THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0058-23
EMPLOYEE,[1]	)	
	)	Date of Issuance: August 11, 2025
v.	)	
	)	
D.C. OFFICE OF THE CHIEF TECHNOLOGY OFFICER,	)	NATIYA CURTIS, Esq.
Agency	)	Administrative Judge
	)	

Employee, *Pro Se*
Victor Régal, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 14, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Office of the Chief Technology Officer's ("Agency" or "OCTO") decision to terminate him from his position as Telecom Specialist, effective July 14, 2023.[2] OEA issued a letter dated August 14, 2023, requesting Agency file an Answer on or before September 13, 2023. Agency filed its Answer to Employee's Petition for Appeal on September 13, 2023. This matter was assigned to the undersigned Administrative Judge ("AJ") on September 14, 2023. On September 20, 2023, I issued an Order Convening a Prehearing Conference for October 24, 2023. Prehearing Statements were due on October 17, 2023. Agency submitted its Prehearing Statement on October 16, 2023. Employee submitted his Prehearing Statement on October 17, 2023.

Both parties appeared for the Prehearing Conference as scheduled. Following the Conference, I issued an Order on October 25, 2023, codifying the verbal orders issued during the Prehearing Conference and set a schedule for the submission of briefs. Agency's brief was due by November 21, 2023. Employee's brief was due by December 20, 2023. Agency's optional reply brief was due by January 8, 2024.

Agency submitted its brief on November 21, 2023. On December 5, 2023, I issued an additional Order, requiring Agency to submit an organizational chart by December 14, 2023, that was effective

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee was terminated for the following causes of action: DPM § 1607.2(d)(2)-Deliberate or Malicious Refusal to Comply with Rules, Regulations, Written Procedures, or Proper Supervisory Instructions.

as of May 2023. Agency submitted the required information within the prescribed deadline. Employee submitted his brief on December 18, 2023. Accordingly, on January 18, 2024, I issued an Order scheduling a Status Conference for Tuesday, February 6, 2024. On January 31, 2024, the undersigned issued an Order rescheduling the Status Conference for February 27, 2024. On February 5, 2024, the undersigned issued an Order extending the deadline for Agency to file its Sur Reply. Agency cited that it had not received a copy of Employee's brief that was submitted to OEA on December 18, 2023. Agency's reply brief was due by February 23, 2024. The Status Conference was convened as scheduled on February 27, 2024, with both parties present. At this Conference, the parties' witnesses were discussed and approved. After a review of the record and the parties' submissions, the undersigned determined that an Evidentiary hearing was warranted.

On February 27, 2024, the undersigned issued an Order convening an Evidentiary Hearing for April 4, 2024. Per the February 27, 2024, Order, changes to either parties' list of approved witnesses was due by March 8, 2024. On March 18, 2024, Agency emailed the undersigned citing a potential issue of attorney-client privilege concerning one of its witnesses. Thus, on March 19, 2024, the undersigned issued an Order for Status Conference and scheduled the Conference for March 21, 2024. During the Conference, the undersigned addressed outstanding discovery issues raised by Employee, and Agency's concerns of attorney-client privilege concerning one of its witnesses. On March 28, 2024, the undersigned issued a Post Status Conference Order/Order Rescheduling Evidentiary Hearing, which codified the verbal orders issued during the March 19, 2024, Status Conference. Per this Order, the Evidentiary Hearing was rescheduled for April 30, 2024. Agency was also ordered to submit information regarding disciplinary action of other employees by April 12, 2024.[3]

On April 23, 2024, Agency submitted a Motion for Protective Order, citing alleged issues of attorney-client privilege, and requesting that one of its witnesses, OCTO's General Counsel Todd Smith refrain from testifying. On April 23, 2024, Agency also submitted its Response to the Order for Production, as required by the March 28, 2024, Order. On April 25, 2025, I issued an Order Staying the Evidentiary Hearing, pending the issuance of an Order regarding the disposition of Agency's Motion for Protective Order.

On May 15, 2024, I issued an Order for Employee Response and Status Conference, in which I extended Employee the opportunity to reply to Agency's Motion for Protective Order by May 30, 2024. I also scheduled a Status Conference for June 6, 2024. In an Order issued on May 24, 2024, the undersigned rescheduled the Status Conference for June 11, 2024, due to a scheduling conflict. Employee submitted his response to Agency's Motion for Protective Order on June 3, 2024.

On June 11, 2024, a Status Conference was held as scheduled. On June 12, 2024, the undersigned issued a Post Status Conference Order requiring the parties to submit witness lists by June 21, 2024. On June 27, 2024, the undersigned issued an Order for Statement of Good Cause requiring Employee to submit his witness list by July 9, 2024. Employee submitted the Statement of Good Cause on July 15, 2024, noting that he would not be calling any witnesses.

On July 17, 2024, the undersigned issued an Order Regarding Agency's Motion for Protective Order, noting with detailed analysis that attorney-client privilege was not an issue in this matter and denying Agency's Motion for Protective Order. The AJ found that Agency could not make a blanket claim of privilege and provided detailed analysis as to why the attorney-client privilege did not apply

[3] The undersigned issued an Order on March 29, 2024, clarifying the date that the requested information was due, as the previous Order omitted this information.

to Smith's participation as a witness in this fact-finding hearing. The undersigned found that because Agency alleged that Smith occupied a supervisory role and was central to the discipline that is the subject of this adverse action, his testimony was pertinent in ascertaining the facts in this discreet matter.

On August 8, 2024, the undersigned issue an Order Convening an Evidentiary Hearing, which rescheduled the Evidentiary Hearing for October 8, 2024. On September 30, 2024, Agency submitted a Motion to Postpone the Evidentiary Hearing, citing that Agency's counsel was recovering from an illness. On October 7, 2024, the undersigned issued an Order Rescheduling the Evidentiary Hearing for November 19, 2024.

On November 13, 2024, Agency filed a Motion for Reconsideration of its Motion for Protective Order, again citing to an alleged issue of attorney-client privilege. The undersigned denied the Motion on the record during the Evidentiary Hearing, which was held on November 19, 2024, as scheduled. During the Evidentiary Hearing, the undersigned also ordered Agency to produce a copy of the DC Bar advisory opinion, to which Agency maintained that it relied on in refusing to offer Smith as a witness in this matter. On December 13, 2024, Agency submitted its Response to this Order, noting that it would not produce an Advisory Opinion, and argued that this Office did not have jurisdiction or the authority to request an Advisory Opinion from the DC Bar.[4]

On January 3, 2025, the undersigned issued an Order for Closing Arguments, requiring the parties to submit their written closing arguments by February 13, 2025. Both parties submitted their written closing arguments as required. On April 21, 2025, Employee submitted a Motion for an Order and/or Decision. On May 13, 2025, Employee submitted a Motion to Add Final Specification Pertaining to the Code of the District of Columbia §1-615.51(5) in accordance with 6B § 613 Motions. On June 11, 2025, Employee submitted a Motion to Add Direct Evidence from 5/31/23 in Accordance With 6B 613 Motions.[5] 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. If so, whether termination was an appropriate penalty under the circumstances.

BURDEN OF PROOF

[4] This Office's authority to hear appeals is authorized by D.C. Official Code §1-601.01 et seq. Smith was ordered to testify in the matter by the undersigned Administrative Judge pursuant to OEA Rule 622.2(f), which grants authority to OEA's administrative judges to call and examine witnesses. Further, Agency was required to make Smith available pursuant to OEA Rule 630.2, which requires District government agencies to make its employees available to furnish sworn statements or affirmation or to appear as witnesses at the request of the administrative judge. [4] In contradiction of these rules and OEA's authority to hear appeals, Agency refused to provide Smith as witness.

[5] Employee filed these motions without any directive from the undersigned. These Motions are denied.

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.

SUMMARY OF TESTIMONY

On November 19, 2024, an Evidentiary Hearing was held virtually before this Office through Webex. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceedings.

Agency's Case in Chief

Henry Lofton ("Lofton")-Tr. 41-115

Lofton is the Deputy CTO for the Office of the Chief Technology Officer ("OCTO"), which he affirmed is a managerial position. Tr. 42. Lofton was shown Agency's Exhibit 8, which is OCTO's organizational chart as of April 14, 2023, which he cited was not the most recent chart. Lofton testified that the executive team included General Counsel Todd Smith ("Smith"). Tr. 43-44. Lofton affirmed that the executive team members are the highest-ranking members of OCTO. Tr. 45. Lofton testified that he was the Deputy CTO of IT Operations at the time of the adverse action in question. Tr. 45. Lofton explained that IT operations encompassed all services related to DC Net, which was a service provider owned and operated by the District of Columbia. Lofton testified that half of the organization worked underneath him in his capacity as Deputy CTO. Tr. 46-47.

Lofton testified that the warehouse where Employee worked is a critical location to ensure proper service delivery. He testified that as the project team and engineers work on projects, items are ordered and arrive at the warehouse. Lofton testified that there are strict guidelines to ensure that assets are received and tagged if they are above a certain value. Tr. 47-48. Lofton indicated that warehouse staff are tasked with inventory tracking, putting and pulling products off-the-shelf, putting them on a pallet and having them ready for pickup, as well as disposal of inventory. Tr. 48.

Lofton affirmed that administering discipline is a part of his role as a Deputy CTO. Lofton noted that all managers are tasked with administering discipline and must take a refresher course. Tr. 48-49. Lofton testified regarding general procedure involving a disciplinary incident. Lofton noted that if it is a matter that he can discuss with the manager of the individual and work it out, he will. He

testified that if the matter escalates or seems to be a little more involved and he is available, he will have the conversation. He testified that if he is not available, he will ask the General Counsel's office to do a fact-finding investigation to get all the data so that he can weigh in on the matter if needed. Tr. 49. Lofton noted that he is familiar with Employee and has known him for over twelve years. Tr. 50. Lofton testified that he has not always been in a supervisory role over Employee, but noted that Employee worked at DC Net, which he affirmed was the warehouse he mentioned earlier in his testimony. Lofton noted that this warehouse is located at 2900 V Street, NE, and OCTO Headquarters is located at 200 I Street, SE. Tr. 50-51.

Lofton further testified that he did not receive the initial email regarding Employee's use of two (2) parking spaces, which was sent to Peter Noble ("Noble") from another employee ("E.G.") on January 18, 2023. Tr. 54. Lofton testified that based on the picture attached to the email, it was clear that there were two parking spaces being used, which seemed trivial. Lofton noted that Noble was going to address the issue and there would be no problem moving forward. Lofton affirmed that his normal course of action is to let lower-level management handle a disciplinary matter, if he believes it can be handled in that manner. Tr. 54.

Lofton indicated that he thought the matter was resolved after Noble sent an email to E.G., noting that Noble asked Employee to move his car. Tr. 55. Lofton reviewed an email from E.G. to Noble that alleged that Employee yelled expletives at .E.G., then went to "talk trash" to other employees because E.G. reported Employee's vehicle parking. Tr. 56. Lofton testified that the email sent to him was disturbing because it showed that the issue had escalated. Lofton stated that he had a conversation with Noble about it. Tr. 56-57. Lofton explained that based on that correspondence he wanted to get more insight into what was transpiring and asked Mr. Todd Smith ("Smith"), General Counsel if he could start a fact-finding investigation. Lofton affirmed that asking Smith to do an investigation would be the ordinary course of action to collect the facts. Lofton stated that Smith does not work with any of those programs, so it is a clean way of doing things. Tr. 62. Lofton affirmed that once he received all the information he requested in an investigation, he would make the decision as to whether and to what extent there was discipline. Tr. 62-63. Lofton testified that he had a conversation with Smith and engaged Agency's human resources. Tr. 63.

Lofton affirmed that on May 30, 2023, Smith emailed Employee, with Noble and Lofton cc'd stating, "Dear Mr. [Employee], it's my understanding that you are currently on-duty. Please immediately respond to my Microsoft Teams chat." Lofton testified that the investigation started in January, so this May 30th email would have been at the end of the investigation. Tr. 66-67.

When asked why he asked Smith to reach out to Employee, Lofton testified that having Smith reach out to employees was something they have done many times in the past. He testified it was a busy time for the Agency and he did not want to let the issue slip and asked Smith to conduct the fact-finding. Tr. 67. Lofton testified that Smith has the authority to direct people to report or to respond to messages. Tr. 67-68. Lofton stated that Smith has been given that authority from the Chief Technology Officer. Lofton testified that Smith answered to the Chief Technology Officer, but the executive team is all on the same level. Lofton affirmed that the Chief Technology Officer has empowered Smith as General Counsel to summon people to report, and answer questions as he directs. Tr. 68.

Lofton noted that he was Noble's supervisor at the time of the incident in question and affirmed that meant he was Employee's boss's boss. Tr. 69-70. Lofton testified regarding the email communication from Smith to Employee on May 30, 2023, and noted that he thought that Employee was possibly busy at the warehouse. He noted that employees had devices and asked Smith to continue

to reach out to Employee. Lofton stated that he was not concerned when Employee did not reply initially because of the nature of the work in the warehouse. He affirmed that he made some allowance for the fact that Employee was not sitting at a desk. Tr. 70-71.

Lofton testified regarding another message Smith sent to Employee on May 31, 2023, which stated, "Mr. [Employee] you failed to acknowledge or comply with my directive sent yesterday during your regular tour of duty. I am now directing you to immediately acknowledge receipt of my Teams chat to you. Your supervisory chain is cc'd on this email and yesterday's." Tr. 71. Lofton testified that it was possible that Employee did not see the messages sent on May 30, 2023, but once it had been twenty-four hours, Employee should have responded. Tr. 72. Lofton testified that he thought Employee's response to Smith's email messages that stated "Sir I don't know who you are. You're giving me directives and instruction. I didn't know lawyers were involved in the day to day of civil servants…. " was strange because Smith's signature was there and it stated who he is. Lofton further noted that new employees are introduced as they are hired, and there is a legal portion that is mandatory for everyone. He further testified that if an employee read the newsletter from OCTO, they should be aware of who's who. Tr. 73.

Regarding Smith's email to Employee that stated, "Report immediately to 200 I St. This is a directive," Lofton stated that typically if someone other than the direct manager asked an employee to do something, the employee would comply and notify their immediate supervisor. Lofton indicated that they, the supervisory chain, were already on the email chain so he did not know why Employee's supervisors had to follow up to tell Employee to comply because it was clear that they were included in the communication. Tr. 74. Lofton stated that he thought Employee's response to an email where Lofton told him to report as instructed was full of sarcasm. It was noted that Employee stated, "Sir how on earth am I supposed to do that? Take my personal car, not possible." Lofton stated that Agency's Headquarters is located at 200 I Street, SE and any time there is a meeting of this nature, human resources and legal are located at headquarters. Lofton testified that he did not understand why Employee questioned how it was possible. Tr. 76. Lofton affirmed that it is fair to say that people under his authority report to different work locations as an ordinary part of the job. Tr. 76-77. Lofton further stated that there is paid visitor parking that is made available, so in this case there would have been visitor spots that would have been made available. Tr. 77.

Lofton testified regarding the email sent on May 31st from Smith to Employee in which Smith stated, "you have refused lawful directives for two straight days including this most recent refusal below. Though these incidences of misconduct are already complete and may already warrant discipline. I am directing you again to report immediately to 200 I Street. Your repeated refusals will continue to negatively impact your outcomes under DPM Chapter 16. When you arrive at 200 I Street in the next 15 minutes, check in with the security desk in the front lobby and asked them to call me." Tr.77- 78. Lofton testified that he was confused as to why it escalated. He stated that this was a part of the investigation to hear what Employee had to say. Lofton affirmed that at this point Smith was still speaking on his behalf in terms of directing Employee. Tr. 78-79.

Lofton further recalled receiving an email from Smith to Employee on June 1, 2023, which stated, "We have attempted several times this week to discuss with you an earlier discipline incident, and you have maliciously refused each time to acknowledge receipt of messages or to appear for interviews. As a result, we are forced to proceed on that prior disciplinary matter with the record available to us. Today is your last opportunity to be interviewed concerning your many incidents of malicious insubordination through this week which constitute a new and separate disciplinary matter. If you fail to appear at 200 I Street today as I have directed you to, we will resolve this new disciplinary

matter of your repeated, malicious insubordination on the record available to us." Lofton affirmed that the portion of the email that said, "as a result, we are forced to proceed on that prior disciplinary matter…" pertains to the parking matter that had begun in January 2023. Lofton testified that Employee did not comply with the final directive to report to 200 I Street SE, OCTO's Headquarters. Tr. 86.

Lofton also acknowledged that he received an email from Noble on June 1, 2023, the same date as Smith's final email to Employee, that stated "I spoke with [Employee] a short time ago, please call to discuss." Tr. 87-88. Lofton explained that this email from Noble was about how Employee was not going to take any directives from Smith. Lofton testified that Noble wanted to discuss how to move forward, and what to say to Employee. Tr. 88. Lofton clarified that any employee of OCTO is required to comply with those directives and confirmed that he sent an email to Noble that stated, "General Counsel, Todd Smith has authority to give directives to members of OCTO. We are obligated to comply with those directives." Tr. 89. Lofton testified that sometimes employees are given directives that come directly from the Mayor's office, and they have to move quickly. He stated that it may not make sense, but one may have to move quickly and he may not have time to explain the directive. Lofton stated that Employee was asked by three chains of leadership, including his direct supervisor and openly stated that he was not going to comply. Tr. 91-92. Lofton testified that it escalated to noncompliance.

Lofton stated that they are required to take a progressive discipline course every two (2) years. When asked by the undersigned Administrative Judge if every member of the Executive team is required to take that course, Lofton noted that every Management Supervisory Service ("MSS") employee is required to take that course, and that includes the executive team. When asked what occurred between January and May as part of the investigation, Lofton testified that he thought interviews were had but he was not sure if that included all parties. Lofton stated he thought some of this was a follow-up for the interview with Employee. He further testified that he did not know what conversations had occurred between Smith and Employee. Tr. 93-94.

On cross-examination, when asked if he recalled having a conversation with Employee in January shortly after the incident occurred, Lofton answered affirmatively. He further stated that he could not remember the timeline or the reason why, but he remembered having the conversation. Lofton affirmed that this conversation occurred at 2900 V Street, NE. Tr. 95-96. When asked if he gathered all of the facts of the case regarding the incident that occurred between Employee and coworker E.G. in January 2023, Lofton responded in the negative. Lofton testified that he did not think he was there for that and remembered the conversation being about something completely different. He further indicated that he came to see how things were and the conversation that he and Employee had was not about the parking incident. Lofton stated that he listened to the conversation because he assumed Employee wanted to vent about something. Tr. 96. Lofton stated that if they had a conversation about the incident, it was only a few minutes and that most of that conversation involved Employee talking to him about other things. Tr. 97.

Lofton testified that he did not recall if he called Employee on May 30th. Lofton affirmed that May 30th and June were busy times for the warehouse. Lofton also affirmed that Employee was a lead at the warehouse, but not the warehouse manager. Tr. 105. Lofton affirmed that the emails sent made no mention of paid parking versus visitor parking at 200 I Street, SE. When asked who would be the responsible authority that can authorize visitor space at 200 I Street, SE, Lofton responded that facilities would make a space available as needed. Tr. 108.

On redirect examination, Lofton affirmed that someone with managerial authority does not have to issue directives by phone. Tr. 108-109. Lofton testified that they rely on various forms of communication which could be an MS Teams message, an email, or a phone call. He testified that any of the communication listed would be appropriate. When questioned whether driving is the only way to get to 200 I Street, SE, Lofton stated that he thought there was a Metro stop or one could get a ride, Uber, or other modes of transportation. Lofton affirmed that it is considered a job requirement that you show up where you are directed to go. Tr. 109.

Lofton testified that in the past he has sent emails directly to Employee pertaining to a project that required a response. He testified that in those emails he made clear the modes of communication and the timeframe by which he should respond. Tr. 112. Lofton testified that the response time was within ninety-minutes, possibly less. He affirmed that the response time would be less than twenty-four hours. Tr. 113.

When questioned by the Administrative Judge ("AJ") whether there is a notice requirement from Agency to an Employee prior to being investigated by Smith, Lofton affirmed there is not a notice requirement. Tr. 114. When questioned by the AJ whether there is an email policy regarding email and Teams response times, Lofton stated "he would have to locate that." He testified that he has personally sent messages and noted what was considered a reasonable time to respond or dictated just for clarification that a response is required within a reasonable time. Tr. 110-111. When asked again if he was aware of any official policy, he responded he does not think there is a policy that states an actual time. Tr. 111. He further stated if you were to call most government employees, there is a message that says that they will return your call within 24 hours or the next business day. Lofton stated he was not aware of how many employees Smith supervised. Tr. 111-112.

Peter Noble ("Noble") Tr. Pgs 119-155.

Noble is a Program Manager and works for the Office of the Chief Technology Officer, DC Net. He testified that he is responsible for the fiberoptic engineering and construction teams as well as helping to oversee the warehouse. Noble stated that Lofton is his supervisor. Noble testified that he has known Employee for approximately five years, or longer. Tr. 120-121. Noble testified that his duty station is not the warehouse location where Employee worked, but 655 15th Street NW. Noble noted that he has been in a supervisory role over Employee for two (2) to three (3) years. Tr. 121.

Noble indicated that he was aware of a January 2023 incident involving a parking dispute at the warehouse and that he started the email chain. Noble confirmed that he was aware of a disciplinary investigation that was open regarding Employee. Noble testified that he is familiar with Smith as General Counsel. He stated that everyone in the legal department works under Smith. He testified that Smith has the authority to issue directives to members of OCTO. Tr. 123. Noble affirmed that he recalled receiving the email on May 30th from Smith. He stated that he did not understand Employee's hesitation to meet at 200 I Street, SE and was surprised that Employee did not see that as a directive. Tr. 124. Noble was directed to an email dated May 31 at 1:07 p.m. from Employee in response to Smith. Noble stated that he was surprised by Employee's email response to Smith that stated "Sir, I don't know who you are. You're given me directives and instructions? I didn't know that lawyers were involved in the day-to-day of civil servants…" Noble noted that in Employee's defense, Employee probably did not know who Smith was. He noted that Smith presented himself so he thought that Employee would move on with the situation. Tr. 125.

Noble testified that there were additional emails where Lofton told Employee to report to 200 I Street, SE. He testified that there was an additional email where he asked Lofton about the situation and Lofton responded that Employee should report to the General Counsel because they are on the same level as a CTO. Tr.126. Noble affirmed that from his perspective as a manager, there was nothing unclear about what was being demanded of Employee in that email, and that this was a mandatory directive with which he would have to comply. Noble stated that he just thought Employee would take his personal vehicle and drive down, then possibly leave from there. Noble affirmed that Employee would not have to drive himself, and while there is no Metro close to the warehouse, he could have used Uber. Tr. 128.

Noble confirmed that a directive from Lofton is not optional and Employee should have gotten there somehow. Tr. 129. Noble stated that Employee could have called him and he could have helped Employee get a ride with a technician. Noble affirmed that Employee did not follow the directive. Noble testified that he spoke with Employee and told him he should go see Smith. Noble also noted that he sent Lofton an email about his discussion with Employee because Lofton is his supervisor and he thought that Lofton should know what was going on and perhaps could shed light on the situation. Tr. 132. Noble affirmed that Lofton sent him an email stating that Smith had authority to give directives to members of OCTO and they are obligated to comply with those directives. Noble affirmed that he forwarded this message to Employee. Noble testified that Employee obviously did not know Smith or what was going on so he thought that if Lofton told him he had to go, then that would be enough to convince Employee. Tr. 132. Noble affirmed that from May 30th to June 1st, Smith, Lofton, and Noble directed Employee to report to 200 I Street, and Employee never complied. Tr. 133.

Noble confirmed that Employee emailed him on June 1st, to ask about the District Personnel Manual and accused Smith of being overly aggressive. Noble confirmed that this email prompted him to reach out to Lofton for guidance. Noble testified that he was not familiar with some of the things Employee addressed in the email and thus thought Lofton would. Noble testified that Employee's duty hours were 6:00 a.m. to 2:00 p.m. Tr. 134.

On cross-examination when asked if he instructed Employee to travel to 200 I Street, SE Noble responded that he told Employee that he should probably follow the directive that was sent to him by Lofton and Smith. Noble testified that there are nine technicians at 200 I Street, SE and probably four vehicles at their disposal. Noble confirmed that there is no Metro available at 2900 V Street, NE. Tr. 135. Noble confirmed that he saw the screenshot of the Microsoft Teams app that Employee sent to him, showing that his Microsoft Teams app was frozen. Noble stated that he reached out to Employee to ask what the screenshot was. When asked if he remembered Employee calling him on June 1, 2023, and discussing the entire incident, Noble testified that he could not recall, but noted it was likely. Tr. 139-140.

Noble confirmed that he sent an email to Employee on June 1, 2023, and testified that he told Employee to take his personal vehicle and leave the meeting from there, so he did not have to come back to the warehouse. Noble testified that he was not invited to the meeting at 200 I Street, SE. Tr. 140-141. Noble testified that at 1:00 p.m. on June 1, 2023, he was likely located at 655 15th Street, NW. Noble indicated that he does not know who was invited to the meeting other than Employee. Tr. 142.

Noble testified that he had taken a Managerial Supervisory Services refresher course within the past year. Tr. 143. He stated that he was familiar with Chapter 16 of the DPM but had not read the entire chapter. Noble confirmed that he did not give Employee guidance pursuant to DPM 1601.2 on

May 30th, May 31st, or June 1st. He stated that since Smith was involved, he did not think there would be an issue. Tr. 146-148. Noble further testified that he had never had disciplinary issues prior to this that were of any consequence. Tr. 148. Noble stated that he and Employee have had conversations about some of the work duties but nothing of serious consequence. Tr. 149.

On redirect examination, Noble confirmed that he advised Employee to follow the directive during the time period at issue-May 30th to June 1st, but that he and Employee did not discuss anything else during that time period. Noble affirmed that his understanding was that Smith and Lofton gave Employee a clear directive, and that he also directed Employee as well to follow the instructions of Smith and Lofton. Tr. 149-150.

When asked by the AJ whether there was a policy for reporting to an alternative duty station after one's tour of duty, Noble responded that if the workday was over, the employees could go home. When asked what OCTO's policy was if an employee were to receive an order toward the end of the workday, such that complying with the order would take them past their normal duty day, Noble stated that he did not know if there was a policy. He further testified that if his boss or the general counsel asked him to report after his work duty, he would report because they had authority over him. The undersigned AJ asked Noble again whether there was a policy for working past non-duty hours, to which he responded that there was none that he was aware of.

Employee chose not to testify.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

In a Notice of Final Decision dated June 30, 2023, Employee was separated from his position as a Telecom Specialist effective July 14, 2023.[6] The action was proposed in accordance with Chapter 16 of the DPM and based on the specific cause of action of Failure or Refusal to follow instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions, pursuant to DPM § 1607.2(d)(2). The Notice of Final Decision specifically noted that "[t]his action is being proposed for the following reason: Between 5/30/2023 and 6/1/2023, while on duty, you repeatedly and maliciously refused lawful directives from your direct supervisor, the Deputy Chief Technology Officer, and the General Counsel (Failure/Refusal to Follow Instructions, 6B DCMR § 1607.2(d)(2))."[7] Employee's immediate supervisor was Noble. Noble's supervisor was Lofton. There is no official OCTO policy as to internal email or MS Teams response times.[8]

Agency's Position

Agency avers that between May 30, 2023, and June 1, 2023, while on duty, Employee repeatedly and maliciously refused lawful directives from General Counsel Smith, his direct supervisor Noble, and the Deputy Chief Technology Officer, Lofton.[9] Agency asserts that Smith issued Employee several directives over email and MS Teams, and that Employee's supervisory chain, Lofton and Noble were copied on the email messages.[10] Agency maintains that the instructions Employee received from

[6] Employee's Petition for Appeal at p. 5 (August 14, 2023).
[7] *Id*.
[8] Tr. 111.
[9] Agency's Prehearing Statement, pp 1-6 (October 16, 2023).
[10] Agency's Answer to Petition for Appeal, pp 1-5 (September 13, 2023).

Smith were within the scope of Smith's authority and his status as a Legal Executive does not reduce his authority to issue directives to Employee. Agency avers that even if Smith's status as a Legal Executive did not grant him such authority, both Lofton and Noble had the authority to issue directives to Employee.[11] Agency notes that a Senior Executive attorney and Legal Services play an integral role in disciplinary matters. Agency further avers that Smith has supervisory authority and was speaking on behalf of Employee's supervisors.[12] Agency maintains that Employee failed to comply with the supervisory instructions even when directed to do so by both Noble and Lofton. Agency argues that Employee had an obligation to obey the directives unless doing so would cause Employee harm.[13]

Agency maintains that Employee's refusals to comply were deliberate, repeated and malicious because Employee did not respond to Smith's MS Teams' messages and emails when directed and did not report to OCTO Headquarters when directed. Agency further asserts that Employee questioned Smith's authority, complained about Smith's use of legal language, accused Smith and Lofton of "conspiring," demanded that Lofton show him legislation, and described Smith and Lofton as untrustworthy, unfair, and biased".[14]

Employee's Position

Employee avers that Smith had no authority to issue him directives. Employee argues that 1600.3 of the DPM establishes guidance for those in the Management Supervisory Services when a disciplinary action is taken for cause. Employee further argues that Smith is in Legal Services and not a supervisor serving in a Management Supervisory Service position. Employee avers that a Legal Service attorney can only supervise other attorneys, and disciplinary action taken under Chapter 16 of the DCMR is reserved for Management Supervisory Service.[15] Employee asserts that Smith's authority is limited to assisting OCTO leadership with disciplinary matters. Employee argues that Smith misrepresented his authority by asserting that Employee refused his lawful directives.[16] Employee asserts that while Lofton stated that Smith has the authority to give directives to members of OCTO, he did not cite to any District regulations to substantiate his claim.[17] Employee asserts that he had never heard of or interacted with Smith prior to May 30, 2023.[18]

Employee cites that a topic of discussion was not specified in the emails Smith sent and thus Agency was not transparent regarding the reason for the messages. Employee argues that even though Lofton and Smith refused to state their intentions, the emails were a request for a formal action of discipline. Employee avers that managers are obligated to be fair, supportive and transparent.[19] Employee also avers that Agency waited over four (4) calendar months to request a formal interview for a disciplinary action that occurred in January, and did not provide Employee prior notice or clarity, or a reason for the messages.[20] Employee argues that Smith "set him up" by withholding the law then

[11] Agency's Prehearing Statement, p. 5 (October 16, 2023).
[12] Agency's Answer to Petition for Appeal, pp 6-7 (September 13, 2023).
[13] *Id*. at pp 7-8.
[14] *Id.* at pp. 8-9.
[15] Employee's Prehearing Statement, p 1 (October 17, 2023). *See also* Employee's Closing Argument, pp. 11-12 (February 13, 2023).
[16] Closing Argument, pp. 1-3 (Feb 13, 2025).
[17] Employee's Brief, p. 4 (December 18, 2023).
[18] Employee Prehearing Statement, pp. 1-3 (October 17, 2023)
[19] *Id*. at 2.
[20] Employee's Brief, p 1. (December 18, 2023).

using the Table of Illustrative Actions against him by sending an "unnecessary amount of enumerated harassing emails" during his shift in a short amount of time.[21]

Employee asserts that Agency does not have a policy that requires employees to immediately respond to MS Team chats or emails. Employee avers that his supervisors knew he was overtime exempt and that his tour of duty ended at 2pm.[22] Employee maintains that all the emails sent were toward the end of his shift, which he alleged was unreasonable.[23] Employee specifically asserts that Agency did not consider his tenure, lack of disciplinary history, did not engage in progressive discipline, and ignored his request to have a human resources staff present. Employee contends that Agency did not charge him with insubordination, yet emailed him about insubordination, which is evidence that Agency is "wrongfully stacking charges" against him.[24]

ANALYSIS[25]

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), *an adverse action for cause that results in removal*, 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 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…."[26] Accordingly, disciplinary actions may only be taken for cause.

The instant matter involves Employee's failure to respond to a series of emails and/or MS Teams messages, and failure to report to OCTO headquarters as instructed. From May 30th to June 1, 2023, OCTO's General Counsel Smith contacted Employee via MS Teams and/or email, directing Employee to immediately respond to his messages. The emails progressed to Smith asking Employee to report to

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[21] Employee's Prehearing Statement, p. 3 (October 17, 2023).
[22] *Id*. at pages 2, 5.
[23] Employee's Petition for Appeal, p. 9 (August 14, 2019).
[24] Prehearing Statement, pp.2- 6. (October 17, 2024).
[25] 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").
[26] DPM §1601.7(2019).

OCTO's headquarters. Initially, it is not clear from the messages why Employee is being directed to report to OCTO's headquarters. Agency's Supplemental Brief revealed that Employee was being investigated for a potential disciplinary action that occurred in January 2023.[27] While the prior alleged misconduct is the reason for which Smith contacted Employee, it is not the subject matter of the instant adverse action.

The following are the findings of fact concerning the communication that is the basis for the adverse action in this matter, based on the record:

1. On Tuesday May 30, 2023, at 12:45 pm, Smith sent Employee an MS Teams message which stated "hello [Employee]. I am the OCTO General Counsel. Please immediately acknowledge receipt of this message." At 12:47 pm, Smith sent an email to Employee which stated, "it is my understanding that you are currently on duty. Please immediately respond to my Microsoft Teams chat." The subject line of this email stated Immediate Acknowledgment Required. Importance: high. At 1:02pm, Smith sent an additional email which stated "Mr. [Employee]. 15 minutes have now elapsed since I first reached out to you on teams. If you are, indeed, at work today, I am instructing you a second time to respond immediately." Employee did not respond to Smith's messages on Tuesday May 30, 2023.[28]

2. On Wednesday May 31, 2023, at 12:14 pm, Smith sent an MS Teams message to Employee which stated, "hello Mr. [Employee]. I am the OCTO General Counsel. I am directing you to acknowledge receipt of this message immediately." At 12:16 pm, Smith sent an email that said, "Mr. [Employee], you failed to acknowledge or comply with my directives sent yesterday during your regular tour of duty. I am now directing you to immediately acknowledge receipt of my Teams chat to you. Your supervisory chain is cc'd on this email and yesterday's." Lofton and Noble were both cc'd on the emails.[29]

3. At 1:07 pm on Wednesday, May 31, 2023, Employee responded to Smith's emails for the first time and said, "Sir, I don't know who you are. You're giving me directives and instructions? I didn't know that lawyers were involved in the day-to-day of civil servant. Compliance? Let's talk about it. Do you know how many MS employees @ OCTO over 150K are DC residents? Compliance? You can assume whatever you like regarding your emails thank you." Attached to this email was a picture of the MS Teams app on a cell phone, which Employee indicated would not load to his phone.[30] At 1:09 pm, Smith sent an email that said "report immediately to 200 I Street. This is a directive" At 1:13 pm, Lofton responded and stated" Joe, please report as instructed." Lofton's communication to Employee on Wednesday May 31, 2023, is the first that he received from a member of his supervisory team.[31]

4. At 1:43 pm on May 31, 2023, Employee responded "Sir, how on earth am I supposed to do that? Drive my personal car??? Not Possible." At 1:47 pm, Smith emailed Employee and stated, "you have refused lawful directives for 2 days straight, including this most recent refusal below. These incidences of misconduct are already complete and may already warrant discipline. I am directing you again: report immediately to 200 I St. Your repeated refusals will continue to negatively impact your outcomes under DPM Chapter 16. When you arrive at 200

[27] The alleged misconduct involved the use of two parking spaces and an alleged dispute with a coworker.
[28] Agency's Answer to the Petition for Appeal, Exhibits 2-3 (September 13, 2023)
[29] *Id*.
[30] At the Prehearing Conference, Employee stated that his MS Teams app was not functioning properly.
[31] *Supra* note 27

I St. in the next 15 minutes, check in with the security desk in the front lobby and ask them to call me. Thank you". At 2:20 pm, Smith emailed Employee, "you have again refused a lawful directive. Your malicious insubordination spans 2 working days. Report tomorrow to 200 I Street, SE at 1:00 PM. When you arrive, check in with security at the front desk, request that they call me, and wait in the lobby until I arrive to escort you. I will send a calendar invite shortly after this meeting to block out the time on your calendar."[32]

5. On June 1, 2023, at 8:06 am, Employee emailed his immediate supervisor Noble and asked him on what authority Smith had to manage, discipline, or direct a civil service employee. He noted that Smith's tone was aggressive, and he took exception to being called insubordinate. Employee asked why they could not come to his place of work instead. He stated it was "disturbing" that Lofton provided information about him to a non-human resources Employee regarding a disciplinary matter. He stated that he was willing to meet with Noble and a human resources employee, but not Smith.[33]

6. At 10:49 am on June 1, 2023, Smith emailed Employee, "Dear Mr. [Employee], this is a reminder that you will appear at 200 I St. today at 1:00 PM. We have attempted several times this week to discuss with you an earlier discipline incident, and you have maliciously refused each time to acknowledge receipt of messages, or to appear for interviews. As a result, we are forced to proceed on that prior disciplinary matter with the record available to us. Today is your last opportunity to be interviewed concerning your many incidents of malicious insubordination throughout this week, which constitute a new and separate disciplinary matter. If you fail to appear at 200 I St. today as I have directed you to, we will resolve this new disciplinary matter -the repeated, malicious insubordination -on the record available to us. Though you have repeatedly failed to acknowledge directives from myself and from Deputy CTO Lofton, and you directly refused a directive to appear at 200 I Street yesterday, I am confident you will correct your behavior, obey my directive to appear at 200 I Street. at 1:00 PM, and that you will follow all instructions from building security and I upon your arrival. Thank you for your compliance."

7. At 12:02 pm, on June 1, 2023, Noble forwarded a response he had received from Lofton, which stated that Smith had authority to give directives, and OCTO had to follow them. At 12:05 pm, Noble sent an email only to Employee which stated, "If you have any inclination to attend the meeting at 200 I please go ahead and leave from there in your personal car and head home after the meeting. That would be easy enough."[34] At 12:19 p.m. Employee demanded to see the legislation that gave Smith that authority. He stated that he wanted a human resources representative involved. He further stated that he found Lofton and Smith untrustworthy, unfair, and biased.[35] Employee did not report to OCTO's headquarters as instructed.

8. On July 14, 2023, Employee was terminated under 1607.2(d)(2)-deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions.[36] A first occurrence for this charge is three-day suspension to removal. Employee did not have a prior disciplinary history.

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[32] Agency's Supplemental Brief, Exhibit 13 (November 21, 2023).
[33] *Id*. at Exhibit 2.
[34] *Id*. at Exhibit 13.
[35] Agency's Answer to Petition for Appeal, Exhibit 4 (September 13, 2023).
[36] *Id*. at Exhibit 9 (September 13, 2023).

Analysis

Deliberate or Malicious Refusal to Follow a Proper Supervisory Instruction

OEA has held that a failure/refusal to follow instructions includes a deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions.[37] Thus, section 1607.2(d)(2) includes an element of intent: the evidence must support a finding of *deliberate or malicious refusal to comply* to support this charge (Emphasis added).[38]In this matter, Agency noted in the Final Agency Decision that Employee "repeatedly *maliciously* refused lawful directives…" Malicious is not defined in the DPM thus the common meaning controls. The common definition includes an intent to deliberately cause harm, versus an accidental or negligent act. Accordingly, Agency has the burden to show that Employee's actions rose to this level. While Agency noted that the commonly accepted federal labor law "obey now, grieve later" doctrine requires an Employee to comply with instructions, unless doing so would cause harm, 1607.2(d)(2) still carries an element of intent that applies in spite of this doctrine. Thus, based on its charge, Agency must show that Employee was provided a *proper supervisory instruction* with which he *deliberately* or *maliciously* refused to comply. (Emphasis added).[39]

The undersigned finds that Employee's failure to respond to Smith's messages on May 30th cannot be established as deliberate or malicious. Agency has not shown that Employee actually reviewed the messages and deliberately or maliciously failed to respond or that he had a duty to immediately respond to them. Agency has also not shown that Employee intended to cause harm by not replying to the messages. On May 30, 2023, Smith messaged and/or emailed Employee in very short order at 12:45pm, 12:47pm, and 1:02pm, each time requesting immediate responses.[40] In spite of Smith's requests for immediate responses, both Lofton and Noble testified that OCTO did not have a policy related to email and MS Teams response times. Tr. 111. While Agency included in the record a Customer Service Standards 2018 Quick Guide, this policy outlined how employees should interact with *customers* when using official email and phone accounts.[41] Notably, this guide also notes that a call must be returned in twenty-four hours or the next business day. Employee and Lofton further stated that the general expectation was a response time within twenty-four hours.[42] Thus, Agency has not shown that Employee had a responsibility to check emails and MS Teams messages that were received in short succession and immediately reply to them.

Further, Employee averred that as a warehouse employee he had various duties, including moving boxes and operating a forklift, none of which required him to check emails or MS Teams messages with frequency. Employee also testified that the MS Teams messaging app would not download to his phone that day, which I find credible considering the nature and location of his work in a warehouse. Employee also noted that the messages from Smith were sent toward the end of his tour of duty, which Noble confirmed ended at 2pm daily.[43]

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[37] *Employee v. D.C. Fire and Emergency Medical Services* Department, OEA Matter No. 1601-0056-22 (June 22, 2023).
[38]*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).
[39] This matter only involves failure to follow a proper supervisory instruction, as Agency has not alleged that Employee failed to follow any Agency rules or regulations.
[40] Agency's Answer to the Petition for Appeal, Exhibits 2-3 (September 13, 2023)
[41] Agency's Supplemental Brief, Exhibit 3 (November 21, 2023).
[42] Tr.111-112; Employee's Prehearing Statement, p. 2 (October 17, 2023)
[43] Tr. 32; 134

Lofton also affirmed that May and June were busy months for the warehouse and also acknowledged that Employee was possibly busy at the warehouse.[44] Thus, Agency has not met its burden to show that failure to answer emails and MS Teams messages immediately, within fifteen minutes or before the end of Employee's tour of duty at 2pm was deliberate or malicious. Thus, the messages sent on May 30, 2023, cannot count toward Agency's charge of deliberate or malicious refusal to follow a proper supervisory instruction.

Whether the instruction was a proper supervisory instruction.

The undersigned finds that the instructions issued to Employee from Smith on May 30th and May 31st that did not include direct input or instructions from Lofton or Noble were not proper supervisory instructions, under 6B DCMR § 1607.2(d)(2). Chapter 16 of the DPM defines supervisor as "an individual who supervises another employee or his or her activities." Agency has not presented evidence that Smith supervises Employee's activities or manages him in any manner. When asked how many Employees Smith supervisors, Lofton testified that he did not know that answer.[45] While Lofton stated that Smith was granted the authority to investigate OCTO employees, specifically here for an alleged instance of misconduct, Agency has not shown that this authority to assist in the investigation of disciplinary matters amounts to supervising employee or his activities for purposes of 1607.2(d)(2). Notably, Employee's immediate supervisor Noble testified that Employee probably did not know who Smith was, again suggesting that Smith does not occupy a supervisory role over Employee. Tr. 125. Employee's reply to Smith's email also supports this fact, as Employee stated, "Sir, I don't know who you are. You're giving me directives and instructions? I didn't know that lawyers were involved in the day-to-day of civil servants…"[46]

Further, Lofton testified that concerning disciplinary matters, he asks the General Counsel's office to do a *fact-finding* investigation to get all the data so that he-*Lofton* can weigh in on the matter if needed, suggesting that Lofton retains the supervisory authority in disciplinary matters. Tr. 49. (Emphasis added). This is consistent with Chapter 16 of the DPM, which "establishes a progressive approach for addressing District of Columbia government employee performance and conduct standards…" and notes that the established rules in Chapter 16 are to be "relied upon as a guide for Management Supervisory Services when a disciplinary action is taken for cause." Thus, the expectation is that disciplinary actions for cause under Chapter 16 would be implemented by an employee's managerial team. Accordingly, the undersigned finds that it is a reasonable conclusion that Employee did not initially know or believe that he was receiving a proper supervisory instruction when Smith emailed and messaged him without direct input from Employee's actual supervisors Lofton and Noble.

Agency argues that Employee's supervisors were cc'd on the email, which should have been sufficient notice to Employee that Smith was acting on behalf of Employee's supervisory team. However, "cc" stands for carbon copy, and the common understanding means that the individuals included in the cc are receiving a copy of the message. It is not proof of communication from the individuals cc'd. Further, as noted above, OCTO does not have a policy specific to response times for its Employees, and the general expectation is a response time within twenty-four hours or the next business day. Smith also did not provide any explanation for his instructions to Employee to respond immediately to email and/or MS Teams messages, nor did he iterate that he was acting on *behalf* of Employee's supervisors; he only mentions that Employee's supervisors are cc'd on the emails. Smith

[44] Tr. 71, 108
[45] It is also not apparent from the record whether Smith supervises the activities of employees who are not in the Legal Service.
[46] Agency's Answer to Petition for Appeal, Exhibit 3 (September 13, 2023).

does not even mention the purpose of his instructions to Employee until June 1, 2023, when he emails Employee: "We have attempted several times this week to discuss with you an earlier discipline incident, and you have maliciously refused each time to acknowledge receipt of messages…"[47] Thus, I find that Agency has not shown that Employee had the intent to maliciously or deliberately refuse a proper supervisory instruction on May 30, 2023 or May 31, 2023 prior to Lofton's input to "report as instructed."

Based on this analysis, the undersigned finds that actual misconduct in this matter is Employee's failure to report to OCTO Headquarters on May 31, 2023, and June 1, 2023, for a meeting regarding a disciplinary matter as Lofton and Noble instructed. On May 31st, at 1:09 p.m. Smith sent an email to Employee that stated "report immediately to 200 I Street. This is a directive" At 1:13 pm, Lofton responded and stated" Joe, please report as instructed." I find that this was the first instruction that Employee received from a member of his managerial team and thus the first instance where he could have refused a proper supervisory instruction. At 2:20p.m. after Employee's tour of duty had ended, Smith emailed Employee, "… Report tomorrow to 200 I Street, SE at 1:00 PM..." At 12:02 pm, on June 1, 2023, Noble forwarded a response from Lofton to Employee that stated Smith had authority to give directives, and OCTO had to follow them, which again was an instruction from his supervisor. At 12:05 pm, Noble sent an email only to Employee which stated, "If you have any inclination to attend the meeting… please go ahead and leave from there in your personal car and head home after the meeting. That would be easy enough." Employee failed to report as instructed on May 31st and June 1st.

While Employee ultimately did not comply with Lofton and Noble's instructions to report to OCTO headquarters, Agency still has the burden of showing that Employee's failure to report was deliberate or malicious as Agency alleged. Here, Employee noted that he did not believe Smith had the authority to summon him to a disciplinary meeting but agreed to meet with his immediate supervisor Noble and a human resources employee, suggesting that he was amenable to meeting regarding the past action. Employee further noted that he believed that Smith lacked authority under the DPM to investigate disciplinary matters, suggesting that Employee believed Agency could not compel him to meet in the manner required. Thus, while Agency charged Employee with "repeatedly maliciously refusing lawful directives" the cumulative evidence does not support that he refused these instructions with the requisite intent to show malicious refusal. However, his refusals were deliberate, even if he believed the instructions were unwarranted. Thus, Agency's action was taken for cause only as it relates to Employee's deliberate failure to report to OCTO's headquarters, as instructed.

Appropriateness of Penalty

While the undersigned finds that Employee failed to report for a disciplinary interview as instructed, as discussed above, the question remains whether the penalty for failing to report was appropriate. In making this assessment, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. It is well established that Agency has a primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge. The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded the limits of reasonableness. When assessing the appropriateness of the penalty, OEA is not to substitute its

[47] *Id.*

judgments for that of Agency but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[48]

I find that while the penalty was within the range allowed by law, it was not based on a balanced weighing of the relevant factors and thus exceeded the limits of what is reasonable. In assessing and weighing the *Douglas* factors, [49] and in determining the severity of Employee's conduct overall, Agency relied on mischaracterizations and inflated descriptions of the conduct at issue. Agency also charged Employee with a mixed charge of insubordination and failure to follow instructions and in doing so, relied on outdated references to elements of the now defunct charge of insubordination. Accordingly, Agency considered factors that are not elements of the charge of deliberate or malicious refusal to follow a proper supervisory instruction in assessing its penalty. Agency's improper analysis had the effect of making the conduct at issue more severe and numerous than the record supports. Thus, Agency's weighing of the *Douglas* factors was not a reasonable assessment based on the facts.

In the *Douglas* Factor analysis and in its submissions to this Office, Agency relied repeatedly on the incorrect assertion that Employee refused directives *nine times over three days*. (Emphasis added). [50] In making this assertion, Agency credited each of Employee's failures to respond to Smith's emails and MS Teams messages as an individual instance of misconduct. In Douglas Factor 1, Agency considered the communication on May 30th against Employee in assessing that he "maliciously refused" to comply and specifically noted that "the General Counsel attempted to contact [Employee] on May 30, beginning at 12:45…via both Teams and email, directing [Employee] immediately to acknowledge receipt…and left for the day without acknowledging receipt." The analysis goes on to note that OCTO was left to "resolve *Employee's three day campaign of malicious insubordination*

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[48] *See* Stokes v. District of Columbia, 502 A.2d 1006, 1010 (D.C. 1985). ("When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment.") *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985)).

[49] *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

the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[50] Agency's Answer to Petition for Appeal, Exhibit 7 (September 13, 2023).

…without the benefit of a disciplinary interview." Agency further notes that "[Employee] received *9* directives over *3 days*, and he refused to comply with all of them."[51]

In assessing *Douglas* Factor 2, Agency asserted that "Nine times over three days, [Employee] openly repudiated OCTO's management structure and made it clear that his demonstrated malice renders him incapable of actually receiving meaningful supervision in the workplace". *Douglas* factor 6 states "No other employee under my supervision has refused to comply with *nine* written directives." (Emphasis added). *Douglas* Factor 9 also refers to Employee's "continuing three-day-rebellion." Douglas factor 12 states "No lesser action will deter future conduct." Agency reasoned that "No agency can function where even direct intervention of *two senior executives is insufficient to inspire an employee to acknowledge receipt of electronic communications or to appear for a disciplinary interview*."[52] It is clear from the record that Agency enumerated each email/messenger communication as a separate instance of refusal to follow a proper supervisory instruction, which the undersigned finds is a mischaracterization of the conduct at issue. As noted above, Employee's failure to respond to emails and MS teams messages and emails on May 30th cannot count towards the charge of deliberate or malicious refusal.

Agency also relied on inflated descriptions of Employee's conduct and on factors that are not required in assessing the charge under 1607.2(d)(2). *Douglas* Factor 5 concerning confidence in employee notes that Employee responded with name calling and threats to basic directives and directly refused *lawful directives* from his supervisor and senior-level Agency executives *(*Emphasis added). However, Agency has not made clear when Employee responded with name calling and threats or how this relates to the charge of deliberate or malicious refusal to follow a proper supervisory instruction. While name calling is certainly a punishable offense, it is not an element of the charge of the misconduct that Agency levied against Employee and the specific incidents of this alleged conduct are not clear from the record.[53] This Office has held that an employee must be aware of the charges for which they are penalized in order to appropriately address and appeal those charges.[54] Further obeying *lawful directives* is not an element of 1607.2(d)2) as discussed more below.

In its *Douglas* Factor 5 analysis, Agency reasoned that "[Employee] openly repudiated the entire chain of command at OCTO for three days-and to date appears to remain openly defiant of these *9 written directives*…He has maintained his refusals for three days and counting."[55] Agency reasoned in *Douglas* Factor 8 that "were the public to learn that employees are allowed to maintain *open and complete rebellion from every level of agency leadership*, public confidence both in agency, and in the District government generally, would be grievously injured," which is an overstated account of refusing to attend a disciplinary meeting.[56] Agency has not demonstrated that Employee "openly repudiated the *entire* chain of command at OCTO for three days," and suggesting such is an exaggeration of the facts.

Further, Agency used outdated DPM language by repeatedly referring to Employee's "malicious insubordination", which is outdated terminology for the now defunct charge of

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[51] *Id*.
[52] *Id*.
[53] If Agency believed Employee's use of language was a cause for discipline, it had the opportunity to charge Employee with Conduct Prejudicial to the District Government 1607.2(a)(16), which addresses unacceptable language. Agency failed to do so.
[54] *Rachel George v. D.C. Office of the Attorney General,* OEA Matter No. 1601-0050-16, Opinion and Order (July 16, 2019)
[55] Supra note 50.
[56] *Id*.

insubordination and not elements of 1607.2(d)(2).[57] A charge of insubordination included a refusal to comply with direct orders, accept an assignment or detail, or carry out assigned responsibilities and duties.[58] Notably, Lofton and Noble characterized the demand that Employee report to headquarters as reporting to another work location.[59] However, the emails were a request for a factfinding interview concerning an alleged issue of misconduct. Further, there is no requirement in 1607.2(d)(2) that Employee comply with "direct orders," or "lawful directives" which are vague, and his conduct should not be classified as insubordination. Accordingly, references to elements of insubordination in assessing a charge of deliberate or malicious refusal to follow a proper supervisory instruction are misplaced.

The effects of Agency's flawed *Douglas* Factor considerations are evident even from its analysis in *Douglas* Factor 7, wherein, Agency reasoned that "while the first occurrence of a single refusal to obey a single directive from a single supervisor might warrant suspension, here, removal is the only appropriate remedy. [Employee] openly repudiated the entire chain of command at OCTO for three days." In the Final Agency Decision, Agency reasoned that Employee's potential for rehabilitation was carefully considered. Agency reasoned that even though Employee's "fourteen years of service with the District, with good performance ratings, and without any corrective or adverse actions tend to weight against removal" Employee could not be rehabilitated. Agency reasoned that it is "vitally important for all employees to respect the leadership chain, and the District cannot afford to countenance employee defiance, especially not defiance ongoing for days at a time. The evidence shows that you refused to acknowledge or obey directives issued to you by your leadership nine times over the course of three days."[60] In its analysis, Agency clearly expresses that Employee's refusal nine times over three days significantly impacted Agency's determination of its final penalty.

Based on Agency's flawed analysis in assessing the *Douglas* factors, the undersigned finds that Agency did not engage in a responsible balancing of the factors it considered, and in doing so clearly exceeded the limits of reasonableness.

ORDER

Based on the foregoing, it is hereby **ORDERED** THAT:

1. Agency's action of terminating Employee is **REVERSED.**
2. Agency shall reimburse Employee all backpay, and benefits lost as a result of the termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Natiya Curtis
Natiya Curtis Esq.
Administrative Judge

[57] Agency's Answer to Petition for Appeal, Exhibit 9 (September 13, 2023); Agency's Prehearing Statement, p. 3 (October 16, 2023);
[58] DPM § 1619.1(6)(d)(2012).
[59] Tr. 76-77
[60] Agency's Answer to Petition for Appeal, Exhibit 9 (September 13, 2023).