

⁴ DPM §§1605.4(e) and 1607.2(e) - which states, “Failure to carry out duties/responsibilities expected of reasonable individual in same position; failure to perform, undue delay in completing tasks/duties; failure to assist public; careless work; personal business; abandoning post; sleeping on duty.”

Conference for October 2, 2024. Both parties were present at the scheduled conference. Subsequently, on October 3, 2024, the undersigned issued an Order scheduling a Prehearing Conference for November 14, 2024. That Order also directed the parties to submit Prehearing Statements. Both parties attended the scheduled Prehearing Conference and submitted their Prehearing Statements. Thereafter, on November 14, 2024, the undersigned issued an Order Convening an Evidentiary Hearing in this matter for January 29, 2025.⁵ On February 10, 2025, the undersigned issued an Order Rescheduling the Evidentiary Hearing to March 18, 2025. Per Employee's request, the undersigned issued an Order on March 18, 2025, rescheduling the scheduled Evidentiary Hearing for May 7, 2025.⁶ The Evidentiary Hearing was held on May 7, 2025, with both parties in attendance. A copy of the transcript from the Evidentiary Hearing was emailed to the parties, and on May 30, 2025, the undersigned issued an Order requiring the parties to submit written closing arguments. Both parties have filed their respective closing arguments. 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 to discipline Employee; and if so,
- 2) Whether the penalty of fifteen (15) days suspension without pay is appropriate under applicable District laws, rules, regulations and the Table of Illustrative Action.

SUMMARY OF MATERIAL TESTIMONY

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issues of whether Agency had cause to suspend Employee for fifteen (15) days for violating Chapter 16 of the District Personnel Manual. The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.⁷

Agency's Case in Chief

Enrique Gomez ("Mr. Gomez") Tr. pgs. 11-26, 150 - 154.

Mr. Gomez is employed by Traffic Services and Control LLC as a Fiber supervisor. His responsibilities are to execute traffic control plans, organize and lead a team. Mr. Gomez confirmed that he was working on November 29, 2023, at the intersection of Van Buren and 3rd Street, Northwest, in the District of Columbia. He stated that he was working his normal tour of duty on November 29, 2023, which was from 7:00 a.m. until 4:00 p.m. Tr. pgs. 11-12.

⁵ Due to personal extenuating circumstances requiring the undersigned's absence, on December 11, 2024, AJ Harris issued a Notice Regarding Temporary Abeyance of Proceedings to the parties postponing the Evidentiary Hearing until my return.

⁶ Employee's official request was received by OEA on March 30, 2025.

⁷ Wednesday, October 25, 2023 – Vol. I. and Transcript Vol II – November 2, 2023.

Mr. Gomez testified that on November 29, 2023, at around 12:23 p.m., there was an altercation between Employee and Ms. Barba-Cuella.⁸ Mr. Gomez testified that around 12:23 p.m., he and his team were controlling the intersection on 3rd Street and Van Buren when Employee arrived and parked her Toyota Prius at the intersection of their work zone. Mr. Gomez stated that he approached Employee and asked her if she could please move her vehicle, to which Employee responded very rudely that “she does not have to listen to [him] and that she's not going to move her vehicle.” He stated that Employee was very hostile, and she stepped out of her vehicle to start taking pictures. Mr. Gomez asserted that as Employee was taking pictures, she got close to Mr. Gomez’s co-worker, Ms. Barba-Cuella, who also asked Employee if she could move her vehicle. He stated that Employee again rudely told Ms. Barba-Cuella that she would not remove her vehicle. Mr. Gomez cited that they continued controlling traffic, while Employee returned to her vehicle. He testified that Employee suddenly exited her vehicle, “very angrily stating that her tablet had died and we are basically, were at fault because we took time out of her day.” Mr. Gomez cited that Employee blamed them for her table dying. Mr. Gomez stated that Employee started exchanging words with him and Ms. Barba-Cuella, as she walked towards Ms. Barba-Cuella and got in Ms. Barba-Cuella’s face. He noted that “at one point an altercation broke out.” That’s when he ran over towards them to “break it up and I get [Employee] off of [Ms. Barba-Cuella]. And [Employee] is continuing trying to go after [Ms. Barba-Cuella], but could not go past me.” Mr. Gomez testified that Employee then ran to her vehicle to call law enforcement and an ambulance. Tr. pgs. 13-14, 19.

Mr. Gomez asserted that the police did an investigation and interviewed all three (3) of them when they arrived at the scene. He testified that there were a total of three (3) flaggers on the scene. He noted that they discovered that Ms. Barba-Cuella’s property was broken and that she suffered a bite mark on her hand, which she had to later go to the hospital to get a vaccine to treat the bite. He cited that the police gave Ms. Barba-Cuella an incident report number. Mr. Gomez identified Employee during the Evidentiary Hearing. Tr. pgs. 15-16, 151.

Mr. Gomez testified that when Employee got out of her vehicle, she said something along the lines of “now my motherfucking tablet died, it's you all fucking fault.” He asserted that that’s when Employee started walking towards Ms. Barba-Cuella. When asked who swung first when the altercation between Employee and Ms. Barba-Cuella started, Mr. Gomez stated that he saw Employee attack Ms. Barba-Cuella because Employee was the one that approached Ms. Barba-Cuella. He explained that Employee swung her fist at Ms. Barba-Cuella’s face, hitting Ms. Barba-Cuella. He stated that both Employee and Ms. Barba-Cuella were grabbing each other when he got over to them. He cited that Employee had already bit Ms. Barba-Cuella’s hands “that’s when I ripped them both apart.” Mr. Gomez was asked if he ever saw Ms. Barba-Cuella strike Employee, and he said “No, I did not.” He noted that Ms. Barba-Cuella did touch Employee to keep Employee away from her. Mr. Gomez cited that Ms. Barba-Cuella’s prescription glasses were broken when Employee shoved her face and they fell to the ground and were stepped on. Tr. pgs. 16-18.

Mr. Gomez identified Ms. Barba-Cuella in Employee’s Exhibit 1 as the flagger holding a pole and wearing gloves in the picture. He stated that Ms. Barba-Cuella removed her gloves during the November 29, 2023, incident to call 311 to have Employee’s vehicle ticketed and towed. Mr. Gomez testified that the Employee approached Ms. Barba-Cuella, and the altercation between Employee and Ms. Barba-Cuella started about three (3) minutes after Ms. Barba-Cuella made the 311 call. When asked if Ms. Barba-Cuella was wearing her gloves when she was bitten by Employee, Mr.

⁸ Mr. Gomez testified that Ms. Barba-Cuella was his wife. Tr. pg. 19.

Gomez said “No. She had taken them off because after she made the phone call she never put them back on.” Tr. pgs. 151-153.

Mr. Gomez testified that Employee parked at the work zone impacted their work because “that section of the road was coned off to make way for the utility workers to do their job. That means, there's only two, there's basically a limited amount of space for two-way traffic to go. So, when [Employee] parked on the side, ...basically where she parked her vehicle, it was taking away from one lay (sic). So, essentially one lane could go one way, but she was basically blocking the road for the lane to go the opposite way. And the issue is that we have multiple very big, very big construction vehicles going back, possibly buses. And when you take away space from a lane, it makes it very dangerous for not only them, but for her to get hit.” Tr. pgs. 19-20.

Mr. Gomez testified that if a driver parked by the side of the road and is impeding their work, they would verbally ask the driver to move their vehicle if they were in the vehicle. If the driver refuses to move their vehicle, then they would call 311 and have them ticketed and towed immediately. Tr. pgs. 20-21. Mr. Gomez stated that they called 311 for the incident with Employee, but no one responded to their 311 call. Tr. pg. 22.

Mr. Gomez asserted that the incident on November 29, 2023, with Employee started with a verbal altercation, with Employee verbally assaulting them and then progressed to a physical altercation when Employee approached Ms. Barba-Cuella. He cited that he broke up the altercation “while the altercation was still happening...” He noted that Ms. Barba-Cuella went to the hospital on the same day to receive treatment and a vaccine for the bite on her palm. He stated that except for her broken glasses, Ms. Barba-Cuella did not sustain any injuries to her eyes. He cited that Ms. Barba-Cuella was wearing her glasses during the altercation. Mr. Gomez stated that he did not call the police after the altercation. Tr. pg. 22-25. Mr. Gomez asserted that he knew Employee was a District employee when she parked her vehicle, because she was wearing a shirt with the District of Columbia flag on the shoulder, and her vehicle was marked as well with the District of Columbia flag. Tr. pgs. 25-26.

Aaron Horton (“Mr. Horton”) Tr. pgs. 29-59.

Mr. Horton has worked at Agency for 21 years. He is the chief of maintenance operations. Tr. pg. 29. His responsibilities include establishing maintenance preservation programs for the District's roadway asset network, which involves City policy, establishing positions, establishing budget, developing work plans, and criteria to meet the goals for the Department of Transportation in terms of maintenance and preserving the assets. Tr. pg. 30.

Mr. Horton affirmed that he also served as a final decision maker in disciplinary actions and that he was the final decision maker in Employee's case. Tr. pg. 30. Mr. Horton asserted that he sustained the proposed 15-day suspension against Employee after reviewing the proposing documents, the description of what happened, Employee's statement, statements from the witnesses, and all the supporting documents, to include pictures. Mr. Horton testified that the description of what happened led him to believe that a suspension was warranted. He stated that he expected Employee to handle the incident on November 29, 2023, with the flaggers differently. Tr. pgs. 30-34, 54-57. Mr. Horton testified that Employee had another incident, involving a complaint from a citizen about poor behavior while on duty. He cited that it was a “How's My Driving” complaint. Tr. pgs. 34-35.

Mr. Horton confirmed that as the final decision maker for the 15-day suspension, he also made a *Douglas* factors determination. He applied the *Douglas* factors to the current matter and provided an explanation for his decision for the *Douglas* factors. Tr. pgs. 35-38, 42-49. Mr. Horton affirmed that he considered the 311 complaint that occurred in 2024, in his decision to suspend Employee. He cited that Employee had previously been coached by her supervisor, and she took classes. Tr. pgs. 53-54.

Maria Barba-Cuellar (“Ms. Barba-Cuella”) Tr. pgs. 61 - 73

Ms. Barba-Cuella is a supervisor and flagger in Traffic Control and Services. She cited that her regular work schedule is from 7:00 a.m. until around 5:00 p.m. Her duties include setting signs, standing out there with a stop and go sign, and helping pedestrians cross. Ms. Barba-Cuella cited that she was working on November 29, 2023, on 3rd and Van Buren in the District of Columbia. She said she was dressed as a flagger on November 29, 2023. Tr. pgs. 61-63.

Ms. Barba-Cuella confirmed that an incident occurred on the morning of November 29, 2023. She testified that Employee was parked in a handicap space that had been converted into a one-way lane. She explained that they told Employee she could not park there because she was blocking the one-way lane. Employee stated that it would only take a minute. She explained that Employee was rude to her and her coworker. Ms. Barba-Cuella cited that she told Employee she could park next to her since “you won't block anybody anywhere. And she proceeded to curse and yell. And when I, and when my coworker told her first and then I told her second because she was blocking traffic, a FedEx couldn't pass through or a UPS, one of those big trucks. And she didn't care.” Ms. Barba-Cuella asserted that when Employee came next to her and took some pictures, Employee “started cussing me out. Like I don't know if she was having a bad day but she was taking it out on me. And I told her if she could please move it once again and she wouldn't, so then she got in my face and she started hitting me. She broke my glasses, she bit my hand, I had to go to the hospital ... to get a shot for that.” Ms. Barba-Cuella testified that she missed a day of work, she had to buy new glasses and pay her medical bills. She identified Employee during the Evidentiary Hearing. Tr. pgs. 63-65, 68.

Ms. Barba-Cuella confirmed that Employee physically walked up to her and got in her face, cussing her out. She stated that Employee punched her, and as she was trying to defend herself, Employee bit her hand. Ms. Barba-Cuella stated that her coworker was also trying to get Employee off her. She testified that Employee hit her first and she hit Employee in self-defense. She maintained that she did not approach Employee in an aggressive manner when she asked her to move her vehicle. Ms. Barba-Cuella described that Employee was wearing black pants and had a DDOT shirt on. Tr. pgs. 66-67.

Ms. Barba-Cuella testified that when she and Employee had the verbal altercation, her coworker, Mr. Gomez, was across the street. She asserted that Mr. Gomez, had to leave his post and run over to get Employee off her. Tr. pgs. 68-69. Ms. Barba-Cuella cited that she went to the hospital prior to the end of her tour of duty. Tr. pgs. 69-70. She stated that she did not have any damage to her eyes, but her glasses were completely damaged. Ms. Barba-Cuella noted that Employee bit the thumb of her left hand. Tr. pgs. 70-71. Ms. Barba-Cuella testified that Employee “first hit me when I was trying to -- so she got my glasses, broke those. And then I was trying to push her off of me and as I was pushing her off of me, she bit my hand.” She cited that Employee contacted the police, and they got a police report. Ms. Barba-Cuella stated that she was not wearing gloves on the day of the

incident. She affirmed that she provided a written statement to Agency regarding the incident. Tr. pgs. 71-73.

Clement Smith (“Mr. Smith”) Tr. pgs. 86 -96

Mr. Smith is the Fleet manager of the Department of Transportation. He stated that he manages Agency’s fleet operations. His duties entail tracking vehicles, buying vehicles, disposal of vehicles, and keeping track of the tracker box. He testified that they receive “How's My Driving” complaints from the public for District employee. He explained that once he receives those complaints, he sends them out to the employees’ managers so they can answer questions related to the complaint. Tr. pgs. 87-88.

Mr. Smith affirmed that a “How’s My Driving” complaint was received on January 29, 2024, regarding an incident on 14th Street, Northwest and Massachusetts Avenue, Northwest, Washington, D.C. He explained that “after I received the complaint, I did an investigation of who was driving the vehicle, what's involved in the complaint, the vehicle number. Once I do that, I go into the tracking system and see who was driving that vehicle at that time and I send it to the manager.” Mr. Smith identified the license plate number of the vehicle, and he stated that “...the initial title of the complaint was using cell phone. And they build it to the summary of events saying that the driver was sitting in the middle of the road blocking Thomas Circle on a green light, not moving and on the phone and they're non-responsive.” Mr. Smith also testified that the complaint stated that “... did not respond to other drivers, suddenly pulled in front of our vehicle as we were turning on service road, and then honked ... at them aggressively at Thomas Circle on 14th Street and Massachusetts.... And then it said that they were not able to get through via phone or the website to us, so they sent the 311 complaint.” Mr. Smith stated that the initial complaint did not have a name attached to it, but after he received the complaint, he looked up the vehicle license number in their system, and he tracked the vehicle keys and driver/employee driving the vehicle on that day. He cited that he sent Employee’s information to her supervisor. Tr. pgs. 88-92.

Mr. Smith testified that Employee was identified as the driver of the vehicle in question. He stated that “the thing that I do know is that she is the only one that's assigned to that, once I looked it up in the tracker box there, there was no other name attached to that vehicle except hers. He identified Employee on the date of the Evidentiary Hearing. When asked how he verified if the complaints were legit, Mr. Smith stated that “Well, the one thing that I do, what my responsibility is, is to identify the driver, that’s my responsibility.” Tr. pgs. 92-94.

Employee’s Case in Chief

Derrick Nobles (“Mr. Nobles”) Tr. pgs. 98 - 102

Mr. Nobles has been employed with Agency for approximately 25 years. He is a construction representative inspector. He stated that he’s known Employee since 1983, and Employee was an excellent inspector. He asserted that “I never had any issues with her at all since I've been working with [Employee].” When asked if he has ever witnessed Employee on the job, having any issues with any citizens on the street while doing their job, Mr. Smith said “No, not at all.” He testified that Employee is “a woman of integrity, definitely trustworthy, somebody that you would definitely want in your corner, or by your side. Basically, she's zero tolerance when it comes to a lot of drama.... she's definitely dependable, she's also just a downright out good person, I would say. Like I said, I've

never had any issues with Ms. Sumler at all, since I've been knowing her. She's also an ordained licensed minister, so I think that also helps her, you know, Christianity, her walk with Christ as well." He noted that he has never heard Employee curse. Tr. pgs. 98-101.

Mr. Nobles stated that he trained Employee and that Employee is just a coworker and he does not supervise Employee. When asked if he partnered up with Employee when they work, Mr. Nobles said "No, actually we work separately. She does her thing and I do my thing as well. We do work in the same yard but she works alone and I work alone." He noted that he was not working in the field with Employee on November 29, 2023. Tr. pgs. 100 – 101.

Employee – Tr. pgs. 103 - 149

Employee has been employed by the District of Columbia government since 1988, but she has been employed by Agency since 2021. Tr. pg. 103. Employee testified that on November 29, 2023, at about 12:25 p.m., as she was coming across 3rd Street, looking for address 6601, she came across some cones in her lane, and to her right, there was a construction guy, and an open bodied truck on the side of the street, alongside the park. She asserted that as she went through the intersection to the next block, she realized she had passed the address she was looking for. She turned around and the property she was looking for was across the street from the construction worker. She cited that there was nothing in front of the property she was inspecting, and that the cones were in the middle of the street and across the street where the construction worker was. She explained that there was a young lady with a sign, on the corner of the property she was inspecting. Employee stated that when she stopped at the corner of the 3rd Street side, there were two vehicles parked and she parked right behind one of them, along the curb, ensuring she wasn't impeding traffic. Tr. pgs. 103 – 105, 114-117.

Employee testified that when she got out of the vehicle, she was approached by a male construction worker (who has been identified as Mr. Gomez), who informed her that she could not park there because they had construction work there. She asserted that she told the construction worker that "you don't have any signs or anything.... I'm only here for this house right here on the corner, and I'll be brief, I only have 2 percent battery." She stated that Mr. Gomez said it was okay. Employee cited that this was her last inspection for the day and she was trying to be brief. Tr. pgs. 105-106.

Employee asserted that as she proceeded to start her inspection, she heard a noise from the female flagger's (who has been identified as Ms. Barba-Cuella) walkie-talkie. She explained that Ms. Barba-Cuella "was on the street at the stop sign area. I was on the sidewalk doing an inspection on the cracking. And I could hear her radio, but it was coming also from across the street where the young man was, so they were conversing." Employee testified that Ms. Barba-Cuella "simultaneously started picking at me and telling me that I didn't belong there. And I said, ma'am, I'm only going to be brief, my iPad is going to run out." Employee cited that Ms. Barba-Cuella said "we should have you towed or writing a ticket. And I proceeded to tell her like we're supposed to, I full addressed that I am a DC inspector and I'm not park, and a parking officer, I specifically told her that." Tr. pgs. 106 – 107.

Employee stated that her tablet died while she was doing the inspection and she had to go to her vehicle to get her phone since they could also work with their phones. She stated that she only needed about three (3) more pictures, which she took with her phone. Employee testified that Ms.

Barba-Cuella started giving her a hard time as she was taking the pictures. She stated that Ms. Barba-Cuella “aggressively came at me and dared me to say anything. And then, the next thing I knew, she was beating me in the face, pulling my hair. I was humiliated. I thought that there were cameras that they would catch everything. And a guy came from across the street. I had the phone in my hand, I was in the middle of taking pictures. So, I was unbalanced, she caught me off guard... when the guy came across, I felt like he had to see everything because they were conversing all the time. I could hear that from the radio. I didn't know their language, they were talking their language.” Tr. pgs. 107-108, 134-135.

Employee testified that as she returned to her vehicle, she “told them then, I said, I'm going to the police. He said that it's okay, because if you call them, I'm just going to tell them that you hit her first. I had no knowledge of who they were, how they were related.” Tr. pg. 109. Employee stated that Ms. Barba-Cuella’s “glasses are knocked on the ground and as a result, you've got a man, knocking my arm and her glasses got broken and I got blamed.” Employee cited that as she came to her vehicle, Mr. Gomez and Ms. Barba-Cuella got together and started talking, but she could not understand what they were saying. Employee noted that she called the police at approximately 12:35 p.m. and she sat in her vehicle until the police arrived. Tr. pgs. 109-111.

Employee testified that she was interviewed by the police. She stated that she was very upset. She also cited that she told the police she worked for DDOT, but for some reason, they kept referring to her as ‘parking enforcement’. Employee stated that “I told them that the cameras would show everything and they pretty much like laughed, like oh really, like really, okay. I felt like I was a joke, I was so humiliated that day.” She explained that she thought she had a police report, “Later to find, that it's saying the opposite. ... I was not allowed to call my supervisor...” Tr. pg. 111.

Employee asserted that she knew it was protocol for construction workers to wear gloves. She stated that Ms. Barba-Cuella “had on thick ski-like gloves that day, they were black, so there's no way, she hit me in the face, am I going to have a chance to bite her with the mark that she showed.” When asked if Ms. Barba-Cuella was wearing gloves on November 29, 2023, Employee stated that “Yes, absolutely, she had gloves on and it is a construction requirement, it's in the photo. There's a photo with a glove on... When I took my photos of the sidewalk, she was standing there, you could see her. So, you could see she had gloves on.” Employee identified the picture showing Ms. Barba-Cuella wearing gloves as “Photo number IMG3318.jpeg.” She stated that the pictures were taken during her assignment and that Ms. Barba-Cuella was the only flagger. Employee explained that she took pictures as part of her work for the day, which she submitted to her supervisor via email, along with her statement. She cited that the pictures were timestamped. Tr. pg. 112, 118-126, 129.

Employee stated that she did not use profanity. She also stated that she had on a navy blue sweater and not a shirt with a patch on the day of the incident. Employee testified that the construction workers knew she was a government employee because she showed them her ID and told them she was a DDOT inspector. Tr. pgs. 113, 130. Employee reiterated that she did not bite Ms. Barba-Cuella or anybody else. Employee asserted that she immediately went to the emergency room, and she called her supervisor to inform him of the incident and that she was going to the hospital. Tr. pg. 112, 118, 147-148.

Employee acknowledged that she has had more than one (1) “How’s My Driving” complaints prior to the current incident. She confirmed that she took driving courses recommended by Agency in 2021 or 2022. She also confirmed that she took a diagnostic driving course on August 7, 2023.

Employee also confirmed that the training was regarding another complaint management received about her driving. Tr. pgs. 137-139.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁹

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of suspending Employee for fifteen (15) days was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. I find Mr. Gomez's and Ms. Barba-Cuella's testimonies to be more credible than Employee's testimony. Moreover, their testimonies are supported by the evidence already in the record. The following findings of fact, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

1) Whether Agency had cause to discipline Employee

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. The District Personnel Manual ("DPM") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency suspended Employee for fifteen (15) days for (1) Safety and Health violations; (2) Conduct prejudicial to the District of Columbia government; and (3) Neglect of duty.¹⁰ Pursuant to OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021), Agency has the burden of proving the charges that resulted in the suspension. Agency must meet this burden by a preponderance of the evidence. "Preponderance of the evidence shall mean: the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."¹¹

Safety and Health violations: failure or refusal to observe and/or enforce safety and health regulations or to perform duties in a safe manner

Agency argued that Employee failed to observe and/or enforce safety and health regulations or to perform her duties in a safe manner. Agency asserted that Employee failed to cooperate with the flaggers on November 29, 2023, when they asked her to remove her vehicle and she refused to do so. Agency explained that Employee failed to conduct herself as expected of a reasonable government employee, with courtesy and respect of the safety work the flaggers were performing. Agency maintained that the location Employee parked her vehicle was a work zone, and the flaggers were attempting to promote safety when they asked Employee to park her vehicle elsewhere, but she did not comply with their directive.¹² Both Mr. Gomez and Ms. Barba-Cuella testified that Employee was asked to remove her vehicle, but she refused to comply. Mr. Gomez indicated that Ms. Barba-

⁹ 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").

¹⁰ Agency's Answer to Petition for Appeal at Exhibits 1 and 3 (August 15, 2024).

¹¹ OEA Rule § 699.1.

¹² Agency's Answer, *supra*, at Exhibits 1 and 3.

Cuella called 311 to have Employee's vehicle ticketed and towed because Employee refused to move her vehicle. Ms. Barba-Cuella explained that they told Employee she could not park there because she was blocking the one-way lane, but Employee stated that it would only "take a minute."

While Employee asserted that she was parked along the curb, in order not to impede traffic, she does not deny that she was approached by Mr. Gomez who informed her that she could not park there because they had construction work there. Employee claimed that she explained to Mr. Gomez that she was only going to be there for a short time and Mr. Gomez said it was okay. However, Mr. Gomez testified that when he approached Employee and asked her if she could please move her vehicle, Employee responded very rudely stating that "she does not have to listen to me and that she's not going to move her vehicle." There's no dispute that Employee parked her vehicle in a work zone, and she refused to remove her vehicle after being instructed by Mr. Gomez to do so. As both Mr. Gomez and Ms. Barba-Cuella testified, parking in the work zone was dangerous not only for the flaggers, but for Employee, as well as other drivers. I also agree with Agency's assertion that Employee's refusal to cooperate with the flaggers on November 29, 2023, placed the flaggers at risk and made it difficult for the flaggers to perform their duties safely and effectively. Accordingly, I conclude that Agency had cause to discipline Employee for failure or refusal to observe and/or enforce safety and health regulations or to perform duties in a safe manner.

Conduct prejudicial to the District of Columbia government: use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures, or other conduct; quarrelling; creating a disturbance or disruption; or in appropriate horseplay.

Agency argued that it was Employee's argumentative behavior and failure to follow the flagger's initial instruction to move her vehicle that caused the altercation on November 29, 2023. Agency also stated that Employee's quarrelsome behavior and unprofessional conduct towards the flaggers demonstrated a lack of professionalism, which escalated to a physical altercation.¹³ While Employee stated that she did not use profanity, and Mr. Nobles noted that he has never heard Employee curse, he cited that he was not working in the field with Employee on November 29, 2023.

Additionally, Mr. Gomez testified that when he approached Employee and asked her if she could please move her vehicle, Employee responded very rudely that "she does not have to listen to [him] and that she's not going to move her vehicle." Mr. Gomez also testified that when Employee returned to her vehicle after taking some pictures, Employee suddenly exited her vehicle, "very angrily stating that her tablet had died and we are basically, were at fault because we took time out of her day." Mr. Gomez cited that Employee blamed them for her table dying. Mr. Gomez stated that Employee started exchanging words with him and Ms. Barba-Cuella, as she walked towards Ms. Barba-Cuella and got in Ms. Barba-Cuella's face. Ms. Barba-Cuella also testified that Employee cursed and yelled at her. Consequently, I find that Employee arguing with the flagger after being told she could not park her vehicle in the construction zone was unprofessional and created a disturbance that escalated to a physical altercation and to the police being called to the scene.¹⁴

¹³ *Id.*

¹⁴ Ms. Barba-Cuella testified that Employee bit her hand, however, Employee denied biting Ms. Barba-Cuella or anyone on November 29, 2023. I find that this fact is irrelevant to this cause of action as the cause of action does not require physical contact. Additionally, even assuming that Employee did not use profanity as she stated, Agency has still met its burden because Employee acted unprofessionally when she refused to comply with the flagger's directive to move her vehicle. This conduct escalated to a verbal and physical disturbance, that led to the police

Neglect of Duty

Agency also charged Employee with Neglect of Duty. Agency explained that as a Civil Engineering Technician at DDOT, Employee should reasonably have known that flaggers were sometimes necessary and could be required to control traffic in work zones, yet Employee deliberately refused to follow safety instructions from Mr. Gomez and Ms. Barba-Cuella. Agency stated that as a Civil Engineering Technician, Employee was expected to demonstrate heightened attention to safety when visiting a work zone while inspecting public space, yet Employee failed to comply with the safety instructions from the flaggers, which led to a verbal and physical altercation. Agency concluded that Employee failed to carry out her duties as reasonable expected.¹⁵ Employee does not dispute that she was expected to pay attention to safety while conducting her duties, especially in work zones. Mr. Gomez and Ms. Barba-Cuella testified that Employee failed to comply with their safety request to move her vehicle which was parked in a work zone on November 29, 2023. Accordingly, I find that Employee neglected her duty in this instance, and as such, Agency can discipline Employee for Neglect of Duty.

Agency also charged Employee with Neglect of Duty for an incident that occurred on January 29, 2024. This incident stemmed from a “How’s My Driving” complain. Agency stated that its Office of Risk Management received a complaint from a citizen about a distracted and dangerous operation of a government vehicle on January 29, 2024, stating that:

“Hello, wanted to report a city worker for dangerous driving. License plate number: DC ***** Drive was sitting in middle of road – BLOCKING THOMAS CIRCLE DURING A GREEN LIGHT not moving and on phone, did not respond to other drivers, suddenly pulled in front of our vehicle as we were turning onto service road, and then honked at US aggressively. Thomas Circle on 14th and Massachusetts. Happened just now, approximately 2:40 pm on Jan 29. I was not able to get through via phone or on the website. Thank You.”¹⁶

Agency cited that the behavior described by the citizen is distracted driving and erratic operation of the vehicle, which jeopardizes the safety of other road users and blocks traffic. Agency noted that Employee’s lack of attention was similar to previous instances of failure to pay attention while driving. Agency stated that Employee had previously been warned, trained and disciplined for the careless operation of DDOT vehicle while on duty. Agency maintained that Employee’s job description requires her to maintain a valid driver’s license, and to operate government vehicles while on duty. Thus, Employee is reasonably expected to comply with traffic laws and demonstrate commonplace traffic safety and courtesy for other road users.¹⁷

Mr. Smith testified that after he received the complaint, he looked up the vehicle license number in their system, and he tracked the vehicle keys and employee driving the vehicle on that day. Mr. Smith cited that Employee was identified as the driver of the vehicle. He stated that “the thing that I do know is that she is the only one that’s assigned to that, once I looked it up in the tracker box there, there was no other name attached to that vehicle except hers.”

being called to the scene and a disruption to both Employee and Ms. Barba-Cuella’s workday as both had to go to the hospital following the altercation.

¹⁵ Agency’s Answer, *supra*, at Exhibits 1 and 3.

¹⁶ *Id.*

¹⁷ *Id.*

Employee on the other hand does not deny the occurrence of the January 29, 2024, incident or that she was the driver of the vehicle involved in the January 29, 2024, “How’s My Driving” complaint. However, she argued that the incident was not properly investigated by Agency. Employee’s representative asked Mr. Smith during the Evidentiary Hearing how he verified if the complaints were legit, and Mr. Smith stated that “Well, the one thing that I do, what my responsibility is, is to identify the driver, that’s my responsibility.” Employee did not provide any evidence to contradict the citizen’s rendition of what happened on the road on January 29, 2024. Additionally, Employee did not dispute that pursuant to her job description, she was reasonably expected to comply with traffic laws and demonstrate commonplace traffic safety and courtesy for other road users. Furthermore, Employee acknowledged during the Evidentiary Hearing that this was not the first “How’s My Driving” complaint Agency had received about her or that she had taken training courses prior to the January 29, 2024, incident. She confirmed that she took driving courses recommended by Agency in 2021 or 2022. Employee also confirmed that she took a diagnostic driving course on August 7, 2023. She affirmed that the training was regarding another complaint management received about her driving. Therefore, I find that Agency has met its burden of proof for this cause of action as it relates to this specification.

2) *Whether the penalty of suspension is within the range allowed by law, rules, or regulations.*

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).¹⁸ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the following charges against Employee: “Safety and Health violations: failure or refusal to observe and/or enforce safety and health regulations or to perform duties in a safe manner; (2) Conduct prejudicial to the District of Columbia government: use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures, or other conduct; quarrelling; creating a disturbance or disruption; or in appropriate horseplay; and (3) Neglect of duty.” As such, Agency can discipline Employee based on these charges.

In reviewing Agency’s decision to suspend Employee for fifteen (15) days, OEA may look to the Table of Illustrative Actions (“TIA”). Pursuant to the record, this is Employee’s first charge for Safety and Health violations: failure or refusal to observe and/or enforce safety and health regulations or to perform duties in a safe manner. Agency suspended Employee for fifteen (15) days pursuant to this cause of Agency. The penalty for the first offense of Safety and Health violations: failure or refusal to observe and/or enforce safety and health regulations or to perform duties in a safe

¹⁸ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *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).

manner ranges from Counseling to removal. Thus, I find that Agency's penalty of fifteen (15) days suspension for this cause of action is within the range allowed by the TIA.

Additionally, based on the record, this is Employee's first charge of Conduct prejudicial to the District of Columbia government: use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures, or other conduct; quarrelling; creating a disturbance or disruption; or in appropriate horseplay. Agency suspended Employee for fifteen (15) days for violating this cause of action. The penalty for the first offense for Conduct prejudicial to the District of Columbia government: use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures, or other conduct; quarrelling; creating a disturbance or disruption; or in appropriate horseplay ranges from Counseling to 15-day suspension. Therefore, I find that the penalty of fifteen (15) days suspension for this cause of action is within the range allowed by the TIA.

Agency noted in its discussion of the *Douglas factors* that Employee was disciplined for careless negligent operation of motor vehicle on April 21, 2023, therefore, I find that this was Employee's second (2nd) offense for "Neglect of Duty". Agency suspended Employee for fifteen (15) days for this cause of actions. The penalty for the first offense of Neglect of Duty ranges from Counseling to removal; and the penalty for subsequent offenses ranges from a five (5)-day suspension to removal. Accordingly, I find that Agency's penalty of fifteen (15) days suspension for this cause of action is within the range allowed by the TIA.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.¹⁹ When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.²⁰ Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to terminate Employee.²¹ The *Douglas* factor analysis included in the record

¹⁹ *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

²⁰ *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

²¹ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

demonstrates that Agency considered all factors in imposing the penalty in this matter. Mr. Horton confirmed that he also made a *Douglas* factors determination, wherein, he applied the *Douglas* factors to the current matter and provided an explanation for his decision for the *Douglas* factors. As noted above, the evidence does not establish that the penalty of fifteen (15) days constituted an abuse of discretion. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for fifteen (15) days is **UPHELD**.

FOR THE OFFICE:

/s/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

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- 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
 - 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
 - 3) the employee's past disciplinary record;
 - 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
 - 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
 - 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - 7) consistency of the penalty with any applicable agency table of penalties;
 - 8) the notoriety of the offense or its impact upon the reputation of the agency;
 - 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - 10) potential for the employee's rehabilitation;
 - 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 - 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.