THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0077-15
JOHN J. BARBUSIN, Employee	
	Date of Issuance: March 1, 2017
v.	
DEPARTMENT OF GENERAL SERVICES, Agency	
	Arien P. Cannon, Esq. Administrative Judge

J. Scott Hagood, Esq., Employee's Representative
C. Vaughn Adams, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

John Barbusin ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 20, 2015, challenging the District of Columbia Department of General Services' ("Agency") decision to suspend him for thirty (30) days from his position as a Supervisory Special Police Officer in its Protective Services Division ("PSD"). Employee's suspension was effective May 3, 2015, through June 11, 2015. Employee returned from his suspension on June 14, 2015. Agency filed its Answer to Employee's petition on July 8, 2015.

I was assigned this matter on September 16, 2015. A Prehearing Conference was convened on November 16, 2015. A Post Prehearing Conference Order was issued on November 17, 2015, which required the parties to submit legal briefs addressing the issues in this matter. Prior to the submissions of the briefs, Employee filed a Motion to Compel Discovery on January 8, 2016. Agency filed an Opposition to Employee's Motion to Compel on January 26, 2016. Employee submitted a Reply to Agency's Opposition Motion to Compel on January 29, 2016. I issued an Order granting a Consent Protective Order on January 29, 2016. On February 29, 2016, a telephonic Status Conference was convened to address outstanding discovery issues. Subsequently, I issued an Order granting some of the requests Employee made in his Motion to

Compel and denying the others. On March 7, 2016, Employee filed a Second Motion to Compel Discovery. An Order was issued on March 9, 2016, which granted three discovery requests by Employee.

On April 19, 2016, Agency filed a Motion for Relief from Scheduling Order. Subsequently, Employee filed an Opposition to Agency's Motion for Relief from Scheduling Order, along with a Motion to Reverse Agency's Action for Failure to Defend. Employee's Motion to Reverse Agency's Action for Failure to Defend was denied in an order issued on May 2, 2016. After extensive discovery issues were sorted, and numerous extensions were granted, the parties ultimately submitted their briefs addressing their legal arguments in this matter. Agency's brief was submitted on May 11, 2016; Employee's Brief was submitted on September 29, 2016. Based on the submissions by the parties, I determined that an evidentiary hearing is not warranted. The record is now closed.

JURISDICTION

Jurisdiction of this Office is established in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee for:

   (a) Any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty (failure to observe precautions regarding safety; carless work habits); operating outside of authority as defined in DCMR 6A[1]; and
   (b) Any knowing or negligent material misrepresentation on other document given to a government agency: intentional false statement, on DC Office of Risk Management Incident Report, regarding traveling speed.[2]

2. If so, whether a thirty (30) day suspension was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[3] "Preponderance of the evidence" shall mean:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

[1] *See* DPM § 1603.3(f)(3) (August 27, 2012).
[2] *See* DPM § 1603.3(d) (August 27, 2012).
[3] 59 DCR 2129 (March 16, 2012).

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[4]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

It is undisputed that Employee was involved in an accident during the early morning hours of December 28, 2014. The legal issue to determine here is whether Employee's actions rise to the level of neglect of duty as set forth in the specifications provided in Agency's Advance Notice of Proposed Suspension issued on March 30, 2015.[5] I must also determine whether Agency had cause to take adverse action against Employee for material misrepresentation on the D.C. Office of Risk Management Incident Report.

Neglect of Duty

Agency bases its neglect of duty charge on three separate allegations: (1) Employee responded to a call for service outside of Agency's jurisdiction; (2) Employee self-dispatched to a call for service; and (3) Employee recklessly operated an Agency vehicle that resulted in an accident.

Responding to call for service outside of Agency's jurisdiction

First, Agency states that its officers are Special Police officers with jurisdiction limited to District owned and operated properties.[6] In support of its position that Employee operated outside of Agency's jurisdiction, Agency cites to 6A DCMR (District of Columbia Municipal Regulations) 1100, *et seq*. as the authority of its officers. 6A DCMR 1100, *et seq*. provides, in pertinent part:

> 1100.1 Special police officers may be appointed by the Mayor for duty in connection with the property of or under the charge of a corporation or individual requesting the appointment or appointments.
>
> 1100.2 Special police officers appointed pursuant to § 1100.1 shall be strictly confined in their authority to the particular place or property which they are commissioned to protect.
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> 1100.3 Commissions issued to special police officers shall specify the following information:
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> (a) The particular place or property they are commissioned to protect;
>
> (b) Any waiver of the uniform requirement; and

[4] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[5] Agency's Brief Regarding Petitioner's Appeal, Exhibit 4, Tab 1 (May 11, 2016).
[6] *See* Petitioner's Brief at 7 (September 29, 2016).

> (c) In the case of § 1100.2, any requirement for storage or special provisions for transportation of firearms or other dangerous weapons.
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> 1100.6 Special police officers appointed under the provisions of either § 1100.4 or § 1100.5 shall be amendable to the rules laid down for the government of the Metropolitan Police Force in so far as those rules are applicable.

Additionally, § 1101.12, provides that Special police officers may be appointed under the provisions of D.C. Official Code § 4-114 (1981), if employed by the Government of the District of Columbia and if their duties require protection of the property or interest of the District of Columbia. Section 1101.13 states that the location of the property or buildings of the District of Columbia to be protected pursuant to § 1101.12, or the description of the interests of the District of Columbia, shall be specified on the face of the commission issued to those special police officers.

Agency maintains that the only exception to these jurisdictional limits is when an officer is pursuing a suspect in fresh pursuit in connection with an offense committed on District property.[7] Here, Agency asserts that Employee was well aware of these limitations as its officers were reminded via a Memo emailed to them on August 27, 2014.[8] Additionally, Agency argues that the jurisdictional restrictions were reiterated by the Associate Director in its Protective Services Division newsletter issued in November of 2014.[9] Thus, Agency avers that Employee was on notice of the restrictions of the law enforcement authority of Agency's PSD officers from numerous sources—his Special Police Officer Commission, 6A DCMR 1100, *et. seq*., D.C. Code § 23-582(a), his job description, all PSD General Orders, an email and Memorandum, and a newsletter issued in November 2014.

Countering Agency's assertions, Employee avers that there was significant confusion regarding the jurisdiction of PSD officers. He maintains that the confusion stems from the existence of a variety of formal general orders by past PSD Chiefs, and oral instructions and policies relating to the jurisdiction of PSD officers.[10] In support of this contention, Employee points to an April 2015 Office of Inspector General ("OIG") Report.[11] The OIG Report addresses, in part, the concern of PSD patrol operations' Special Police Officers occasionally engaging in law enforcement activity outside of their jurisdiction.[12] The OIG Report goes on to provide that "[d]uring fieldwork, the team observed that there are no written policies and procedures that define jurisdictional limits for conducting patrol operations, and that PSD and [Agency] officials have provided inconsistent verbal guidance regarding PSD's jurisdiction."[13]

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[7] *See* D.C. Code 23-582(a).
[8] Agency Brief Regarding Petitioner's Appeal, Exhibit 4, Tab 2 (May 11, 2016).
[9] *Id*.
[10] Petitioner's Brief at 7 (September 29, 2016).
[11] Petitioner's Brief, Exhibit 1 (September 29, 2016).
[12] *Id*., Executive Summary of OIG Report.
[13] *Id*., OIG Report at 7.

Additionally, the OIG Report stated that "PSD has not provided clear guidance to its frontline employees regarding the Division's jurisdiction and authority, and PSD management acknowledged that formal guidance is deficient."[14]

The assertions made in the Executive Summary of the OIG's Report are also supported by statements made by Agency management officials during depositions pertaining to the instant case. The Proposing and Deciding Officials in this matter, Heath Scott and Anthony Fortune, respectively, were deposed during the discovery process. Deciding Official ("DO") Fortune testified during his deposition that PSD officers were not trained on their jurisdictional limits until early 2015, shortly after Employee's accident.[15] Employee argues that this training was necessitated by the confusion of the officers regarding their jurisdictional limits. While the DCMR and D.C. Code attempt to establish the jurisdictional bounds of PSD officers, it is apparent that officers also received direct verbal orders from former Chiefs, Lou Cannon and Rodney Parks, respectively, on responding to 10-33 calls.[16] Those direct orders allowed for PSD officers to respond to 10-33 calls in assisting other law enforcement officers in distress. The record does not support that the verbal orders pertaining to 10-33 calls were ever rescinded. The fact that Employee was responding to a 10-33 call here is significant, given that Employee's accident occurred while responding to a call for assistance to a location that is not a District government controlled location.

At the time of Employee's accident, General Order 301.6 was the only written directive regarding Code-1 responses for 10-33 calls.[17] Additionally, PSD officers were told that if they decided to help another officer that "[n]obody is going to investigate you or discipline you for helping another officer in that situation."[18] Thus, under former Chief Cannon's written order (General Code 301.6, issued February 2010), and former Chief Parks' subsequent verbal command, the policy regarding an officer's response to a 10-33 call was to "go to it."[19] Employee argues that this was the guidance he was operating under when he responded to the 10-33 call on December 28, 2014.

It is clear based on the documentary evidence that Employee and other PSD officers had unclear directives regarding the jurisdictional bounds of PSD officers—including whether it was appropriate to respond to 10-33 calls that were not on District owned or leased property. Accordingly, and based on the documentary evidence regarding the unclear jurisdictional limits of PSD officers, as provided for in 6A DCMR 1100, *et. seq*., D.C. Code § 23-582(a), and the verbal directives given to officers, I do not find that Agency has met its burden of proof that Employee neglected his duty when he responded to a 10-33 call to assist a Metropolitan Police Officer during the early morning hours of December 28, 2014.

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[14] Petitioner's Brief, Exhibit 1 at 3 (September 29, 2016
[15] *See* Petitioner's Brief, Exhibit 6, Tr. 26:8-19 (September 29, 2016).
[16] 10-33 calls are calls that denote "Officer in trouble, needs immediate help." *See* Petitioner's Brief, Exhibit 9 at 4.
[17] *See* Petitioner's Brief, Exhibit 9, General Order 301.6, Section IV, 10. A Code-1 response is a response code assigned to a particular emergency call that indicates to officers the appropriate level of urgency needed in responding to call.
[18] *See* Petitioner's Brief, Exhibit 5, Heath Scott Deposition Tr. 62:13-16, 68:16-18.
[19] *Id*. at 66:19-21, 69:13-22.

Self-dispatching to call for service

Agency further avers that Employee neglected his duty when he self-dispatched to the 10-33 call for service. In Employee's brief, he contends that this is a new allegation and not under review by this tribunal.[20] Employee further asserts that even if this tribunal were to consider this charge, it is unsupported by the facts.

In the Advance Written Notice of Proposed Suspension, issued to Employee on March 30, 2015, the specifications for the charges against Employee state, in relevant part, that "[Employee was] not specifically dispatched to that call and [was] operating outside of PSD jurisdiction and legal authority…"[21] Thus, I disagree with Employee's assertion that this is a new allegation being raised by Agency.

Agency argues that PSD Officers must be specifically dispatched to a call and may only respond Code-1 if directed by the Office of Unified Communications. In support of this position, Agency cites to PSD General Order 301.6 (February 28, 2010), Operation and Use of Police Vehicles, Section I.[22] The relevant portion of this Order provides that, "Officers will respond to calls consistent with the response code assigned to the incident by the Office of Unified Communications (OUC) Dispatcher or a supervisor." In Agency's brief, it also points to General Order 302.4 (January 26, 2010)[23], to support its argument that PSD Officers should respond to calls for service "only after they are affirmatively dispatched…by the Office of Unified Communication and/or their PSD supervisors."[24]

As discussed above in the "Responding to call for service outside of Agency's jurisdiction" section, there seems to be contradicting directives in the General Order 302.4 and the verbal orders given by former Chiefs Cannon and Parks about responding to 10-33 calls. It is clear from the record that the verbal order encouraged officers to respond to 10-33 calls in rendering aid to fellow law enforcement officers and asserted that there would be no penalty for responding to such a call. Thus, I find that Employee did not neglect his duty by "self-dispatching" to a 10-33 call.

Failure to observe precautions regarding safety

Lastly, Agency bases its neglect of duty charge on Employee's reckless operation of an Agency vehicle that resulted in an accident. Agency's General Order 301.6 (February 28, 2010)[25] pertaining to the operation and use of police vehicles emphasizes the safe operation of patrol cars. Specifically, it provides that:

> Whether the situation is routine or emergency, the operator's first concern is the safe operation of the vehicle and preserving operator

[20] *See* Petitioner's Brief at 16.
[21] *See* Agency's Brief, Exhibit 4, Tab 1.
[22] *Id.*, Exhibit 1.
[23] *Id.*, Exhibit 2, Section IV, "Emergency Calls," C.
[24] *See* Agency's Brief at 5-6.
[25] Agency Brief Regarding Petitioner's Appeal, Exhibit 1.

> and citizen safety. In emergency situations, a fast response is necessary; however, the need for urgency must always be balanced against the high concern for vehicle operator and citizen safety.[26]

Here, the Motor Vehicle Accident Report Form indicates that Employee was involved in an accident on December 28, 2014, at 3:10 a.m., which is described as a "Collision with fixed object."[27] The accident report also indicates that the weather was clear, traffic conditions were light, and the roads were dry.[28] The report, which was completed by Metropolitan Police Officer Terrence Turner, provides that the primary cause of the accident was "Driver inattention." This accident resulted in Employee's patrol vehicle being rendered "totaled."[29]

The guidelines set forth in General Order 301.6 (February 28, 2010) regarding the safe operation of patrol vehicles, and the resulting accident on December 28, 2014, demonstrate that Employee neglected his obligation to safely operate his vehicle while responding to a 10-33 call. Given the conditions on the night (early morning) of this single car accident, I find that this accident could have been prevented if Employee was operating his vehicle with due care and in a safe manner as expected of PSD Officers. Accordingly, I find 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.

Any knowing or negligent material misrepresentation on other document given to a government agency: intentional false statement, on DC Office of Risk Management Incident Report, regarding traveling speed.

In addition to the neglect of duty charges, Employee was charged with any knowing or negligent material misrepresentation on other document given to a government agency: intentional false statement, on DC Office of Risk Management Incident Report, regarding traveling speed," pursuant to DPM § 1603.3(d).

Agency asserts that this charge is based on Employee's "deliberate attempt to minimize the excessive speed of his vehicle at the time of the crash," as provided for in his written statement provided to the D.C. Office of Risk Management.[30] In his written statement, Employee stated that he was travelling 30 mph at the time of the accident. Agency's asserts in its brief that the GPS tracking logs for the accident indicates that right before the accident, at 3:11:46 a.m., Employee was driving 51.57 mph.[31] The GPS log further provides that Employee was driving 27.34 mph at 3:11:51 a.m., which Agency asserts is the exact moment of the crash.

To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding,

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[26] *Id.*
[27] *Id.*, Exhibit 4 at Tab 6.
[28] *Id.*
[29] *Id.*, Exhibit 4 at Tab 1.
[30] Agency's Brief Regarding Petitioner's Appeal at 10.
[31] *See* Agency Brief at 10; *See also* Exhibit 4.

deceiving, or misleading the agency.[32] In levying this charge, Agency relied on the GPS device attached to Employee's vehicle. During the deposition of Proposing Official, Heath Scott, he stated that "the false statement charge [was] probably unwarranted."[33] This statement was based on the fact that the GPS was not calibrated, and thus could not be relied upon as an accurate statement or measure of the speed at with Employee was actually traveling. Proposing Official Scott further stated that had he known that the GPS was not calibrated, he would not have made a recommendation for providing a false statement.[34]

Given that Agency's Proposing Official acknowledged that the GPS device relied upon in levying the misrepresentation charge against Employee was not calibrated, is significant. In essence, Agency officials acknowledge that the reliability of the information provided by the GPS log was called into question. The GPS reading was the sole piece of evidence in determining that Employee misrepresented material information in his Incident Report. Thus, I find that Agency did not have cause to take adverse action against Employee for an intentional false statement on his D.C. Office of Risk Management Incident Report regarding his traveling speed.

Disparate treatment

Employee raises a disparate treatment argument by asserting that other PSD officers have been in accidents where no disciplinary actions were imposed.[35] In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office's Board set forth the law regarding a claim of disparate treatment:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [her] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

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

[32] *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).
[33] Petitioner's Brief, Exhibit 5, Heath Scott Dep. Tr. at 140-141.
[34] *Id*. at 140:21-22.
[35] Petitioner's Brief at 18.

employees.[36] Here, Employee asserts that another officer was involved in an accident that resulted in significant damage when she recklessly conducted an illegal u-turn and was t-boned by another vehicle. This assertion was elicited from the deposition of the Proposing Official here, Deputy Chief Scott.[37] The details and circumstances surrounding the other officer's accident are lacking. Agency acknowledges that other PSD officers have damaged PSD vehicles and there is no record of disciplinary action since the accidents were the result of another driver's negligence, the damage to the vehicle was minor (dent or scratch) or the accident was not a result of reckless conduct.[38] The burden is on Employee to demonstrate that other officers who were involved in an accident were similarly situated to him. The deposition testimony relied on by Employee in making this disparate treatment argument fails to show that other officers were similarly situated and the circumstances of their accidents were similar to his. Thus, I find that Employee's disparate treatment argument fails to satisfy his burden.

Appropriateness of Penalty

As discussed above, I find that Agency did not satisfy its burden with respect to two of the three incidents which resulted in a "Neglect of Duty" charge. I also found that Agency did not meet its burden with respect to the "material misrepresentation" charge. As a result I will not discuss the appropriateness of the penalty for those charges. However, I do find that Agency satisfied its burden with respect to the "Neglect of Duty" charge stemming from Employee's negligent operation of his patrol car which resulted in an accident.

In determining 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 Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Here, I find that Agency met its burden of proof regarding the "Neglect of Duty" charge; specifically failing to observe precautions regarding safety. Thus, Agency can only rely on this charge in disciplining Employee.

6-B DCMR § 1619.1(6)(c)(Table of Appropriate Penalties)(January 2, 2015) [39] provides the range of appropriate penalties for a charge of "[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty (failure to observe precautions regarding safety…)." The penalty for a first time offense for this cause ranges from a reprimand to removal. Based on the documentary evidence, and the discussion above, I find that Agency had cause to discipline Employee for a neglect of duty charge.

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[36] *See Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).
[37] Petitioner's Brief, Exhibit 5, Heath Scott Dep. Tr. at 55-58.
[38] Agency's Brief Regarding Petitioner's Appeal at 12.
[39] This Table of Appropriate Penalties was in effect at the time of the adverse action taken against Employee. This section has since been replaced, and a Table of Illustrative Actions, 6-B DCMR § 1607 (February 5, 2016), is now used instead of a Table of Appropriate Penalties.

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[40] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[41] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[42] Here, in the Notice of Final Decision on Proposed Suspension, issued on April 27, 2015, Deciding Official, Associate Director Anthony Fortune, explicitly states that the *Douglas* factors were carefully considered in imposing the thirty (30) day suspension.[43] Accordingly, I find that Agency reasonably concluded that a thirty (30) day suspension was an appropriate penalty under the circumstances.

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

[40] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[41] *See Id.*
[42] *Id.*
[43] Agency's Brief, Exhibit 4, Tab 6. *Also see Id*., Tab 1, Advance Written Notice of Proposed Suspension which provides that the penalty for the Neglect of Duty charges was a thirty (30) day work suspension and the penalty for the intentional false statement charge was a fifteen (15) day suspension. These penalties were served concurrently.