No. 22-CV-220

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

CRAIG ROYAL,
APPELLANT,

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, *et al.*,
APPELLEES.

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

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT

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STATEMENT OF THE ISSUES

Appellant Craig Royal is a police lieutenant and residential landlord. He was suspended for 20 days from his employment with respondent the Metropolitan Police Department ("MPD") after an off-duty encounter in April 2015 during which he pepper-sprayed two neighborhood construction workers over a parking spot. MPD found Royal guilty of two charges of misconduct related to the incident. On appeal to the District of Columbia Office of Employee Appeals ("OEA"), the OEA reversed one of the charges based on Royal's testimony at an OEA hearing, but sustained the suspension as to two other, related charges predicated on the same conduct. The OEA also sustained an additional suspension for inefficiency. Royal's appeal raises the following issues:

1. a. Whether the OEA reasonably sustained MPD's discipline against Royal based on his instigation and escalation of a conflict that resulted in his use of pepper spray, without warning or attempted de-escalation; and

b. Whether, assuming any procedural error occurred, the error was harmless.

2. Whether the "inefficiency" charge was supported by substantial evidence and in accordance with law, based on a number of adverse actions sustained against Royal, where inefficiency requires only "repeated and well-founded complaints

from superior officers, or others, concerning the performance of police duty, or the neglect of duty."

STATEMENT OF THE CASE

On April 16, 2015, Royal was involved in an off-duty argument that resulted in multiple calls to police and culminated in Royal's deployment of pepper spray against neighborhood construction workers. This incident occurred on the heels of another off-duty incident on February 15, 2015, that also triggered disciplinary charges, the merits of which are not at issue in this appeal. The Chief of Police issued Royal a 20-day suspension for the April 2015 incident, 10 days of which were predicated on an "inefficiency" charge for multiple well-founded instances of prior misconduct, including the February 2015 incident. App. 370-71.

On appeal to the OEA, an administrative judge in an April 29, 2019 decision affirmed the 20-day suspension. App. 434-53. Royal timely petitioned for review in the Superior Court, which affirmed the OEA decision on March 7, 2022. App. 454-68. Royal then filed a timely notice of appeal.

STATEMENT OF FACTS

1. Legal Framework.

The OEA is an independent adjudicatory agency created by the Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Code § 1-601.01 *et seq*. Relevant here, the CMPA permits a District employee to appeal to the OEA

an "adverse action for cause that results in . . . suspension for 10 days or more." D.C. Code § 1-606.03(a); *see also* 6B DCMR § 604.1. The appeal proceeds "upon the record and pursuant to other rules and regulations which [the OEA] may issue." D.C. Code § 1-606.03(a); *see also* 6B DCMR § 600 *et seq.*

OEA proceedings are presided over by an Administrative Judge ("AJ") tasked with "review[ing] the record and uphold[ing], revers[ing], or modify[ing] the decision of the agency." D.C. Code § 1-606.03(b); 6B DCMR § 622. The OEA "may order oral argument" and "provide such other procedures or rules and regulations as it deems practicable or desirable in any appeal." D.C. Code § 1-606.03(b).

By regulation, an OEA AJ possesses broad "powers necessary" to conduct hearings fairly, impartially, promptly, and methodically. 6B DCMR § 622.2. Under the regulations, the AJ may take new evidence and determine the facts de novo. The AJ "[r]egulate[s] the course of the proceeding," conducts "require[d] [] evidentiary hearing[s]," "[c]all[s] and examine[s] witnesses," and "[a]dmit[s] documentary or other evidence to the record." *Id.* § 622.2(e)-(g).

On appeal from an agency to an OEA AJ, "[t]he burden of proof for material issues of fact shall be by a preponderance of the evidence." *Id.* § 631.1. For management members of MPD, the OEA record closes only at the conclusion of the hearing, *id.* § 632.1, whereas nonmanagement members, under the terms of a

collective bargaining agreement, have bargained for an appellate process grounded "solely [in] the record established in the Departmental hearing," *D.C. Metropolitan Police Dep't v. Pinkard*, 801 A.2d 86, 91 (D.C. 2002).

The AJ is charged with issuing written "[f]indings of fact and conclusions of law, as well as the reasons or bases therefor[], upon all the material issues of fact and law presented on record." 6B DCMR § 634.2(a); *see also* D.C. Code § 1-606.03(c). If, however, the AJ elects to affirm the final agency decision, she may do so without findings of fact or a written decision. D.C. Code § 1-606.03(c). OEA decisions are appealable to the Superior Court, which may "affirm, reverse, remove, or modify such decision, or take any other appropriate action the Court may deem necessary." *Id.* § 1-606.03(d).

2. Royal's Off-Duty Encounters And Suspensions.

Royal began his employment with MPD in 1990 and at all relevant times held the rank of lieutenant. App. 87. Royal's disciplinary record included a July 2014 three-day suspension without pay for failing to timely complete and submit an investigation (IS No. 14-1674), and a January 2015 two-day suspension without pay for improper conduct with a subject while in an off-duty status (IS No. 13-3040). App. 440. Royal was additionally disciplined for two incidents in February 2015 and April 2015, both of which occurred while he was off-duty and acting in his

capacity as residential landlord of the building in which he also resided. App. 88, 102.

A. The February 2015 incident.[1]

On February 7, 2015, Royal overheard a loud argument in Spanish in one of his apartments between a tenant and his girlfriend. App. 89-93. Royal "thought somebody was being beaten" and entered the apartment. App. 90. Believing his tenant's girlfriend to be a prostitute and her screams to be "theatrical," he ordered the girlfriend to return a cellphone to the tenant and escorted her from the premises. App. 10, 90-91, 94. Royal, however, was mistaken; a police investigation revealed that he had actually witnessed the aftermath of a domestic assault for which the tenant and the girlfriend would both be arrested. App. 94.

B. The April 2015 incident.

On April 16, 2015, Royal, again off-duty and out of uniform, was involved in another altercation—this time in connection with a home renovation in the neighborhood. App. 102-03. After spotting a construction van at the rear of his building, parked in contravention of various "No Parking" signs, Royal yelled at a construction worker to move the van. App. 103. The worker later maintained that he could not immediately do so and called his colleague and asked him to retrieve

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[1] The following facts are not in dispute, except where noted, and taken from the parties' stipulated facts submitted to the OEA in advance of the evidentiary hearing. *See* App. 87.

the keys. App. 104. In the meantime, Royal changed into camouflage pants containing his "less-than-lethal weapons" and moved a minivan belonging to his parents close to the construction van, parking it so that the minivan blocked and prevented the construction van from leaving the illegal spot. App. 104. He then returned to his apartment and called the police. App. 104.

From his apartment, Royal saw the construction van pull out from around his parents' minivan, and he thought he saw the construction van strike the minivan. App. 104-05. He bolted downstairs and inspected the minivan: it had a black scratch. App. 105. On foot, he followed the path of the construction van. App. 105. When he spotted it, he recorded its tag numbers and contacted police again, this time to report an "accident." App. 105.

By this point, two construction workers had begun arguing with Royal. App. 105-06. On the recording of the 911 call, Royal alternates between reporting the black scratch and arguing with the workers. App. 105-06. On the call, Royal is heard repeatedly commanding a worker: "Sir, step away from me." App. 105. Later in the call, he recounts to the dispatcher that "[t]here's a scratch right on the side of the [minivan] and I saw you do it." App. 105.

As the argument escalated, Royal displayed his baton and a can of pepper spray. App. 106. Royal then sprayed the approaching workers—but the weapon malfunctioned, emitting only a light mist, and Royal ran from the scene. App.

106-07. When MPD officers arrived, they spotted a mark on Royal's parents' minivan but quickly determined that it could not have been produced by the construction van. App. 111.

C. MPD proposes a 15-day suspension for the February 2015 incident and a 20-day suspension for the April 2015 incident.

As to the February 2015 incident, MPD suspended Royal for 15 days for failing to obey orders and directives (1) to investigate a crime, (2) to provide language-access services to those present at the altercation, and (3) to notify local on-duty police prior to taking action. App. 26-29, 34-39, 43-47.

As to the April 2015 incident, MPD charged Royal with seven instances of misconduct. Relevant here, Royal was charged with three interrelated and overlapping violations regarding his use of force:

Charge No. 2 for unlawfully deploying pepper spray, in violation of General Order 120.21, Attachment A, Part A-11, and General Order 901.04, Part III-B(5). The relevant provisions of General Order 120.21 prohibit "[u]sing unnecessary and wanton force in arresting or imprisoning any person, or being discourteous, or using unnecessary violence toward any person(s), or the public." App. 81. General Order 901.04, Part III-B(5), "prohibit[s] [officers] from using OC spray [i.e., pepper spray] to disperse crowds or others unless those crowds or others are committing acts of

disobedience that endanger public safety and security."[2] SA 3. The specifications supporting this charge noted that (1) Royal's use of pepper spray was not justified and not within departmental policy, and (2) Royal's use of off-duty pepper spray escalated the conflict.

Charge No. 3 for improperly escalating the use of force, in violation of General Order 120.21, Attachment A, Part A-16 and General Order 901.07, Part V-B, Parts 1, 3, and 4. General Order 901.07, Part V-B, Parts 1-4, codifies MPD's general Use of Force Continuum, which mandates that officers "modify their level of force in relation to the amount of resistance offered by a subject," and further dictates that members respond to resistant or dangerous individuals with escalating options of force, to begin with verbal persuasion. SA 19-20. The specification supporting this charge described Royal's use of pepper spray as without legal cause to detain and absent any active resistance, and therefore as unjustified and not within MPD policy.

Charge No. 4 for failure to use objectively reasonable force, in violation of General Order 120.21, Attachment A, Part A-16 and General Order 901.07, Part

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[2] General Order 901.04, at Part III-A, further articulates the Use of Force Continuum in a fashion identical to General Order 901.07, Part V-B, which forms the basis of Charge 3. And General Order 901.04, at Part IV-B, mandates that "[w]hen using [pepper] spray, members shall . . . [i]ssue a warning that [pepper] spray is going to be used against the subject," which did not occur here. SA 4.

V-C, Parts 1-4. The relevant provision of General Order 901.07 authorizes objectively reasonable non-deadly force under the circumstances to protect life or to control a situation and/or subdue and restrain a resisting individual. SA 20. The specification supporting this charge noted Royal's off-duty use of pepper spray in an unjustifiable and inappropriate manner that escalated the conflict, similar to Charges 2 and 3.

In addition, Royal was charged with one infraction related to the multiple credible complaints lodged against him in the preceding months:

Charge No. 7 for inefficiency, in violation of General Order 120.21, Attachment A, Part A-8. App. 307. The inefficiency charge refers to "repeated and well-founded complaints from superior officers, or others, concerning the performance of police duty, or the neglect of duty," and considers "[t]hree sustained Adverse Actions within a 12-month period" to be "prima facie evidence of inefficiency," though the "charges need not be related." App. 307. The specification supporting this charge cited three prior complaints against Royal: (1) the July 2014 suspension (IS No. 14-1674); (2) the January 2015 suspension (IS No. 13-3040); and (3) the suspension over the February 2015 domestic-violence incident. App. 307.[3]

[3] Royal was also charged with making an untruthful report (Charge 1), failure to obey orders to contact on-duty personnel (Charge 5), and failure to provide medical assistance (Charge 6), none at issue here. App. 304-07.

Royal requested a hearing on the April 2015 charges before MPD's Adverse Action Panel, which sustained Charges 4 and 7. App. 351-58. The Panel noted some overlap among the charges. It stated that "specification number two of [Charge 2] was identical to that of charge number four specification one." App. 353. It thus opted to "review[] Lieutenant Royal[']s conduct with regard to this aspect of charge number two within the context of charge number four." App. 353.[4] Ultimately, the Panel exonerated Royal of the remainder of Charges 2 and 3 on the basis that he credibly perceived an imminent assault immediately before deploying his pepper spray and in fact used the minimum amount of force necessary to fend off the perceived assault. App. 354. The panel nonetheless sustained Charge 4, reasoning that Royal "intentionally created and then escalated the situation to the point that he had no choice but to use force" when he intentionally blocked the construction van, left his apartment rather than waiting for on-duty officers to arrive, and displayed his baton and pepper spray with no warning. App. 355. Finally, the panel sustained Charge 7, because Royal's three adverse actions within a 16-month period amounted to "a sustained pattern of misconduct that rose to [the] level of inefficiency." App. 358.

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[4] The Board then listed a "not guilty" finding after the heading Charge 2, Specification 2, immediately thereafter referring to it as "Charge 1 Specification 2." App. 353.

Although punishable by termination, as initially proposed by MPD, App. 311, the Panel recommended a 10-day suspension on Charge 4 and a consecutive 15-day suspension on Charge 7. App. 362. Upon Royal's written appeal to the director of the Human Resource Management Division, the suspension was reduced even further, to consecutive 10-day suspensions on each charge. App. 363-69. On appeal to the Chief of Police, the Chief affirmed the aggregate 20-day suspension. App. 371. Notably, Royal argued in his appeal that owing to the common facts and theory underlying Charges 2, 3, and 4, it was impossible for his use of pepper spray under Charge 4 to have been objectively unreasonable if it was lawful under Charges 2 and 3. SA 203-4; *see* App. 371. The Chief rejected Royal's argument that Charge 4 should not be sustained, agreeing with the Panel that Royal (i) "initially caused the incident" by blocking the construction vehicle's path, (ii) caused the subsequent confrontation by leaving his apartment before on-duty officers could arrive, and (iii) made matters worse by displaying a baton and pepper spray. App. 371.

3. The OEA Reverses The February 2015 Charges, Reverses Charge 4 From The April 2015 Incident, And Sustains Charges 2, 3, And 7.

Royal appealed his 15-day (February 2015 incident) and 20-day (April 2015 incident) suspensions to the OEA. The two matters were consolidated, and an OEA AJ heard testimony in a two-day evidentiary hearing covering both incidents. The OEA's July 14, 2017 "Order of Consolidation and Order for [Prehearing] Submissions" defined the issues to be decided as "whether Agency's action to

suspend Employee was for 'cause'; and, if so, whether Agency's penalty was appropriate under the circumstances." App. 85.

A. The evidentiary hearing.

The two-day, de novo hearing was populated by seven police witnesses, including Royal. App. 441-46. It was supplemented by the parties' joint stipulation of facts, App. 441, which summarized the civilian witnesses' reports and Adverse Action Panel testimony, as well as every round of charges faced by Royal, App. 87-171.

The evidence of the April 2015 incident was encapsulated by Royal's own testimony. Royal testified that he did not identify himself as a police officer or otherwise explain himself when he displayed his baton and his pepper spray, because he did not have his badge with him and, based on past experience, was concerned he would be accused of abusing his authority. SA 70 ("The other thing is, . . . from the department's perspective, is that I'm using my position for personal gain. And that's been hammered into me extensively while [I have owned] this building."); *see also* App. 308 (sustained prior adverse action for "Improper conduct with a subject while in an off-duty status"). Royal recounted that, as he spoke to the police to report the "accident," the two construction workers were yelling at and approaching him. SA 51-52. He repeatedly described the workers as "aggressive," and testified that they were "yelling, getting closer, ignoring my request to stay away from me." SA 52-

53. He testified that when he "pulled out [his] [baton] and [his] pepper spray to deter them . . . [an] older gentleman . . . told [him that] he would take those items . . . and whip [his] ass with them, was the words that he used." SA 53. Royal sprayed them without further warning. SA 176. Still, he maintained that "[t]here was no escalation on my part whatsoever, and that "[m]e calling the police is not escalating." SA 176-77.

B. The AJ's decision.

The OEA reversed Royal's 15-day suspension for the February 2015 incident, App. 446-47, and the merits of that suspension are not directly at issue on appeal.

As to the April 2015 incident, the OEA affirmed the 20-day suspension on the basis of Charges 2, 3, and 7. Endorsing the same reasoning as MPD, the OEA found that the facts—including those admitted to by Royal during the evidentiary hearing—more properly implicated Charges 2 and 3, as opposed to Charge 4. *Compare* App. 434-52 (OEA decision), *with* App. 353-56, 371 (decisions of MPD Adverse Action Panel and Chief).

On Charge 2 (unlawfully deploying pepper spray) and Charge 3 (improper escalation), the OEA explained that Royal admitted during the hearing that he did not follow the Use of Force Continuum before displaying or deploying his pepper spray, in that he failed to identify himself as a police officer and should have first issued a verbal warning. App. 448. Moreover, "[a]ll of th[e] evidence" pointed to

the conclusion that Royal had no legal cause to detain the construction workers, and that Royal's use of the van to block their exit essentially escalated the conflict and "led to his eventual use" of the pepper spray. App. 449; *see also* App. 355, 371 (Adverse Action Panel and Chief decisions, concluding that Royal "intentionally created and then escalated the situation to the point that he had no choice but to use force").

On Charge 4 (failure to use objectively reasonable force), the OEA reversed MPD. App. 449. Notwithstanding that Royal should have first "used verbal persuasion and a declaration that he is a police officer before using [the] [pepper] spray," the OEA credited Royal's testimony that when the construction workers began approaching him, they did so in a threatening manner, and Royal found himself "in reasonable fear of imminent attack," which, at that point in time, justified the use of pepper spray. App. 449; *see also* App. 353-54 (Adverse Action Panel decision crediting Royal's testimony that he "deployed his [pepper] spray to fend off what he perceived in the moment to be an imminent assault" under the framework of Charges 2 and 3).

Finally, on Charge 7 (inefficiency), the OEA sustained the charge owing to the three complaints lodged against Royal that resulted in suspension. Those three complaints included the February 2015 incident, and two additional incidents from

July 2014 and January 2015. App. 317, 450. Royal "d[id] not deny having these priors in his work record." App. 450.

4. The Superior Court Affirms The OEA's Decision.

Royal appealed his 20-day suspension over the April 2015 incident to the Superior Court. The court rejected Royal's argument that the OEA was without authority to consider the counts for which MPD had found Royal not guilty. App. 459. The court explained that the OEA "is empowered to review [agency] decisions and to make changes as the facts and law require," noting the OEA's statutory authority to "uphold, reverse, or modify the decision of the agency," App. 460 (citing D.C. Code § 1-606.03), 462, as well as its authority to conduct de novo evidentiary hearings, App. 460-61 (citing 6B DCMR § 619(e)). The court cautioned that this authority was not without limit, and that the OEA could not, for example, impose sanctions for charges never brought by the agency in the first instance. App. 463 n.1. Here, however, the court reasoned that the OEA's Order of Consolidation and Order for Submissions, which broadly inquired whether MPD "has cause for adverse action against [Royal]," and "whether [MPD's] penalty was appropriate under the circumstances," fairly warned that the entirety of the charges outlining the cause for discipline were subject to review. App. 463. The court, moreover, affirmed the OEA's decision to sustain Charge 7 for inefficiency. App. 467. Although the OEA reversed with respect to one of the underlying charges, for the February 2015

incident, the inefficiency charge was nevertheless supported by repeated complaints, including the April 2015 misconduct. App. 467.

STANDARD OF REVIEW

Although this case arrives on appeal from the Superior Court, this Court must "review the OEA's decision as though the appeal had been taken directly to this court." *Brown v. Watts*, 993 A.2d 529, 532 (D.C. 2010) (internal quotation marks omitted). In so doing, "[d]ue deference must . . . be accorded to the [AJ]'s credibility determinations," because "only the [AJ] heard the testimony and observed the demeanor of the witnesses." *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999). Thus, "the [AJ]'s findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence." *Id.* If the Court concludes that the OEA's factual findings "are supported by substantial evidence, [it] must accept those findings even though the record could support a contrary finding." *Brown*, 993 A.2d at 532 (quoting *Zhang v. D.C. Dep't of Consumer & Regul. Affs.*, 834 A.2d 97, 101 (D.C. 2003)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ferreira v. D.C. Dep't of Emp. Servs.*, 667 A.2d 310, 312 (D.C. 1995) (internal quotation marks omitted).

This Court will affirm the OEA's determination if it is not "arbitrary, capricious, or an abuse of discretion." *Brown*, 993 A.2d at 532 (quoting *District of Columbia v. King*, 766 A.2d 38, 44 (D.C. 2001)).

SUMMARY OF ARGUMENT

This Court should affirm the OEA's decision to uphold Royal's 20-day suspension.

1. Substantial evidence clearly supported Royal's suspension on Charges 2 and 3 for unlawful deployment of pepper spray and improperly escalating his use of force. Both the Adverse Action Panel and the OEA agreed on the following facts: (i) Royal deliberately blocked in the construction workers' van over a parking dispute, (ii) after calling for assistance, he failed to wait for on-duty officers to arrive and instead went back to the parking lot, (iii) he then displayed pepper spray and a police baton in response to their mere shouting, and finally (iv) he sprayed the construction workers with pepper spray without warning or announcing that he was a police officer. These actions were contrary to General Order provisions prohibiting unprovoked force, discourtesy, and disproportionate aggression. Significantly, Royal admitted at the OEA hearing that he never announced that he was a police officer or took any other action to defuse the conflict that he both started and ended.

Because the OEA determined that the Adverse Action Panel should have sustained Charges 2 and 3 based on these facts, it affirmed the same punishment but did so using those charges instead. This was a permissible exercise of its statutory and regulatory authority. The CMPA grants the OEA broad powers to "review the record and uphold, reverse, or modify the decision of the agency." D.C. Code § 1-606.03(b). And in appeals, the OEA is tasked with issuing a written decision including "findings of fact . . . as well as the reasons or basis for the decision upon all material issues of fact and law presented on record," which occurred here. *Id.* § 1-606.03(c). These provisions establish that an OEA AJ evaluating a final agency decision is not conducting appellate review akin to this Court and is empowered to reach independent factual and legal conclusions. To the extent there is any doubt, the OEA is entitled to deference in its interpretation of the "statutes it administers and the regulations it promulgates." *Wilson v. D.C. Rental Hous. Comm'n*, 159 A.3d 1211, 1214 (D.C. 2017) (internal quotation marks omitted). A contrary reading of the scheme would prohibit the OEA from taking disciplinary action when a testifying employee admits to misconduct he was not convicted of below, in tension with this Court's precedent.

To the extent Royal contends that the OEA committed procedural error, this Court need not resolve the question, because any alleged error was harmless. Both the Adverse Action Panel and the OEA agreed on two basic conclusions that drove

Royal's suspension: (1) Royal had no legal basis to detain the construction workers and escalated the conflict by his own actions; and (2) only at that point did Royal, credibly fearing for his safety, resort to deploying his pepper spray. Whether framed as a violation of Charges 2 and 3, or exclusively Charge 4, the resulting penalty for Royal's April 2015 misconduct was still a 10-day suspension. Royal's evidence and arguments defending against each charge were identical—and the nature of the charges left no doubt as to the actions for which, or the theory by which, Royal was being charged. Between the Adverse Action Panel, whose findings were reviewed by the OEA AJ, and the OEA hearing, Royal had every opportunity to call favorable witnesses and cross-examine MPD's witnesses. He did so—and he does not now contend that he was deprived of the chance to introduce additional or different evidence.

2. Contrary to Royal's assertion, the affirmance of Charge 7 for inefficiency was amply supported by the record. General Order 120.21 defines inefficiency as "repeated and well-founded complaints," and the record contained evidence of four separate complaints. That at least one complaint did not rise to the level of a sustained adverse action does not alter the analysis, as the Order does not impose any requirement as to the eventual outcome of a "well-founded complaint[]." Royal's objection that two complaints supporting the inefficiency charge were

"stale" is raised for the first time on appeal and, in any event, is based on a now-repealed statute.

ARGUMENT

I. Royal's Suspension For Charges 2 And 3 Was Supported By Substantial Evidence And Is In Accordance With Law.

A. The OEA reasonably sustained Charges 2 and 3 based on substantial evidence.

The evidence before the OEA leaves little question that Charges 2 and 3 were supported by substantial evidence. Indeed, Royal does not raise a substantial evidence challenge on appeal, and he admitted to the key facts underlying the AJ's determination in his own testimony. Any substantial evidence challenge thus lacks merit and is forfeited. *Union Mkt. Neighbors v. D.C. Zoning Comm'n*, 197 A.3d 1063, 1068 n.6 (D.C. 2018) ("We only address the issues and arguments made in the opening brief.").

The facts underlying Charges 2 and 3 are essentially undisputed: All agree that Royal used his parents' minivan to block the construction workers' vehicle. App. 104; SA 47-48. All agree that, after calling for police assistance, Royal left his apartment building to inspect his parents' minivan rather than awaiting help. App. 104; SA 49-51. And Royal admitted during the OEA hearing that he resorted to the display of less-than-lethal weapons—and, not long after, the use of an arrest-compliance tool—without taking a single specific action to defuse the conflict under the Use of Force Continuum. SA 68-78, 135-37, 169-76; *see* App. 448; SA 2

("Members shall not use tactics designed to intentionally escalate the level of force, e.g., taunting, verbal abuse, or ignoring a reasonable citizen request for information."), 19, 54 ("All members who encounter a situation where the possibility of violence or resistance to a lawful arrest is present should, if possible, defuse the situation through advice, warning and verbal persuasion.").

Royal also does not dispute on appeal that his actions met the substantive requirements of Charges 2 and 3. Those charges were based on MPD General Orders prohibiting the unlawful deployment of pepper spray and unlawful escalation of force without first attempting de-escalation or lesser interventions. *See* App. 60-84, SA 1-32 (General Order 120.01, Attachment A, Part A-11; General Order 901.04, Part III-B(5); General Order 901.07, Part V-B). As the OEA explained, officers may only use pepper spray to disperse individuals if they are "committing acts of disobedience that endanger public safety and security," App. 353; *see* SA 3, and officers are prohibited from "[u]sing unnecessary and wanton force in arresting or imprisoning any person, or being discourteous, or using unnecessary violence towards any person(s) or the public." App. 353; *see* App. 81. Unnecessarily threatening the use of pepper spray, with no explanation or warning, violates these provisions. Moreover, the MPD's Use of Force Continuum, with respect to both pepper spray and other non-lethal uses of force, requires that law enforcement's response be proportional to the threat presented under the totality of the

circumstances. SA 19-21. In determining the level of force to be used, verbal persuasion is the first of several escalating options, and pepper spray may only be used after issuing a verbal warning. SA 2-4, 19. Again, it is undisputed that Royal displayed and deployed the spray without warning and without adhering to the Use of Force Continuum.

To be sure, Royal contended before the OEA that by the time he actually used his pepper spray, he feared an imminent assault by the construction workers. Both the OEA and MPD's Adverse Action Panel credited that assertion, but both ultimately found that his earlier actions nevertheless violated MPD's General Orders. *See* App. 449 (OEA conclusion that Royal "found himself in reasonable fear of imminent attack" under Charge 4); App. 353-54 (Adverse Action Panel determination that Royal "deployed his [pepper] spray to fend off what he perceived in the moment to be an imminent assault," but analyzing those facts under Charges 2 and 3). Substantial evidence thus supported the OEA's conclusion that, at the very least, Royal's failure to de-escalate the situation or warn the construction workers violated MPD policy. *See* App. 353-54 (Adverse Action Panel decision noting overlap between the charges); App. 371 (noting Royal's own argument that the charges overlapped and were "duplicative").

B. The OEA's sustaining of Charges 2 and 3 is consistent with its statutory and regulatory authority.

Royal does not challenge whether his suspension is supported by substantial evidence. Instead, he argues exclusively against the OEA's power to affirm his suspension on the basis of Charges 2 and 3 rather than Charge 4. Royal contends that the OEA's jurisdiction extended only to those charges on which MPD declared his guilt, such that the OEA would have had to find Royal guilty of Charge 4 or else overturn 10 days of his suspension.

The OEA's decision was a permissible exercise of its statutory and regulatory authority. The CMPA grants the OEA broad powers to "review the record and uphold, reverse, or modify the decision of the agency." D.C. Code § 1-606.03(b). And in appeals, the OEA shall issue a written decision including "findings of fact . . . as well as the reasons or basis for the decision upon all material issues of fact and law presented on record." *Id.* § 1-606.03(c). The OEA is excused from written decisions explaining its findings of fact and conclusions of law only where it affirms the agency's decision below. *Id.*

Moreover, review of adverse actions proceeds pursuant to rules and regulations that the OEA itself promulgates. *Id.* § 1-606.03(a), (b). Those regulations similarly dictate that an OEA AJ's "Initial Decision shall uphold, reverse, or modify the determination of the agency or personnel authority." 6-B DCMR § 634.5. Furthermore, the record under review is the record established by,

and closed at the conclusion of, an evidentiary hearing before *the OEA*, where material issues of fact must be proven anew by a preponderance of the evidence. 6B DCMR §§ 631.1, 632.1. The OEA is further empowered to "[r]egulate the course of the proceeding," and, during de novo evidentiary hearings, to "[c]all and examine witnesses" and "[a]dmit documentary or other evidence to the record." *Id.* § 622.2(e)-(g). In fact, the OEA possesses all the "powers necessary" to conduct hearings fairly, impartially, promptly, and methodically. *Id.* § 622.2.

These provisions establish that an OEA AJ evaluating a final agency decision is not conducting appellate review akin to this Court. Fact-finding and credibility determinations are not part of the appellate process. No ordinary appellate tribunal would be charged with issuing written findings as to all material issues of fact, *see* D.C. Code § 1-606.03(c), or be excused from owing deference to the court below on questions of fact, *see* 6B DCMR § 631.1 ("The burden of proof for material issues of fact shall be by a preponderance of the evidence."). But that is the routine work of OEA AJs.

This Court's precedent confirms that the OEA is not limited to substantial evidence review. In *Harris v. D.C. Commission on Human Rights*, 562 A.2d 625 (D.C. 1989), this Court declined to endorse a universal rule that an agency is inevitably bound to uphold a hearing examiner's decision if supported by substantial evidence. *Id.* at 630. Instead, the scope of review is determined by "[t]he statutes

and regulations which govern the [agency's] procedures." *Id.* The agency is bound to accept prior credibility determinations or factual findings only where the regulatory scheme does not depart from the principle of "due deference" to those "credibility determinations." *Gunty v. Dep't of Emp. Servs.*, 524 A.2d 1192, 1197 (D.C. 1987); *see also Dell v. Dep't of Emp. Servs.*, 499 A.2d 102, 105 (D.C. 1985). Here, of course, the OEA receives evidence and makes its own credibility determinations in the course of "uphold[ing], revers[ing], or modify[ing] the decision of the agency." D.C. Code § 1-606.03(b). Thus, after the OEA has issued its final decision, "*then* this [C]ourt may review [*the OEA's*] factual findings to determine whether there is substantial evidence to support them." *Harris*, 562 A.2d at 630 (emphasis added).[5]

Royal does not take issue with any of this. Indeed, he does not dispute that OEA proceedings are generally conducted de novo. Br. 18 (acknowledging that AJ Lim considered the charges "de novo"). And Royal concedes, Br. 16, as he must, that neither the D.C. Code nor the D.C. Municipal Regulations foreclose the OEA

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[5] In *D.C. Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), this Court reviewed an MPD disciplinary action governed by the terms of a collective bargaining agreement, which "required appeals to the OEA to be decided solely on the record established before the trial board," and in that circumstance determined that the OEA could "not substitute its judgment for that" of the Adverse Action Panel. *Id.* at 88-91. No similar collective bargaining agreement here "controls and supersedes otherwise applicable OEA procedures." *Id.* at 91.

from modifying or reversing an agency's decision not to sustain certain charges. To the contrary, the regulatory framework and precedent of this Court counsel that the OEA acted well within its authority. In the absence of law to the contrary, the OEA's mandate to "modify the decision of the agency," in a written decision describing "the reasons or basis for the decision upon all material issues of fact and law presented on record," should mean what it says. D.C. Code § 1-606.03(b) to (c). And to the extent there is any doubt, the OEA is entitled to deference in the interpretation of the "statutes it administers and the regulations it promulgates." *Wilson*, 159 A.3d at 1214 (internal quotation marks omitted).

Royal does not dispute that the OEA was entitled to make its factual and legal determinations de novo in his case, but instead asserts that Charges 2 and 3 "were not part of the 'cause of action'" or "final agency action" at issue on appeal to the OEA. Br. 15-16. Royal maintains that "final agency action" is defined at 6B DCMR § 699.1 as "a written document from a District agency which contains the cause of action taken by the District agency against an employee," and that the cause of action on appeal here was limited to Charges 4 and 7 because those were the only charges relied on in the Chief's April 12 letter. Br. 15-16.

Royal misreads the regulation. A cause of action is simply "[a] situation or state of facts that entitles a party to maintain an action in a judicial tribunal," *Cause of action*, Black's Law Dictionary (11th ed. 2019), or "[a] group of operative facts

giving rise to one or more bases for suing," *Cause of action*, Black's Law Dictionary (10th ed. 2014). In other words, a cause of action is the relevant nucleus of facts supporting a legal claim or charge, rather than the claim or charge itself. Here, the underlying facts relied on by both the Chief in his letter and the AJ in his decision were identical. App. 371 (Chief's letter), 448-49 (OEA decision). Fundamentally, Royal was disciplined for creating and escalating a conflict while off-duty and using pepper spray without a proper warning or de-escalation attempts. The OEA was tasked with reviewing that determination, and it did so.

To the extent Royal argues that anything outside the four corners of the Chief's letter is off-limits, that is not so. The letter notes that the Chief's decision was based on "review[]" of the "records in this matter," and thus necessarily incorporated all the facts and charges that the Chief considered. App. 371. The letter also explicitly referenced both the original and amended Notices of Proposed Adverse Action, and the published decision of the Adverse Action Panel. App. 370-371. Rather than listing or quoting the specifications for each charge, the letter simply relies on references to the underlying record—which contained all the charges in full. The Chief upheld some of those charges and not others, all of which were properly before the OEA on appeal.

Indeed, had the Chief denied Royal's appeal as untimely without elaborating further, the letter and the underlying proceedings would still have constituted a "final

agency action" reviewable by the OEA. The Chief's letter assumes the reader's familiarity with the preceding litigation. It is best understood not as some sort of charging document on which an AJ tries an employee, but rather as the final analysis of misconduct first alleged in a Notice of Proposed Adverse Action. It "contains the cause of action," 6B DCMR § 699.1, by virtue of its reference to that history.

As both Royal and the Adverse Action Panel acknowledged, there was significant overlap between Charges 2, 3, and 4, with certain elements of Charges 2 and 4 appearing to be the same. All three charges penalize aspects of Royal's escalation and use of force, based on the nearly identical specifications of Royal's unreasonable act of pepper-spraying the construction workers without any warning or de-escalation. Factually, meanwhile, all three charges were supported by precisely the same misconduct: Royal's repeated escalation of a parking dispute to the point where he had cornered himself into using pepper spray. Royal argued as much on appeal to the Chief, and then again before the OEA, when he contended that Charge 4 was essentially duplicative of Charges 2 and 3. SA 39, 203-04; *see* App. 371.[6] And the Adverse Action Panel was even more explicit: it noted that "specification number two of [Charge 2] was *identical* to that of charge number four

[6] The Chief replied that the charges were not duplicative per se because the "directives"—in other words, the cited provisions of the General Orders—were not the same. App. 371.

specification one," and thus chose to lump the specifications together into Charge 4. App. 353 (emphasis added). It can hardly be reversible error for the OEA, on de novo review, to choose to evaluate these identical or near-identical charges slightly differently from the Adverse Action Panel.

Assuring the permanency of every single "not guilty" finding, as Royal urges, would bind the OEA to potentially absurd results. It would force the OEA to turn a blind eye to concessions of guilt on the witness stand. The instant case serves as a strong example. Here, before the OEA, Royal admitted that he failed to take the steps countenanced by the Use of Force Continuum before resorting to pepper spray—essentially a confession as to Charges 2 and 3. *See* App. 448; SA 68-78, 135-37, 169-76. Royal points to no authority suggesting that the OEA is bound to ignore such testimony.

In fact, this Court has already directly counseled against a principle of administrative review that would permit affiants facing professional disciplinary charges to strategically confess to unchargeable bad behavior. In *In re Smith*, 403 A.2d 296 (D.C. 1979), an attorney charged with neglecting legal matters defended himself by maintaining that he was guilty not of the charge of neglect, but of the related, more minor offense of "using . . . subterfuge in getting the money for the work that I had already done for these people." *Id.* at 297-98. Based on that testimony, Smith was re-charged with conduct involving dishonesty or deceit. *Id.*

He then urged that he was immune from the new charges—but the Court disagreed, noting that an attorney may not rely on the absence of a charged offense to "confess . . . professional indiscretions . . . freely at any time." *Id.* at 300 (cleaned up); *see also In re Slattery*, 767 A.2d 203, 210-11 (D.C. 2001). This Court should not countenance a different result here simply because the charges to which Royal confessed were already levied earlier in the same proceeding.

To be sure, as the Superior Court acknowledged and Royal reiterates, the "OEA's authority is not without limits." Br. 18. "[I]mposing sanctions for charges that were *never* brought before the agency could likely not be construed as 'upholding, reversing, or modifying' an agency's decision, and would likely run afoul of D.C. Code § 1-606.03." App. 463. But here, using its typical procedures, the OEA simply upheld the discipline MPD imposed based on the same factual predicate the Chief relied on, relying on near-identical charges contained in the Notices of Proposed Adverse Action. That is a far cry from inventing new reasons to discipline an employee. Instead, it is well within the bounds of the OEA's de novo "review" of "the decision of the agency." D.C. Code § 1-606.03(b).

C. Any procedural error resulting from the OEA sustaining Charges 2 and 3 rather than Charge 4 was harmless.

In addition to his substantive contentions, Royal further argues that the OEA committed procedural error in sustaining Charges 2 and 3 because he had insufficient notice that the OEA would adjudicate those charges. Royal maintains that he was

required to defend "only against charges which were actually leveled against" him. Br. 17. This argument lacks merit, however, for any procedural error that occurred was harmless. *See R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 539 (D.C. 1991) (inquiring whether the judgment was "substantially swayed" by the asserted error). Thus, this Court can affirm without even reaching the question of whether any procedural error in fact occurred.

Even assuming Royal lacked notice that the OEA proceedings encompassed Charges 2 and 3, any error did not significantly affect the outcome of the proceedings. *Contra* App. 463 (noting that the OEA broadly framed the issue for consideration as whether MPD "ha[d] cause for adverse action against [Royal]"); SA 168 (AJ's question to Royal "to basically explain yourself or make the case as to why you should not be punished . . . [for] the parking lot issue. Say whatever you want to say."). Both the Adverse Action Panel and the OEA agreed on a basic conclusion that drove Royal's suspension: Royal had no legal basis to detain the construction workers and, by his own actions, escalated the conflict to the point where he deployed pepper spray without first providing a verbal warning or properly de-escalating. App. 355, 448-49. Whether framed as a violation of Charges 2 and 3, or exclusively Charge 4, the resulting penalty was the same: a 10-day suspension.[7]

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[7] If this Court were to disagree, the 10-day suspension for Charges 2 and 3 is segregable from the 10-day suspension for Charge 7. *See* App. 367.

Moreover, Royal did not suffer any prejudice from the OEA's reconsideration of the theory supporting Royal's guilt. *See Mercer v. United States*, 724 A.2d 1176, 1994 (D.C. 1999) (setting out prejudice at the core of harmless-error doctrine). Royal is correct that, "[b]efore any sanction can be imposed, an employer is required to provide an employee . . . with advance written notice stating any and all causes for which the employee is charged and the reasons, specifically and in detail, for the proposed action." *Off. of D.C. Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994) (internal quotation marks and emphasis omitted). But that in fact occurred here. Royal was on notice of the charges against him, and the longstanding policies he was alleged to have violated, beginning with MPD's Notice of Proposed Adverse Action. This is not the same situation as the one discussed and disapproved of in *Slattery*; here, MPD did not impermissibly apply a "newly declared standard[] of professional conduct . . . retroactively . . . after [respondent] had admitted to them." *See Slattery*, 767 A.2d at 211.

Nor did the nature of the charges leave any doubt as to the prohibited conduct at issue. As discussed, the charges at bottom inquired whether and at what point in time, if ever, the use of force was legally justified. All three charges were predicated on the same set of factual allegations that were exhaustively investigated and litigated. Royal does not identify on appeal any meaningful legal difference among the charges. In fact, the specifications to support the charges are virtually identical,

compare App. 305 (Charges 2 and 3), *with* App. 306 (Charge 4), and the arguments raised to defend against the charges were indistinguishable. While Royal, for his part, consistently maintained that his use of force was justified throughout the entire encounter, *see* SA 177 (Royal testimony that "I merely protected me" and "[t]here was no escalation on my part whatsoever"), the OEA disagreed, ultimately concluding that Royal had instigated the altercation, though at a certain point in time credibly feared for his safety. *See* Charge 4 (citing General Order 901.07, Part V-C (providing that non-deadly force may be used "to protect life" but that "[o]nly objectively reasonable force may be used to respond to threats or resistance in every situation")).

The administrative record confirms the lack of any prejudice. The record before the OEA included the parties' own stipulation of facts and reflected a full accounting of the incident and subsequent investigation. App. 87-171. That stipulation, in fact, included the summarized testimony of every witness before the Adverse Action Panel. App. 89-121, 135-55. This means that the OEA had the benefit of all the evidence Royal chose to present when he unquestionably knew Charges 2 and 3 were before the factfinder. And then, of course, the OEA held a de novo evidentiary hearing at which seven witnesses testified, including Royal himself. Royal had every opportunity to call favorable witnesses whose testimony would be germane to disproving the charge, to cross-examine witnesses favorable to

MPD, and to introduce relevant documentary evidence. On appeal, Royal does not contend that he was deprived of the chance to introduce any additional or different evidence.

II. Charge 7 For Inefficiency Was Supported By Substantial Evidence.

Finally, Charge 7, for inefficiency, was amply supported by the record. MPD alleged a violation of General Order 120.21, Attachment A, Part A-8, which defines the inefficiency offense as "repeated and well-founded complaints from superior officers, or others, concerning the performance of police duty, or the neglect of duty." App. 80. The order further provides that "[t]hree sustained Adverse Actions within a 12-month period upon charges involving misconduct, as provided in this section, shall be prima facie evidence of inefficiency," and that "[t]he Adverse Action charges need not be related." App. 80-81.

As the OEA explained, the inefficiency charge was sustained on the basis of three complaints: (1) the suspension over the February 2015 domestic-violence incident; (2) a January 2015 suspension (IS No. 13-3040); and (3) a July 2014 suspension (IS No. 14-1674). App. 450. As the OEA noted, Royal did not "deny having these priors in his work record." App. 450. And as the Superior Court accurately observed, inefficiency requires only "repeated and well-founded complaints"; it does not set a minimum number of complaints or demand that corresponding penalties be imposed at the end of the disciplinary road. App. 467.

Royal challenges the inefficiency charge on the basis that the OEA ultimately reversed the February 2015 suspension. Br. 21. Royal maintains that the "two remaining priors were insufficient to support the inefficiency charge," and that the inefficiency charge "requires three sustained adverse actions." Br. 21. That position, however, is belied by the plain language of the order. App. 80-81. The complaints need not rise to the level of sustained adverse action. Royal's argument misreads the inefficiency offense, and relies on a logical fallacy; while all sustained adverse actions flow from well-founded complaints, not all well-founded complaints necessarily result in adverse action.

Royal further challenges the inefficiency charge on the basis that, without the February 2015 suspension that the OEA reversed, "there was no longer prima facie evidence of inefficiency." Br. 20. But Royal's argument about MPD's prima facie case is irrelevant at this juncture. The OEA already determined that MPD proved by a preponderance of the evidence that Royal was repeatedly the subject of well-founded complaints concerning the performance of his police duties. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983) (where an action is decided on the merits, it is unnecessary to address whether a party has made out a prima facie case). Indeed, over a 16-month period, between July 2014 and February 2015, he was the subject of *three* well-founded complaints, a predominant thread

being Royal's improper conduct while off-duty. App. 308; *see also* SA 70 (Royal testimony apparently referencing past allegations of abuse of authority).

Royal did not contest his priors, and he tellingly declines to offer any argument on appeal that the complaints were not, in fact, well-founded. Even the February 2015 complaint, while ultimately not sustained by the OEA, had ample foundation. Royal does not contest that he intervened in what sounded like a domestic dispute in his apartment building; that he escorted one party out of the building without contacting on-duty officers or seriously investigating the potential crime himself; or that the incident later resulted in arrests. *See* App. 26-29, 34-39, 43-47, 89-94. After hearing evidence, an MPD Adverse Action Panel sustained charges regarding the February 2015 misconduct, even if on de novo review the OEA did not. This disagreement does not indicate that the charges lacked any foundation.

Royal also faults the Superior Court's reasoning that Charge 7 could be affirmed on the basis of the April 2015 incident, "as well as the [three] other well-founded complaints submitted by Petitioner's supervisors," which Royal views as "post hoc substitution of charges." Br. 22. Setting aside the fact that it is the OEA decision that is on review before this Court, *Brown*, 993 A.2d at 532, the Superior Court was correct to note that substantial evidence supports the inefficiency charge when taking into account the April 2015 incident. In fact, all told, Royal was

the subject of four complaints in an 18-month period, with *three* of those complaints alone occurring during a *four-month* period between January and April 2015. And although Royal argues that he could not have been expected to defend against the inefficiency charge based on the April 2015 incident, Br. 23, there is no doubt that Royal was aware of the fourth well-founded complaint in his disciplinary record. At a minimum, given that the April 2015 allegations were sustained, the OEA's use of the (now unnecessary) February allegations to support the inefficiency charge was harmless error. *See LCP, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 897, 903 (D.C. 1985) ("reversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed" (internal quotation marks omitted)).

Finally, Royal attacks the inefficiency charge as predicated on "stale" charges. Br. 21. Royal maintains that he was not charged with the offense of inefficiency until more than 90 days past the February 2015 incident, contrary to the timing requirements of D.C. Code § 5-1031. Br. 24. Not only is that argument advanced for the first time on appeal, and therefore forfeited, *see, e.g.*, *Tauber v. Quan*, 938 A.2d 724, 733 (D.C. 2007), but Royal also invokes a repealed statute. Even assuming the applicability of the 90-day rule to this progressive discipline offense, the Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Act 24-781, 70 D.C. Reg. 953 (Jan. 27, 2023) ("Reform Act"), repealed that statute of

limitations and applies retroactively to any pending disciplinary case. *See* D.C. Council, Report on Bill 24-320, at 32-33 ("This repeal is intended to apply retroactively to any disciplinary matter pending [as of] the effective date of this act.").

CONCLUSION

The Superior Court's judgment should be affirmed.

Respectfully submitted,

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Alex Fumelli
Signature

22-CV-220
Case Number(s)

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CERTIFICATE OF SERVICE

I certify that on August 21, 2023, this brief was served through this Court's electronic filing system to:

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