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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:)	
EMPLOYEE, ¹)	OEA Matter No.: 1601-0049-24
Employee)	
v.)	Date of Issuance: May 6, 2026
D.C. DEPARTMENT OF TRANSPORTATION,)	NATIYA CURTIS, Esq.
Agency)	Administrative Judge
)	
Charles Tucker, Esq., Employee Representative		
Kathleen R. Miskovsky Black, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 8, 2024, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the DC Department of Transportation’s (“Agency” or “DDOT”) decision to terminate them² from their position as a Transportation Planner, effective April 9, 2024. OEA issued a letter dated May 9, 2024, requesting that Agency file an Answer on or before June 8, 2024. Agency filed its Answer to Employee’s Petition for Appeal on June 7, 2024. This matter was initially assigned to Administrative Judge (“AJ”) Lois Hochhauser on June 7, 2024.

On July 18, 2024, AJ Hochhauser issued an Order scheduling a Prehearing Conference for August 22, 2024. The Order further directed the parties to consult regarding the documents that should be submitted as part of this appeal. On July 25, 2024, AJ Hochhauser issued an order rescheduling the Prehearing Conference for August 27, 2024. On August 15, 2024, AJ Hochhauser issued an Order, which noted that Employee had requested a continuance of the Prehearing Conference by email, citing that more time was needed to obtain representation and other scheduling conflicts. AJ Hochhauser granted Employee’s request and rescheduled the Prehearing Conference for November 8, 2024. On November 7, 2024, AJ Hochhauser issued an Order which noted that Employee sent a courtesy copy of a Consent Motion to continue the Prehearing Conference that was scheduled for November 8, 2024, citing that they had only recently retained counsel and more time was needed to prepare.³ AJ Hochhauser granted Employee’s Motion and rescheduled the Prehearing Conference for December 3, 2024. The Prehearing Conference was held as scheduled.

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² Employee prefers to be addressed by name and not gender-specific pronouns; however, because Employee’s name will not be published, Employee will be referenced using gender-neutral pronouns “they, them, their” etc. herein.

³ Employee’s filed copy of the Consent Motion was received on November 12, 2024.

On December 5, 2024, AJ Hochhauser issued a Summary and Order, which required the parties to investigate whether Employee had a pending appeal before the DC Department of Human Resources (“DCHR”), and whether that appeal was pertinent to this matter. The parties’ joint submission of the outcome of the investigation was due by December 17, 2024. On January 13, 2025, Agency filed a request for extension to February 14, 2025, citing that the appeal remained under review by DCHR. On January 17, 2025, AJ Hochhauser granted the extension in an order dated January 17, 2025. On February 24, 2025, Agency submitted an additional Request for Extension to March 14, 2025, noting that DCHR had yet to issue its decision. In an order dated April 4, 2025, AJ Hochhauser granted the parties an extension to April 15, 2025. On April 14, 2025, Agency requested an additional extension to May 30, 2025, which AJ Hochhauser granted in an order dated April 21, 2025. On May 30, 2025, the parties submitted a Joint Statement Regarding the Outcome of DCHR’s Final Grievance Review.⁴

This matter was reassigned to the undersigned AJ on June 11, 2025. On June 17, 2025, I issued an Order Scheduling a Status Conference for July 15, 2025. The Status Conference was held as scheduled. On July 16, 2025, I issued a Post-Status Conference Order, requiring the parties to submit briefs in this matter.⁵ Agency’s brief was due by August 13, 2025, Employee’s brief was due by September 10, 2025, and Agency’s sur-reply was due by September 24, 2025. Agency submitted its brief on August 13, 2025. Employee did not submit their brief as required. Thus, on September 17, 2025 the undersigned issued Employee an Order for Statement of Good Cause, requiring Employee to submit their brief and a statement of good cause for their failure to submit the brief as required by the order dated July 16, 2025. Employee’s statement and brief were due by September 26, 2025.

On September 22, 2025, Employee filed a Consent Motion for Extension of Time to Respond and requested a five (5) day extension. On that same date, Employee also filed their brief. Thus, in an Order dated September 25, 2025, I denied Employee’s Consent Motion as moot and reset the due date for Agency’s sur-reply to October 9, 2025. On October 9, 2025, Agency Filed a Motion for Extension of Time to file its Sur-Reply, incorrectly citing that Employee had filed a Motion to withdraw their brief on September 22, 2025. At the time Agency filed its Motion, this Office had not received Employee’s motion to withdraw.⁶

On October 20, 2025, Employee filed a Motion to Withdraw Employee’s Response to Agency’s Brief, citing that the brief submitted on September 22, 2026, contained citation errors. On October 22, 2025, I issued an Order Regarding the Motion to Withdraw Employee’s Brief and granted the Motion. I also granted Agency’s Motion for extension of time to file a sur-reply. Employee’s revised brief was now due by November 12, 2025, and Agency’s sur-reply was due by December 3, 2025. The parties submitted their respective briefs by the prescribed deadlines.

⁴ Employee appealed a three-day suspension that is not the subject matter of the Petition for Appeal before OEA. (See the parties Joint Statement, pp. 2-3 (May 30, 2025)). Further, as that matter concerns a *grievance* and a suspension that was *less than ten (10) days*, it is thus outside the purview of OEA’s jurisdiction, as suspensions for less than ten days and grievances cannot be appealed to this Office (Emphasis added).

⁵ The parties were required to address whether Agency had cause for adverse action in this matter; whether Agency followed all applicable District of Columbia statutes, regulations, and laws; and whether the penalty was appropriate.

⁶ Employee through his counsel emailed a copy of the Motion on October 8, 2025, and noted that a copy would be delivered to this Office. On October 16, 2025, I emailed the parties and noted that Employee’s Motion had not yet been received, and thus I could not rule on the Motion. I further advised the parties that once I received Agency’s Motion, I would revisit the due dates for briefs.

Upon review of the record, I determined that an Evidentiary Hearing was not warranted in this matter. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause for adverse action against Employee; and
2. Whether all applicable laws, rules, and regulations were followed in the administration of the termination; and
3. If so, whether termination was an appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for 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 631.2 *id.* states:

For Appeals filed under § 604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was a Transportation Planner, which is a position in the Curbside Management division of the District of Columbia's Department of Transportation ("DDOT" or "Agency"). The following are the findings of fact concerning the communications that are the basis for the adverse action in this matter, based on the record:

1. On August 18, 2023, Employee emailed their supervisor, Curbside Programs Manager Joseph Kerwin ("Kerwin") and Associate Director Haley Pickett ("Pickett"), and stated: "Haley and Joe, I have been invited to speak on a panel regarding my professional expertise in lightweight electric vehicles, which relates to my District Fleet research project of last year and previous agency, university and nonprofit work. I am requesting clearance to participate as an agency representative, please can you consider this today and also ask comms." Employee provided further details and noted that the conference would take place on a Saturday, during their own time, Employee would be paying their own way, no compensation would be received, and they were not asked to present individually, only to participate in a discussion. Employee further

stated, “I believe it is valuable to the agency and our District to authorize me to participate formally, given the importance of this topic as an emerging strategy to meet so many policy objectives simultaneously and so effectively.” Employee closed the email by stating, “Please let me know as the conference is requesting my identification and by bio for program materials asap.”⁷

2. On August 23, 2023, Kerwin responded to Employee’s email and stated: “Hi [Employee], Thank you for reaching out about this conference. At this point, the answer would be no. Curbside Management does not manage this program or effort for DDOT and would not be their appropriate representatives from DDOT to speak to these topics.”⁸
3. On August 24, 2023, at 4:36 p.m. Employee emailed three members of the staff at the Office of the Deputy Mayor for Infrastructure (“DMOI”), with a subject line: “Requesting Clearance for Panel Speaking Opportunity.” The email stated: “Dear Jonathan, would DMOI support my speaking on behalf of the agency and/or District (identified as DDOT staff) at a conference on this topic, on a panel along with the City of Portland, Oregon and others looking at similar potential for government fleets? You may be aware I conducted a study last year on the potential to utilize electric cargo bikes, trikes and trailers, and other lightweight electric vehicles, in place of heavier cars, trucks and vans, in our District fleet. My work was in communication with [staff at DMOI], who were excited about the potential for e-bikes to achieve a wide array of District policy goals. I have been invited to speak on a panel regarding my professional expertise in lightweight electric vehicles, which relates to my District Fleet research project of last year and previous agency, university and nonprofit work.” Employee provided additional details about the conference and closed the email by stating: “I believe it is valuable to DDOT and our District to authorize me to participate formally, given the importance of this topic as an emerging strategy to meet so many policy objectives simultaneously and so effectively. No confidential information would be shared and no commitments would be made, I would simply be participating in an informational discussion. Please let me know as the conference is requesting my identification and bio for program materials asap.”
4. At 4:40p.m. Jonathon R. of DMOI responded, “If DDOT approves your participation, DMOI wouldn’t have any problem with it.”⁹
5. On August 24, 2023, at 4:55p.m. Employee sent an MS Teams message to Acting Chief Operations Officer Neelima Ghanta (“Ghanta”) and stated: “Is there any chance you would approve me to speak as a DDOT representative at a conference on my own time, about electric cargo bike potential for government fleet use? I did a one-year study on this for DDOT last year. Jonathan [R.] says DMOI would have no problem with this....Unfortunately, you should know my direct supervisors are not currently favorable as they do not see e-bikes as part of my Division’s mission (although I believe they are a powerful curbside management strategy). Therefore, I’m a bit going over their head to appeal to you. Note, the conference would be on my own time, BEGA has said it would be fine if the agency authorizes and I speak properly of course. May I send you the approval request via email to consider?”¹⁰

⁷ Employee's Petition for Appeal, p. 74, 76 (May 8, 2024).

⁸ *Id.* at 74.

⁹ *Id.* at 78, 79.

¹⁰ *Id.* at 81.

6. On August 24, 2023, at 5:30p.m. Ghanta responded: “If you are representing DDOT, it has to be DDOT endorsed. Is using Cargo E bikes what DDOT is doing Going [sic] forward?”¹¹
7. On August 24, 2023, Employee responded: “That is correct and that is why I am seeking your approval. Just to be clear, this is information sharing in a brief panel, possibly sharing some of my study for DDOT. I led a substantial research project last year endorsed by my COO, CAO, CPO, and my supervisor, including a survey which our PIO distributed to sister agencies. It was 20% of my work plan, so in this case, even if DDOT has decided not to use ELCVs in our field of work (which can’t be entirely true, as we’re expanding CaBi e-bikes a lot, and provide free membership and purchased test bikes for my study; and Council is working on e-bike incentive programs, and DOEE is currently launching the incentive program I initiated with them), we could still share our information with the growing number of cities who do wish to consider whether some fleet substitution works for them. This is low hanging fruit for climate mitigation, and many other goals, and has a lot of public support and staff support, so it makes sense to me why other cities would consider this path.”¹²
8. On August 29, 2023, Ghanta responded: “I heard from team performance and your team that Cargo Bike work is not endorsed by these teams. If you are on a panel representing yourself, you can definitely participate, but if its DDOT, I need your supervisor and AD to say that to me.”¹³

On November 1, 2023, Agency issued an Advance Notice of Proposed Removal, which noted that removal was being proposed pursuant to Chapter 16 of the District Personnel Manual (“DPM”) §1605.4(d)-failure or refusal to follow instructions; 1605.4(d) deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.¹⁴ Curbside Programs Manager Kerwin was the proposing official. This matter was assigned to a Hearing Officer who issued her recommendation on January 18, 2024, upholding Agency’s decision to terminate Employee.¹⁵ In a Notice of Final Agency Decision dated April 4, 2024, Employee was terminated from their position as a Transportation Planner effective April 9, 2024 based on failure or refusal to follow instructions; 1605.4(d) deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.¹⁶ This adverse action of removal was predicated on the email and MS Teams communications outlined above.

Summary of Agency’s Position

Agency asserts that that from August 18, 2023, to August 24, 2023, Employee sent a series of emails, seeking permission or approval to represent DDOT at a conference on Light Electric Vehicles.¹⁷ Agency noted that on August 18, 2023, Employee sought permission from their supervisor Curbside Programs Manager Kerwin and Associate Director Peckett to attend the conference as a DDOT representative.¹⁸ Agency asserts that Kerwin denied Employee’s request by email on August

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Agency’s Answer, at Exhibit 1, page 18 (June 7, 2024) (page numbers not in the original but included for ease of reference)

¹⁵ Agency’s Answer, Exhibit 10, p. 269 (June 7, 2024)

¹⁶ *Id.* at Exhibit 5, p. 110.

¹⁷ *Id.* at p. 5, 6.

¹⁸ *Id.*

23, 2023, and reasoned that “[a]t this point, the answer would be no. Curbside Management does not manage this program for DDOT and would not be the appropriate representatives from DDOT to speak on these topics.” Agency avers that rather than accept Kerwin’s decision Employee went outside their chain-of-command and asked staff at DMOI as well as then-acting Deputy Mayor for Operations and Infrastructure Ghanta to approve Employee’s participation in the conference as a DDOT representative. Agency further asserts that Employee did not include their management team on these messages. Agency further avers that Employee acknowledged in Employee’s email to Ghanta that Employee’s supervisors were not in favor of Employee’s attendance as a DDOT representative.¹⁹

Agency maintains that the termination in this matter is warranted because this was the third time in two years that Employee engaged in behavior amounting to deliberate or malicious refusal to comply with rules, regulations, or proper supervisory instructions.²⁰ Agency noted that Employee was verbally counseled in April 2022 and received a corrective three-day suspension in October 2022 for contacting DMOI outside of Employee’s assigned duties after being directed not to do so.²¹ Agency asserts that even after previously being instructed not to contact DMOI, in the instant matter, Employee asked DMOI staff for their support of Employee representing DDOT at a conference on e-bikes, and even after his supervisor had denied permission. Agency avers that Employee’s repeated failure to follow the instructions of their management team supports a finding that the current adverse action of termination is warranted.²²

Summary of Employee’s Position

Employee maintains that Agency’s decision to terminate them is fundamentally flawed. Employee asserts that the adverse action:

“rests on three fundamental flaws: (1) it’s improper reliance on a verbal counseling that cannot, under the District Personnel Manual (“DPM”), be treated as a corrective or adverse action; (2) it’s reliance on an October 2022 suspension that was itself fatally tainted by violations of mandatory grievance procedures; and (3) its mischaracterization of a conference-related request as deliberate disobedience of a supervisory request, when in reality, Employee...was acting transparently, ethically, and with prior clearance from the Board of Ethics and Government Accountability (“BEGA”).”²³

Employee contends that while Agency characterized the instant conduct as Employee’s third infraction of “insubordination”, Employee in this instant matter did not actually disregard or disobey a supervisor’s instructions. Employee asserts that they were planning to attend the conference in their private capacity, and their inquiry to supervisors was limited to whether they could identify as a representative of DDOT.²⁴ Employee maintains they were told that they could not attend as a representative of DDOT, which Employee respected.²⁵

¹⁹ *Id.*

²⁰ Agency’s Brief, p. 3 (August 13, 2025).

²¹ *Id.* at p. 5.

²² Agency’s Answer, pp. 7, 9.

²³ Employee’ Brief, pp. 1-2 (November 14, 2025).

²⁴ *Id.* at p. 3.

²⁵ *Id.*

Employee further asserts that there was no clear supervisory instruction provided. Employee maintains that Kerwin's response to Employee's inquiry was not a "clear, unequivocal, and proper" supervisory instruction, and only stated, "at this point, the answer would be no" in response to Employee's inquiry to represent DDOT.²⁶ Employee maintains that Employee "received no clear directive prohibiting [Employee's] conference attendance or [Employee's] affiliation with DDOT in a research capacity. Employee cites that the conditional language used by their supervisor- "at this point, the answer would be no" -lacks the clarity required to support an insubordination charge."²⁷

Employee argues that Agency improperly relied on Employee's past conduct in determining that the current conduct warranted termination. Employee avers that a verbal counseling is not a corrective or adverse action under the District Personnel Manual and thus cannot serve as the basis for the current adverse action or be counted as one of three prior occurrences of misconduct. Employee maintains that "by repeatedly invoking verbal counseling as a part of a matter of misconduct, the Agency artificially inflated the matter into a 'third occurrence'." ²⁸ Employee further maintains that the suspension in October, 2022, was "procedurally defective" because Employee was denied mediation and a timely grievance interview. Employee contends that because the suspension process was flawed, the suspension cannot be used to support removal.²⁹

Employee additionally asserts that the penalty of termination was "excessive, arbitrary, and inconsistent with governing standards." Employee further contends that Agency misapplied the *Douglas* Factors by using "boilerplate language in evaluating Employee" and by not considering mitigating factors. Employee further maintains that they were not provided access to all relevant documents and communications necessary to support their case.³⁰

ANALYSIS³¹

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and

²⁶ *Id.* at p. 5.

²⁷ *Id.* at p. 6.

²⁸ *Id.* at pp. 3-5

²⁹ *Id.* at pp. 4-5

³⁰ *Id.* at pp. 7-9

³¹ 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").

pursuant to other rules and regulations which the Office may issue.
(*Emphasis added*).

Pursuant to OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1601.7 provides that “Each agency head and personnel authority has the obligation to and shall ensure that corrective and adverse actions are only taken when an employee does not meet or violates established performance or conduct standards....”³² Accordingly, disciplinary actions may only be taken for cause.

In this instant matter, Agency terminated Employee for failure or refusal to follow instructions: deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions, pursuant to DPM § 1605.4(d) and 1607.2(d)(2).

Failure or Refusal to Follow Instructions

The undersigned finds that Agency had cause for the adverse action in this matter. Employee’s termination was levied pursuant to DPM § 1605.4(d)-Failure or Refusal to Follow Instructions and § 1607.2(d)(2)-Deliberate or Malicious Refusal to Comply with Rules, Regulations, Written Procedures, or Proper Supervisory Instructions. OEA has held that a failure/refusal to follow instructions includes a deliberate or malicious refusal to comply with the rules, regulations, written procedures, or proper supervisor instructions.³³ Section 1607(d)(2) includes an element of intent: the evidence must support a finding of *deliberate or malicious refusal to comply....* (*Emphasis Added*). Accordingly, OEA has held that the evidence must show a deliberate or malicious act to support this charge.³⁴

Here, the undersigned finds that the evidence supports a deliberate act of disobeying proper supervisory instructions. As noted above, on August 18, 2023, Employee emailed their manager Kerwin and Associate Director Pickett and requested to speak on a panel regarding Employee’s expertise in lightweight electric bikes and vehicles, as an Agency representative.³⁵ Employee specifically stated, “I am requesting clearance to participate as an agency representative, please can you consider this today and also ask comms.” It is clear from this email that Employee is asking the supervisors to grant their authorization for Employee to represent themselves as an Agency representative on a panel regarding electric bikes and vehicles. In response to Employee’s request, Kerwin emailed Employee and stated: “At this point, the answer would be no. Curbside Management does not manage this program or effort for DDOT and would not be their appropriate representatives from DDOT to speak to these topics.”³⁶ This exchange highlights that Employee requested authorization to act as a DDOT representative, and Employee’s manager denied that request. Thus, I find that Kerwin’s denial of Employee’s request for authorization was a proper supervisory instruction.

The record also supports that Employee deliberately refused to comply with Kerwin’s instruction that Employee could not represent themselves as a DDOT representative at the conference, and instead shopped for an approval of their request. Instead of accepting Kerwin’s answer as the final

³² DPM §1601.7.

³³ *Employee v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0056-22 (June 22, 2023).

³⁴ *See Employee v. D.C. Department of Transportation*, OEA Matter No. 1601-0052-22 (April 12, 2023) (AJ held that Agency failed to provide substantial evidence to prove that Employee acted deliberately and failed to turn in keys as required).

³⁵ Employee’s Petition for Appeal, pp. 74, 76 (May 8, 2024).

³⁶ *Id.* at 74.

instruction on the matter, Employee sought the approval of DMOI, and the permission of Ghanta, who was the Acting COO at the time, and thus more senior than Employee's immediate supervisors. Notably, Employee did not notify Kerwin or Pickett that Employee was still seeking authorization to speak on the panel as a DDOT representative and did not include them on the communications to DMOI or Ghanta. Employee further acknowledged that their supervisors did not approve their request to act as a DDOT representative and noted: "Unfortunately, you should know my direct supervisors are not currently favorable as they do not see e-bikes as part of my Division's mission (although I believe they are a powerful curbside management strategy). Therefore, I'm a bit going over their head to appeal to you."³⁷ Notably, Employee was previously suspended for communicating with outside agencies regarding the e-bikes initiative, although Employee's management team instructed Employee to disengage from this communication.³⁸ Thus, the undersigned finds that Employee deliberately disregarded his management team's instruction once again by seeking approval to represent himself as a DDOT representative for a panel on e-bikes and vehicles.

In spite of Employee's efforts to circumvent Kerwin's instruction, both the staff at DMOI and Ghanta noted that permission for this request should come from DDOT. DMOI staff replied to Employee and stated: "If DDOT approves your participation, DMOI wouldn't have any problem with it." On August 29, 2023, Ghanta responded: "I heard from team performance and your team that Cargo Bike work is not endorsed by these teams. If you are on a panel representing yourself, you can definitely participate, but if its DDOT, I need your supervisor and AD to say that to me."³⁹ While Employee characterizes their appeal to DMOI and Ghanta as "brief internal "pings" under time pressure", it is clear from Ghanta's position that the approval for Employee's participation as a DDOT representative rested with Employee's supervisors.⁴⁰

Employee asserts that ultimately they did obeyed their supervisor's instruction because they did not attend the conference as a DDOT representative.⁴¹ The undersigned finds that this argument fails. Employee's attempt to circumvent Kerwin's instructions is sufficient to establish deliberate refusal to obey a proper supervisory instruction. Employee acknowledged that their ... "direct supervisors are not currently favorable as they do not see e-bikes as part of my Division's mission" evidencing that Employee deliberately ignored Kerwin's instruction. Accordingly, the undersigned finds that Agency has established cause for adverse action.

Whether Agency followed all applicable laws, rules and regulations

The undersigned finds that Agency correctly invoked District Personnel Manual ("DPM") §1605.4(d) and §1607.2(d)(2) Failure or refusal to follow instructions: deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions in terminating Employee."⁴² Based on the analysis and facts above, Employee did not heed Kerwin's instructions that Employee was not the appropriate representative to represent DDOT at a conference on electric bikes. Instead, Employee deliberately ignored Kerwin's instruction and attempted to circumvent his managerial authority. Further, Agency's Proposed and Final Notices of Removal clearly outlined the

³⁷ *Id.* at 81. See also Agency's Answer at p. 19 (June 7, 2024).

³⁸ Agency's Answer, at Exhibit 1, p. 18 (June 7, 2024).

³⁹ Employee's Petition for Appeal, p. 81 (May 8, 2024).

⁴⁰ Employee's Petition for Appeal, p. 10 (May 8, 2024).

⁴¹ Employee's Brief, pp. 3, 5 (November 14, 2025).

⁴² DPM §1607.2(d)(2)

DPM sections that Employee was charged to have violated and presented evidence that the act was deliberate.⁴³

While Employee asserts that Kerwin's instruction was not "clear, unequivocal, and proper,"⁴⁴ the undersigned finds that Employee's admission that their "...direct supervisors are not currently favorable as they do not see e-bikes as part of my Division's mission..." supports a finding that Employee understood Kerwin's instruction.⁴⁵ Employee further affirmed their understanding in their Petition for Appeal and noted that they were:

"...asked to speak at a related conference, and asked how I would identify myself with pressure to respond quickly. Because the topic crossed over to my research, and District/agency goals, and my expertise, I asked the hostile supervisor #3 (Associate Director), and current supervisor #6 if I could identify as working at the District. When they said "not at this time" and gave a reason that didn't make sense to me, I reached further to ask our new Chief Ghanta via Teams text if she would override them."⁴⁶

Thus, Employee's argument that the instructions were not clear or proper is incongruous with Employee's stated intent to 'override' their manager's instructions. Employee's decision to seek approval with Chief Ghanta supports the assertion that Employee refused to follow and accept Kerwin's instruction.⁴⁷

Employee additionally provides conflicting arguments regarding the Agency's use of progressive discipline. Employee asserts that Agency did not follow the proper steps of removal because Agency did not employ progressive discipline, while also asserting that Agency improperly relied on a past verbal counseling and a past suspension in assessing the penalty for the current misconduct.⁴⁸ Concerning progressive discipline, The DPM makes clear that "[s]trict application of the progressive steps in §§ 1601.5 and 1610 may not be appropriate in every situation. Therefore, management retains the right to evaluate each situation on its own merits and may skip any or all of the progressive steps." However, I find that in this matter, Agency engaged in progressive discipline. Employee received verbal counseling in April 2022 and a corrective suspension in October 2022, both related to failure to follow instructions.⁴⁹ His suspension in October 2022 was related to his 'continue[d] pursuit of the e-bike program despite the directive from Associate Directory Peckett to disengage.'⁵⁰ As a result, I find that Employee's assertion that Agency failed to engage in progressive discipline is not consistent with the record.

Concerning the verbal counseling, while section 1612 of the DPM notes that verbal counseling is a reprimand and thus neither a corrective or adverse action, it is a step of the progressive discipline process, and "may be considered in establishing a corrective or adverse action, when the action is initiated within three (3) years of the reprimand."⁵¹ Accordingly, I find that Agency acted properly in

⁴³ Agency's Answer at Exhibit 1 and Exhibit 5 (pp. 18, 111)(June 7, 2024).

⁴⁴ Employee' Brief, p. 5 (November 14, 2025).

⁴⁵ Employee's Petition for Appeal, p. 81 (May 8, 2024).

⁴⁶ *Id.* at attachment 1, p. 9 (May 8, 2024).

⁴⁷ In advancing their argument, Employee also relies on principles of insubordination, which is no longer a recognized charge under the DPM.

⁴⁸ *Id.* at pp. 3-6.

⁴⁹ (Petition for Appeal at Exhibits 2 and 3 (pp. 59, 65)(May 8, 2024).

⁵⁰ Agency's Answer at Exhibit 1 (p. 36) (June 7, 2024).

⁵¹ DPM § 1612.7

considering Employee's past discipline. Further, while Agency considered past discipline in assessing the penalty in the instant matter, the Table of Illustrative actions ("TIA") outlines that suspension to termination is the range for a first and second occurrence of deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.⁵² Therefore, even if Agency did not consider Employee's past reprimand or suspension, Employee's termination would still be within the range allowed by the DPM. Consequently, the undersigned finds that Agency followed all applicable laws, rules and regulations in the instant matter.

Employee additionally asserts that they were denied their right to present evidence; however, Employee does not state with specificity what evidence was sought or how they were denied access. Further, Employee had ample opportunity to request documents from Agency and submit evidence in support of this appeal. Thus, the undersigned finds that Employee's assertion lacks merit.

Whether the Penalty of Termination was appropriate

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).⁵³ Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office. As further noted in *Love*, "...[T]he [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, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness."⁵⁴ Accordingly, when an Agency's charge is upheld, this Office will "leave Agency's penalty undisturbed when the penalty is within the range allowed by law regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgement."⁵⁵

Here, the TIA notes that the penalty range for a first occurrence for the charge of failure or refusal to follow instructions: deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions is a three (3) day suspension to removal.⁵⁶ Thus, Agency's action of terminating Employee was within the range allowed by the DPM. Further, while Employee's past findings of misconduct are not a prerequisite to determine whether the current adverse action can be sustained, I find that Employee's past documented findings of misconduct bolster Agency's position that Employee has a pattern of ignoring supervisory instructions, as this was not Employee's first misconduct of this variety. Agency further provided a thorough and detailed analysis to support its decision to terminate Employee.⁵⁷ Thus, the undersigned finds that the penalty of

⁵² §1607.2(d)(2)

⁵³ See also. *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009)

⁵⁴ *Love* (Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

⁵⁵ *Id.* See also *Sarah Guarin v Metropolitan Police Department*, 1601-0299-13 (May 24, 2013) citing *Stokes supra*.

⁵⁶ DPM§ 1607.2(d)(2).

⁵⁷ Agency's Answer at Exhibit 1 and Exhibit 5 (pp. 18, 36)(June 7, 2024).

termination was not excessive, unreasonable or arbitrary. Further, Agency provided a thorough *Douglas* Factor analysis.⁵⁸ Therefore, the undersigned must leave Agency's penalty undisturbed.

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Natiya Curtis
Natiya Curtis Esq.
Administrative Judge

⁵⁸ *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, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.