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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0077-15R18
JOHN J. BARBUSIN,	)	
Employee	)	
	)	Date of Issuance: September 17, 2018
v.	)	
	)	
DEPARTMENT OF GENERAL SERVICES,	)	Arien P. Cannon, Esq.
Agency	)	Administrative Judge
	)	
	)	
_____	)	
J. Scott Hagood, Esq., Employee's Representative	)	
C. Vaughn Adams, Esq., Agency's Representative	)	

**INITIAL DECISION ON REMAND**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

An Initial Decision was issued by the undersigned on March 1, 2017, upholding Agency's thirty day suspension of Sergeant John Barbusin ("Employee"). The Initial Decision upholding the thirty day suspension was based on the finding that Agency had cause to take adverse action for Neglect of Duty; specifically, failure to observe precautions regarding safety. Employee filed a Petition for Review with the OEA Board on April 4, 2017. The Board issued an Opinion and Order on Petition for Review on January 30, 2018, remanding this matter to the undersigned to afford Employee the opportunity to substantiate his disparate treatment claims.

On March 20, 2018, a Status Conference was convened to address the issue set forth in the Board's Opinion and Order. A Post Status Conference Order was subsequently issued which set forth a briefing schedule for the parties to submit briefs addressing the disparate treatment claim. Agency submitted its brief on April 23, 2018; Employee submitted his brief on June 7, 2018; Agency submitted a Reply Brief Regarding Disparate Treatment on June 13, 2018. The record on remand is now closed.

## JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUES

1. Whether Employee was subject to disparate treatment with regards to the thirty day suspension imposed against him.<sup>1</sup>

## FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

In short, one of the allegations used by Agency to support its “Neglect of Duty” charge was Employee’s reckless operation of an Agency vehicle that resulted in an accident. In my March 1, 2017 Initial Decision, I found that Agency had cause to take adverse action against Employee for neglect of duty by failing to observe safety precautions regarding the safe operation of his patrol car.<sup>2</sup> The Opinion and Order on Petition for Review issued by OEA’s Board found that there was substantial evidence to support this conclusion.

However, in the Initial Decision, I also found that Employee failed to make a prima facie claim of disparate treatment. The reason for this finding was the lack of details provided by Employee addressing his comparator employee and the supposed similarities between the two in his brief. The OEA Board held that this finding was not based on substantial evidence and remanded the matter to afford Employee an opportunity to substantiate his disparate treatment argument.

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.<sup>3</sup> 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.”<sup>4</sup> If 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.<sup>5</sup>

Based on the OEA Board’s January 30, 2018 Opinion and Order, and the record before me, it has been determined that Employee met his burden of making a prima facie showing that he was treated differently from his comparator employee, who was also involved in an accident.

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<sup>1</sup> The disparate treatment argument in this case is also aligned with Douglas Factor 6, which examines the “consistency of the penalty with those imposed upon other employees for the same or similar offenses.” *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (M.S.P.B. 1981).

<sup>2</sup> I found that Agency failed to meet its burden with respect to the remaining charges and specifications levied against Employee.

<sup>3</sup> *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).

<sup>4</sup> *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30, 2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).

<sup>5</sup> *Id.*

It is not disputed that Employee and his comparator received different disciplinary action as a result of their respective accidents. Employee received a thirty day suspension, and his comparator employee was not subject to any disciplinary action. The burden shifted to Agency to produce evidence establishing a legitimate reason for imposing a different penalty for the two employees.<sup>6</sup>

Employee's comparator for his disparate treatment argument is Officer Jeanelle Francis. Officer Francis was also involved in an accident on August 12, 2015, approximately 8 months after Employee's accident. The details of Officer Francis' accident are set forth in Exhibit 3 of Employee's Response to Agency's Brief Regarding Disparate Treatment, which was filed on June 7, 2018. Officer Francis was found to be at fault in the two-car accident and was issued a Notice of Infraction for "Failure to Yield Right of Way" by the Metropolitan Police Department. Officer Francis' accident was a collision of vehicles in heavy traffic conditions which resulted in the patrol car being totaled.<sup>7</sup> Officer Francis was not disciplined for this accident.

Employee argues that the facts of Officer Francis' and his accident are similar with the exception of the discipline imposed. Employee's accident was a single car accident which resulted from a "Collision with fixed object."<sup>8</sup> The primary cause for Employee's accident was "Driver inattention."<sup>9</sup> Employee's accident also resulted in his patrol car being totaled. Employee received a thirty day suspension as a result of his accident.

Both employees were involved in an accident while on duty which resulted in their patrol vehicles being totaled. It is uncontroverted that Employee and Officer Francis were both in the same organizational unit, supervised by Associate Director Anthony Fortune, and their incidents occurred within approximately eight months of each other. However, Agency avers that the similarities between the two employees end there.

At the time of Employee's suspension, he was involved in at least one other accident causing damage to Agency's fleet of vehicles.<sup>10</sup> Despite Employee's accident history, he was never disciplined until the instant case arose, despite being adjudged to be at fault in at least one of the prior accidents. Agency argues that just because two of its officers totaled vehicles while on duty and one received disciplinary action and the other did not, does not amount to disparate treatment. Agency contends that other factors were taken into consideration when suspending Employee for thirty days in the instant case, and not imposing any discipline on Officer Francis. For instance, Employee was involved in at least one prior accident where he was at fault, but never received disciplinary action; whereas, Officer Francis' accident was her first. Thus, Agency asserts that it properly invoked its managerial discretion when it did not discipline

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<sup>6</sup> It is noted that Agency addresses several issues in its brief that have already been adjudicated in the Initial Decision and affirmed by the OEA Board in its Opinion and Order. Because the only issue on remand is the claim of disparate treatment and the consistency of imposed penalties, I will not address the peripheral issues and arguments raised in Agency's brief.

<sup>7</sup> Employee's Response to Agency's Brief Regarding Disparate Treatment, Exhibits 3 and 4 (June 7, 2018).

<sup>8</sup> Agency's Brief Regarding Petitioner's Appeal, Exhibit 4 at Tab 6 (May 11, 2016).

<sup>9</sup> *See Id.*

<sup>10</sup> Agency's Brief Regarding Disparate Treatment, Attachment, Barbusin Risk Management Specialist Report at p. 2 (April 23, 2018).

Officer Francis for her first accident, just as it did not discipline Employee for his previous accidents prior to December 28, 2014.

Additionally, Agency argues that Employee's job level was an aggravating factor in assessing the thirty day suspension. Employee was a supervisor within Agency's Protective Services Division, whereas Officer Francis is a line officer. Given Employee's status as a supervisor, he has more experience and responsibility than Officer Francis, and is held to a higher standard.

Based on Employee's accident history versus that of Officer Francis, and the different levels of responsibilities between Employee and Officer Francis, I find that Agency has provided a legitimate reason for imposing a thirty day suspension against Employee, despite not imposing any disciplinary action against Officer Francis.

#### ORDER

Accordingly, it is hereby **ORDERED** that Agency's thirty (30) day suspension is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge