esteves a few minutes to contact someone to get the permit number. Employee explained that he gave Esteves ten minutes to produce the permit number, but Esteves was still unable to obtain the information. Esteves then contacted his foreman, Mario D’Souza (“D’Souza”). Employee stated that he was familiar with D’Souza and has had to remove him numerous times from sites prior to the incident in question. Employee handed the phone back to Esteves and told him that he would issue him a stop work order and that they would have to leave. Esteves began speaking to his crew in Spanish and they were still working. Employee repeated that they would have to leave the site, but he was unsure if they understood him because they were Hispanic. Employee went to his car to write the stop work order. During that time, the constructions workers were cleaning up their materials and putting the site back in order. However, they could not continue cleaning because the concrete was wet. He further testified that Esteves failed to have exits for pedestrians to walk on the sidewalk, forcing them to walk in the street or grass area. Employee attempted to issue a stop work order, but Esteves got into his vehicle and left the site. Employee tried to get Esteves’s attention by flashing him the stop work order, but he did not stop. Therefore, he was unable to provide Esteves with the stop work order.

Employee was forced to stay at the site because he had to make sure that pedestrians did not walk through the concrete. He stayed on site from 10:30 a.m. until 2:30 p.m. Employee subsequently went to the permit bulletin board that was located on the corner of Third Street and Rhode Island.

Employee explained that Vowell came from the back and asked if there was a problem. He explained to Vowell that cars were illegally parked in the construction staging area. According to Employee, Vowell responded by stating that Employee did not know what he was doing and that he already dealt with that issue with Parking Enforcement. Employee informed Vowell that his authority was broader than Parking Enforcement. Employee testified that

Vowell gave him the middle finger and called him a “black motherfucker” as he walked away. Employee walked behind Vowell and asked him what he said, but Vowell continued to walk away. Employee informed Vowell that he was going to revoke the staging permits and fine Vowell. As Employee walked away to look at the permits, Vowell continued to tell Employee that he did not know what he was doing. Vowell proceeded to get into his vehicle and as he drove past Employee, he called him a “pussy”. Simultaneously, Sulekoiki came from the back and asked what happened. Employee informed him that Vowell cursed at him and stated that Employee did not know how to do his job.

Employee informed Sulekioki that he would be fined and that the staging permits would be revoked. He explained that Vowell contacted someone via telephone whom he thought was going to inform Employee of Vowell’s rights pertinent to the construction staging permit. As Vowell was on the phone, he turned his attention to the ground and asked who messed up the concrete. Employee stated that he ignored Vowell because he knew that Vowell had nothing to do with the concrete and he was not able to pull permits for the concrete. Vowell accused Employee of stepping in the concrete and called the police. However, Employee stated that he did not step in concrete, but he admitted to writing “reject” in it, and told him to contact the police. He explained that he wrote “reject” in the concrete to make sure that the company that Washington Gas hired would come back and re-do the concrete. Employee testified that the concrete was never scored and did not meet Agency’s standards. In order for it to meet Agency’s standards, the concrete had to have contraction joint lines.

When the police officer arrived, the officer spoke with Vowell and Sulekoiki while Employee remained by himself at the permit board. Once the officer was done speaking with Vowell and Sulekoiki, he told Employee that Vowell told him that Employee used profanity towards him. Employee informed the officer that he did not say anything wrong to Vowell. Employee stated that the officer told both parties to remain cool.

According to Employee, the police officer left around 2:00 p.m. By that time, the concrete was dry and pedestrians were able to safely walk on it. Employee stated that before he left the area, he saw footprints and a stick figure house imprinted in the concrete on the opposite side of the street where he wrote “reject”. He stated that he did not pay much attention because he knew that the concrete would have to be repaired. He further explained why “reject” was not written on that side because the pavers were scored.

Employee testified that he removed Fort Myers from the scene because they did not have a traffic control plan, or any of the required permits to meet Agency’s standards. He explained that the emergency signs that were put up were not proper for that location. He further stated that he was informed by some of the residents in the neighborhood that they did not receive their seventy-two hour notice before the construction workers put up their emergency no parking signs, which was also required by Agency.

Employee stated that the vehicles needed to be removed from the staging area and the alley based on Agency’s standards for construction. On the occupancy permit, it stated that vehicles should not be parked in construction staging unless it is delivery for that particular site. Employee asserted that he informed Sulekoiki and Vowell that their permits would be revoked.

Employee testified that he submitted a statement to Collins on March 31, 2015 regarding the occupancy permit with Vowell and the Kady Group. He stated that Collins did not make him aware that the contractors alleged that he walked in the concrete with his boots. Employee explained to Collins that he did not walk in the concrete, but that he wrote “reject” in the concrete. He explained that Collins never asked him about the stop work order.

Employee stated that the police officer did not ask him to identify himself or inquire why he was not wearing his badge. He provided that he had his ID and badge on his person. Employee stated that he wore jeans, an official DDOT polo shirt and blue jacket. Employee did not show his ID to Sulekoiki because he already knew him. He did show his badge and ID to Vowell and Esteves.

On cross-examination, Employee testified that he wrote “reject” in the concrete with a stick that came from the ground.

On redirect examination, Employee stated that it was his first site that he wrote “reject” in the concrete. He explained that he wrote “reject” because it did not have the contraction joints put in before the concrete dried; thus, making it invalid.

On recross-examination, Employee testified that, months prior to the incident in question, Collins told him that he should write “reject” in the concrete. He never questioned her because she was his supervisor.

FINDINGS OF FACT, ANALYSIS & CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of Employee’s appeal process with this Office. Employee was removed for the following three separate causes of action. The application of each will be discussed below.

1. Cause 1- Neglect of Duty, for any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: pursuant to 16 DPM §1603.3(f)(3) and §1619.1(6)(c). Neglect of Duty is defined in the DPM’s Table of Appropriate Penalties as failure to follow instructions; and careless or negligent work habits. 16 DPM §1619.1(6)(c). Here, Employee has admitted to writing in the concrete, and this information is confirmed by multiple witnesses. The Board of the OEA has previously held that an employee’s admission is sufficient to meet Agency’s burden of proof.² Moreover, Employee’s supervisor credibly testified that the proper procedure for halting work on a project is to issue a Stop Work Order to the company. She further noted that it is not proper protocol to write anything, including “reject”, in wet concrete when attempting to issue a Stop Work Order. Employee’s version of events, that it was Agency protocol is unconvincing and lacks any credible corroboration (e.g. a formal policy to that effect, witness testimony from credible co-workers substantiating this self-serving explanation). I find that DDOT has met its burden of proof for this cause of action.

² See *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

2. The Agency also removed Employee for any other on-duty or employment-related act or omission which is cause for disciplinary action that is not arbitrary or capricious: Intimidation and harassment of members of the public, pursuant to 16 DPM § 1603.3(g) and 16 DPM § 1619.1(7). This cause is defined in the Table of Appropriate Penalties as including activities for which the Agency's investigation can sustain and are not minimal. 16 DPM § 1619.1(7). Under this cause of action, it was alleged that Employee was intimidating toward members for the construction crew that he interacted with during the incident in question. More specifically, it was alleged that Employee used profanity when talking with Vowell and that he almost slammed Vowell's arm in his truck during their interaction. On this point, it should be noted that various residents who were also distantly present did not hear Employee use profanity but they did corroborate other parts of Charge 1. This even handed account would tend to prove that Employee did not use profanity. The Undersigned also notes that MPD responded to the scene. Officer Boyd recalled that during his interaction with the parties, Employee was involved in a heated exchange with the construction crew. Officer Boyd also noted that no one from the construction crew had claimed that Employee had assaulted them or had disclosed the allegation regarding Employee slamming a door on Vowell's arm. Officer Boyd indicated that had they done so, it may have subjected Employee to immediate arrest. The Undersigned takes note that Employee is required to account for his actions, while conducting his on-the-job duties, in a professional and calm manner. Engaging in heated arguments (particularly with members of the public) is generally considered unacceptable behavior. However, given the circumstances, I find that the facts that can be adduced from the testimony and evidence provided are insufficient to substantiate cause for the instant charge. Accordingly, I find that Agency has not met its burden of proof with respect to this charge.
3. Employee was also removed under Cause 3, pursuant to 16 DPM § 1603.3(f)(6) and 1619.1(6)(f), for any other on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, providing misleading, inaccurate information to management,. The Table of Appropriate Penalties defines this cause as careless work performance; providing misleading or inaccurate information to superiors; and dishonesty. 16 DPM §1619.1(6)(f). Collins credibly testified that after the incident in question she inquired with Employee about what transpired. During this conversation, Employee at first indicated nothing happened and then after more prodding denied walking through the concrete but admitted to writing "reject" in same. Collins then asked for a written statement. This request resulted in a heated exchange with Employee. From there, the matter was escalated through DDOT upper management resulting in Employee's being placed on administrative leave prior to his removal. The Undersigned takes note that Employee has continually denied walking through the wet concrete; however, Agency Exhibit No. 2 clearly denotes, *inter alia*, foot prints through several sections of the concrete. It was consistently corroborated by members of the construction crew (Sulekoiki &Vowell) that Employee defaced the concrete in multiples ways including but not limited to walking through it; poking it

with a stick and writing “reject.” I find that Employee defaced the wet concrete by placing his foot in it and by poking it with a stick. I further find that since Employee did not disclose this transgression that he provided misleading and inaccurate information to DDOT management. Accordingly, I further find that Agency has met its burden of proof with respect to this cause of action.

Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the undersigned.³ This Office may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.⁴ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.⁵ Here, it has already been established that a significant majority of Employee’s deleterious conduct was credibly corroborated by several non-District government witnesses. Further, Employee readily admitted to defacing the concrete as alleged by the Agency. For this, I see no plausible reason to disturb DDOT’s selection of penalty in this matter. Therefore, I find that Agency’s decision to remove Employee from his position was appropriate based upon the circumstances.

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.⁶ Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate his termination was improperly conducted and implemented. Employee’s numerous ancillary arguments are best characterized as grievances and outside of the OEA’s jurisdiction to adjudicate.⁷

ORDER

Based on the foregoing, it is hereby ORDERED that Agency’s action of removing Employee from service is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

³ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁴ See *Id.*

⁵ See *Id.*

⁶ Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

⁷ Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”). This includes but is not limited to Employee’s extended discussion regarding the minutiae of alleged violations committed by Fort Myers personnel. This Initial Decision is solely focused on Employee’s conduct.