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

In the Matter of:	)	
	)	OEA Matter No.: 1601-0069-23
EMPLOYEE, <sup>1</sup>	)	
Employee	)	
	)	Date of Issuance: September 18, 2024
v.	)	
	)	
D.C. DEPARTMENT OF TRANSPORTATION,	)	NATIYA CURTIS, Esq.
Agency	)	Administrative Judge
	)	

Tameka Garner Barry, Employee Representative  
Kathleen R. Miskovsky Black, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On September 18, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Transportation’s (“Agency” or “DDOT”) decision to suspend him without pay for ten (10) calendar days from his position as Pavement Marking Equipment Operator, effective August 29, 2023.<sup>2</sup> OEA issued a letter dated September 18, 2023, requesting Agency file an Answer on or before October 18, 2023. Agency filed its Answer to Employee’s Petition for Appeal on October 18, 2023. This matter was assigned to the undersigned Administrative Judge (“AJ”) on October 19, 2023. On October 20, 2023, I issued an Order Convening a Prehearing Conference for November 28, 2023. Prehearing Statements were due on November 20, 2023. Agency filed its Prehearing Statement on November 20, 2023. Employee did not submit a Prehearing Statement.

Both parties appeared for the Prehearing Conference as scheduled. Following the Conference, I issued an Order on November 30, 2023, codifying the verbal orders issued during the Prehearing Conference and set a schedule for the submission of briefs.

Agency submitted its brief on January 4, 2024, wherein, Agency requested more time to supplement its response.<sup>3</sup> On January 11, 2024, the undersigned emailed the parties and advised

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.  
<sup>2</sup> Employee was suspended for the following causes of action: DPM § 1605.4(d)-Failure or Refusal to Follow Instructions and 1607.2(d)(2)-Deliberate or Malicious Refusal to Comply with Rules, Regulations, Written Procedures, or Proper Supervisory Instructions.  
<sup>3</sup> Agency requested more time to gather information from Agency’s staff regarding where Lawrence Bradshaw directed Agency employee P.B. to report, and whether it was for the same duty to which Employee had been assigned, as prescribed by the

Agency that it needed to submit a motion regarding its request. On January 12, 2024, Agency responded via email noting that it would not be supplementing its brief. Upon review of Agency's brief, I determined that Agency's submission without the supplemental information was incomplete. As a result, I issued an Order on January 18, 2024, requiring Agency to submit a supplemental brief.<sup>4</sup> I also amended the deadlines for the parties' respective briefs. Agency's supplemental brief was due on February 8, 2024. Employee's brief was due on February 22, 2024. The parties submitted their briefs as required.

On February 18, 2024, I issued an Order convening a Status Conference for March 14, 2024.<sup>5</sup> Based on the parties' submissions and the record to date, I determined that an Evidentiary Hearing was warranted. Accordingly, on March 15, 2024, I issued an Order Scheduling an Evidentiary Hearing for April 23, 2024, via Webex. The Evidentiary Hearing was held as scheduled. On May 9, 2024, following the receipt of the transcript, I issued an Order requiring the parties to submit their written closing arguments by June 20, 2024. Both parties submitted their closing arguments as required. The record is now closed.

### JURISDICTION

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

### ISSUES

1. Whether Agency had cause for adverse action against Employee; and
2. Whether all applicable laws, rules, and regulations were followed in the administration of the adverse suspension; and
3. If so, whether the ten (10) day suspension was an appropriate penalty under the circumstances.

### BURDEN OF PROOF

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

The burden of proof for material issues of fact shall be by a preponderance of the evidence.

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

OEA Rule 631.2 *id.* states:

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November 30, 2023. (Initials are used in this decision for the purposes of publication on the Office of Employee Appeals' website).

<sup>4</sup>Agency was ordered to provide sufficient information regarding employee P.B.'s work assignment, as prescribed by the November 30, 2023, Order.

<sup>5</sup> In this Order, I also ordered that Agency had the option to submit a Sur Reply brief by March 1, 2024.

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 April 23, 2024, an Evidentiary Hearing was held virtually before this Office through Webex. 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. Both Employee and Agency presented testimonial evidence during the Evidentiary Hearing to support their positions. Agency also presented documentary evidence to support its position. Employee did not present any exhibits during the Evidentiary Hearing.

#### *Agency’s Case in Chief*

##### Lawrence Bradshaw (“Bradshaw”)-Tr. 13-36

Bradshaw is a superintendent at DDOT and has held this position for two (2) years. Tr. 13-14. He manages the operations in the street and bridge department and oversees paving and marking operations and other maintenance activities. Bradshaw testified that on the date of the incident in question, he was Employee’s direct supervisor. Bradshaw further testified that at the time of the incident, he had been Employee’s supervisor for approximately three (3) months. Tr. 14. Bradshaw indicated that on the morning of May 11, 2023, he received an email from the Associate Director of DDOT, Aaron Horton (“Horton”) and a Microsoft Teams chat from the Mayor’s office regarding racist graffiti on a roadway. Bradshaw testified that he was asked to immediately respond to this situation. Bradshaw stated that he called Employee to see where he was so he could meet to remove the racist graffiti. Tr. 15. Bradshaw said that he was told the location of the graffiti was 700 Virginia Avenue,<sup>6</sup> which is the address he provided to Employee. Bradshaw indicated that during the call with Employee, Employee informed him that he was ‘way across town’ and would not travel all the way over there. Bradshaw noted that he told Employee that it was an emergency. Bradshaw stated that Employee told him that he was doing something else and not traveling way over there. Bradshaw testified that he then told Employee that his instruction was a directive. Bradshaw stated that he informed Employee that he would write him up for refusing the directive. Bradshaw iterated that Employee told him that he should do what he needed to do because he was not coming all the way over there. Tr. 16.

Bradshaw testified that he called another DDOT employee, P.B. to remove the graffiti at 700 Virginia Avenue, NW. Bradshaw stated that P.B. responded that he needed to go to the warehouse first and then would proceed to the location of the graffiti.<sup>7</sup> Bradshaw then noted that he also called the Department of Public Works (“DPW”) to see if they could assist. Bradshaw indicated that after he arrived at 700 Virginia Avenue, NW he called Associate Director Horton because he did not see any graffiti at that location. He stated that Horton confirmed that the graffiti was not at that address. Tr. 17. Bradshaw explained that he then checked another part of Virginia Avenue, NW based on the picture provided. Bradshaw further explained that he then traveled to the 1800 Block of Virginia

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<sup>6</sup> DDOT Director Horton provided 700 Virginia Avenue, NW as the address of the graffiti. See Agency’s Answer to Petition for Appeal at p. 24 (October 18, 2023).

<sup>7</sup> The “warehouse” refers to the DDOT warehouse at 1900 West Virginia Avenue, NE. See Tr. 25-26; See also Agency’s Brief in Response to November 30, 2023, Order at p. 12 (January 4, 2024).

Avenue, [NW] where he found the racist graffiti.<sup>8</sup> Bradshaw confirmed that while at this location, DPW employees met him there and they were able to remove the graffiti. Bradshaw stated that he called P.B. and told him to “stand down” because the situation was under control. Tr. 17-18.

Bradshaw identified Agency’s Exhibit 1, page 3 as the Advance Written Notice of Proposed Adverse Suspension for Employee. Bradshaw confirmed that in this document, he quoted that Employee stated: “No, I am not going all the way over there. I am not going there. I’ll do it tomorrow, but I’m not going there today.” Bradshaw reiterated that this is what Employee told him when he issued the directive to clean the graffiti. Tr. 19. Bradshaw affirmed that he did not believe that Employee was joking and noted that Employee’s tone was aggressive. He further testified that he also told Employee that it was a directive, and Employee still refused. Bradshaw then indicated that Employee did not have any legitimate reason to refuse this instruction. He explained that it was not even twelve (12) o’clock, and Employee’s tour of duty was over at 2:30p.m. Bradshaw maintained that Employee still had time to come to the site of the graffiti. Tr. 20.

Bradshaw then reviewed page 15 of Agency’s Exhibit 1, which he identified as the text message from Horton directing him to mobilize a team to remove the graffiti. Tr. 22. Bradshaw testified that according to the text message, the graffiti was located at 700 Virginia Avenue [NW].<sup>9</sup> Bradshaw noted that DPW ultimately removed the graffiti. Tr. 23. Bradshaw reviewed Agency’s Exhibit 8, page 117, which he identified as a summary of the conversation between him and P.B. Tr. 22-23. Bradshaw explained that he asked P.B. to remove the graffiti because Employee had refused to report to the location to remove the graffiti. Tr. 23. Bradshaw stated that P.B. told him he had to offload some equipment and also get a bike lane symbol template, in case that was needed. Bradshaw clarified that the graffiti was sprayed on a bike lane. Bradshaw explained that a bike symbol is a template placed on the ground then heated so it melts to the ground. Bradshaw said that P.B. stated he was going to get one of the symbols. Tr. 25. Bradshaw further noted that P.B. indicated that he was going to “the yard” which Bradshaw assumed meant the West Virginia Avenue, location, which is a DPW warehouse where DDOT also stores some of its materials.<sup>10</sup> Tr. 25-26.

Agency further questioned Bradshaw about the addresses at issue. He explained that the address to which he was originally directed was 700 Virginia Avenue, NW. Bradshaw further explained that after driving to this address he realized that there was no graffiti there. He then called to get clarification on the correct address. Tr. 26. Bradshaw testified that he initially directed Employee to 700 Virginia Avenue. Tr. 27. Bradshaw stated that he discovered that the correct address was the 1800 block of Virginia Avenue.<sup>11</sup> Bradshaw maintained that at the time he provided Employee with the 700 Virginia Avenue address, he believed it was the right one. He further iterated that Employee would have no inclination that the address provided was incorrect. Tr. 27-28. Bradshaw stated that despite the address confusion, there was no reason for Employee to refuse the instructions given to him. Tr. 28.

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<sup>8</sup> 1800 Virginia Avenue is in the Northwest quadrant of the city. *See* Agency’s Brief in Response to November 30, 2023, Order at p. 10 (January 4, 2024).

<sup>9</sup> DDOT Director Horton provided 700 Virginia Avenue, NW as the address of the graffiti. *See* Agency’s Answer to Petition for Appeal at p. 24 (October 18, 2023).

<sup>10</sup> This warehouse is located at 1900 West Virginia Avenue, NE. *See* Tr. 25-26; *See also* Agency’s Brief in Response to November 30, 2023, Order at p. 12 (January 4, 2024).

<sup>11</sup> 1800 Virginia Avenue is located in the Northwest quadrant of the city. *See* Agency’s Brief in Response to November 30, 2023, Order at p. 12 (January 4, 2024).

The AJ questioned Bradshaw further about the West Virginia Avenue warehouse location. Bradshaw clarified that the West Virginia Avenue yard is normally referred to as the “Warehouse.” The undersigned also questioned Bradshaw about how employees are assigned work duties on a typical day. Bradshaw explained that on a typical day for a pavement marking equipment operator, they report to a yard located at 1403 W Street, NE (“W Street”) to load up their trucks in preparation to complete their morning assignments. Tr. 29-30. He stated that because the graffiti was an emergency assignment, P.B. did not have the equipment needed on his truck because removing graffiti was not a normal assignment for the day, it was an emergency response. Tr. 30.

On cross-examination, Bradshaw testified that Employee has followed directives from him in the past. Tr. 32. When Bradshaw was asked to whom he sent the text regarding the graffiti location, he clarified that he did not send a text but called Employee and then called P.B. with the location of the assignment. Tr. 33.

On redirect examination, Bradshaw cited that the text message he received regarding the location of the graffiti came from Associate Director Horton. Bradshaw indicated that he did not send or forward this text message to Employee. Tr. 35-36.

#### Steve Messam (“Messam”) Tr. 38-46

Messam is a Supervisory Human Resources Specialist at DDOT and has held this position for nine (9) years. Tr. 38. Messam testified that he first learned about the incident involving Employee when a manager contacted his office citing that an employee refused a directive to go and remove some markings on the ground. Tr. 39. Messam reviewed Agency’s Exhibit 7, which he identified as the position description for a Pavement Marking Equipment Operator at Agency. Tr. 40. Messam confirmed that Employee is a Pavement Marking Equipment Operator. Messam testified that the position description duties include removing marked pavement markings and other traffic control devices. When asked if Employee’s position includes removing graffiti and anything else on pavement Messam answered affirmatively. Tr. 41.

Messam was again referred to Agency’s Exhibit 7 and was asked to read from that document. He testified that Employee’s position was “designated as an emergency position under the District Personnel Manual Chapter 12. As such, services may be required in emergency situations to perform crucial duties...” Messam testified that based on this information, Employee’s position is designated an emergency position. Tr. 42. He stated that an emergency position means that an employee may be required to work outside of their tour of duty due to their skillset and the nature of circumstances warranting the emergency. He explained that the nature of the circumstances may require them to work expeditiously. Messam noted that it is important to follow proper supervisory instruction because the situation is likely critical. Tr. 43. Messam testified that the Agency suspended Employee based on the nature of the event, previous actions that are similar in nature, and progressive discipline. Messam clarified that Employee had a prior disciplinary action that was similar in nature. Tr. 44.

#### Employee’s Case in Chief

#### P.B. Tr. 49-58

P.B. is an employee at DDOT. P.B. testified that on the day of the incident, Bradshaw called him and sent him a text message to meet him at 700 Virginia Avenue. P.B. stated that when he went

to this address, it was the West Virginia Avenue, NE warehouse site. P.B. explained that he sat at the warehouse waiting for further instructions from Bradshaw. P.B. further explained that he ended up at the West Virginia Avenue, NE warehouse because he received a text message instructing him to report to 700 Virginia Avenue. He stated that when he put 700 Virginia Avenue into the GPS on his phone, it directed him to the DDOT warehouse located at West Virginia Avenue. P.B. noted that when he showed up at the warehouse on West Virginia Avenue there was no graffiti present. Tr. 50. P.B. stated that he informed Bradshaw that they were at the warehouse and there was no graffiti present.<sup>12</sup> P.B. testified that Bradshaw told him to wait for further instructions because he may be at the wrong location. P.B. confirmed that Employee was also present at the warehouse. P.B. maintained that they all sat at the warehouse together and no one knew what to do in the situation and did not know exactly what was going on. P.B. said that he knew they probably needed a new bike symbol. Tr. 51. He stated that there were no real instructions provided, they were never told to go to the site of the graffiti and were basically 'on hold'. Tr. 52. P.B. testified that when they returned to their work building, Bradshaw informed them that DPW was going to do the work.<sup>13</sup> Tr. 52-53. P.B. further indicated that the directive came from Bradshaw to report to the location where the graffiti was to be removed. Tr. 53.

The AJ questioned P.B. to clarify what he meant when he stated his GPS took him to West Virginia Avenue when he entered 700 Virginia Avenue. P.B. clarified that when he entered 700 Virginia Avenue into the GPS on his phone, it gave him multiple options, including the warehouse on West Virginia Avenue, NE. He testified that Bradshaw did not provide a quadrant of the city when he provided the address of the graffiti. P.B. noted that they went to the first address that populated, which was the West Virginia Avenue, NE warehouse location. Tr. 54-55.

On redirect examination, P.B. further clarified that when he entered 700 Virginia Avenue into his GPS, there were three different options. He testified that the first address to populate was by the West Virginia Avenue warehouse, so he went there. Tr. 55.

On cross examination, P.B. confirmed that he was not present when Employee received the instruction from Bradshaw. Tr. 56. P.B. testified that when he arrived at the West Virginia Avenue warehouse, Employee was there. Tr. 56-57. P.B. noted that Employee did not say anything to him when he arrived. P.B. testified that when he arrived at the West Virginia Avenue location, he did not see any graffiti and communicated such to Bradshaw. P.B. indicated that Bradshaw told him to 'hold fast'. Tr. 57-58.

#### T.W. Tr. 59-69

T.W. testified that he has worked as a pavement and marking equipment operator for twenty-two years and is Employee's work partner. Tr. 60. T.W. confirmed that he was present with Employee on the day in question. Tr. 60. T.W. noted that he did not receive direct instructions, but that he and Employee went to the warehouse on West Virginia Avenue. Tr. 60-61. He testified that when he and Employee arrived at the warehouse, they did not see any graffiti. T.W. affirmed that to his knowledge, no one contacted the supervisor. T.W. said he and Employee waited there for a while

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<sup>12</sup> "they" includes P.B.'s work partner. "They all" includes P.B.'s work partner, Employee, and T.W. based on P.B.'s testimony at Tr. 53, T.W. testimony at Tr. 67, and Employee's testimony at Tr. 73.

<sup>13</sup> "Work building" refers to P.B. and Employee's main worksite located at 1403 W Street, NE. See Tr. 29-30.

and then returned to W Street, which was their primary location.<sup>14</sup> T.W. testified that when he returned to W Street, he saw Bradshaw. Tr. 61.

T.W. clarified that he was with Employee when Employee received the directive from Bradshaw but did not hear what was said. T.W. maintained that he thought Employee and Bradshaw had a great relationship, and that he had never witnessed Employee exhibit rude or disrespectful behavior or refuse to do an assignment. Tr. 62-63. He stated that Employee would receive an assignment and he and Employee would report to do the assignment. T.W. confirmed that Employee would be contacted for assignments because he was very knowledgeable of the work that they perform. T.W. testified that normally, when they received assignments, the assignments would come from Bradshaw, and he and Employee would perform the work as a team. Tr. 63-64. T.W. again testified that he had never witnessed Employee disrespecting Bradshaw. Tr. 64.

On cross-examination, T.W. confirmed that while he was with Employee at the time the instruction was given, he did not hear the instruction. Tr. 64-65. T.W. explained he did not hear the instruction because Bradshaw contacted Employee by telephone, and he could not hear the other end of the conversation. Tr. 64-65. T.W. further clarified that he did not know if he was inside or outside the work truck when Employee received the phone call, but he knows Employee received a phone call from Bradshaw. Tr. 65-66. T.W. noted that he asked Employee where they were going, and Employee stated that he and T.W. had to go to the West Virginia Avenue warehouse. Tr. 67. T.W. stated that when he and Employee arrived at the warehouse there were a couple of other workers there and they discussed how they would get the graffiti off the pavement.<sup>15</sup> T.W. confirmed that they did not partake in removing the graffiti and stated that it was not a part of their job because they did not have materials to remove graffiti. Tr. 67. T.W. further stated that they have never removed graffiti before. Tr. 67-68.

The AJ asked T.W. what he believed he was reporting to the West Virginia Avenue, NE warehouse to do. T.W. responded that he believed they were reporting to work. When the AJ asked what type of work he thought they were going to do, he stated all he knew was it was related to graffiti located on a “bicycle man” and they were supposed to remove it.<sup>16</sup> T.W. testified that he and Employee are partners and have been riding together for over thirteen (13) years. He confirmed that generally they receive an assignment and complete the assignment together. Tr. 68-69.

#### Employee Tr. 72-85

Employee testified that he is an equipment operator for the District of Columbia and has been employed with DDOT for twenty years. He testified that on the day in question, he received a call from Bradshaw between 11:00a.m. and 12:00p.m. Tr. 72. Employee maintained that Bradshaw asked him to report to West Virginia Avenue,<sup>17</sup> and he jokingly told him no. Tr. 72-73. Employee stated that when he hung up the phone with Bradshaw, his partner T.W. asked him where they were going, and Employee told him West Virginia Avenue. Employee testified that as he was driving to West

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<sup>14</sup> 1403 W Street, NE is a yard where pavement marking equipment operations report to load up their trucks in preparation to complete their morning assignments and is considered their main work location. *See* Tr. 29-30.

<sup>15</sup> The other workers present were P.B. and P.B.’s work partner. *See* P.B. and Employee’s testimony at Tr. 53 and Tr. 73, respectively.

<sup>16</sup> Per Bradshaw’s testimony at Tr. 25, and Agency’s Exhibit 1, p. 15, the graffiti was spray-painted on a bicycle man symbol, in a bike lane. *See also*, Agency’s Answer to Employee’s Petition for Appeal at p. 24 (October 18, 2023).

<sup>17</sup> Employee is referring to the DDOT warehouse located at 1900 West Virginia Avenue, NE, *See* Tr. 49-50; 54-55; *See also* Agency’s Brief in Response to November 30, 2023 Order at p. 12 (January 4, 2024).

Virginia Avenue, he attempted to call Bradshaw. He stated he and Bradshaw had a meeting later that evening, during which he told Bradshaw that he tried to call him back. Employee iterated that Bradshaw acknowledged that he saw Employee's phone call and did not answer the phone.

Employee stated that when he arrived at West Virginia Avenue, he observed P.B. and another employee that works with P.B. sitting in their truck. Employee testified that he asked them what was going on and they replied that they did not know. Tr. 73. Employee indicated that he sat there with them until Bradshaw called P.B. and instructed him to meet at W Street.<sup>18</sup> Employee stated that he also traveled to W Street with P.B., his partner, and Employee's partner and sat there until almost 2:30p.m. Employee testified that at that time, Bradshaw arrived with [supervisor] Aaron Lane ("Lane").<sup>19</sup> Employee asserted that when he later went into the office with Bradshaw, Bradshaw expressed that he was writing Employee up for refusing to do his job. Employee maintained that he asked Bradshaw, how he could claim that he was refusing to do his job when he showed up to both locations-West Virginia Avenue and W Street as Bradshaw instructed. Employee said that Bradshaw stated he was writing Employee up, and Employee responded, "well do what you have to do."

Supervisor Lane was also present at this meeting. Employee stated that Lane asked him to calm down, which Employee stated he did. Employee testified that Lane then said to him that Bradshaw received a call about West Virginia Avenue, then he received a call about Virginia Avenue. Tr. 74-75. Employee clarified that he told Lane that he had not heard of the instruction to report to Virginia Avenue until he spoke to P.B., who mentioned an assignment about graffiti. Employee stated he then responded to Bradshaw and Lane that it is two against one, and Employee could not win. Employee testified that he told Bradshaw that the location Bradshaw gave him was West Virginia Avenue, and that is where he went. Employee maintained that he then told Bradshaw that because he had instructed P.B. to report back to W Street, Employee went there also. Employee stated that was the end of the conversation, and he left.

Employee testified that he never refused to do the job. Tr. 75. Employee further stated that when Bradshaw first came aboard, he told him and another supervisor whose name he could not recall that he jokes a lot. Employee noted that he told them "I might say I'm not going to do your work, but in reality, I'm going to do your work." Employee said that he and Bradshaw had joked in the past all the time. Tr.75-76. Employee testified that Bradshaw used to tell him "thank you" and, "you are doing a great job... I appreciate the work that you are doing."

Employee stated that when Bradshaw first came aboard, Employee told him, "I'm going to run your crew. I got your back." Employee noted that he has always had Bradshaw's back until this incident, and he felt like he was overworking himself. Employee testified that he was not a lead but considers himself a lead because all the young workers follow him because he is the oldest member in his crew. He indicated that prior to this incident, he and Bradshaw had a relationship in which they joked with each other. He testified that he still fulfilled the job. Tr. 76. Employee confirmed that when he arrived at the [West Virginia Avenue, NE warehouse] location, there was no graffiti present.<sup>20</sup> He affirmed that he did not refuse to do the job but went to both locations as instructed. Employee asserted that he attempted to call Bradshaw back, but Bradshaw did not answer the phone. Tr. 77.

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<sup>18</sup> "W Street" is located at 1403 W Street, NE., and is Employee's main work location. See Tr. 30.

<sup>19</sup> Aaron Lane is a supervisor per the record. See Agency's Answer to Petition Appeal at p. 17 (October 18, 2023).

<sup>20</sup> See Tr. 77-78.



Employee testified that he sat at the West Virginia Avenue, NE warehouse with P.B. and traveled to W Street when P.B. was directed to do so.<sup>21</sup> Employee explained that he followed P.B. in his truck. Tr. 77-78 Employee further testified that P.B. and his work partner stated that they were going to get lunch. Employee stated that he said to them he was not going anywhere because he did not want any confusion like he did not show up on a job. Employee indicated that Bradshaw and Lane showed up around 1:30p.m. or 2p.m. Employee testified that his tour of duty ended at 2:30p.m. that day.<sup>22</sup> Employee indicated that at 2:30p.m. he was called into the office and was told he was being written up. Employee stated that he told them to do what they had to do, but also stated that he showed up for the work duties as instructed. Tr. 78.

On cross-examination Employee affirmed that when Bradshaw first gave him the instruction to report to West Virginia Avenue, NE he said ‘no’. He testified that he was joking with Bradshaw. He further testified that Bradshaw knew that he would show up to do the work. Employee stated that after he spoke to Bradshaw there was no additional conversation. Employee maintained that he attempted to call him back to make sure he was at the correct location. Tr. 80. Employee further noted that while he was at West Virginia Avenue, he and P.B. attempted to call Bradshaw. Employee stated that Bradshaw would not answer the phone for him, but he answered for P.B. He stated that Bradshaw acknowledged that Employee had tried to call him when he and Bradshaw had their meeting that afternoon. Employee indicated that Bradshaw stated that he saw the call from Employee but did not answer. He stated that he called Bradshaw to determine what to do. Employee stated that he did not find out about the graffiti until he spoke with P.B. Tr. 81.

Employee stated that when Bradshaw called him initially, he told him to come to West Virginia Avenue and nothing else. Tr. 82. Employee affirmed that he jokingly told Bradshaw “No” when directed to report. Employee testified that he then went to West Virginia Avenue as he was instructed. He said he did not know about the graffiti until P.B. showed Employee a picture of it on his phone that he had received from Bradshaw. Employee testified that P.B. asked how they could rectify the graffiti. Employee instructed him that they needed to get a bicycle man to put on top of the graffiti, but he was not sure how they could rectify the brick concrete. Tr. 82.

Employee testified that Bradshaw did not instruct him to go to W Street. He stated that P.B. talked to Bradshaw, and Bradshaw instructed P.B. to go to W Street. He stated that P.B. then told Employee that they needed to go to W Street. Employee reiterated that Bradshaw had refused his calls. Employee testified that he knew Bradshaw had refused his calls because Bradshaw acknowledged that he had seen the calls and did not answer. Tr. 83.

Employee reiterated that Bradshaw called him and told him to report to West Virginia Avenue, NE. Employee responded that he was not going. Employee testified that Bradshaw said to meet him there so Employee would know where to report. Employee stated that when Bradshaw said to meet at West Virginia Avenue he said “no”, but he was really going. Employee stated that Bradshaw should have known this because they joked like that in the past. Employee maintained that he has shown up for every task Bradshaw has asked him to do, and Bradshaw has always thanked him. Tr. 85.

#### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

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<sup>21</sup> “W Street” is located at 1403 W Street, NE., and is Employee’s main work location. See Tr. 30.

<sup>22</sup> Supervisor Lane and Bradshaw met Employee at the W Street Yard. See Tr. 61.

In a Notice of Final Decision for Proposed Adverse Suspension dated August 28, 2023, Employee was suspended without pay for ten (10) calendar days from his position as Pavement Marking Equipment Operator effective August 29, 2023.<sup>23</sup> 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 § 1605.4(d) and DPM § 1607.2(d)(2). As a Paving Marking Equipment Operator, Employee’s duties include installing and/or removing pavement markings and other traffic control devices throughout the District.<sup>24</sup> Additionally, Supervisory Human Resources Specialist Steve Messam (“Messam”) testified that Employee’s position was designated as an emergency position under the District Personnel Manual Chapter 12. That designation meant that services may be required in emergency situations to perform crucial duties and outside of duty hours, if required.<sup>25</sup> Accordingly, the removal of racist graffiti would fall within Employee’s job duties, as described above.

### **Agency’s Position**

Agency avers that it had cause to suspend Employee from service for ten (10) days and that it did so in accordance with all applicable laws, rules and regulations. Agency asserts that on May 11, 2023, Bradshaw instructed Employee by phone to travel to a worksite at 700 Virginia Avenue, NW to remove offensive graffiti spray-painted on a bicycle lane. Agency asserts that Employee repeatedly refused this instruction by stating “No, I am not going all the way [there]....”<sup>26</sup> Agency notes that Bradshaw repeated his request that Employee travel to 700 Virginia Avenue, and Employee again refused.<sup>27</sup> Agency avers that while Employee stated that his refusal was a joke, there was no indication that Employee was joking. Agency maintains that Employee refused multiple times to follow Bradshaw’s instruction.<sup>28</sup> Agency avers that even when Employee was told he might face disciplinary action for refusing the instruction, his response was for Bradshaw to “do what he needed to do.”<sup>29</sup> Agency argues that only after the instant suspension had been proposed that Employee asserted that his refusal to travel to the worksite was a joke.<sup>30</sup>

Agency concedes that there was confusion as to whether Employee should have reported to Virginia Avenue, NW or a bike lane on West Virginia Avenue, NE, which is also where an Agency warehouse is located.<sup>31</sup> Agency asserts that Employee did not report to the address where Bradshaw instructed. Agency further avers that this address confusion does not change Employee’s stated refusal to comply with Bradshaw’s instruction.<sup>32</sup> Agency argues that in admitting that he told Bradshaw that he would not remove the graffiti, Employee admitted to deliberately or maliciously refusing a proper instruction.<sup>33</sup>

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<sup>23</sup> Employee’s Petition for Appeal at p. 9 (August 28, 2023).

<sup>24</sup> Agency Answer to Petition at p. 93 (October 18, 2023).

<sup>25</sup> See Tr. 42.

<sup>26</sup> Agency’s Answer to Employee’s Petition for Appeal, at pp. 1-5 (October 18, 2023). See also, Agency’s Closing Argument at p. 3 (June 20, 2024).

<sup>27</sup> Agency’s Prehearing Statement at p. 3 (November 20, 2023) (Agency did not include page numbers in this submission).

<sup>28</sup> *Id.* at p. 4.

<sup>29</sup> Agency’s Closing Arguments at p. 5 (June 20, 2024).

<sup>30</sup> Agency’s Prehearing Statement at p. 4 (November 20, 2023).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Agency’s Closing Arguments at p. 3 (June 20, 2024).

Agency further asserts that Employee has a history of refusing to comply with proper supervisory instructions. Agency maintains that Employee's refusal to comply with Bradshaw's instructions, coupled with his past refusals to comply with proper supervisory instructions shows by a preponderance of the evidence that Employee refused to comply with a proper supervisory instruction in this instant matter.<sup>34</sup>

### **Employee's Position**

Employee avers that Agency's action of suspending him from service was without cause because he complied with his supervisor Bradshaw's instructions.<sup>35</sup> Employee asserts that on May 11, 2023, he received instructions from his supervisor Bradshaw to report to a DDOT warehouse on West Virginia Avenue, NE and not 700 Virginia Avenue, NW to remove graffiti.<sup>36</sup> Employee cites that he jokingly told Bradshaw that he would not report to the worksite as instructed.<sup>37</sup> Employee stated that while he told Bradshaw he would not report to the worksite, he and his partner T.W. reported to a DDOT Warehouse on West Virginia Avenue, NE but Bradshaw was not present.<sup>38</sup> Employee iterated that he attempted to contact Bradshaw by phone, but Bradshaw did not answer.<sup>39</sup> Employee further asserts that another Agency employee, P.B. was also at the West Virginia Avenue warehouse location for the same assignment to remove graffiti. Employee explained that Bradshaw instructed P.B. to remove graffiti from 700 Virginia Avenue, which was an incorrect address.<sup>40</sup> Employee asserts that P.B. contacted Bradshaw to inform him that he gave him the wrong address, and Bradshaw directed P.B. to report back to the DDOT Yard on W Street, NE. Employee maintains that he also reported to W Street based on the directive issued to P.B. Employee contends that Bradshaw gave the wrong address for the location of the work to be performed, that he followed proper protocol by reporting to the address Bradshaw gave him and was ready to perform the work. Employee argues that his suspension should be rescinded.<sup>41</sup>

### **ANALYSIS**<sup>42</sup>

#### ***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

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<sup>34</sup> *Id.* at p. 5

<sup>35</sup> Employee's Post Status Conference Brief at p. 4 (February 12, 2024). (Employee did not include page numbers in this submission). *See also* Tr. 82.

<sup>36</sup> *Id.*

<sup>37</sup> Employee's Post Hearing Brief at p. 2 (June 17, 2024).

<sup>38</sup> *Id.*

<sup>39</sup> Employee's Post Status Conference Brief at 4 (February 12, 2024).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 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").

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....”<sup>43</sup> Accordingly, disciplinary actions may only be taken for cause.

The undersigned would note that the instructions/directives involved in this instant matter involve *significant* address confusion (Emphasis added). The following are the findings of fact concerning the addresses involved, based on the record: The address DDOT Director Horton initially communicated to Bradshaw was 700 *Virginia Avenue, NW*.<sup>44</sup> (Emphasis Added). The correct address of the graffiti was 1800 *Virginia Avenue, NW*.<sup>45</sup> (Emphasis Added). There is a DPW warehouse where DDOT stores some of its equipment at 1900 *West Virginia Avenue, NE*, and is referred to as the West Virginia warehouse.<sup>46</sup> (Emphasis Added). There is also an 1800 block of *West Virginia Avenue, NE* and an 1800 block of *Virginia Avenue, NW*, and both locations have bicycle lanes.<sup>47</sup> (Emphasis Added).

Bradshaw testified that he directed Employee to 700 Virginia Avenue, NW. Employee testified that Bradshaw directed him to the DDOT warehouse at 1900 West Virginia Avenue, NE. P.B. testified that Bradshaw directed him to 700 Virginia Avenue but did not specify a quadrant of the city. P.B. stated that when he input 700 Virginia Avenue into his phone GPS, without specifying a quadrant of the city, the options that populated included the DDOT warehouse on West Virginia Avenue, NE. P.B. testified that accordingly, he traveled to this warehouse. Both Employee and P.B. traveled to the West Virginia Avenue warehouse for the same assignment. Neither P.B. or Employee testified that they were directed to a bike lane at 1800 *West Virginia Avenue, NE* or *1800 Virginia Avenue, NW*. (Emphasis Added).

#### Failure or Refusal to Follow Instructions

Employee’s suspension was levied pursuant to DPM § 1605.4(d)-Failure or Refusal to Follow Instructions and § 1607.2(d)(2)-Deliberate or Malicious Refusal to Comply With Rules, Regulations, Written Procedures, or Proper Supervisory Instructions. OEA has held that a failure/refusal to follow instructions includes a deliberate or malicious refusal to comply with the rules, regulations, written procedures, or proper supervisor instructions.<sup>48</sup> Section 1607(d)(2) includes an element of intent: the evidence must support a finding of *deliberate or malicious refusal to comply....* (Emphasis Added). Accordingly, OEA has held that the evidence must show a

<sup>43</sup> DPM §1601.7(2019).

<sup>44</sup> Agency’s Answer to Employee’s Petition for Appeal at p. 24 (October 18, 2023).

<sup>45</sup> Agency’s Closing Arguments at p. 3 (June 20, 2024).

<sup>46</sup> Agency’s Brief in Response to November 30, 2023, Order, at p. 2 (January 4, 2024).

<sup>47</sup> *Id.* at p. 9.

<sup>48</sup> *Employee v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0056-22 (June 22, 2023).

deliberate or malicious act to support this charge.<sup>49</sup> To support this charge, Agency asserts that Employee told Bradshaw he would not report to the worksite to remove graffiti and then subsequently failed to report to any address, as directed.<sup>50</sup> It is undisputed that Employee was directed to perform a job duty that was considered urgent due to the offensive content of the graffiti. What is at issue is whether Employee's refusal to comply with his supervisor's instruction to report to the worksite was deliberate or malicious as the Agency charged.

While the record clearly reflects that Employee stated his verbal refusal to travel to the worksite, albeit jokingly or otherwise, there is a question of whether Employee made an effort to comply with the instruction given. Here, Bradshaw testified that Employee was directed to a worksite at 700 Virginia Avenue, NW.<sup>51</sup> However, Employee testified that Bradshaw called him and directed him to a DDOT warehouse on West Virginia Avenue, NE, which is located at 1900 Virginia Avenue, NE.<sup>52</sup> Employee asserts that he jokingly told Bradshaw he would not go to the worksite; then, after hanging up with Bradshaw, his work partner T.W. asked where they had to report. Employee testified that per Bradshaw's instructions, they had to report to the DDOT warehouse on West Virginia Avenue, NE, which is where he and his work partner T.W. reported.<sup>53</sup> The undersigned finds that Employee's attendance at what he believed was the correct address does not support a finding that he deliberately or maliciously refused to comply with Bradshaw's instructions, in spite of his initial verbal refusal to do the work for the reason discussed herein.

Agency presents two main arguments in support of the adverse suspension: Agency maintains that Employee's verbal refusal to report to the worksite was the cause for the adverse suspension; thus, Agency maintains that the address to which Employee was directed to report was irrelevant. Agency asserts, "Specifically, the cause for the proposed action was based on Employee's refusal to travel to an assigned worksite during Employee's normal tour of duty to complete an assigned task."<sup>54</sup> Secondly, Agency also maintains that even if Employee was present at the DDOT warehouse on West Virginia Avenue, NE, he was not directed to travel to that warehouse, and therefore did not actually travel to any address, as instructed. Agency concedes that while there was a discrepancy with the address of the worksite, Employee was initially instructed to travel to 700 West Virginia Avenue, NW to which he did not comply.<sup>55</sup>

The undersigned disagrees with Agency's assessment that the actual location to which Employee was directed was irrelevant. Determining whether Employee traveled to the location to which Bradshaw directed him is a key aspect in determining whether Employee deliberately or maliciously refused to comply with a proper supervisory instruction. As noted, the DPM charge requires a showing of deliberate or malicious refusal to comply with a proper supervisory instruction. Thus, if Employee reported to the West Virginia Avenue, NE warehouse in an attempt to comply with Bradshaw's order, I find that his stated refusal alone would not be enough to show that he deliberately or maliciously failed to comply. Agency also argues that Employee was not instructed to report to the West Virginia Avenue warehouse, but was either directed to 700 Virginia Avenue, NW

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<sup>49</sup>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).

<sup>50</sup> Agency's Prehearing Statement at p. 3 (November 20, 2023).

<sup>51</sup> Tr.16.

<sup>52</sup> Tr.72-73; See also Agency's Brief in Response to November 30, 2023, Order, at p. 12 (January 4, 2024).

<sup>53</sup> Tr. pp. 72-73.

<sup>54</sup> Agency's Brief in Response to November 30, 2023, Order, at p. 2 (January 4, 2024).

<sup>55</sup> Agency's Closing Argument at p. 3 (June 20, 2024).

or a bike lane at 1800 West Virginia Avenue, NE.<sup>56</sup> Even if Employee was mistaken in his belief that the West Virginia Avenue location was the correct location, Agency has not shown that Employee had the intent to deliberately or maliciously refuse to comply. To make such a showing, Agency would also be tasked with proving that Employee traveled to the West Virginia Avenue location, knowing that it was not the address to which he was directed.

Further, Agency concedes that there was address confusion and Agency's submissions of record illustrate this significant confusion. Thus, it is not clear to which address Bradshaw initially directed Employee to report. Even where clarification is added, Agency uses several addresses, and both city quadrants "NW" and "NE". For example, the Advance Written Notice of Proposed Suspension, which was signed by Bradshaw states that Bradshaw directed Employee to report to 1800 West Virginia Avenue, *NW*, which is not a correct address (Emphasis Added).<sup>57</sup> The Notice of Final Decision for Proposed Adverse Suspension, which Bradshaw signed as Agency Representative, indicates that Employee was directed to a bike lane at 1800 West Virginia Avenue, *NE* (Emphasis Added).<sup>58</sup> A Notice of Disciplinary Action dated May 22, 2023, and drafted by Bradshaw notes that Employee was directed to 700 Virginia Avenue, and does not specify a quadrant of the city, i.e. NE, NW, SE, SW.<sup>59</sup>

In Agency's Brief in Response to the November 30, 2023, Order, Agency states that Bradshaw contacted Employee by telephone and directed him to report to 1800 West Virginia Avenue, *NE*.<sup>60</sup> (Emphasis Added). In this brief, Agency further discusses the address confusion and notes that there is no such address as 700 Virginia Avenue, NW. and further notes that the graffiti was located on a bike Lane at 1800 *Virginia Avenue, NW*, (Emphasis Added).<sup>61</sup> Additionally, Bradshaw testified that he directed Employee to 700 Virginia Avenue, NW. Accordingly, the undersigned finds that Agency cannot suggest that Employee traveled to the wrong address, and thus failed to follow Bradshaw's instructions, while also illustrating in its submissions of record that it is not clear where Employee was directed to report.

As noted, Agency has the burden of proving that Employee deliberately or maliciously refused to comply. Accordingly, the address errors are not insignificant but inform whether Employee in fact attempted to comply with Bradshaw's instructions. Here, Employee testified at the hearing that he believed the address to be the West Virginia Avenue, NE warehouse location. He testified that he was not aware of the 700 Virginia Avenue NW location, until DDOT employee, P.B. mentioned it.<sup>62</sup> DDOT employee P.B. testified that while Bradshaw provided him with 700 Virginia Avenue as the location, Bradshaw did not specify a city quadrant, i.e. NE, NW, SE, SW. P.B. testified that his GPS did not recognize 700 Virginia Avenue as an address, but populated West Virginia Avenue, NE as an option, which is where P.B. reported. The record shows that both Employee and P.B. were given instructions by Bradshaw at separate times, yet both independently traveled to the same address with their work partners, believing that to be the location where Bradshaw instructed them to report. Notably, neither Employee nor P.B. testified that they were instructed to travel to a bike lane at 1800 West Virginia Avenue, NE, or any address in NW, as Agency asserts Bradshaw instructed in the Advance Written Notice of Proposed Suspension, the

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<sup>56</sup> Agency's Answer to Employee's Petition for Appeal at pp. 11; 42-43 (October 18, 2023).

<sup>57</sup> Agency's Answer to Employee's Petition for Appeal at p. 11 (October 18, 2023).

<sup>58</sup> Agency's Answer to Employee's Petition for Appeal at pp. 42-43 (October 18, 2023).

<sup>59</sup> Agency's Answer to Employee's Petition for Appeal at p. 17 (October 18, 2023).

<sup>60</sup> *Id.* at p. 3. (Agency's Answer to Employee's Petition for Appeal at p. 17 (October 18, 2023).

<sup>61</sup> Agency's Brief in Response to November 30, 2023, Order, at p. 2 (January 4, 2024).

<sup>62</sup> Tr. 75

Notice of Final Decision for Proposed Adverse Suspension, and in Agency's Brief in Response to November 30, 2023, Order, as detailed above.

### Witness Credibility

Employee's co-workers also corroborated Employee's assertion that Employee was required to and did report to West Virginia Avenue, NE. Employee's work partner T.W. testified that he was present with Employee on the day in question. T.W. also testified that when he asked Employee where they had to report, Employee told him West Virginia Avenue.<sup>63</sup> Employee's colleague P.B. also received a directive from Bradshaw to report to the site of the graffiti. P.B. testified that he also reported to the West Virginia Avenue, NE warehouse because that is where his GPS directed him. P.B. further testified that while he was there, Employee was also present at the West Virginia Avenue, NE location.<sup>64</sup> Employee, T.W., and P.B. all testified that they were there at Bradshaw's instruction and did not find any graffiti at the West Virginia Avenue location.<sup>65</sup>

Employee also maintained that he attempted to call Bradshaw while on the way to West Virginia Avenue, NE to clarify the location of the worksite, but Bradshaw did not answer.<sup>66</sup> Notably, Bradshaw continued to give instructions to P.B., which P.B. communicated to Employee. First, Bradshaw told P.B. to await further instructions because he may have provided the wrong address. Employee testified that P.B. communicated these instructions to him, and accordingly, Employee also waited at this site awaiting further instruction. Then Bradshaw told P.B. to report back to their work building at W Street, NE, their primary work location, which P.B. also communicated to Employee.<sup>67</sup> Employee testified that because P.B. was there for the same work assignment, and continued to receive instructions from Bradshaw, he followed the instructions Bradshaw provided to P.B. (first to await further instruction, then to travel back to the DDOT Yard at W Street).<sup>68</sup>

The undersigned finds Employee's, P.B.'s and T.W.'s testimony to be credible. The testimony from both T.W. and P.B. corroborate that Employee was present at the West Virginia Avenue location. It is clear from their testimony that they were all there at Bradshaw's direction and were awaiting further instructions. Additionally, Employee testified that he attempted to call Bradshaw and when Bradshaw was nonresponsive, he followed Bradshaw's instructions provided to P.B. to await further instructions, and then to report back to W Street. It is also clear from the record that the address confusion interfered with Bradshaw's ability to correctly direct the involved parties to the correct location. While Employee told Bradshaw he would not travel to the worksite, his actions after making this statement support his attempt to comply with Bradshaw's instructions. As such, I find that Employee's communication to his work partner that they had to travel to West Virginia Avenue, NE, his attendance at the West Virginia Avenue, N.E. warehouse, his testimony that he received instructions through P.B. to first await further instruction from Bradshaw, then travel back to the W Street location support Employee's assertions that he attempted to comply with Bradshaw's instructions.

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<sup>63</sup> Tr. 60; 65-66.

<sup>64</sup> Tr. 49-50

<sup>65</sup> Tr. 49, 67, 76.

<sup>66</sup> Tr. 72.

<sup>67</sup> Tr. 73-75.

<sup>68</sup> *Id.*

Further, Bradshaw's instruction to Employee as well as P.B. included an incorrect address. P.B. testified that no quadrant was provided in the address Bradshaw texted him. Employee testified that Bradshaw told him to meet at West Virginia Avenue, NE. It is also of note that Bradshaw acknowledged during his testimony that 700 Virginia Avenue was the wrong address. Further, the Notice of Final Decision for Proposed Adverse Suspension lists 1800 West Virginia Avenue, NE as the location to which Employee was directed to report, which is also the wrong address, and is located one block from the West Virginia Avenue, NE warehouse location.<sup>69</sup> Yet, none of the witnesses testified that they were told to report to 1800 Virginia Avenue, NE. As a result, I find that Agency cannot acknowledge that Employee traveled to the wrong address and thus claim that he deliberately or maliciously refused to comply with supervisory instructions, while also conceding that the correct address was never provided, especially when the evidence suggests that Employee, P.B., and their partners traveled to the West Virginia Avenue warehouse believing that they were at the correct location and awaiting further supervisory instruction from Bradshaw.<sup>70</sup> Accordingly, Agency has not met its burden of proof in this matter.

### Appropriateness of Penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (1985). According to the Court in *Stokes*, the undersigned must determine whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment. Per *Stokes*, OEA is not to substitute its judgement for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.<sup>71</sup> As explained above, I find that Agency has not met its burden of proof that Employee deliberately or maliciously refused to comply with rules, regulations, written procedures, or proper supervisory Instructions. As a result, I find that the penalty of a ten-day (10) suspension cannot be sustained.

### ORDER

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

1. Agency's action of suspending Employee for ten (10) days is **REVERSED**.
2. Agency shall reimburse Employee all backpay, and benefits lost as a result of the suspension.
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

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<sup>69</sup> Agency's Answer to Petition for Appeal at p. 42 (October 18, 2023); *See also* Agency's Brief in Response to November 30, 2023, Order at pp. 12-13 (January 4, 2024) (noting that an Entrance to the West Virginia Avenue Warehouse is located at 1900 West Virginia Avenue, NE).

<sup>70</sup> The undersigned would note that address discrepancies proved to be difficult in the review of the record and the undersigned was challenged in deciphering which address Employee was told to report.

<sup>71</sup> *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).