THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOHN BARBUSIN,	)	OEA Matter No. 1601-0077-15
Employee	)	
	)	
v.	)	Date of Issuance: January 30, 2018
	)	
DEPARTMENT OF	)	
GENERAL SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

John Barbusin ("Employee") worked as a Supervisory Special Police Officer ("SPO") with the Department of General Services ("Agency"). On March 20, 2014, Agency served Employee with an Advance Written Notice of Proposed Suspension based on charges of "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty" and "any knowing or negligent material misrepresentation on other document given to a government agency: intentional false statement." Agency's adverse action proposed a suspension of thirty days for the neglect of duty charge and fifteen days for the misrepresentation charge. Both charges stemmed from a December 28, 2014 incident wherein Employee responded to a 10-33 call (Officer Needs Assistance) that was outside of Agency's jurisdiction and legal authority. While responding, Employee was involved

in a single-person car accident on F Street in Northwest, D.C. On April 27, 2015, the Director of the Protective Services Division, Anthony Fortune, sustained Employee's proposed suspension. Employee began serving his suspension on May 3, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 20, 2015. In his appeal, Employee argued that the suspension was without merit, not supported by the evidence, and overly harsh. Therefore, Employee requested that the adverse action be reversed and that Agency reimburse him for lost pay, leave, benefits, and attorneys' fees.[1]

Agency filed an Answer to the Petition for Appeal on July 15, 2015. It denied Employee's allegations and stated that a thirty-day suspension was appropriate under the circumstances. Agency also reasoned that it followed the District Personnel Manual ("DPM") and considered the relevant *Douglas* factors in selecting the penalty. Accordingly, it requested that Employee's appeal be dismissed.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter in September of 2015. On November 16, 2015, the AJ held a prehearing conference to discuss the issues presented by the parties. Employee and Agency were subsequently ordered to submit briefs addressing whether there was cause for the adverse action, and whether a thirty-day suspension was appropriate.[3]

In its brief, Agency argued that the suspension was justified because Employee failed to follow directives which limited his jurisdictional authority to District of Columbia owned or operated properties. Agency stated that Employee responded to a call for service without being

[1] *Petition for Appeal* (May 20, 2015).
[2] *Agency Answer to Petition for Appeal* (July 15, 2015).
[3] *Post-Prehearing Conference Order* (November 17, 2015); *Briefing Order* (May 2, 2016) and *Briefing Order* (September 16, 2016). Employee filed four consent motions to extend the briefing deadline.

dispatched and that Employee carelessly and recklessly drove his patrol vehicle, resulting in the vehicle being totaled. It also provided that the concurrent fifteen-day suspension for material misrepresentation was warranted because of the wide disparity between Employee's claimed travel speed at the time of the accident and the actual speed of his vehicle as recorded by the vehicle's internal GPS tracking software. Agency contended that there was substantial evidence in the record to support each charge against Employee. Thus, it requested that his Petition for Appeal be dismissed.[4]

In response, Employee argued that Agency failed to meet its burden of proof for the dishonesty charge. According to Employee, Agency failed to provide any evidence to show that he deliberately attempted to minimize the speed of his vehicle in the incident report after the December 28, 2014 car accident. He further stated that the GPS installed in the vehicle was uncalibrated at the time and could not be relied on as an accurate measure of speed.

Next, Employee opined that the neglect of duty charge could not be sustained. In support thereof, he noted that in April of 2015, the Office of the Inspector General ("OIG") authored a report stating that "…there are no written policies and procedures that define jurisdictional limits for conducting patrol operations…." Therefore, Employee reasoned that he should not have been punished because of the lack of formal training and confusion surrounding the jurisdictional limits of SPOs. Moreover, Employee stated that Agency imposed a double penalty because his driving privileges were suspended for several months prior to being suspended for the same underlying incident.

Regarding the "self-dispatching" allegation, Employee claimed that this was a new charge that was unsupported by the facts. Employee believed that Agency should not be allowed to rely upon such an allegation in support of its adverse action because the Advance Written

[4] *Agency Brief* (May 11, 2016).

Notice of Proposed Suspension did not charge him with neglecting his duty by "self-dispatching" to a 10-33 call.

Concerning the penalty, Employee submitted that a thirty-day suspension was harsh, arbitrary, and capricious. In addition, he stated that the *Douglas* factors were not properly considered.[5] Lastly, Employee believed that his suspension was the result of harmful due process violations. Consequently, he requested that the suspension be overturned, or in the alternative, that the AJ conduct an evidentiary hearing.[6]

The AJ issued an Initial Decision on March 1, 2017. First, the AJ provided that Agency based its neglect of duty charge on three separate specifications: responding to a call for service outside of Agency's jurisdiction; self-dispatching to a call for service; and recklessly operating an Agency vehicle, resulting in a car accident. With respect to Agency's contention that Employee responded to a call for service outside of its operating jurisdiction, the AJ stated that

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[5] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

[6] *Employee Brief* (September 29, 2016).

Chapter 6A, Sections 1100 and 1101 of the D.C. Municipal Regulations ("DCMR") limits a SPO's ability to respond to certain District of Columbia owned or leased locations while on duty. However, he noted that OIG's report regarding the lack of clear guidance on jurisdictional limits, in addition to the statements made by Agency's own management officials during depositions relevant to this appeal, undermined the only written directive that was in place for 10-33 calls at the time Employee was suspended.[7] After analyzing the evidence, the AJ concluded that Agency failed to meet its burden of proof in establishing that Employee neglected his duty when he responded to the 10-33 call on December 28, 2014.

Regarding Agency's argument that Employee responded to a call without specifically being dispatched, the AJ reiterated that SPOs were given contradicting directives in both the General Orders ("GO") and from the verbal orders given by the former Agency Chiefs, Lou Cannon and Rodney Parks. Specifically, he stated that employees during the relevant time period were told that if another officer required help, "[n]obody is going to investigate you or discipline you for helping another officer in that situation" and to "go to it." Accordingly, the AJ reasoned that Employee did not self-dispatch when he responded to the 10-33 call. Thus, he determined that Agency failed to meet its burden of proof with respect to this specification.

Relating to Employee's alleged failure to observe safety precautions, the AJ held that the guidelines provided in GO 301.6 clearly state that police vehicles must be operated with the purpose of preserving operator and citizen safety. According to the AJ, Employee violated the GO when he responded to the 10-33 call. In support of his finding, the AJ cited to the Motor Accident Report Form that was issued after Employee's accident. The report noted that the weather was clear and the traffic conditions were light at the time Employee's vehicle ran off the road. However, the primary cause of the accident was determined to be "driver inattention."

[7] *See General Order* 301.6.

Therefore, the AJ stated that Employee neglected his duty by failing to observe safety precautions and concluded that Agency met its burden of proof for this specification.

Next, the AJ held that Agency could not prove that Employee made an intentional false statement on his Incident Report regarding the speed at which he was traveling at the time of the accident. While the GPS installed on Employee's vehicle reflected that he was travelling at 51.57 miles per hour, the AJ acknowledged that the device was not calibrated. The AJ also noted that Agency's Proposing Official, Heath Scott, recognized during his deposition that the false statement charge was probably unwarranted. Consequently, the AJ opined that Agency failed to meet its burden of proof for this charge.

Lastly, citing to the holding in *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995), the AJ concluded that Employee failed to make a prima facie claim of disparate treatment. Ultimately, the AJ concluded that a thirty-day suspension was appropriate for a first time charge of neglect of duty because Agency proved that Employee failed to observe safety precautions at the time of his accident. As a result, Employee's suspension was upheld.[8]

Employee disagreed and filed a Petition for Review with OEA's Board on March 1, 2017. He argues that the Initial Decision is not based on substantial evidence because AJ erred in concluding that he failed to observe safety precautions at the time of the accident. Employee maintains that he was not negligent in operating his vehicle and that he behaved in a reasonably prudent manner under the circumstances. He also explains that Agency punished him twice for the same underlying conduct. Further, Employee disputes the AJ's finding that that he failed to provide a prima facie showing of disparate treatment because at least one similarly situated officer was not punished under the same set of circumstances. Consequently, he asserts that the

[8] *Initial Decision* (March 1, 2017).

penalty imposed was erroneous and that the Initial Decision should be overturned. In the alternative, Employee requests that the matter be remanded to the AJ for the purpose of holding an evidentiary hearing to elicit witness testimony relevant to the accident and his disparate treatment argument.[9]

In response, Agency states that there is substantial evidence in the record to support the neglect of duty charge because Employee drove recklessly at a high rate of speed while responding to a call for service. According to Agency, crashing over a curb at a high speed, when there is no mechanical problem or interceding impact, falls below the standard of care expected of an operator of an emergency vehicle. Moreover, it argues that the AJ correctly concluded that there was insufficient evidence in the record to prove disparate treatment and that Employee did not suffer double employment jeopardy. Therefore, Agency submits that the thirty-day suspension was appropriate and asks that this Board uphold the Initial Decision.[10]

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11]

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[9] *Petition for Review* (April 4, 2017). *See also Employee's Motion for Leave to File a Sur-Reply Brief Regarding Petition for Review of Initial Decision* (May 26, 2017). In his sur-reply, Employee seeks to clarify factual misstatements and addresses the arguments relevant to double jeopardy, disparate treatment, and the waiver of the right to present evidence at a hearing.

[10] *Agency Brief Regarding Petition for Review of Initial Decision* (May 9, 2017). Agency filed a *Response to Employee's Sur-Reply* on May 19, 2017, in which it reiterated its position that Employee did not experience double jeopardy because he suffered no harm when Agency revoked his driving privileges.

[11] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Neglect of Duty

Employee first argues that the AJ erred in upholding one of the neglect of duty specifications. Specifically, Employee asserts that the AJ's findings are not based on substantial evidence and that the AJ erroneously interpreted Agency's General Order relevant to responding to a 10-33 emergency call. Employee also maintains that the resulting car accident was not negligence *per se* and that "the existence of the accident does not equate to the Agency proving that [Employee] operated his vehicle in a negligent or 'reckless' manner or otherwise disregarded public safety."

Chapter 16, Section 1603.3 of the DPM enumerates the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Under DPM § 1603.3(f)(3), a neglect of duty charge includes failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; and careless or negligent work habits. During the relevant time period, Agency's GO 301.6 provided specific guidance for the operation and use of police vehicles responding to CODE-1 (10-33) calls. Section IV of the Order states the following in pertinent part:

> IV. Response to Calls
>
> A. CODE-1
>
> 1. CODE-1: A "CODE-1" response will be designated for situations that require a quick, emergency response to the scene of an incident.
>
> 2. When officers respond to a CODE-1 call, they are authorized to activate their vehicle's emergency lights and siren to warn other users of the road of their approach.
>
> 3. When responding CODE-1, officers will drive with

> due care and caution and will not drive their vehicle at a speed greater than reasonable and prudent for the conditions then existing or that hinders the vehicle's safe operation.
>
> 4. Operators of police vehicles responding to an emergency call shall, when approaching an intersection controlled by a red traffic signal light, [] come to a complete stop and ensure the intersection is safe to cross before entering the intersection.

Further, GO 301.6 states that the operators of emergency vehicles must primarily be concerned with the safety of other motorists, pedestrians, and fellow officers. Under the GO, officers are not protected from the consequences of failing to exercise reasonable care under the circumstances.

This Board finds that there is substantial evidence in the record to support the conclusion that Employee failed to observe precautions regarding safety when he responded to the 10-33 emergency call. Employee has successfully argued that the GPS installed on his vehicle was not calibrated for speed accuracy at the time of his accident. However, he offers no reasonable explanation for the actual cause of the accident other than stating that he "didn't realize F [street] at this intersection is off centered."[12] According to the Motor Vehicle Accident Report Form, at the time Employee's vehicle ran off the road, traffic conditions were light, the road was dry, the weather was clear, and the street lights were on.[13] Employee's accident was ultimately determined to be caused by "driver inattention."

Based on the foregoing, Employee's failure to exercise reasonable care in the operation of his vehicle serves as a basis for cause under DPM § 1603.3(f)(3) and General Order 301.6. But for Employee's inattention, the single-car accident would not have occurred. While it is true

[12] *Agency Answer to Petition for Appeal*, Tab 3 (July 8, 2015).
[13] *Agency Brief*, Tab 6. The accident occurred at 3:10 a.m.

that the actual speed of Employee's vehicle was unknown, his conduct while responding to an emergency call was careless. Employee's failure to observe precautions regarding safety on December 28, 2014 is sufficient to support a neglect of duty charge. Accordingly, we conclude that the AJ did not err in his finding that Agency met its burden of proof with respect to this specification.

Employment Double Jeopardy

Employee contends that the AJ failed to consider that he was subjected to employment double jeopardy because Agency suspended his driving privileges prior to imposing a suspension for the same underlying conduct. Therefore, he believes that Agency was barred from imposing an adverse action—suspension without pay—based on conduct for which he was previously disciplined. Typically, adverse employment actions are economic injuries and involve a loss or reduction of pay or monetary benefits.[14] An actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities, such as reducing an employee's workload and pay.[15]

In this case, Agency's act of suspending Employee's driving privileges following the car accident was not tantamount to an adverse action. Employee continued to perform the functions of his job during the time in which his driving privileges were administratively suspended. Moreover, he did not suffer a loss in pay during this time period. According to Agency, its Office of Risk Management has the right to suspend an employee's driving privileges if he or she has been involved in two or more accidents. Thus, Employee's temporary loss of his driving privileges cannot serve as a basis for double employment jeopardy because he did not suffer a tangible change in his employment status. Consequently, this Board finds his argument to be

[14] *Markel v. Board of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 911 (7th Cir.2002); *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir.1987).
[15] *Kirby v. City of Tacoma*, 124 Wn. App. 454 (Wash. Ct. App. 2004)..

unpersuasive.

Disparate Treatment

Lastly, Employee argues that the AJ erred in determining that he did not present a *prima facie* face of disparate treatment. In support thereof, Employee states that other similarly situated officers who were involved in on-duty car accidents were not subject to disciplinary action. As such, Employee believes that this matter should be remanded so that the weight of evidence can be properly addressed by the AJ. This Board agrees.

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.[16] In proving a claim for disparate treatment, an agency must apply practical realism to each disciplinary situation to ensure that employees receive equitable treatment when genuinely similar cases are presented.[17] To establish disparate penalties, an employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently.[18] If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[19]

The D.C. Court of Appeals in *Washington v. Office of State Superintendent of the District of Columbia*, 133 A.3d (D.C. 2005) remanded to OEA a case in which the AJ failed to address whether the penalty imposed upon employee was reasonable where the employer has not

[16] *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, *Opinion and Order on Petition for Review* (July 22, 1994).
[17] *See Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995) and *Lewis v. Department of Veterans Affairs*, 2010 M.S.P.B 98.
[18] *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012).
[19] *Id.*

imposed any discipline on other employees to whom the employer had the same basis for discipline.[20] Further, in *Lewis v. Department of Veterans Affairs,* 113 M.S.P.R 657 (2010), the Merit Systems Protection Board ("MSPB"), this Office's federal counterpart, provided a wider approach for determining disparate treatment. In *Lewis*, the MSPB stated that "factors such as whether an agency treated similarly-situated employees differently, whether the difference in treatment was knowing and intentional, whether an agency began levying a more severe penalty for a certain offense without giving notice of a change in policy, and whether an imposed penalty is appropriate for the sustained charge(s) are all relevant considerations but not outcome determinative nor threshold requirements in disparate penalty analysis…."

This Board is persuaded by Employee's argument that a remand is warranted under the circumstances to address his disparate treatment claim. Employee has presented evidence that at least one other SPO who was involved in a single car accident while "recklessly" conducting an illegal U-turn was neither investigated, nor disciplined for such conduct.[21] In his analysis, the AJ held that Employee did not make a *prima facie* claim for disparate treatment because the "details and circumstances surrounding the other officer's accident are lacking." This conclusion, however, does not mean that Employee has failed to present affirmative evidence to demonstrate that he was punished differently than similarly situated officers.

When reviewing the penalty imposed by an agency, OEA is guided by the principles established in *Douglas*. In this instance, factor number six, consistency of the penalty with those imposed upon other employees, may be a dispositive in determining whether Employee's suspension was reasonable under the circumstances. Accordingly, this Board finds that the AJ's

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[20] *See also Hylton v. D.C. Department of Transportation*, OEA Matter No. 1601-0122-15 (October 21, 2016). In *Hylton*, this Office upheld a claim for disparate treatment in which the employee successfully proved that he was the only Engineering Technician in his supervisory chain that was subject to discipline for using a parking placard in a non-District government issued vehicle.

[21] *See Sur-Reply to Respondent's Brief Regarding Petition for Review of Initial Decision*, Exhibit 1.

conclusion that Employee failed to make a *prima facie* claim of disparate treatment is not based on substantial evidence. Therefore, in the interest of justice, this matter must be remanded to afford Employee an opportunity to substantiate his disparate treatment claims.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** for the purpose of addressing the disparate treatment argument.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

_____
P. Victoria Williams

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Jelani Freeman

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