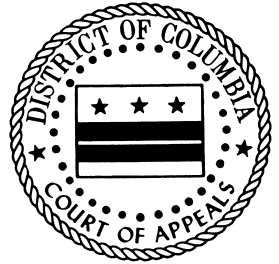


No. 24-CV-326



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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KISHA SPENCER,
APPELLANT,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF FOR-HIRE VEHICLES, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA
DEPARTMENT OF FOR-HIRE VEHICLES**

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STATEMENT OF THE ISSUE

Relying on the mistaken belief that her assigned two-hour training was more difficult than her peers', appellant Kisha Spencer refused to complete the training in a timely fashion. This was her third recent act of insubordination toward her supervisors at the District of Columbia Department of For-Hire Vehicles ("DFHV"). After notice and a hearing, DFHV terminated Spencer. Although the Office of Employee Appeals ("OEA") opted to forgive her insubordination based on the difficult circumstances of the Covid-19 pandemic, the Superior Court determined that this was legal error and reinstated her termination.

Spencer's appeal raises the question whether the Superior Court properly reversed, as legal error, the OEA's vacatur of discipline for an act of insubordination, where the OEA excused her refusal to follow supervisory instructions based not on dangerousness or risk of irreparable harm, but simply on perceived unfairness, and where she has forfeited any other challenges to the Superior Court's decision.¹

STATEMENT OF THE CASE

On December 3, 2020, DFHV issued a final decision terminating Spencer on each of two disciplinary charges. App. 56-58. Spencer appealed to the OEA. On

¹ In this appeal, DFHV does not rely on the charge of reporting false or misleading information in violation of 6-B DCMR § 1607.2(b)(4) to sustain Spencer's termination. Instead, DFHV relies solely on the charge of refusing to follow instructions in violation of 6-B DCMR § 1607.2(d)(2), which independently justifies Spencer's termination.

April 20, 2022, following an evidentiary hearing, an OEA administrative judge (“AJ”) vacated DFHV’s decision on both charges and, in the alternative, reduced Spencer’s penalty to a two-week suspension. App. 302-22. On August 25 of the same year, the OEA Board affirmed. App. 325-42. DFHV petitioned for review in the Superior Court, which issued a final order on February 29, 2024, reversing the OEA decision and reinstating Spencer’s termination. App. 18-25. Spencer filed a timely notice of appeal on March 28, 2024. App. 1.

STATEMENT OF FACTS

1. Spencer’s Refusal To Timely Complete Her Assignments.

As a DFHV vehicle inspection officer (“VIO”), Spencer enforced District laws ensuring that for-hire vehicles in the District were operating safely and lawfully. App. 92-93; *see* DCMR titles 18, 31. She inspected taxis, limousines, and rideshare cars and, if appropriate, issued tickets and impounded vehicles that were not compliant. App. 92. In cases where a vehicle operator challenged Spencer’s enforcement action, she would testify before the Office of Administrative Hearings (“OAH”). App. 93.

That regime changed in the early days of the Covid-19 pandemic. When the public health emergency forced employees to telework, VIOs were unable to perform their usual duties. App. 96. In March 2020, to make sure that they remained competent and up to date with their profession, DFHV assigned VIOs trainings on

an e-learning platform called Skillport. App. 96. Each day by 8:00 a.m., VIOs were assigned a set of Skillport trainings to complete by 5:00 p.m. SA 1. A day's trainings usually took under two hours to finish. App. 159.

After supervisory VIO Mia Bowden, Spencer's direct supervisor, was detailed to the Department of Employment Services in April 2020, Carl Martin, an assistant chief VIO, and Amber Sigler, a program analyst, took charge of DFHV's training program. App. 158, 179-80. Bowden, however, remained Spencer's supervisor of record, approving her timesheet and leave requests. App. 97.

On May 6, 2020, Spencer emailed Bowden and Martin to memorialize a request for an accommodation. Spencer wrote: "I am not able to make the training classes at the time they are posted because I have remote learning with my son Monday-Friday 9 a.m.-3:30 p.m. [and] I am required to make sure he attends all his remote training sessions and do[es] his daily work activities." App. 39. Spencer further explained: "I am not asking to be excused from doing [the work training classes but] requesting another time d[ur]ing the day for me to take them." App. 39. Spencer's son was in pre-kindergarten. See SA 14-15.

Bowden granted the accommodation. "Moving forward," she replied on May 7, "I will approve extending your deadline to complete daily trainings by 7 p.m. Monday-Friday." SA 1. Spencer thanked her, confirming that "[t]hey will be done." SA 1.

On May 12, Spencer emailed Bowden that she “did not attend any of the [training] classes because they were schedule[d] during [her son’s] remote learning time.” SA 3. Although the hearing record does not specify whether the classes Spencer purported to have missed were from May 12 or some prior date, Bowden responded to Spencer that day, at 9:56 p.m., reminding her that, on May 7, she had already granted Spencer’s request for accommodation for her son’s remote learning. SA 3. Accordingly, Bowden directly ordered that Spencer complete the May 12 trainings and submit confirmation of their completion by 7:00 p.m. on May 13. SA 3. By that time, Bowden reminded her, she was also required to submit confirmation of her completion of the May 13 trainings. SA 3.

On May 13, at 2:09 p.m., Spencer emailed Bowden to ask why she had a “different amount of training classes [from] the other VIO[’s],” noting that she had been assigned seven assessments on May 12 in addition to the seminars that she and others had attended. SA 10. At 8:31 p.m., Bowden explained that, because Spencer could not attend live webinars, she was being assigned non-time-sensitive trainings that included assessment questions. SA 9. Whereas other VIOs had been assigned a live webinar on May 13 from 11:30 a.m. to 1:00 p.m., Spencer had been assigned a separate Skillport training. SA 9. Even with that necessary difference in assigned trainings, Bowden noted that the expected completion time for Spencer’s course was

still under two hours. SA 9. She directed Spencer to confirm that she had attended the course as ordered. SA 9.

Spencer did not do so. In fact, as she informed Bowden the following morning (May 14), she had not completed “*any* trainings on [May 13] because” Bowden had not immediately responded to her question about differences in training assignments. SA 9 (emphasis added). Spencer now claimed that, in her request for accommodation, she had asserted “that the 9:30 web seminars I can make.” SA 9. Unsatisfied with Bowden’s explanation for the assessment questions, Spencer also said she would discuss her concerns with her union. SA 9.

At 6:07 p.m. on May 14, Bowden shared a union representative’s email address and asked Spencer to coordinate a meeting. SA 8. Less than an hour later, Spencer withdrew her accommodation request. She wrote: “I have spoken with [a human resources employee] today and I stated to her that I do not need the special arrangement that has been provided. I would like to have the same schedule assignments during this Covid-19 transition as all other VIO[s].” SA 8. Moments later, Spencer submitted belated certificates of completion for her May 13 trainings. SA 4-5.

Spencer’s abrupt change in tune prompted DFHV to doubt the legitimacy of her May 7 accommodation request. Human resources staffers reached out both to Spencer and to administrators of her son’s charter-school network for evidence of

the all-day “remote learning” that Spencer had described. SA 14-15; *see* SA 11. Spencer produced only a screenshot of a text message from her son’s teacher; it showed that her son was expected to participate in two Zoom calls a week. SA 11. Meanwhile, DFHV obtained a network-wide remote learning plan reflecting very few assignments for students in Spencer’s son’s grade: “[r]ead[ing] a book together,” “[p]ractic[ing] counting objects around the house,” “[d]raw[ing] a play plan,” “[p]ractic[ing] writing your name at the top of your play plan,” and “[d]o[ing] an activity together.” SA 16. A charter-network administrator informed DFHV that she “would be surprised to hear that any school offered [Z]oom programming from 9 a.m.-3 p.m.” and urged that employers should “do whatever they can to support our families in these very challenging times.” SA 13.

2. DFHV Terminates Spencer.

On September 2, 2020, DFHV issued Spencer a notice of proposed separation. SA 18-29. The notice alleged two violations. First, it accused Spencer of deliberately refusing to follow instructions—specifically, Bowden’s instruction “to complete and submit May 12th’s trainings on May 13th along with that day’s completed trainings”—in violation of 6-B DCMR § 1607.2(d)(2). SA 18. As the notice stated: “You intentionally did not complete the trainings because you claimed that it was unfair that you were assigned those trainings; then after it was explained to you why your trainings differed, you still did not complete the training.” SA 18.

Second, the notice accused Spencer of having “knowingly and willfully reported false or misleading information or purposely omitted material facts to your superior,” in violation of 6-B DCMR § 1607.2(b)(4). SA 18. Namely, she told her superiors that she was unavailable to attend training classes because she had remote learning with her son from 9:00 a.m. to 3:30 p.m., yet she knew that those hours did not reflect her son’s actual remote-learning schedule. SA 18.

The notice contained a rationale worksheet explaining DFHV’s evaluation of the *Douglas* factors² and recommending termination separately as to each charge. SA 21-30. Among the aggravating factors were two prior incidents of failure to follow instructions in the preceding 18 months, which resulted in a reprimand and then a three-day suspension. SA 22. The worksheet also noted that the charged conduct impacted Spencer’s ability to do her job, that Spencer held a position of trust, that she had shown no remorse over her refusal, and that termination would be consistent with penalties issued in similar circumstances. SA 22-24.

On November 20, 2020, based on written, counseled submissions, a hearing officer from outside the agency determined that “DFHV has met its burden, by a

² In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (M.S.P.B. Apr. 10, 1981), the Merit Systems Protection Board established the legal standard for, and the relevant factors in, determining the appropriateness of a penalty. That standard, and those factors, were adopted by the District in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

preponderance of the evidence,” and that “the [termination] action may proceed as proposed.” SA 31.

On the first charge, the hearing officer was confounded by Spencer’s evidence that she *had* completed the May 12 trainings in a timely fashion, even though afterward she appeared to have told her supervisor that she had not completed them. SA 33, 36-37. What was clear to the hearing officer, however, was that Spencer had not submitted *proof* to her supervisors of completion of the May 12 trainings, and that she had submitted proof of the completion of the May 13 trainings *late*. SA 36. As the hearing officer found, Spencer’s “insubordination toward supervisors” and her “refusal to complete her trainings, and timely submit the completed trainings to her supervisors . . . constitutes a deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.” SA 37. The hearing officer also found that “Spencer’s past corrective or adverse actions within the last three (3) years[] exhibits a pattern of failure to follow instructions.” SA 37. The charge was sustained.

On the second charge, the hearing officer was likewise persuaded by DFHV’s evidence. She agreed that Spencer’s son was not “online for distance [learning] consistently from 9:00 a.m.-3:[00] p.m., Monday through Friday,” as she represented to her superiors when she requested an accommodation. SA 38. Thus, the ALJ

found, Spencer “knowingly and willfully reported false or misleading information, and purposely omitted material facts to a superior.” SA 38.

Finally, the hearing officer determined that the penalty of termination was reasonable as to either charge. SA 38-39. The hearing officer explained that “Spencer holds a position of public trust” and that “her statement that she would not complete the training . . . demonstrates a wanton disregard for the integrity of her role, the Agency and the District of Columbia, as it displays a refusal to comply with job duties.” SA 39. “Undeniably, DFHV’s ability to have confidence in Ms. Spencer . . . was immobilized.” SA 39.

3. Spencer Prevails At The OEA, But The Superior Court Reinstates Her Discipline.

Spencer appealed to the OEA, where an AJ conducted an evidentiary hearing on January 25, 2022. Afterward, the AJ reversed Spencer’s termination in an initial decision dated April 20. App. 302-22. On the first charge (Refusal to Follow Instructions), the AJ credited Spencer’s testimony at the OEA hearing that she had timely completed her May 12 assignments, notwithstanding her own contrary statements at the time, and timely submitted proof to that effect. App. 319.

The AJ’s resolution of the dispute over the May 13 assignments was more complex. During the hearing, Spencer’s counsel took the position that the notice of proposed adverse action had contemplated only Spencer’s purported refusal to complete the *May 12* assignments. Accordingly, counsel variously objected to

DFHV’s references to Spencer’s refusal to timely complete the *May 13* assignments, even though her May 13 refusal was part of the basis for discipline on the first charge. The AJ was vague about those objections. When counsel first told the tribunal that “[s]he’s charged [only] with specifically not submit[ing] May 12th trainings on the 13th,” the AJ sidestepped the issue, agreeing only that DFHV should limit its questions to the charges “as listed in the documents.” App. 109-10. When counsel objected that a set of May 14 emails containing Spencer’s May 13 completion certificates was irrelevant, the AJ overruled the objection. App. 116. Finally, when DFHV questioned Bowden about whether the notice of proposed termination was intended to encompass Spencer’s refusal to timely complete the May 13 trainings, the AJ appeared to sustain Spencer’s objection, but only on asked-and-answered grounds. App. 148-52 (“I think the testimony as presented now has already answered that question. So please move on to your next question.”).

The April 20 initial decision likewise avoided ruling on whether Spencer could properly be disciplined for failures tied to her May 13 assignments. To be sure, the decision concluded that, “while May 13th is mentioned as a date to turn in both the May 12th and May 13th assignments, [] the notice does not cite [May 13] as the misconduct.” App. 320. It then pivoted to a consideration of the May 13 question on the merits—and committed four long paragraphs to that purpose. App. 319-20. The decision concluded that it was not “unreasonable for Employee to have

waited for an answer from her supervisor regarding the issue of the assignments, particularly since Employee noted that she would contact her union regarding the issue.” App. 319. Thus, in the AJ’s view, the refusal to comply with her supervisor’s instructions was deliberate but excusable.

The AJ further concluded that, even if the refusal to comply with instructions was *not* excusable, the penalty of termination was unreasonable. The AJ’s basis was essentially that “at the time of the matter, the District of Columbia Covid-19 State of Emergency was in effect and everything was in flux which created *unusual job tensions*.” App. 321. Thus, the ALJ would have ultimately imposed a penalty of only a 14-day suspension (the minimum of the range in penalties for a subsequent failure to follow instructions under 6-B DCMR § 1607.2(d)(2019)). App. 321. The AJ alluded to her belief that this was Spencer’s second recent infraction for failing to follow instructions, App. 321 n.63; in fact, the record showed that it was her *third* such offense, SA 22.

Finally, on the second charge (False Statement), the AJ concluded that “absent more specific confirmation regarding [Spencer’s son’s] schedule, [DFHV] has not proven that [Spencer] knowingly and willfully provided false statements to Bowden.” App. 317-18. The ALJ found that “there was no one schedule and due to the [Covid-19] situation at that time . . . pre-k 3 parents were challenged to be able to work as they normally would.” App. 318.

The OEA Board upheld these findings in an August 25, 2022 opinion and order. App. 325-42. As to Charge 1 (Refusal to Follow Instructions), the Board found “substantial evidence in the record to support a finding that [Spencer] successfully completed her assigned May 12th trainings, notwithstanding her “inexplicabl[e]” admission to Bowden that she had not done so. App. 335. Unlike the AJ, the Board clearly acknowledged that the notice of proposed separation “explicitly referenced” the May 13 assignments—and clearly concluded that the May 13 assignments were fair game for consideration by the fact-finder. App. 336. Nonetheless, the Board agreed that, even though Spencer did not complete her trainings on May 13th as ordered, it was reasonable for her to delay completion until she received a response to her inquiry about the difference in assignments. App. 336-37. The Board further found substantial evidence to set aside the penalty of termination because it was “based on Employee’s untimely submission of one days’ worth of training assignments.” App. 339.

On February 29, 2024, the Superior Court granted DFHV’s petition for review and reversed the OEA’s decision. It determined that the initial OEA decision was not supported by substantial evidence on either charge or on the question of penalty. First, the court observed that Spencer had plainly failed to comply with supervisory instructions when she did not complete her May 13 trainings on that date. The court further agreed with DFHV that the instructions were not conflicting, unlawful, or

dangerous. App. 18-19. Spencer “refused simply because her question about the issuing assignments to other colleagues had not yet been answered.” App. 19 (quoting DFHV Initial Br. 12). And that was not a legally sufficient excuse for her noncompliance. App. 18-19.

The court further rejected the AJ’s alternative ruling that the penalty of termination for her failure to follow instructions was unreasonable and excessive. It explained that “although the OEA has a marginally greater latitude of review than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate . . . [, and] the primary discretion in selecting a penalty has been entrusted to agency management, not the OEA.” App. 21 (brackets and internal quotation marks omitted) (quoting *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985)). The court relied on the fact—apparently unrecognized by the AJ—that Spencer had previously been disciplined *twice* for failing to follow instructions, making this her third such offense in the past 18 months. App. 22. Looking to the table of illustrative penalties in 6-B DCMR § 1607.2(d)(2), the court further noted that the penalty range for a first occurrence of this offense was “3-day Suspension to Removal” and for a subsequent occurrence “14-Day Suspension to Removal.” App. 22. The court concluded that the penalty of termination was “within [DFHV’s] discretion and reasonable.” App. 21.

The Superior Court also found that the AJ abused her discretion in overturning the second charge (False Statement). App. 22-25. The court determined that, given the evidence of Spencer's son's few academic responsibilities, substantial evidence did not support the veracity of Spencer's "certain and consistent unavailability" to perform work duties from 9:00 a.m. to 3:00 p.m. Monday through Friday. App. 24. Noting that "the AJ's findings rely heavily on the challenges the COVID-19 pandemic presented to parents," the court found those challenges could not overcome the evidence that Spencer's statements were "facially false." App. 25.

STANDARD OF REVIEW

This Court "review[s] agency decisions on appeal from the Superior Court the same way [it] review[s] administrative appeals that come to [it] directly." *Dupree v. D.C. Dep't of Corr.*, 132 A.3d 150, 154 (D.C. 2016). "Thus, in the final analysis, confining [it]sel[f] strictly to the administrative record," the Court "review[s] the OEA's decision, not the decision of the Superior Court," and affirms factual findings "so long as [they are] supported by substantial evidence in the record and otherwise in accordance with law." *Id.* (internal quotation marks omitted). "Questions of law, including questions regarding the interpretation of a statute or regulation, are reviewed *de novo*." *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the Superior Court's order and vacate the OEA's decision to reverse Spencer's termination.

1. DFHV properly terminated Spencer over a straightforward violation of 6-B DCMR § 1607.2(d)(2), which forbids deliberate refusal to comply with rules, regulations, written procedures, or proper supervisory instructions. In Spencer's case, that deliberate refusal occurred when she declined to timely complete the trainings that had been assigned to her on May 13, all because of a mistaken belief that they were more difficult than those assigned to her peers.

Every tribunal has agreed that Spencer's refusal was deliberate. The OEA's decision to nonetheless forgive Spencer's actions due to the Covid-19 pandemic was an abuse of discretion. The law recognizes a fundamental management right to expect that a supervisor's decisions will be obeyed and her instructions carried out. An employee may not disregard a supervisor's order unless complying with the order would be dangerous or cause irreparable harm. Those conditions were not present here—and, in any event, Spencer has never alleged that they were. If Spencer were to prevail here, the result would impermissibly broaden this very narrow exception to the “work now, grieve later” rule. And because there is no dispute over Spencer's failure to “work now,” the OEA's error was legal rather than factual—and easily reversed in a *de novo* analysis.

2. Spencer's discipline can be upheld based on her failure to timely complete her May 13 assignments alone, and she has forfeited any objection to considering those assignments in the context of this appeal. Before the AJ, Spencer attempted to limit the scope of questioning to her alleged failures to complete work assigned on May 12. She contended that the notice of proposed separation had contemplated her May 12 failures only. After the OEA Board and the Superior Court disagreed, she abandoned that objection. Nowhere in her opening brief does she allege a legal defect in any tribunal's consideration of the May 13 discipline. As a result, she has forfeited any chance to reraise the claim in response to DFHV's brief.

In any event, the charges amply put Spencer on notice that her May 13 conduct was an independent basis for punishment. The written notice referenced incomplete trainings on both May 12 and May 13, then alleged, without limitation, that Spencer "intentionally did not complete the trainings." SA 18. No less tellingly, the notice cited Spencer's refusal to work based on purported differences between her trainings and her colleagues'—a refusal that occurred on May 13, and which encompassed the May 13 trainings. Those trainings were therefore fairly incorporated in the notice of proposed separation and were an appropriate basis for discipline.

3. Spencer has also forfeited any challenge to the Superior Court's determination that, if the charge for refusal to follow instructions is sustained, the penalty of termination must be reinstated. In upholding the penalty of termination,

the court below discussed in detail the OEA's limited authority to interfere with an agency's selection of penalty, and it ruled that the penalty was both reasonable and within DFHV's discretion. That conclusion is left unchallenged in Spencer's opening brief.

It is also the only reasonable conclusion for a tribunal to draw. Spencer had a long history of insubordination—three cases, in fact, within two years—and DFHV made efforts to accommodate her challenges in completing the assignments. The OEA ignored this context and even misapprehended the essential facts, treating Spencer's refusal as a second recent infraction instead of her third. Its conclusion that termination was an impermissible penalty for Spencer's insubordination was legally erroneous and not supported by substantial evidence.

ARGUMENT

I. DFHV Properly Terminated Spencer For Refusing To Complete Her May 13 Training Assignments.

A. The OEA committed legal error in excusing Spencer's undisputed refusal to comply with supervisor instructions.

Spencer was properly terminated from employment for her violation of 6-B DCMR § 1607.2(d)(2), which contemplates “[d]eliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions” and, in the case of “subsequent occurrences,” recommends penalties ranging from a 14-day suspension to removal. This offense alone was a sufficient basis to end her employment because, even as to a first occurrence, termination is an

appropriate penalty. 6-B DCMR § 1607.2(d)(2). In support of this charge, the notice of proposed separation alleged that Spencer had ignored Bowden's instruction "to complete and submit May 12th's trainings on May 13th along with that day's completed trainings," and that Spencer, believing that "it was unfair that [she was] assigned those trainings," "still did not complete the trainings . . . after it was explained to [her] why [her] trainings differed." SA 18.

While the record is inconsistent as to Spencer's timely completion of the trainings assigned for *May 12*—especially given her own apparent contemporaneous admission to her supervisor that she had not completed them—there is no such dispute as to whether she timely completed her *May 13* trainings. As the DFHV hearing officer, the AJ, the OEA Board, and the Superior Court all agreed, Spencer refused to complete those trainings in a timely fashion because she felt that her supervisor's orders were somehow unfair. App. 319-20; SA 37; App. 18-19. This conscious choice to disobey is the very definition of a "deliberate" refusal.

"[A]n employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; rather, he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause irreparable harm, neither of which are present here." *Bowen v. Dep't of Navy*,

112 M.S.P.R. 607, 617 (M.S.P.B. Oct. 30, 2009); *see Washington v. Dep't of Veterans Affs.*, 2023 WL 2025527 at *2 (M.S.P.B. Feb. 15, 2023) (applying the same rule where employee was charged with failure to follow instructions and delay in carrying out an assigned duty); *Pedeleose v. Dep't of Def.*, 110 M.S.P.R. 508, 510, 518 (M.S.P.B. Feb. 12, 2009) (applying the same rule where employee was charged with refusal to cooperate in an agency investigation, insubordination, and failure to follow instructions).

“This rule is popularly known as ‘work now, grieve later’ or ‘obey now, grieve later.’” *Blunt v. D.C. Dep't of Parks & Recreation*, OEA No. 1601-0167-16, Op. at 25 (Sept. 30, 2019).³ “The rule reflects the fundamental management right to expect that its decisions will be obeyed and its instructions carried out,” *Pedeleose*, 110 M.S.P.R. at 516 (citing *Nagel v. Dep't of Health & Hum. Servs.*, 707 F.2d 1384, 1387 (Fed. Cir. 1983)), and “has long been recognized as one that is necessary to an agency’s ability to effectively manage the workplace,” *Pedeleose*, 110 M.S.P.R. at 516. “[T]he exceptions [to the rule] are few and place a heavy burden on the employee to establish.” *Blunt*, OEA No. 1601-0167-16, Op. at 25. “There is no corresponding requirement placed on an employer to show that harm will result if

³ The decision is available at <https://tinyurl.com/2duj27d6>. It was affirmed by the OEA Board on June 30, 2020, in an opinion and order available at <https://tinyurl.com/2wurbhfa>.

the directive is not obeyed.” *Id.* Thus, “[t]he burden is solely on the employee to establish ‘extreme or unusual circumstances,’ such as irreparable harm and immediate danger that would ensue if the compliance is required.” *Id.* (citing *Fleckenstein v. Dep’t of the Army*, 63 M.S.P.R. 470 (M.S.P.B. July 5, 1994)).

Spencer does not—and cannot—claim that compliance would have been dangerous or caused irreparable harm. All that she alleges is that she acted “reasonabl[y]” in “wait[ing] for her supervisor’s answer” to her inquiry about why her trainings differed from that of other VIOs, who took trainings during the times that Spencer said she was unavailable. Br. 22. As just discussed, this is a legally insufficient basis to defeat a charge of refusing to follow instructions. Spencer falls well short of her heavy burden of justifying her insubordination.

Although Spencer relies principally on *Raphael v. Okyiri*, 740 A.2d 935 (D.C. 1999), that reliance is entirely misplaced. *Okyiri* reaffirms that “there can be no doubt that an employee may be discharged for failure to obey valid instructions, or that a discharge for insubordination will promote the efficiency of the service.” *Okyiri*, 740 A.2d at 946 (quoting *Meehan v. Macy*, 392 F.2d 822, 836 (D.C. Cir. 1968)). It further makes clear that “an employee’s subjective feeling that an order from her superior is unlawful or unreasonable” does not “permit[] her to disobey it with impunity.” *Id.* at 947. As this Court explained, *Okyiri*’s refusal to certify a payment voucher because she believed it to be an unlawful duplicate payment was

not obviously permissible, *id.* at 946, but certain relevant factors tilted the question in Okyiri's favor. For example, under a mayor's memorandum, Okyiri would be held personally liable for any false certifications. *Id.* at 944, 946. And her attempts to corroborate the validity of the voucher had been met first with silence and later with an order to approve the voucher "regardless of any lack of documentation, and with no questions asked." *Id.* at 946. In other words, Okyiri had been placed in "a very difficult position," *id.* at 946—one where compliance would, thanks to the mayor's memorandum, subject her to irreparable financial harm.

Spencer was in no such position. There is no suggestion that completion of her assigned training would have somehow been unlawful. Unlike Okyiri, Spencer had not been asked to certify the payment of public funds based on a legally dubious request. And Spencer's reliance on Bowden's order would not have caused any irreparable harm. At most it would have cost her two hours of her workday, when she apparently had no other work assigned and had to take comparable training of similar length in any event. Simply put, the AJ's forgiveness of Spencer's insubordination does not square with the holdings of *Bowen*, *Pedeleose*, and their progeny.

This dearth of analysis is all the more glaring because, as a purely legal determination, it is subject to *de novo* review. *Dupree*, 132 A.3d at 154 ("Questions of law . . . are reviewed *de novo*"). The AJ resolved no dispute of fact when she

determined that it was not “unreasonable for Employee to have waited for an answer” before complying with her supervisor’s directive. App. 320. Indeed, as far as the May 13 assignments were concerned, the parties had no disagreement over whether or when Spencer had complied with Bowden’s order. The only question was whether that failure was excusable under established case law—a legal question wholly suitable for full appellate review. *See Simms v. United States*, 41 A.3d 482, 486 (D.C. 2012) (“[T]he trial court is in the best position to resolve any factual disputes. But this court is best situated [to make legal determinations] ‘through reasoning, comparison with like cases, and review of a trial court record.’” (quoting *Davis v. United States*, 564 A.2d 31, 36 (D.C. 1989))).

Were employees permitted to thwart supervisors’ time-sensitive directives through the ready expedient of posing questions and awaiting answers, charges of failure or refusal to follow instructions would be unenforceable, and agencies’ work would too easily grind to a halt. Spencer’s refusal to comply with a lawful order was no less a refusal because she preferred to seek a second opinion from her union on whether to comply. If Spencer were to prevail here, it would broaden the very narrow exception to the “work now, grieve later” rule “in a way that threatens to make the exception the rule.” *Pedeleose*, 110 M.S.P.R. at 518. The Court should correct the OEA’s departure from the established legal rule.

B. Any objection to the Superior Court’s consideration of Spencer’s refusal to complete the May 13 trainings is not preserved for this Court’s review.

In the hearing before the AJ, Spencer’s counsel took the position that the notice of proposed adverse action had contemplated only Spencer’s purported refusal to complete the *May 12* assignments—and that any reference to her May 13 violations was beyond the scope of both the notice of proposed separation and the hearing. As discussed above, the AJ’s response to those objections was vague—and since then, every tribunal and every brief has addressed whether, on the merits, Spencer’s insubordination as to the May 13 assignments violated 6-B DCMR § 1607.2(d)(2). For her part, Spencer has ceased objecting.

As a result, Spencer may not now urge that her refusal to timely submit her May 13 assignments is beyond the scope of this case. Indeed, “[i]t is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived.” *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993). After the Superior Court held that Spencer’s May 13 violations alone justified her termination, she did not allege in her opening brief that the court had erred simply by considering those violations in the first place. Her only oblique reference to the May 12/May 13 question was a footnote—similar to a footnote in her Superior Court brief, 5/13/23 Br. 14 n.5—explaining that the OEA had considered allegations pertaining to the May 13 assignments. Br. 20 n.3. And arguments raised only in footnotes are

generally forfeited, especially when not developed through discussion and application of governing legal standards. *See Aquinnah/Gay Head Cmty. Ass’n v. Wampanoag Tribe of Gay Head (Aquinnah)*, 989 F.3d 72, 80 (1st Cir. 2021) (finding argument addressed in a single footnote in opening brief forfeited); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (collecting cases for same principle). Spencer said no more—and then proceeded to argue that her failure to follow the May 13 instructions had not been proven on the merits. Br. 22.

This mere explanation of the OEA’s reasoning, alleging no error of law, is not sufficient to avoid forfeiture. *See Evans v. United States*, 304 A.3d 211, 219 (D.C. 2023) (“To preserve an issue for appellate review, a party generally must raise the complained-of error in the trial court in a manner that is specific enough to direct the judge’s attention to the correct rule of law.” (internal quotation marks omitted)); *Graham v. United States*, 12 A.3d 1159, 1165 n.9 (D.C. 2011) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.”). And even if Spencer were to finally raise an objection in her reply brief, that would not be permitted, as it is an “established and controlling principle of appellate review that a party may not raise new arguments in its reply brief.” *In re Huber*, 708 A.2d 259, 260 n.1 (D.C. 1998).

Even Spencer's brief in Superior Court falls short of asserting the same claim. There, she inserted a remark in her "Statement of the Case" that "any assignments on May 13th or 14th" cannot "be used to support a charge of failure/refusal to follow instructions because those dates were not specified in the Final Notice of termination." 5/13/23 Br. 6. But apart from a version of the explanatory footnote discussed above, Spencer never picked up the question in the argument section of her brief below—and never asserted a point of law that the OEA would have violated by considering the May 13 violations on the merits. *See Evans*, 304 A.3d at 219.

The Superior Court's consideration of those violations on the merits was, in fact, reasonable and appropriate—and it followed as naturally from the case's posture as it did from its facts. That DFHV had charged Spencer based on her May 13 refusals as well as her May 12 refusals was apparent from the notice of proposed separation. The notice referenced both sets of trainings, then alleged, without limitation, that Spencer "intentionally did not complete the trainings." SA 18. To the OEA Board, this constituted an "explicit[] reference [to May 13] in the proposed notice." App. 336. No less tellingly, the notice cited Spencer's refusal to work based on purported differences between her trainings and her colleagues'—a refusal that occurred on May 13, and which encompassed the May 13 trainings.

The Superior Court, the OEA Board, and the DFHV hearing officer all treated Spencer's failure to timely complete the May 13 trainings as an independent basis

for her separation. App. 18-19, 336. The AJ's decision in no way changes that analysis. The AJ agreed during the hearing that DFHV should limit its questions to the charges "as listed in the documents," App. 109-110, but she did not contemporaneously opine on whether the May 13 charges were so listed—and at no point did she directly sustain an objection on the grounds that the May 13 assignments were off-limits. Even when, in her initial decision, she remarked that "the notice does not cite [May 13] as the misconduct," App. 319, she did not conclude that consideration of May 13-related insubordination was impermissible. Instead, she proceeded to discuss why, on the merits, Spencer's insubordination as to the May 13 assignments should be excused.

C. Spencer has also forfeited any challenge to the Superior Court's determination that, if the charge for refusal to follow instructions is sustained, the penalty of termination must be reinstated.

Spencer's forfeiture in her opening brief extends beyond the Superior Court's consideration of her May 13 violations. She also abandons any challenge to the court's conclusion that, if the charge for refusal to follow instructions is sustained, the penalty of termination must be reinstated. *See Rose*, 629 A.2d at 535 ("It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived."). And she cannot pick up the issue anew in her reply. *Huber*, 708 A.2d at 260 n.1. This forfeiture is even more straightforward than an oblique reference in a footnote; the point is discussed nowhere in Spencer's opening brief.

Indeed, the appropriateness of DFHV's proposed penalty was one of three principal holdings that made up the Superior Court judgment presently on appeal. App. 20-22. In upholding the penalty of termination, the court discussed in detail the OEA's limited authority to interfere with an agency's selection of penalty, App. 21, and ruled that the penalty was reasonable and within the DFHV's discretion, especially given that this was Spencer's third recent offense of failing to follow instructions and that the table of illustrative penalties authorizes termination even for a first offense, App. 21-22; *see* 6-B DCMR § 1607.2(d)(2).

Even if Spencer had not forfeited any challenge to appropriateness of the selected penalty, the Superior Court's conclusion was right: DHFV was entitled to terminate Spencer over her obvious and acknowledged refusal to follow orders. Had the refusal been only the second recent occurrence of Spencer's insubordination, perhaps DFHV would have exercised its discretion to impose just a lengthy suspension. *See* 6-B DCMR § 1607.2(d)(2) (recommending penalties ranging from a 14-day suspension to removal, in the case of a "subsequent occurrence"). But this was no mere subsequent occurrence. As the rationale worksheet's evaluation of the *Douglas* factors explained, Spencer had been recently reprimanded on December 5, 2018, and suspended for three days on June 11, 2019—both times for failing to follow instructions. SA 22.

The AJ and the OEA Board did not acknowledge that full history. App. 321, 339. For her part, the AJ appeared to be aware of Spencer's *second* infraction for failing to follow instructions, but not her first. App. 321 n.63. Otherwise, the AJ and OEA Board predicated their findings on "unusual job tensions" arising from the pandemic, the fact that Bowden had been detailed to another agency, and testimony from an agency witness that agencies "were advised to be as flexible as possible." App. 321. Not only are these generalized considerations evidentiarily weak, but they ignore the myriad ways in which DFHV and other agencies *did* accommodate employees in the early stages of the pandemic.

Spencer was asked to perform only two hours of work each day. App. 159. When she sought extra time to complete that work, her request was granted. SA 1. When, a week later, she informed her supervisor that she had inexplicably still failed to complete her assignments, Bowden reminded her of the accommodation and authorized her to complete them the next day. SA 3. After all those exchanges, Spencer *still* declined to complete her May 13 assignments until she had evidently been assured by a union representative that there was no way around it. SA 8.

As the Superior Court discussed, because penalty decisions are primarily the province of an employer, the "OEA reviews the severity of a penalty imposed upon an employee simply to ensure that the employer properly exercised its managerial discretion," *Jahr v. Off. of Emp. Appeals*, 19 A.3d 334, 340 (D.C. 2011),

“conscientiously considered the relevant factors, and [struck] a responsible balance within tolerable limits of reasonableness,” *Douglas*, 5 M.S.P.R. at 306. A penalty should be reversed “[o]nly 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.” *Stokes*, 502 A.2d at 1010. Otherwise, the OEA “may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate.” *Id.* at 1011.

That is not what the OEA did here. Far from respecting DFHV’s conscientious weighing of the *Douglas* factors, the OEA rejected the agency’s articulated rationale in favor of an open-ended, pandemic-era leeway. App. 321. It did not allege particular iniquities in DFHV’s analysis or cite to any legal principle permitting departure from the factors on the worksheet. It also got the basic facts wrong, treating as a second infraction what was in fact a third infraction. App. 321 n.63. As a result, the Superior Court rightly concluded that the OEA’s decision—that termination was an impermissible penalty for Spencer’s insubordination—was legally erroneous and unsupported by substantial evidence.

CONCLUSION

The Court should affirm the Superior Court’s order reversing the OEA’s decision and reinstating Spencer’s termination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 19, 2025, this brief was served through this Court's electronic filing system to:

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