THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0037-21
	)	
	)	Date of Issuance: January 4, 2024
D.C. DEPARTMENT	)	
OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as an Engineering Technician ("ET") with the Department of Transportation's ("Agency") Public Space Regulation Division ("PSRD"). On May 10, 2021, Agency issued an Advance Written Notice of Proposed Adverse Suspension. The ten-day suspension notice charged Employee with "failure or refusal to follow instructions: negligence, including the failure to comply with rules, regulations, written procedures, or proper supervisory instructions."[2] He was also charged with "conduct prejudicial to the government: use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Charge No. 1 was taken in accordance with Chapter 16, Sections 1605.4 and 1607.2(d)(1) of the District Personnel Manual ("DPM). This charge contained four specifications of misconduct.

conduct, quarreling; creating a disturbance or disruption; or inappropriate horseplay."[3] The charges stemmed from Employee's alleged failure to follow written supervisory instructions as well as his failure to meet Agency's policies related to the approval of several public space permit applications in the District. Additionally, the charges were predicated upon Employee's use of unprofessional email responses when communicating with both his supervisor and Agency customers who sought clarification on pending permit applications. On July 9, 2021, Agency issued its Notice of Final Decision, sustaining both charges. Employee served his suspension from July 12, 2021, through July 26, 2021.[4]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 16, 2021. He argued that Agency created a hostile work environment and engaged in harassment, discrimination, and retaliation. Employee believed that Agency erred by failing to have the proposed suspension reviewed by an impartial third party or a hearing officer from the Department of Human Resources. Additionally, he contended that his suspension was unjustifiable in light of Agency's actions. As a result, Employee requested that the record of the suspension be removed from his personnel file; repayment of back pay and benefits; and a formal apology from Agency for its unjust actions.[5]

Agency filed its answer on December 17, 2021.[6] In response, it contended that Employee's negligent customer service, lack of accountability, deficient goal attainment, and failure to meet the responsiveness standards to clients, supported its suspension action. Agency explained that Employee's position as an ET required him to process multiple permit applications. In support

[3] Charge No. 2 was taken pursuant to DPM §1605.4(a) and DPM §1607.2(a)(16).
[4] *Agency Answer to Petition for Appeal*, Exhibit 24 (December 17, 2021).
[5] *Petition for Appeal* (July 16, 2021).
[6] On December 1, 2021, Agency requested an extension of time to file its response after indicating that its counsel was unaware of Employee's appeal.

thereof, it highlighted instances wherein Employee failed to process or adjust permits for clients in a timely manner (or at all), including permits for the 2021 Presidential Inauguration. According to Agency, Employee's conduct constituted a refusal to follow instructions, negligence, and conduct prejudicial to the District. It further posited that in December of 2020, Employee engaged in quarrelsome, unprofessional, and unacceptable communications with his supervisor, Tiffany Tenbrook ("Tenbrook") and a customer, Kim Mitchell ("Mitchell"), of CDKM Consulting, LLC. Lastly, Agency asserted that it performed a thorough assessment of the relevant *Douglas* factors.[7] Therefore, it opined that a ten-day suspension was reasonable under the circumstances and requested that the adverse action be sustained.[8]

An OEA Administrative Judge ("AJ") was assigned to the matter in March of 2022. On June 9, 2022, the AJ held a prehearing conference to assess the parties' arguments.[9] During the conference, it was determined that the issues presented warranted an evidentiary hearing. Therefore, a hearing was held on January 11, 2023, wherein the parties presented documentary

[7] *Douglas v. Veterans Administration*, 5 M.S.P.B. 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 it's 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.
[8] *Agency Answer to Petition for Appeal* (December 17, 2021).
[9] *Prehearing Conference Order* (April 14, 2022).

and testimonial evidence in support of their positions.[10] Employee and Agency submitted closing statements thereafter.[11]

The AJ issued an Initial Decision on September 6, 2023. With respect to Charge No. 1, the AJ held that under DPM §§ 1607.2(d)(1) and 1605.4(d), a charge of failure to follow instructions includes the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. Regarding the specification of "Negligent Customer Service and Failure to Meet Department Responsiveness," the AJ held that Agency met its burden of proof. She concluded that Employee failed to provide adequate customer service to contractor who expressed his frustration when he attempted to contact Employee about a permit application that was locked due to nonpayment. The AJ noted that it was unnecessary to determine whether Employee's January 11, 2021, communications to the contractor conformed to Agency's policy for returning calls and emails since Employee failed to respond to the customer and did not offer a compelling reason for failing to do so.[12] She also concluded that Employee failed to comply with directives from his supervisor, Tenbrook.[13]

Concerning the specification of "Negligent Customer Service, Lack of Accountability, and Deficient Goal Attainment," the AJ explained that Employee failed to process permits related to the 2021 Presidential Inauguration after being assigned to the Presidential Inauguration Committee ("PIC") by memorandum dated August 10, 2020. According to the AJ, Employee's failure to

[10] *Hearing Order* (December 12, 2022).
[11] *See Order Requesting Closing Arguments* (March 6, 2023); *Agency's Written Closing Argument* (April 25, 2023); and *Employee's Closing Arguments* (May 5, 2023).
[12] Employee's Annual Performance Evaluation required him to return voicemails and emails within forty-eight hours or two business days. Paul communicated with Employee via email on January 11, 2021, requesting a change to a permit date.
[13] *Initial Decision* (September 6, 2023). On January 7, 2021, Employee was directed by Tenbrook to respond to a customer no later than 4:45 p.m. regarding a permit application but failed to do so. Tenbrook then directed Employee to respond to a different customer on January 8, 2021. Employee failed to contact the customer and offered no explanation in support of his inaction.

process the applications resulted in the permits being escalated to Public Space Manager, Elliot Garrett ("Garrett"), on January 8, 2021, who processed the applications without issue.[14] She assessed that Employee did not contradict Agency's argument that the applications were not complicated and stated that Employee lacked a reasonable explanation as to why he did not respond to either of Program Support Supervisor Courtney Williams' ("Williams")[15] January 8, 2021, directives requesting updates on the status of the assigned applications. The AJ agreed that the Covid-19 Public Health Emergency, as well as the January 6, 2021, insurrection, could have negatively impacted Employee's ability to process the applications. However, she noted that even if the permit applications were assigned on December 30, 2021, as alleged by Employee, he still had at least three days to complete the priority assignments prior to January 6, 2021.[16] The AJ also disagreed with Employee's argument that it was improper for Agency to indicate that he failed to attain assigned goals related to the 2021 Inauguration since those goals were not included in his performance evaluation plan as required by the DPM. She reasoned that the position description for an ET required Employee to process permitting applications, including those for the 2021 inauguration, and to interact with individuals in the public and private sectors during that process.[17]

The AJ went on to discuss Employee's contention that he previously submitted supporting evidence of his challenges to Agency's charges by email after filing a Petition for Appeal with OEA. However, she deduced that no such documentation existed; neither Employee nor his representative requested additional time to obtain the information via discovery or subpoena; and Employee had seventeen months to present the purported evidence to either the Deciding Official

[14] The PIC included the Joint Task Force ("JTF"). Employee's responsibility on the JTF was to process applications filed by or associated with the PIC. Employee's duties while on the PIC were identical to his regular duties, but PIC assignments took priority.
[15] Williams served as the Citywide Program Support Supervisor during the relevant time period and was Employee's supervisor until 2014.
[16] *Initial Decision* (September 6, 2023).
[17] *Id*.

or to OEA. Additionally, the AJ found Employee's argument that the email threads presented by Agency lacked authenticity and completeness to be without merit. She opined that Employee had the opportunity to investigate the accuracy of the emails during the discovery process, but if he did so, those efforts did not result in any evidence to support his claims. The AJ also found Employee's assertion that he responded to emails by telephone to be unpersuasive. She explained that while a record of the purported calls would not appear in the Transportation Online Permitting System ("TOPS")[18] program, Employee could have introduced evidence of their existence but did not.

Regarding the third specification, "Negligence in Customer Service and Failure to Follow Supervisory Instructions," the AJ concluded that Employee failed to update a permit for a customer from City Permit[19] after being directed to do so by his supervisor, which almost caused the application to lapse. As it related to the last specification, "Failure to Follow Supervisory Instruction, Negligent Customer Service, and Lack of Accountability," she held that Employee failed to provide adequate customer service to two separate contractors on December 17, 2020, and January 8, 2021, respectively. As a result, the AJ concluded that Agency met its burden of proof with respect to Charge No. 1 because Employee failed to respond to directives from his supervisors regarding PIC applications; failed to respond to inquiries from customers on pending applications; and offered no compelling explanation as to why he failed to process the PIC applications. Therefore, she held that Employee's conduct violated DPM §§ 1607.2(d)(1) and 1605.4(d).[20]

The AJ also concluded that Charge No. 2 – conduct prejudicial to the District – was taken for cause. She explained that the language Employee used in emails to customer Mitchell was

[18] Agency utilizes TOPS to process permit applications.
[19] City Permit specializes in consulting for permitting, surety, and performance bonds. The company was Agency's client during the relevant time period.
[20] *Initial Decision* at 34.

inappropriate, unprofessional, and did not reflect well on Agency or the District government. According to the AJ, Employee knew that his position as an ET required him to maintain professional and productive relationships with customers. However, the record demonstrated that instead of communicating to Mitchell what errors were made on the pending permit application in an amicable manner, Employee chose to add the names of individuals who retained Mitchell's services to emails in an effort to chastise her in a negative and demeaning manner. The AJ expounded that Employee treated his supervisor, Tenbrook, with disrespect; ignored her supervisory instructions; and created a negative work environment. She took note that Employee received counseling for his disrespectful conduct towards Tenbrook. Further, the AJ highlighted that Agency produced evidence that it implored other methods to work with Employee to improve his performance issues. As a result, she concluded that Employee's misconduct fit within the parameters of DPM §1605.4(a) and DPM §1607.2(a)(16).[21]

Regarding witness veracity, the AJ concluded that Agency's witnesses provided credible and reliable testimony. Conversely, while the AJ found Employee to be knowledgeable and articulate, she nonetheless deemed his testimony to be counterfactual because he had no supporting documentary or testimonial evidence to support his assertions. She noted that Employee was afforded the time and opportunity to obtain supporting documentation after claiming that it existed but failed to do so. Because neither Employee nor his representative requested assistance in obtaining the alleged supporting documentation, the AJ surmised that the evidence likely did not exist.[22]

The AJ further opined that there was no evidence in the record to support Employee's claims of retaliation or bias other than his bare assertions. She believed that the penalty of a ten-

[21] *Id*. at 35.
[22] *Id*. at 30.

day suspension was both permissible and appropriate based on the Table of Illustrative Actions, an assessment of the relevant *Douglas* factors, as well as the holding in *Stokes v. District of Columbia*, 502 A. 2d 1006 (D.C. 1985).[23] As a result, the AJ held that Employee's suspension was taken in accordance with all applicable regulations.[24]

Employee filed a Petition for Review with the OEA Board on October 11, 2023. He first argues that new and material evidence is now available that, despite due diligence, was not available when the record closed. Specifically, Employee proffers that he has been able to locate information relative to the TOPS program to support his position that the permits relied upon by Agency were not issued or assigned to him in December of 2020, as the AJ was inclined to believe. According to Employee, the new evidence establishes that the final versions of the permit applications were not received by him until January 15, 2021, which means that he did not have weeks in which to complete the required tasks. Employee opines that the AJ overlooked integral evidence to support her rulings; provided undue weight to the testimony of Agency's witnesses; and failed to sufficiently articulate with specificity what grounds were used to determine that Employee was not credible. Additionally, he contends that neither Charge No. 1, nor Charge No. 2 are supported by the record. As a result, Employee asks that the Board grant his Petition for Review.[25]

In accordance with OEA Rule 637.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides: The petition for review

[23] In *Stokes*, the Court of Appeals held that OEA must determine whether the penalty imposed was within the range allowed by law, regulation, and any Table of Illustrative Actions as prescribed in the DPM; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency.
[24] *Initial Decision* at 38.
[25] *Petition for Review* (October 11, 2023).

shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal

Additionally, the D.C. Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[26] After reviewing the record, this Board believes that the AJ's assessment of this matter was based on substantial evidence.

Discussion

Employee first argues that new and material evidence is available that, despite due diligence, was not available when the record was closed. He states that during the evidentiary hearing, the parties discussed reopening the record to receive information pertinent to Agency's permit processing application, TOPS. Specifically, Employee presents that he has been able to obtain the information discussed during the evidentiary hearing that proves that the permits in question were not issued or resubmitted to him on December 18, 2020, as the AJ determined. According to Employee, the newly attained information enables to the reader to see the date on which the permit application was either assigned or released to him, which evidences that he did

[26] Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

not receive the final version of the permit applications in question until January 15, 2021. As such, Employee submits that contrary to the AJ's findings, he did not have weeks in which to complete the required permit approvals.

Employee has failed to expound upon why he did not produce these documents prior to filing a Petition for Review with the Board and has not explained if this evidence was unavailable despite due diligence in locating such. As the AJ explained explicitly, Employee had representation throughout course of this appeal, and he was afforded several opportunities to obtain supporting documents. We, therefore, agree that it was reasonable to assume that either Employee or his representative would have followed the Deciding Official's advice to make every effort to obtain the purported evidence during the proceedings before Agency, or while the record was being developed before OEA. Further, Employee offers no reasonable explanation of his efforts to obtain the documentation that was purportedly unavailable before the record closed. Assuming *arguendo* that this Board were to reopen the record for the submission of Employee's newly submitted evidence, the outcome of this appeal would remain unchanged. As discussed herein, Charge No. 2 serves as an independent basis for the imposition of a ten-day suspension. Therefore, a dismissal or reversal of Charge No. 1 would not alter the outcome of the imposed penalty. Accordingly, we find no basis for granting Employee's petition based on OEA Rule 637.3(a).

Charge No. 1

Pursuant to OEA Rules 631.1 and 631.2, 6-B DCMR Ch. 600 (December 27, 2021), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Agency's Charge No. 1 is based on Employee's "Failure or refusal to follow instructions: Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions, pursuant to DPM §1605.4(d)

and DPM § 1607.2(d)(1)." In its first specification titled "Negligent Customer Service and Failure to meet Department Responsiveness Standard," Agency asserted the following:

> On January 11, 2021 at 11:44 AM…[Contractor] Leon Paul…sent you an email to inform you that he received the approval of the construction permit…[and] requested to have the [end] date [changed]… [Y]ou failed to [respond]…As a result of your lack of response, Mr. Paul sent another email on January 26… at 10:31 AM, requesting to have the [end] date adjusted…You immediately replied …at 10:34 AM and informed [him] that the application had [been] locked due to nonpayment and [that] a new application [was] required…Mr. Paul followed up with an email expressing his frustration because [you did not respond to] his two attempts to contact you with requests to adjust the dates…Your lack of response and poor customer service resulted in the application being timed-out and required [its] resubmittal. Due to your repeated failure to respond to Mr. Paul's requests…I had to apologize on behalf of [Agency] for your lack of response and lack of customer service and waived the application fee.[27]

During the hearing, Employee's supervisor, Tenbrook, testified that Agency's policy requires its employees to respond to clients within twenty-four hours or the next business day. When asked how long it should have taken Employee to complete a requested permit change, Tenbrook stated that "if a client requests a change to a permit…you know…if he didn't have any objections to the dates or anything in the application, roughly…20 minutes at most."[28] Conversely, Employee contends that he followed all procedures for handling the process of approving permit applications but did not notate the conversation that he had with Paul in TOPS. Employees' own testimony suggested that the emails presented and relied upon by Agency were inaccurate and/or incomplete.

However, the record in this matter supports a finding that Employee failed to record a formal and detailed denial of the client's request to revise the permit start date in TOPS. Employee waited more than two weeks to respond to an inquiry from a client. This conduct is particularly

[27] *Advance Written Notice of Proposed Adverse Suspension*.
[28] *Evidentiary Hearing Transcript*, pp. 52-53 (January 11, 2023).

problematic given the time-sensitive nature of processing and approving permits to enable the efficient functioning of government operations. Further, on several occasions, the AJ encouraged and afforded Employee the opportunity to locate and produce the purported supporting evidence to refute Agency's allegations. His inability to adhere to Agency's responsiveness standards constitutes his careless failure to comply with written instructions and Agency policy. Therefore, we find no credible basis for overturning the AJ's ruling on this specification.

Agency's second specification contained within Charge No. 1 is titled "Negligent Customer Service, Lack of Accountability and Deficient Goal Attainment." This Board finds that the AJ's conclusions with respect to this specification are supported by the record. As Agency avers, Employee's failure to process several permits related to the 2021 Presidential Inauguration placed the department in jeopardy of failing to properly manage public space in the District through effective permitting for the inauguration and associated events. As a member of the JTF, Employee was responsible for processing priority permit applications in TOPS within fifteen business days of the assignment of the application.[29] The record reflects that on December 18, 2020, Citywide Program Manager, Williams, emailed Employee with the subject line "Presidential Inauguration: Assets in Public Space."[30] The email listed ten permit applications relevant to the inauguration. According to Williams, Employee would have known that it was his responsibility to process the permits listed in the email.[31] On January 8, 2021, at 10:42 a.m., Employee was again instructed by Williams to approve the ten permit applications by the close of business that day or the following Monday, at the latest.[32] Williams reiterated that PRSD applications must be completed within

[29] *Evidentiary Hearing Transcript,* p. 58 (January 11, 2023).
[30] *Id., Agency Exhibit A18*. The email included Johnny Brown from the Secret Service Administration, Tanya Mitchell from Homeland Security, James Grand from the Department of Transportation, and James Strange, who works with District-wide transportation issues.
[31] *Evidentiary Hearing Transcript*, p. 181 (January 11, 2023).
[32] *Id.*, Agency Exhibit A18.

fifteen days.[33] However, Employee failed to process the applications that were assigned to him. Williams did qualify that some of the applications may have been tricky to process but noted that he expected Employee to begin working on the permits as soon as they were assigned to him. Employee's failure to act resulted in the permits sitting in his TOPS queue for approximately twenty days, and eventually Garett had to complete Employee's tasks on January 11, 2021, with no issue.[34]

During the evidentiary hearing, Employee disputed Agency's claim that the permits were assigned to him on December 18, 2020, stating that he did not receive the assignments until December 30, 2020. The AJ found Employee's testimony to be unpersuasive and reasoned that even if the permits were assigned on December 30, 2021, as alleged by Employee, he still had at least three days to complete the priority applications prior to the January 6, 2021, insurrection.[35] Employee presented no evidence during the evidentiary hearing that he completed the PIC applications. He now argues before the Board that he did not receive the final version of the permits referenced by Agency in its advance notice until January 15, 2021, which demonstrates that he did not have weeks in which to process the required permits.

Even if this Board were to consider Employee's newly produced screenshots from TOPS, a review of the record reflects that Employee was aware that it was his responsibility to process the assigned applications as early as December 18, 2020.[36] Employee was again instructed on

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[33] *Evidentiary Hearing Transcript*, p. 30, 59, and 189 (January 11, 2023).

[34] Garrett also testified that Employee would have received the permit assignments in the TOPS system as soon as they were issued and that when a user enters the TOPS program, it shows both the date of submission and the assignment. *Id*. at 268.

[35] Employee testified that the January 6, 2021, insurrection, as well as the Covid-19 Public Health Emergency negatively impacted his ability to complete the applications because of security concerns. However, the AJ noted that Garrett was able to process the permits at home on January 8, 2021, without issue. *See Initial Decision* at p. 32.

[36] *See Petition for Review,* Exhibit 2. Employee's newly submitted evidence includes screenshots from the TOPS program. In an effort to prove that the permits in question were not actually assigned in final form to him until January 15, 2021, Employee points to the "Status Change History" section which contains areas for "Status Date," "Update Date," and "Updated By." For example, the history for Permit No. 10831761, which was identified as one of the

January 8, 2021, by Williams, to approve the same permit applications via email. Thus, it is axiomatic that Employee was aware that the permits were assigned to him. His failure to process the permits is inconsistent with his duties as an ET.[37] Employee's testimony reflects that he took no accountability for failing to process the PIC applications. Furthermore, Employee's failure to act could have adversely affected the public space management for the 2021 Presidential Inauguration. Based on the foregoing, we find that this specification is based on substantial evidence.

There is also substantial evidence in the record to support the third specification contained within Charge No. 1 of Agency's advance notice, entitled "Negligence in Customer Service and Failure to Follow Supervisory Instructions." Agency charges that on January 7, 2021, at 9:09 a.m., City Permit Project Manager, Luz Acosta, emailed Employee to request changes on a pending permit. City Permit members contacted Employee a total of three times within twenty-four hours

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permits Agency relied on in its suspension action, reflects a "Last Update Date" of January 15, 2021, but the status change history in TOPS reflects that Employee resubmitted the same permit on December 8, 2020. In the notes section of the permit, Employee indicated that a new application was required because the applicant failed to identify the correct address in their application. Permit No. 10825540, also relied upon by Agency, reflects that Employee was assigned the application on January 6, 2021; however, there are notes for the same permit, entered by Employee, dating back to October 30, 2020. This Board is not persuaded that Employee's newly produced documents would alter the disposition of this appeal, and he offers no explanation as to why this evidence could not be produced prior to the closing of the record.

[37] The Engineering Technician is responsible for "a variety of general technical engineering assignments and projects pertinent to the design or operation of systems, structures, processes, and equipment. The ET provides "contractors and other agencies with technical guidance and assistance regarding related engineering issues and problems which may be difficult and/or complex." The position description provides that the ET must have "[c]omprehensive knowledge of and extensive experience in the application of a wide range of technical engineering concepts…techniques… practices [and] requirements… as required to provide comprehensive management advisory and related services on substantive matters." The ET is required to interact and communicate with individuals in both the public and private sectors in order to "explain polices…resolve service requests…and/or other requests for information or assistance." The ET works under the "general supervision of a supervisor who makes assignments in terms of overall employee parameters related to assignment planning, scope of objectives, deadlines, and priorities. Within established parameters, the incumbent determines the most appropriate approach to complete assignments…interprets regulations or policy frequently on own initiative in terms of established objectives; coordinates the work with others appropriately; and resolves most of the conflicts that arise... The supervisor is kept abreast of progress and of potentially controversial matters or policy questions. Completed work is reviewed for adequacy of overall approach and technical soundness, feasibility…effectiveness of recommendations…and adherence to requirements. *See Initial Decision,* p. 3 (September 6, 2023)

because the permit was due to lapse the next day; however, Employee only responded to the first email inquiry. This resulted in the matter being escalated to his supervisor, Tenbrook, who instructed Employee to update the permit no later than 4:45 p.m. on January 8, 2021, to prevent it from moving into "not paid" status. Tenbrook testified that the task should have taken Employee no longer than fifteen minutes, but she had to intervene on Employee's behalf and update the permit to prevent a lapse.[38] Employee denied Agency's claim, asserting that the email chains introduced into evidence were incomplete but offered no evidence to the contrary or to prove that he spoke with the client from City Permit by telephone.[39] This is yet another example of Employee's persistent failure to follow a lawful supervisory instruction, which constitutes a violation of DPM Sections 1605.4 and 1607.2(d)(1). Employee's position required him to communicate with customers in a timely and efficient manner, and failing to act to prevent an avoidable lapse of a permit application was unreasonable under the circumstances. Consequently, Agency established cause to impose a suspension based on this specification.

Agency's last specification, "Failure to Follow Supervisory Instruction, Negligent Customer Service and Lack of Accountability," is also supported by the record. The advance notice detailed two instances wherein Employee was alleged to have neglected his duties as an ET. The first instance occurred on January 8, 2021, when Tenbrook instructed Employee to follow up with a contractor by a certain time on that date regarding the process for obtaining proper signage for a permit. Tenbrook testified that Employee did not respond to her until after the prescribed deadline, only stating "Good day, Stephanie Coffey and I will speak on this matter."[40] According to Tenbrook, when following up on this issue approximately fourteen days after Employee was given

[38] *Evidentiary Hearing Transcript*, p. 63 (January 11, 2023).
[39] *Id*., p. 326-327
[40] *Id*., at 364.

a directive, the client indicated that he never heard from him about obtaining the proper signage.[41] Additionally, Agency notated that on December 17, 2021, a different contractor contacted Tenbrook to request an update on a permit application. The contractor communicated to Tenbrook that he was unable to get in contact with Employee. Tenbrook testified that she directed Employee to respond to the contractor by the close of business on December 17, 2021, but he did not.[42] Employee conceded that he was directed by Tenbrook to respond to the contractor. Agency's documentation of his negligent customer service in this instance reflects a continued pattern of his failure to follow supervisory instructions and lack of accountability when responding to customer inquiries and complaints.

This Board agrees with the AJ's assessment of the specifications contained within Charge No. 1. Employee failed to follow directives from his supervisor, failed to respond to customer complaints, and failed to process permits, which are all required as an ET. As Agency correctly points out, Employee's instances of misconduct are linked to his competency deficiencies in the areas identified on his performance evaluation.[43] Employee's defense relies heavily on questioning the completeness and authenticity of the emails presented by Agency, but he does not offer a rational basis for repeatedly disregarding instructions from his supervisors or for failing to adequately respond to customer complaints. His conduct falls short of what is reasonably expected

[41] *Id*., p. 65-68.
[42] *Id*. pp. 72-74.
[43]Employee's Annual Performance Document for the period October 1, 2020, through September 30, 2021, was last revised by Tenbrook in November of 2020. The "Core Competencies" and "Smart Goals" for which Employee was evaluated included, in pertinent part the following: Core Competency 1: Communication: Presents ideas and information verbally and in writing in a clear, concise manner. Shares information with others on a timely basis; Core Competency 2: Customer Service: Partners with internal and external customers to provide quality service. Demonstrates consistent and continual adherence to all prescribed District customer service goals and standards. Treats all customers in a professional manner; Core Competency 4: Accountability: Demonstrates personal responsibility for ensuring the completion of work assignments. The section entitled "Use of TOPS notes and Communications with Customers" states that Employee will use "internal notes" to explain in detail how permit conflicts are resolved, including conversations with customers, as well as "notes to applicant" regarding conflicts and/or required revisions. The document requires Employee to return voicemail messages and emails within forty-eight hours or two business days.

of an employee in his position. The AJ provided a logical and thorough evaluation of her reasoning for finding that Charge No. 1 was taken for cause, and her conclusions of law flow rationally from the facts presented. Based on a review of the record, we find that the AJ's rulings are based on substantial evidence.

Charge No. 2

Employee was also charged with "Conduct prejudicial to the District of Columbia government: Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct, quarreling; creating a disturbance or disruption; or inappropriate horseplay, pursuant to DPM §1605.4(a) and DPM §1607.2(a)(16)." In its specification, Agency discussed a December 9, 2020, email complaint from Kim Mitchell, who worked as a permits manager for CDKM Consulting, LLC. After receiving the complaint, Tenbrook forwarded the email to Employee at 4:07 p.m. and directed him to explain the action taken on the permit. During the course of the email exchanges with Tenbrook, Employee stated the following in pertinent part:

> 4:12 PM: "Called you didn't answer. Do you contact the customers when they input false information??? Don't send me directives if you're not checking all the information needed…."
>
> 4:17 PM: "Can you explain why you approve applications with false information provided? Just because I do my job thoroughly do not attempt to chastise and single me out. You are showing you are targeting and have an attitude towards me. You dropped the ball on our evaluations copying and pasting information and not providing an accurate review. When you were away, we had less problems."[44]

Tenbrook responded to Employee's email, stating that her directive regarding Mitchell still stood and informed Employee that he had until the next business day to provide an answer. He responded on December 9, 2020, at 4:17 PM, stating "I do my job do yours." Employee continued to

[44] *Advance Written Notice of Proposed Adverse Suspension* (May 10, 2021).

challenge Tenbrook's directives after she informed him that his emails were unprofessional. On that same day, he redirected his dismay towards the CDKM client, stating "Kim [Mitchell], You send managers emails before contacting me on my own permit application." Employee then sent another email to Mitchell which included Stefan Kronenberg and Jaime Weinbaum of Mid-City Financial Group. The email also copied Supervisory Civil Engineers Hamza Masud and Levon Petrosian, as well as Associate Director Matthew Marcou. Employee elicited support from the aforementioned clients and managers and insinuated that Mitchell was "confused."[45] During these communications, Mitchell also informed Employee that his misfeasance in processing the permit application was a huge liability to her clients, and she requested management oversight and review.[46]

Employee avers that the AJ's findings with respect to Charge No. 2 are unsupported by the record. He further denies Agency's claim that the tone in the emails to Tenbrook and Mitchell was inappropriate, citing to the holding in *Employee v. D.C. Department of Corrections*, OEA Matter No. 1601-0013-21 (January 7, 2022), in which this Office held that "[n]ot everyone is comfortable with everyone else's tone, but that does not make the individual's tone offensive." This Board certainly acknowledges that the perception of an employee's tone, especially in written communication, can be subject to an array of interpretation. However, it is evident from the record that Agency made specific assessments and inferences based on Employee's communications to both Tenbrook and Mitchell. The implications of Employee's emails do not comport with a professional or respectable disposition in the execution of his duties. Employee is responsible for maintaining productive relationships with Agency's clients, and he is expected to engage in amenable communications with his supervisor. Nonetheless, the words and tone of Employee's

[45] *Agency Answer*, Exhibit 11.
[46] *Id*.

emails to Tenbrook are consistent with her testimony that he treated her with disrespect, ignored her instructions, and created a negative work environment.

As explained below, the Board must "give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing."[47] The AJ made credibility determinations and found that Agency proved that Employee's misconduct was unprofessional and prejudicial to the overall operations of the department. The record in this case supports a finding that Employee's actions violated DPM §1605.4(a) and DPM §1607.2(a)(16).[48] A charge of conduct prejudicial to the District of Columbia government serves as an independent basis for the imposition of a suspension, and there is no indication that the AJ abused her discretion in sustaining this charge. Therefore, we will leave her ruling undisturbed.

Witness Credibility

Employee submits that each of the AJ's credibility determinations must be evaluated. The D.C. Court of Appeals in *Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA AJ was the fact finder in this matter. As this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[49] In her analysis, the AJ assessed

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[47] *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

[48] *See Grubb v. Department of Interior*, No. DE-1221-01-0025-W-2, 2004 WL 1416303 (M.S.P.B. June 22, 2004) (holding that the charged employee used language that was insulting and name-calling in nature. In addition, the appellant's gratuitous attacks their supervisor's competence and commitment to the agency's mission were deemed by the Board to be unprofessional as charged); *See also Agboke, Adetayo v. Departnent of Jusice.*, No. SF-0752-19-0574-I-1, 2019 WL 6051003 (Nov. 15, 2019), in which the employee was charged with inappropriate conduct and failure to follow instructions after sending numerous emails concerning work-related disputes. The Merit Systems Protection Board ("M.S.P.B.") held that the tone and content of the employee's email communications to both their supervisor and an associate for whom they provided support were unprofessional, rude, and constituted inappropriate conduct.

[49] *Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012);

Agency's witnesses to be credible and indicated that she could rely on their evidence in reaching a decision. She characterized Agency's witnesses as being unrehearsed and noted that they provided testimony that was consistent with the documentary evidence presented during the evidentiary hearing. On the contrary, while the AJ believed that Employee was knowledgeable and articulate, she nonetheless opined that his testimony was not credible. The AJ articulated her reasons for finding such, explaining that during the hearing, Employee offered a myriad of reasons as to why Agency's assertions were untrue but offered no evidence to support his position. The AJ was in the best position to observe and analyze the credibility of each witness, and she made specific determinations as to witness demeanor and veracity. Consequently, we find no basis for challenging her rulings on such.

Penalty Within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

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).[50] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. The *Stokes* court reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency,

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Henderson v. Department of Consumer and Regulatory Affairs, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601- 0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[50] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601- 0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No.1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[51]

In this case, Employee was charged with violation of DPM §1605.4(d) and DPM § 1607.2(d)(1). Under the Table of Illustrative Actions, a first offense for this charge carries a penalty of counseling to removal. A charge under DPM §1605.4(a) and DPM §1607.2(a)(16) carries a potential penalty of counseling to a fifteen-day suspension. Agency's May 10, 2021, Advance Written Notice of Proposed Adverse Suspension included a thorough assessment of what it determined to be the relevant *Douglas* factors. This Board finds that Agency conducted a logical and reasonable analysis of these factors, and there is no evidence in the record to support a finding that it abused its managerial discretion in selecting the penalty. Accordingly, a ten-day suspension for either Charge No. 1 or Charge No. 2 was permissible under the relevant regulations. Therefore, this Board must uphold Agency's selection of the penalty.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision is supported by substantial evidence. Both Charge No. 1 and Charge No. 2 against Employee were taken for cause. The AJ did not abuse her discretion in making credibility determinations. We further find that Employee's basis for requesting that the record be reopened and remanded to be unpersuasive. Finally, a ten-day suspension was an appropriate penalty under the circumstances. Therefore, we must deny Employee's Petition for Review.

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[51] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

ORDER

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

FOR THE BOARD:

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Clarence Labor, Jr., Chair

_____
Peter Rosenstein

_____
Dionna Maria Lewis

_____
Arrington L. Dixon

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