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 Office Manager 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:	)	
	)	
SHEENA WASHINGTON,	)	
Employee	)	OEA Matter No. 1601-0129-11R16
	)	
v.	)	
	)	Date of Issuance: July 11, 2017
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOL SYSTEM,	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Sheena Washington ("Employee") worked as a Motor Vehicle Operator with the Department of Transportation ("Agency"). On January 31, 2008, Agency terminated Employee for failure to maintain a valid Commercial Driver's License ("CDL") with an S Class Endorsement. The effective date of Employee's removal was March 11, 2008.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 12, 2011, claiming that she was wrongfully terminated.[2] Agency filed its response on September 7, 2011. It provided that Motor Vehicle Operators must maintain valid CDLs, and

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[1] *Petition for Appeal,* p. 12-14 (July 12, 2011).
[2] *Id.* at 3.

Employee's failure to do so resulted in her termination.[3]

The OEA Administrative Judge ("AJ") issued her Initial Decision on October 15, 2013. She found that in 2007, Agency had 362 bus drivers who were required to obtain the S Class Endorsement, and only five drivers, including Employee, did not receive it. The AJ held that all Motor Vehicle Operators were notified that they were required to have the S Class Endorsement to be in compliance with federal regulations. She ruled that Employee was placed on notice and failed to pass the practical skills portion of the exam, a prerequisite to obtaining the endorsement. Moreover, she provided that there was no evidence in the record to show that Employee took any training in preparation for her skills examination. The AJ reasoned that Employee's failure to adhere to Agency's policies and procedures to maintain an S Class Endorsement constituted an on-duty act or omission that interfered with the efficiency and integrity of Agency's operations. Additionally, the AJ found that removal was within range of penalty for the first offense, as established in the Table of Penalties. Therefore, she upheld Agency's removal action.[4]

On August 8, 2014, the Superior Court for the District of Columbia issued its decision affirming the AJ's Initial Decision.[5] However, on February 17, 2016, the District of Columbia Court of Appeals issued its Memorandum Opinion and Judgment remanding the matter to OEA for the AJ to address why Employee was terminated from her position for failure to secure an S Class Endorsement, while other employees who also lacked the endorsement were permitted to continue to work. The court tasked OEA with determining the following:

> (1) whether an employer has cause to discipline an employee where there is an objective basis for discipline but the employer has not disciplined other employees as to whom the employee had the same basis for discipline and

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[3] *The Office of the State Superintendent of Education's Answer to Sheena Washington's Appeal,* p. 1-2 (September 7, 2011).
[4] *Initial Decision,* p. 9-12 (October 15, 2013).
[5] *Sheena Washington v. District of Columbia Office of Employee Appeals,* No. 2013 CA 7454 P (MPA)(D.C. Super. Ct. August 8, 2014).

(2) whether, assuming cause, discharge is reasonable discipline where the employer has not imposed any discipline on other employees as to whom the employer had the same basis for discipline.[6]

The previous AJ, Judge Murphy, was promoted to a new position within OEA. Therefore, Judge Dohnji was assigned to the case. On July 18, 2016, AJ Dohnji issued an Initial Decision on Remand. She found that Agency engaged in disparate treatment due to the credible testimony of Mr. Washington and Agency's documentary evidence related to Mr. Jennings. The AJ determined that neither Mr. Washington nor Mr. Jennings were disciplined in 2008 for failing to possess the required S Class Endorsement by the end of 2007, but Employee was disciplined for failing to comply with the same requirement. She ruled that although Agency had cause to remove Employee, Employee was able to establish that she was similarly-situated to Mr. Jennings and Mr. Washington and should not have been removed.[7]

The AJ held that they all worked at Agency as Motor Vehicle Operators, and they were all required to obtain their S Class Endorsement by early 2008. However, Employee was terminated in March of 2008, while Mr. Jennings was allowed to continue to work until 2009. Additionally, Mr. Washington was allowed to drive without the S Class Endorsement until June of 2008.[8] Moreover, another employee was allowed to transfer to a Bus Attendant's position.[9] As a result, the AJ ruled that Agency engaged in disparate treatment when it allowed similarly-situated employees other options but terminated Employee. Accordingly, the AJ reversed Agency's termination action and reinstated Employee pending her compliance with the driver's

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[6] Additionally, the Court remanded the matter for the AJ to address if termination was warranted when Employee asked to be transferred to the attendant position and to determine if discipline short of termination could have been imposed. *Sheena Washington v. District of Columbia Office of Employee Appeals and Office of the State Superintendent of Education,* No. 14-CV-914, p. 4-7 (D.C., February 17, 2016).
[7] *Initial Decision,* p. 7-11 (July 18, 2016).
[8] Mr. Washington obtained his S Class Endorsement on June 26, 2008.
[9] The AJ provided that during the OEA hearing, Agency's witness, Mr. Mills, testified that one of the drivers, who had difficulties passing the written S Class Endorsement exam, was allowed to be transferred to a Bus Attendant.

license requirement.[10]

Agency filed its Petition for Review on August 16, 2016. It argues that if Employee is reinstated it would be in violation of District and federal law because Employee still does not have the S Class Endorsement and is not fit to operate a school bus. Additionally, Agency contends that there was no evidence that Mr. Jennings had a learner's permit during the period in question. Therefore, it believes that the AJ could not accurately conclude that it engaged in disparate treatment. Further, Agency asserts that Judge Dohnji did not hear the testimony regarding the employee who transferred to the Bus Attendant position, and it notes that Judge Dohnji's order did not request that it demote Employee to a Bus Attendant. Moreover, it provides that removal was within range set forth in the Table of Penalties and that removal was reasonable given the need of Agency to rely on its employees to transport students. Accordingly, Agency requests that its termination action be upheld.[11]

On September 20, 2016, Employee filed her response to Agency's Petition for Review. As it relates to Agency's argument that adhering to AJ Dohnji's order would violate federal law, Employee provides that the order specifically states "pending her compliance with the driver's license requirement for the bus driver position." Thus, it is Employee's position that the order takes into account that she is required to adhere to the federal licensing requirements. Employee maintains that Agency engaged in disparate treatment. She explains that the AJ's decision relied on testimonies provided at the hearing and Agency's own submissions. Therefore, she concludes that the Initial Decision on Remand is proper and based on substantial evidence. Accordingly, Employee requests that Agency's petition be denied.[12]

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[10] *Initial Decision,* p. 7-11 (July 18, 2016).
[11] *Office of the State Superintendent of Education Petition for Review,* p. 1-8 (August 16, 2016).
[12] *Complainant's Answer Opposing Agency's Petition for Review of the Initial Decision on Remand,* p. 2-6 (September 20, 2016).

Disparate Treatment

OEA has historically held that if an employee is singled out for punishment or is punished in a disproportionate manner as compared with other similarly-situated employees, the punishment may be reviewed for consistency and may be reduced or reversed altogether.[13] Over the years, OEA has reasoned that an employee who raises an issue of disparate treatment has the burden of making a *prima facie* showing that they were treated differently from other similarly-situated employees.

In *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994), the OEA Board provided the following as it relates to disparate treatment:

> 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.[14]

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[13] *Employee v. Agency,* OEA Matter No. 1601-0180-81, 31 D.C. Reg. 2186 (1984); *Harris v. Department of Human Services*, OEA Matter No. 1601-0188-91 (May 19, 1993); and *Alvin Frost v. Office of the D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995).

[14] 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); *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 Corrections,* 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); *Reynold Morris v. Office of State Superintendent of Education,* OEA Matter No. 1601-0261-10 (September 4, 2013); *Shalonda Smith v. D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601-0195-11 (November 27, 2013); and *Shelby Ford v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0066-13 (January 12, 2016)

Based on *Hutchinson*, the AJ properly held that ". . . to establish disparate treatment, an employee must show that [they] worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period." Moreover, she properly determined that ". . . in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[15]

This Board agrees with the AJ's assessment that Employee made a *prima facie* showing that she was treated differently than similarly-situated employees. The AJ's ruling that Employee, Mr. Jennings, Mr. Washington, and Mr. Williams were similarly situated was based on substantial evidence.[16] As the AJ provided, this matter arose from the requirement that Agency's Motor Vehicle Operators have an S Class Endorsement. Thus, the circumstances of all parties are substantially similar.

As for the requirement that the parties work in the same organizational unit, the AJ found that Employee, Mr. Jennings, Mr. Washington, and Mr. Williams all worked for Agency as Motor Vehicle Operators. This Board agrees with this determination and will further note that in its brief, Agency submitted to the AJ that Employee and Mr. Jennings were in the same organizational unit, had the same supervisor/manager, during the same time period, and received the same penalty.[17] According to Agency, the AJ requested "documentation on all bus drivers

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[15] *Sheena Washington v. D.C. Public Schools System, Department of Transportation,* OEA Matter No. 1601-0129-11R16 (July 18, 2016).

[16] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *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). The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found 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.

[17] As will be addressed below, although Employee and Mr. Jennings received the same penalty, it was not imposed at the same time.

who were similarly situated as Employee (bus drivers without S-endorsement) when she was terminated – include their organizational unit, the name of the supervisor/management that disciplined them, the time period, and the penalty received."[18] However, Mr. Jennings was not terminated from his position in March of 2008, as Employee was. Mr. Jennings was allowed to continue to work until Agency proposed termination on March 17, 2009.[19] Employee was terminated on March 11, 2008, a full year before Mr. Jennings. Therefore, on its face, it appears that there was a difference in the penalties that Agency imposed on Mr. Jennings and Employee.

Moreover, according to Agency's witness, Mr. Mills, after failing to secure his S Class Endorsement, Mr. Williams successfully requested that he be transferred to the position of Bus Attendant instead of being terminated.[20] Agency admits that Employee submitted the same request to be transferred to a Bus Attendant position and that "her request received a favorable reception."[21] However, Agency ultimately took the position that Employee ignored the process it offered to determine if she should be terminated or reassigned. This Board is puzzled by Agency's position because, as the AJ correctly explained, Employee took and passed the physical examination required for her to become a Bus Attendant. Thus, we agree with the AJ's determination that Agency engaged in disparate treatment as it relates to Mr. Williams because it did not allow Employee to transfer as Mr. Williams was allowed to do.

As for Agency's argument that adhering to the AJ's order would violate federal law, Employee correctly provided in her Response to Petition for Review that the AJ's order considered the federal licensing requirements. The AJ ordered that Employee shall be reinstated to ". . . a bus driver position or a comparable position pending her compliance with the driver's

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[18] *Office of the State Superintendent of Education Brief in Support of Termination,* p. 3-4 (May 27, 2016).
[19] *Id.* at 17.
[20] OEA Hearing Transcript, p. 70 (June 6, 2013).
[21] *Office of the State Superintendent of Education Brief in Support of Termination,* p. 4 (May 27, 2016).

license requirement for the bus driver position. . . ." Thus, the plain language of the order clearly denotes that Agency is only required to reinstate Employee after she complies with securing her S Class Endorsement CDL. As such, Agency would not violate the federal requirement.

As it relates to Agency's arguments regarding the AJ's conclusions that it engaged in disparate treatment by comparing Employee to Mr. Jennings and Mr. Williams, the Board will note that Agency presented both Jennings and Williams as being similarly situated to Employee. As previously provided, Agency submitted in its brief that Mr. Jennings was similarly situated to Employee in response to the AJ's request for "documentation on all bus drivers who were similarly situated as Employee (bus drivers without S-endorsement) when she was terminated – include their organizational unit, the name of the supervisor/management that disciplined them, the time period, and the penalty received."[22] Additionally, Agency's witness, Mr. Gill, offered testimony that Mr. Williams requested and was granted the opportunity to transfer to a Bus Attendant position when he failed to secure his S Class Endorsement.[23] Hence, these arguments lack merit.

<u>Conclusion</u>

The AJ's decision that Agency engaged in disparate treatment is based on substantial evidence. The penalty of termination was unreasonable in this matter given the options provided to other similarly-situated employees. Accordingly, we must deny Agency's Petition for Review.

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[22] *Office of the State Superintendent of Education Brief in Support of Termination,* p. 3-4 (July 1, 2016).
[23] OEA Hearing Transcript, p. 70 (June 6, 2013).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED,** and the Initial Decision on Remand Order is **UPHELD**.

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

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P. Victoria Williams

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.