Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Chief Operating Officer of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of: )
)
EMPLOLYEE[1] )
) OEA Matter No.: 1601-0035-25
v. )
) Date: April 23, 2026
METROPOLITAN POLICE )
DEPARTMENT, )
Agency )
)

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Police Officer with the Metropolitan Police Department ("Agency" or "MPD"). On May 13, 2024, Agency issued a Notice of Adverse Action charging Employee with violation of General Order Series 120.21, Attachment A, Part A-11 (Conduct Unbecoming an Officer); Attachment A, Part A-1 (Alcohol: Off-Duty); Attachment A, Part A-6 (Conduct Constituting a Crime); Attachment A, Part A-16 (Failure to Obey Orders); Attachment A, Part A-5 (Untruthful Statements); and Attachment A, Part A-24 (Conduct Detrimental to Reputation and Good Order).[2] The charges stemmed from a November 11, 2023, incident wherein Employee consumed alcohol at a

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Charge No. 1 contained two specifications; Charge No. 2 contained one specification; Charge No. 3 contained two specifications; Charge No. 4 contained four specifications; Charge No. 5 contained one specification; and Charge No. 6 contained two specifications.

restaurant and drove his department-issued police cruiser in the District of Columbia. According to Agency, Employee then interfered with a Driving Under the Influence ("DUI") investigation involving his romantic parter; became argumentative with on-duty officers conducting the investigation; provided an untruthful statement to MPD officers; and actively resisted being placed in handcuffs. Employee was arrested for DUI and obstruction of justice as a result of his actions.[3]

On December 12, 2024, Agency held an Adverse Action Panel Hearing. The Panel found Employee guilty of all but two specifications.[4] While the Panel determined that the remaining charges warranted suspensions ranging from five to thirty days, it concluded that the Conduct Constituting a Crime (Charge No. 3, Specification No. 1) warranted Employee's termination. Employee appealed the Panel's findings to the Chief of Police, which was denied on March 11, 2025. Accordingly, the effective date of his termination was March 12, 2025.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 4, 2025. He argued that Agency's termination action was arbitrary, unsupported by the facts, and not in accordance with the law or regulations. Employee further contended that Agency violated its General Orders, due process, the Table of Penalties, and misapplied the *Douglas* factors.[5] As a result,

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[3] *Agency's Answer to Petition for Appeal* (May 1, 2025).
[4] Employee was found not guilty of Charge No. 3, Specification No. 2 and Charge No. 6, Specification No. 1.
[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 its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses. 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct.

he opined that the adverse action was taken without cause. Therefore, Employee requested that OEA reverse the termination action; restore all lost pay and benefits; and award attorney's fees and costs.[6]

Agency filed its Answer on May 1, 2025. It asserted that Employee's removal was conducted in accordance with all laws and the established policies and procedures of MPD. Further, it disagreed with Employee's claim that his termination was not supported by substantial evidence. Consequently, Agency submitted that the termination action was taken for cause and was reasonable considering the *Douglas* factors.[7]

On May 5, 2025, the OEA Administrative Judge ("AJ") issued an order notifying the parties that this matter was governed by the holding in *Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002).[8] Therefore, the parties were ordered to submit briefs addressing whether the Employee's removal was supported by substantial evidence; whether there was harmful procedural error; and whether the termination action was taken in accordance with all applicable laws and regulations. Both parties submitted responses to the order.

As it related to Charge No. 3, Agency argued that Employee did not dispute that he engaged in conduct constituting a crime because he entered a guilty plea to DUI in the Superior Court for the

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[6] *Petition for Appeal* (April 4, 2025).
[7] *Agency's Answer to Petition for Appeal* (May 1, 2025).
[8] In *Pinkard*, the District of Columbia Court of Appeals held that OEA's scope of review was limited to making a decision solely on the record if certain conditions were met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
> 2. The employee has been subjected to an adverse action;
> 3.The employee is a member of a bargaining unit covered by a collective bargaining agreement;
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, i.e.: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing;" and
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

District of Columbia on January 9, 2024. It contended that the remining charges were supported by the record as evidenced by Employee's guilty plea to most of the charges before the Panel. Agency maintained that Employee was afforded due process in accordance with D.C. Code § 5-133.06. It also reasoned that termination was appropriate under the *Douglas* factors, which highlighted several aggravating elements of the case. Finally, it opined that Employee failed to establish a prima facie claim of disparate treatment. Therefore, Agency asked that OEA uphold its termination action.[9]

Employee's brief contended that termination for Charge No. 3 was not an appropriate penalty because he expressed regret regarding driving under the influence; voluntarily received counseling for alcohol use; and his DUI charge was dismissed with prejudice after it was converted to a disposition of *nolle-diversion*.[10] According to Employee, termination for receiving a DUI was disproportionately severe when compared to prior punishments imposed on similarly situated MPD employees. Lastly, he argued that Agency failed to properly analyze and weigh the *Douglas* factors. Consequently, Employee requested that his removal be reversed.[11]

The AJ issued an Initial Decision on November 12, 2025. As it related to cause, she held that Agency met its burden of proof with respect to Conduct Unbecoming an Officer, Alcohol: Off-Duty, Conduct Constituting a Crime, Failure to Obey Orders, and Conduct Detrimental to Reputation and Good Order (Charges Nos. 1, 2, 3, 4, and 6) because Employee pleaded guilty to these charges before the Panel. However, the AJ determined that Agency did not meet its burden of proof for Charge No.

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[9] *Agency's Brief* (June 11, 2025).
[10] "*Nolle diversion*" indicates that a case was dismissed following a defendant's successful completion of a court-approved diversion program. Subsequently, the United States Attorney's Office declined to prosecute Employee's obstruction of justice charge.
[11] *Employee's Brief* (July 7, 2025). Agency submitted a reply brief on July 18, 2025, in which it asserted that Employee was judicially estopped from arguing that Charge No. 3, Specification No. 1 was unsupported by substantial evidence. It reiterated that the remaining charges and specifications were supported by the record. Further, Agency opined that the Panel analyzed and weighed each *Douglas* factor in an appropriate manner. Agency rejected Employee's claim of disparate treatment, noting that none of the comparators engaged in substantially similar conduct to Employee. Alternatively, Agency suggested that even if Employee established a prima facie claim of disparate treatment, it presented a legitimate reason for imposing a more severe penalty because of the egregious nature of Employee's misconduct. Therefore, it again requested that Employee's removal be sustained. *Agency's Reply Brief* (July 18, 2025).

5 (Untruthful Statements) because Employee was not on the scene in his official capacity as an MPD officer on November 11, 2023, and because he was not carrying out his official duties. As a result, Charge No. 5 was reversed.[12]

While the AJ held that Employee admitted to the Conduct Constituting a Crime charge, she concluded that termination was not the appropriate penalty under the circumstances.[13] According to her, Employee's termination constituted disparate treatment because one of the disciplinary cases cited by Employee involved a similarly-situated police officer who was disciplined for an alcohol-related charge in the State of Virginia. The AJ noted that the comparator employee (DRD # 095-23) only received a thirty-five-day suspension, whereas Employee was terminated. She further reasoned that the penalty constituted an abuse of discretion because the Panel's conclusion that termination was the only effective sanction and deterrent, was unconvincing. Therefore, the AJ reversed and reduced the penalty for Charge No. 3 from termination to a thirty-five-day suspension.[14]

Agency filed a Petition for Review with the OEA Board on December 16, 2025. It argues that the AJ's rulings regarding Charge No. 3 are unsupported by substantial evidence because the penalty was reduced based on an analysis that misapplied each element of disparate treatment. Alternatively, it suggests that even if officer DRD # 095-23 was similarly situated, the AJ erred by disregarding its legitimate reason for terminating Employee. Agency further opines that the AJ impermissibly rebalanced the *Douglas* factors and substituted her judgment in contravention of well-established OEA precedent. It maintains that proper managerial discretion was exercised in selecting the appropriate penalty. Thus, Agency asks that the Board reverse the Initial Decision and uphold Employee's termination.[15]

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[12] *Initial Decision* (November 12, 2025).
[13] Charge No. 3 was the only charge supporting termination. The remaining charges supported suspensions ranging from five to thirty days.
[14] *Initial Decision* at p. 27.
[15] *Petition for Review* (December 16, 2025).

In response, Employee contends that the AJ's application of the disparate treatment factors is supported by the record. He avers that the AJ acted in accordance with the law in finding that termination exceeded the tolerable limits of reasonableness. As such, Employee believes that a thirty-five-day suspension is appropriate in this case. Consequently, he requests that the Board deny Agency's petition.[16]

Disparate Treatment

In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995), the OEA Board provided guidance as it relates to the disparate treatment of employees:

> A number of factors are important in determining whether a penalty is reasonable. Among these factors is whether or not the agency has meted out similar penalties for similar offenses. However, the principle of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity, or perfect consistency regardless of variations, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented. Employee bears the burden of showing that the circumstances surrounding the misconduct are substantially similar to the circumstances in the cases being compared. . . . Normally, in order to establish disparate treatment, the employee must show that they worked in the same organizational unit as the comparison employees, and they were subject to discipline by the same supervisor within the same general period.[17]

[16] *Answer to Petition for Review* (January 20, 2026).
[17] Citing *Douglas v. Veterans Administration*, 5 M.S.P.R 280 (306-307)(1981); *Bess v. Department of the Navy*, 46 M.S.P.R. 583 (1991); *Carroll v. Department of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983); *Kuhlmann v. Department of Health and Human Services*, 10 M.S.P.R 356 (1982); and *Mille v. Department of Air Force*, 28 M.S.P.R 248 (1985). *Also see Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Adewetan v. D.C. General Hospital*, OEA Matter No. 1601-0021-93 (July 11, 1995); *Link v. Department of Correction*s, OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (September 29, 1995); *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995); *Shade v. Department of Administrative Services*, OEA Matter No. 1601-0360-94 (August 3, 1999); *Morris v. Office of State Superintendent of Education*, OEA Matter No. 1601-0261-10 (September 4, 2013); *Smith v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0195-11 (November 27, 2013); and *Ford v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0066-13 (January 12, 2016).

The employee bears the burden of proving that the agency engaged in disparate treatment.[18] For the consistency of the penalty factor to be considered in a penalty determination, "there must be a great deal of similarity, not only between the offense(s) committed by the appellant and a proposed comparator, but as to other factors, such as whether the employees were in the same work unit, had the same supervisor, and whether the events occurred relatively close in time."[19] In *Baines v. D.C. Public Schools*, OEA Matter No. 1601-0093-14 (May 4, 2016), this Office held that it is insufficient for an employee to show that another employee engaged in identical misconduct; the employee must also establish that the circumstances surrounding the incident were substantially the same.[20] If a prima facie showing of disparate treatment is made, 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.[21]

This Board agrees with the AJ's determination that both Employee and comparator officer DRD# 095-23 were off duty at the time of their arrest; were under the influence of alcohol at the time of the misconduct; and were administratively charged with conduct constituting a crime. However, we do not believe that there is enough similarity between the nature of the misconduct *and the other factors* to lead to an inference that Agency engaged in disparate treatment when selecting the current penalty. (emphasis added). Consequently, we conclude that Agency did not engage in disparate

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[18] *Manning v. Department of Human Services*, OEA Matter No. 1601-0071-98, *Opinion and Order on Petition for Review* (September 26, 2005).
[19] *See generally Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010). In 2022, the Merit Systems Protection Board issued a decision in *Singh v. U.S. Postal Service*, 2022 M.S.P.R. 15 (May 31, 2022), wherein the MSPB Board departed from the more flexible standard for establishing disparate treatment as provided in *Lewis*. The Board in *Singh* held that the proper inquiry for the analysis is whether an agency knowingly treated employees differently "in a way not justified by the facts, and intentionally for reasons other than the efficiency of the service." While MSPB case law is not controlling before this tribunal, it has historically been used as guidance for the purpose of legal analysis.
[20] Quoting *Jordan and Carroll supra*.
[21] *See Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, *Opinion and Order on Petition for Review* (January 30, 2018); *Employee v. Office of the Chief Technology Officer*, OEA Matter No. 1601-0024-09 (2011); and *Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0071-98 (2012).

treatment when disciplining Employee and the AJ's conclusions on this issue are not supported by substantial evidence.[22]

In *Sharp v. Metropolitan Police Department*, OEA Matter No. 1601-0019-17 (May 25, 2028), OEA held that two police officers were not in the same organizational unit for purposes of disparate treatment because the employee worked within the command of the Sixth District, whereas the comparator officers were in the command of the First District.[23] Accordingly, to satisfy this element of disparate treatment, it is insufficient to show that the comparison employees worked in the same agency; the employee must also show that they worked within the same organizational unit or division.[24]

Here, the AJ held that Employee and DRD# 095-23 "worked in the same organizational unit – MPD."[25] However, the record establishes that Employee worked on the Emergency Response Team ("ERT") of Agency's Special Operations Division, while DRD# 095-23 worked as a police officer in the Seventh District of the Department. As a member of the ERT or "SWAT," Employee's duties included responding to high-stakes situations including active shooters and hostage situations. There is no indication that DRD# 095-23 worked within the same division as Employee during the relevant period, and the duties and operational realities within ERT conceivably differ from those of a police officer within a different unit. Moreover, Employee concedes that he and DRD# 095-23 were not in

[22] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. If the Panel's findings are supported by substantial evidence, then OEA must accept them even if there is substantial evidence in the record to support findings to the contrary.
[23] *See also Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998) (holding that the four purported comparison employees who had been disciplined worked in different divisions and were, therefore, not similarly situated to the employee).
[24] *See Carter v. Metropolitan Police Department*, OEA Matter No. 1601-0022-20 (December 17, 2020)(holding that the employee failed to make a prima facie showing of disparate treatment because the comparator employee worked in a different division. *See also Employee v. Department of Transportation*, OEA Matter No. 1601-0049-20 (September 27, 2023)(finding that the two identified comparison employees were not similarly situated because they did not have the same job title; were not in the same unit; and were not disciplined by the same supervisor).
[25] *Initial Decision* at p. 23.

the same division.[26] Consistent with the holding in *Sharp*, employ by the same agency alone does not satisfy the "same organizational unit" requirement.[27]

Additionally, the facts presented in this case do not meet the threshold for establishing disparate treatment under the standard provided in *Baines*. For four miles, Employee drove his marked police cruiser with the emergency lights engaged, while under the influence with alcohol, in the same jurisdiction in which he was employed. He then failed to comply with numerous commands from officers; actively resisted being placed in handcuffs; interfered with the DUI investigation regarding his girlfriend; and acted in a rude and disrespectful manner towards Second District officers on the scene. Conversely, comparator DRD# 095-23 was operating his personal vehicle in the State of Virginia at the time of his arrest. The Notice of Proposed Adverse Action for DRD# 095-23 does not indicate that this employee impeded an ongoing criminal investigation, nor does it reflect that the officer failed to comply with commands and/or actively resisted arrest.[28] As a result, Agency levied four charges against DRD# 095-23 related to his 2022 arrest. On the other hand, Employee was charged with six offenses related to his actions on November 11, 2023. Accordingly, Employee's misconduct and that of DRD# 095-23 involved dissimilar circumstances, and we conclude that this officer was not a proper comparator for the purpose of disparate treatment. Consequently, we must reverse the AJ's ruling.[29]

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[26] *Response to Petition for Review* at p. 10. Employee nonetheless asserts that both employees should be considered comparable because they worked as police officers; held the same rank; and had significant overlap in the job responsibilities and standards of professionalism.

[27] The OEA AJ in *Sharp* noted that the comparator employee was subject to a different chain of command, different supervisors, as well as a different Internal Affairs Division official investigating the misconduct in each incident.

[28] *Agency's Answer to Petition for Appeal* at Exhibit 12.

[29] As it relates to discipline by the same supervisor requirement, the record only contains the proposed notice of adverse action for DRD# 095-23, which was signed by Agency Director, Hoble Hong. Although Director Hong also signed Employee's proposed notice, the record is unclear as to the identification of the official responsible for deciding disposition of the comparator officer's disciplinary action. Further, Employee's notice reflects that Hong, who was the acting Director of the Disciplinary Review Division, received the proposed adverse action through the Commander of the Special Operations Division. *Notice of Adverse Action* at p. 10. Employee and DRD# 095-23 worked in different operational divisions within Agency and this Board cannot sufficiently determine based on the record whether Director Hong can be deemed supervisor for both employees for the purposes of this analysis.

Assuming *arguendo* Employee satisfied his burden of proof for disparate treatment, Agency has nonetheless established a legitimate reason for selecting the penalty of termination. The AJ held in part that Agency waived its opportunity to proffer a basis for imposing a greater penalty on Employee because it did not attempt to articulate its reasons in the assessment for *Douglas* factor number six – consistency of the penalty with those imposed upon other employees for the same or similar offenses – and because the holding in *Pinkard supra* limits OEA to a review of the record at the agency level. On the contrary, the D.C. Court of Appeals in *Metropolitan Police Department v. Office of Employee Appeals*, 88 A 3.d 724 (D.C. 2014), rejected the employee's argument that Agency forfeited its right to distinguish him from other Metropolitan Police Department members because it did not articulate such in its *Douglas* analysis before the employee was terminated.

After Employee and Agency presented evidence in support of their positions, the Panel ruled that termination was warranted based on the extensive news media coverage that Employee's arrest received; aggravating factors surrounding operating a police cruiser while under the influence; the unique requirements placed on members of the ERT; and the potential public perception that Employee abused his position as a police officer. Discipline imposed on comparator officers was introduced by Employee during the Panel hearing, and there is no indication that the Panel failed to consider Agency's evidence in support of imposing a more severe penalty compared to other officers.. Additionally, Employee's appeal to the Chief of Police included his disparate treatment argument, which was considered and denied. The AJ was not required to open the record for additional evidence

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Concerning the proximity in time requirement, in *Lewis v. Department of Public Works*, OEA Matter No. 1601-0037-14 (July 14, 2024), and *Whitehouse v. Metropolitan Police Department*, OEA Matter No. 1601-0105-12R16 (May 10, 2016), this Office ruled that disciplinary matters occurring more than one year apart did not satisfy the "within the same general period" element. The AJ here concluded that Employee and DRD# 095-23 were disciplined approximately one year and three months apart, thereby satisfying the general time period requirement. We agree, as there is no pervasive OEA case law ruling that a relatively small departure from the one-year chronological proximity parameter would warrant a finding that a comparator employee was not disciplined within the same time period.

to reach this conclusion. As a result, we can find no basis for upholding the AJ's findings related to disparate treatment.[30]

Penalty

To determine the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the D.C. Court of Appeals in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. The Court reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[31]

Indeed, the consistency of the penalty with those imposed on other employees for the same or similar offenses is only one of twelve *Douglas* factors to be considered by an agency in determining the reasonableness of a penalty. In *Singh v. U.S. Postal Service*, 2022 M.S.P.R. 15 (2022), the Merit Systems Protection Board, OEA's federal counterpart, reiterated that under a *Douglas* factor analysis,

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[30] Employee's argument regarding disparate treatment also fails under the legal framework established in *Singh* because the record does not establish that Agency knowingly treated Employee "in a way not justified by the facts, and intentionally for reasons other than the efficiency of the service." *Also see Facer v. Department of the Air Force*, 836 F.2d 535, 539 (Fed. Cir. 1988).

[31] *See Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), wherein OEA provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, [it is] appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (*Citing Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

"the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibility, is the most important factor in assessing the reasonableness of a penalty."[32] The MSPB Board went on to provide the following:

> "There often will be a range of penalties that would fall within the tolerable limits of reasonableness in a given case. That an agency chooses to impose a penalty at the more lenient end of that range in one case should not mean that it cannot impose a penalty at the more severe end of that range in another case."[33]

To support the reduction of the penalty for Charge No. 3 from termination to a thirty-five-day suspension, the AJ stated that she disagreed with Agency's rationale concerning *Douglas* Factor No. 12 because it was not convincing.[34] She further opined that "giv[en] the totality of the circumstances, the aggravating factors do not outweigh the mitigating factors."[35] However, this analysis fails to accord proper deference to Agency's primary discretion in managing its workforce. Agency weighed each of the relevant *Douglas* factors, as illustrated by its acknowledgment of the aggravating, neutral, and mitigating circumstances surrounding Employee's misconduct. The AJ rejected this assessment, but the record does not reflect that Agency erred by applying an incorrect standard to the factors; failed to consider relevant evidence; or selected a penalty that exceeded what is permitted by law. Thus, even if this Board were to accept the Initial Decision's findings relative to disparate treatment, they are not outcome-determinative in this case. Removal is within the range permitted under General Order 120.21 B (Table of Penalties) which lists termination as the presumptive penalty for a charge of Criminal Conduct.[36] Because termination was a permissible penalty in light of Employee's

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[32] *See also Batara v. Department of the Navy*, 123 M.S.P.R. 278, (2016) and *Spencer v. U.S. Postal Service*, 112 M.S.P.R. 132, (2009).
[33] *Singh* at p. 5.
[34] This factor concerns the adequacy and effectiveness of alternative sanctions to deter conduct in the future by the employee or others.
[35] *Initial Decision* at p. 26.
[36] General Order 120.21 was updated on November 27, 2022. The revised order includes a new Table of Penalties. *Agency's Answer* (May 1, 2025).

egregious misconduct, the AJ's finding to the contrary is not supported by substantial evidence. Consequently, we must reverse the Initial Decision and uphold Agency's termination action.

## ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED.** The Initial Decision is **REVERSED.** Therefore, Employee's termination is **UPHELD.**

**FOR THE BOARD:**

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Pia Winston, Chair

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Arrington L. Dixon

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LaShon Adams

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Jeanne Moorehead

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.