

MARICOPA COUNTY LAW ENFORCEMENT OFFICER'S MERIT SYSTEMS COMMISSION

2015 DEC 10 PM 2:09

MERIT COMMISSION

Sean Pearce	)	
	)	
Appellant,	)	<b>HEARING OFFICER'S</b>
vs.	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW</b>
Maricopa County Sheriff's Office	)	<b>AND RECOMMENDATION</b>
	)	
Respondent.	)	

MC2015-13

This matter came for hearing on November 13, 2015, in Phoenix, Arizona, before Hearing Officer Prudence Lee in an appeal by Deputy Sean Pearce of an 80-hour suspension from the Maricopa County Sheriff's Office on alleged violations of the Maricopa County Law Enforcement Officer's Merit Systems Resolution Section 15(C) (5) Neglect of Duty and Rule 10.07(A) involving CP-2 Code of Conduct, Section 3, *Conformance to Established Laws and CP-4; Emergency and Pursuit Driving.*

Appellant appeared in person at the hearing and was represented by Kathryn Baillie, Attorney. Maricopa County Sheriff's Office was represented by Emily M. Craiger, Deputy County Attorney. A private hearing was conducted. The hearing was observed by Chief Ken Holmes from the Maricopa County Sheriff's Office.

The following persons testified in this matter:

- Sergeant Mike Bocchino
- Deputy Chief Edward Lopez
- Captain Steve Bailey
- Sergeant John Davison
- Deputy Sean Pearce

Having heard the testimony of the witnesses, having read and considered the exhibits admitted into evidence (the exhibits are catalogued in the transcript prepared by the Court

1 Reporter), having heard argument by the parties and being fully advised in the premises, the  
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3 undersigned Hearing Officer now submits the following findings of fact, conclusions of law and  
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5 recommendation to the Maricopa County Law Enforcement Officer's Merit Systems  
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7 Commission.  
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10 **FINDINGS OF FACT**

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12 1. Appellant is a regular employee of the Maricopa County Sheriff's Office ("MCSO"),  
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14 and has been a Deputy Sheriff for the MCSO for 22 years (Tr. p. 140).  
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16 2. Appellant was given an 80-hour suspension on September 17, 2015 (Respondent's  
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18 Ex. 3).  
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20 3. On December 16, 2013, at approximately 3:00 p.m., Appellant was traveling north on  
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22 59<sup>th</sup> Avenue in Glendale, Arizona, in an unmarked vehicle not equipped with  
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24 emergency lights and siren, in tandem with another MCSO Deputy, who was in a  
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26 separate, unmarked vehicle, also not equipped with emergency lights and siren  
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28 (Respondent's Ex. 5, p. 20).  
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30 4. Appellant and the other Deputy were assisting a homicide Detective who was  
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32 tracking a recent homicide suspect and were on their way to meet with the Detective  
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34 at a Food City on 59<sup>th</sup> Avenue and Bethany Home Road (Respondent's Ex. 5, p. 30;  
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36 Tr. p. 146).  
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38 5. While observing normal speeds in their separate vehicles, Appellant and the other  
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40 Deputy received a communication that the homicide suspect had entered a cab and  
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42 was moving east on Olive Avenue toward Appellant and the other Deputy. Both  
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44 Deputies believed they were the closest ones to assist the homicide detective and  
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46 intercept the suspect (Respondent's Ex. 2; Tr. pp. 146, 152-153).  
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- 6. This information, that the suspect was on the move, caused Appellant and the other Deputy to treat the assignment as an emergency and substantially increase their speed. They did so in an effort to prevent the armed suspect, who was believed to have committed a recent homicide, from taking rash action against the cab driver or the pursuing Detective, should the suspect realize he was being pursued. The pursuing Detective was not equipped with tactical gear nor had the tactical training of Appellant and the other Deputy. Appellant and the other Deputy also proceeded through 2 red lights, using due care (Respondent's Ex. 2; Ex. 5, p. 24).
- 7. Appellant believed he was traveling at a speed of 55 miles per hour. Although not tracked, the other Deputy estimated his speed to be between 55-60 miles per hour. The Glendale Police later estimated Appellant's speed to be between 77 to 84 miles per hour. The speed limit was 40 miles per hour (Respondent's Ex. 5, p. 20; Tr. pp. 18, 23-24).
- 8. Appellant had a collision with a motor vehicle driven by a motorist who turned left/south onto 59<sup>th</sup> Avenue from his westbound position at Hayward Avenue. The motorist did not look south during his turn, and, as a result, could not see Appellant approaching. The Glendale Police determined that the motorist failed to yield to Appellant. The motorist died as a result of injuries incurred in the collision. Although Appellant noticed a medical device on the driver when Appellant rendered aid after the collision, the Glendale Police report was silent on the medical conditions of the driver (Respondent's Ex. 2; Respondent's Ex. 5, pp. 22-23; Tr. pp. 22, 37-38, 159).

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- 9. When Appellant saw the motorist pulling out in front of him, Appellant applied his brakes and tried to turn to lessen the impact of the collision. The brakes locked and Appellant had no steering power. At the time of the impact, Glendale Police estimated Appellant's speed to be between 48 and 53 miles per hour (Respondent's Ex. 5, p. 22-23, 50; Tr. p. 160).
- 10. Appellant was in a "loaner vehicle" while his regular vehicle was having emergency lights and a siren installed (Respondent's Ex. 14; Tr. p. 142).
- 11. Appellant pled guilty to a traffic ticket in the Glendale Municipal Court and was assigned to traffic school. A complaint was filed with the judge who called a new hearing, overturned the decision for traffic school and changed the charge to a Class 3 Misdemeanor. Appellant was told that the complaint was filed by the *New Times* newspaper. Appellant then pled guilty to a Class 3 Misdemeanor. The date of the final disposition in the Glendale City Court was April 8, 2015 (Respondent's Ex. 5, p. 14; Tr. pp. 162-163).
- 12. The Glendale Police Department submitted charges of Manslaughter-Reckless to the Maricopa County Attorney for prosecution. The Maricopa County Attorney declined to prosecute on June 16, 2014, stating that there was no reasonable likelihood of conviction. (Respondent's Ex. 5, pp. 14, 26; Tr. p. 21).
- 13. The MCSO Internal Affairs Division started its investigation of Appellant on July 10, 2014, and completed it on July 28, 2015. (Respondent's Ex. 5, p. 14).
- 14. Even if Appellant had not pled guilty, the Deputy Chief would have found that Appellant violated Critical Policy, C-2, Code of Conduct, Section 3 (Tr. p. 78).

1 15. As a result of the MCSO investigation, Appellant was given a suspension of 80 hours  
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3 for violation of Critical Policy-2, Code of Conduct, Section 3 *Conformance to*  
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5 *Established Laws*, because he exceeded the posted speed limit by more than twenty  
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7 miles per hour and for violation of CP-4, Section 2, *Emergency and Pursuit Driving*,  
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9 because he engaged in emergency driving without emergency lights and a siren  
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11 (Respondent's Ex. 3; Tr. p. 45-48).  
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14 16. The other MCSO Deputy who was driving in a separate vehicle in tandem with  
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16 Appellant but not involved in the collision, and who admitted to proceeding through  
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18 red lights and exceeding the speed limit, was not investigated nor disciplined. No  
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20 analysis was performed of his speed (Respondent's Ex. 5, p. 20; Tr. pp. 39, 82, 115).  
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23 17. Critical Policy-2, Code of Conduct, Section 3, *Conformance to Established Laws*,  
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25 provides: "Employees shall obey all local ordinances as well as all federal and state  
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27 laws. Violation of any established ordinance or law may result in disciplinary action  
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29 being imposed, in addition to the possibility of criminal prosecution. Disciplinary  
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31 action may be imposed regardless of the outcome of the court case" (Respondent's  
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33 Ex. 3; Respondent's Ex. 9).  
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36 18. Arizona Revised Statutes §28-701.02 (A) (2), Excessive Speeds; Classification,  
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38 provides in pertinent part: "A person shall not: exceed the posted speed limit in a  
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40 business or residential district by more than twenty miles per hour..." (Respondent's  
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42 Ex. 3).  
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45 19. Critical Policy-4, Section 2, *Emergency and Pursuit Driving*, provides in pertinent  
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47 part: "Operators of vehicles not equipped with emergency lights and sirens shall not  
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49 engage in emergency driving" (Respondent's Ex. 3; Respondent's Ex. 10, p. 75).  
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1 20. MCSO's Employee Disciplinary Procedure, GC-17, employs a Discipline Matrix.

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3 The purpose of the Matrix is to "make discipline uniform and equitable throughout  
4 the Office. It is essential to consider the offense, as well as mitigating and  
5 aggravating circumstances, when determining the level of discipline to be imposed"  
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9 (Respondent's Ex. 11, p. 84).

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12 21. When considering a violation under the provisions of the Discipline Matrix, the  
13 Employee Disciplinary Procedure requires that the violation be placed into a  
14 Category of Offenses. Appellant's violation fell into a Category 6 because he  
15 committed a misdemeanor (Respondent's Ex. 11, pp. 39, 95-100; Tr. pp. 54-55).

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20 22. After a violation is placed in a Category, the Discipline Matrix provides "a  
21 recommended level of discipline for first, second, and third offenses" (Respondent's  
22 Ex. 11, p. 84; Tr. p. 54).

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27 23. When Appellant committed the violation in December of 2013, it was his first  
28 disciplinary offense. The Discipline Matrix provides that the minimum discipline for  
29 a Category 6 first offense is 40 hours; the maximum is dismissal. The Deputy Chief  
30 who made the disciplinary decision did not believe Appellant's violations warranted  
31 dismissal (Respondent's Ex. 2; Respondent's Ex. 11, p. 93; Ex. 14; Tr. p. 59, 64).

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38 24. On August 21, 2014, Appellant and at least one other Deputy received a written  
39 reprimand for not properly packaging, marking and accounting for evidence in a  
40 property and evidence room. Although this reprimand occurred eight months after  
41 the first offense, the Deputy Chief used the August 21, 2014, reprimand as the first  
42 offense and the December 16, 2013, violations as Appellant's second offense in his  
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- application of the Discipline Matrix (Respondent's Ex. 8; Respondent's Ex. 14; Tr. p. 61).
25. At the pre-disciplinary hearing pertaining to the 80-hour suspension, Appellant questioned why the Deputy Chief considered the December 16, 2013, to be a second offense in applying the Discipline Matrix (Respondent's Ex. 2; Respondent's Ex. 14; Tr. pp. 59, 61).
26. The Deputy Chief considered Appellant's question of why this was not a first offense to be valid, thought that the chronological order was "off", and before making his ruling, asked MSCO Human Resources for clarification on this point. He had not had a case such as Appellant's before, although he had a case in which two violations in the same investigation straddled a first offense (Respondent's Ex. 14; Tr. pp. 61-63, 68).
27. The Deputy Chief was told by MCSO Human Resources, who was directed by an Assistant County Attorney, to apply Appellant's violation as a second offense on the Discipline Matrix (Respondent's Ex. 14; Tr. p. 109).
28. The Deputy Chief did not consider, in imposing discipline, that the Glendale Police Department concluded that the motorist failed to yield to Appellant or that the motorist did not look south toward Appellant when executing his turn. The Deputy Chief did consider Appellant's past record (Tr. pp. 74-75; 87).
29. Appellant was awarded a Purple Heart Medal on March 17, 2006, and has received numerous commendations (Appellant's Ex. 6).
30. MCSO's Policy GC-17, Employee Disciplinary Procedures, states that a "regular status law enforcement officer shall not be subject to suspension, demotion or

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dismissal except for just cause. Command staff shall ensure that each of the following prongs are met prior to issuing such discipline to a regular status law enforcement officer:

1. The employee was informed that disciplinary action could potentially result for such conduct, through the law, Merit Rules, applicable County Policy, Office Policy, command directives, *The Briefing Board*, other communications to the employee or the employee should reasonably have known that disciplinary action could occur for such conduct.
2. The disciplinary action is reasonably related to the standards of conduct for a professional law enforcement officer; the mission of the Office; the orderly, efficient or safe operation of the Office; or the law enforcement officer's fitness for duty.
3. The discipline is supported by a preponderance of evidence that the conduct occurred.
4. The discipline is not excessive and is reasonably related to the seriousness of the offense and the law enforcement officer's service record" (Respondent's Ex. 11, pp. 87-88).

31. The Appellant was properly notified of MCSO's intention to dismiss him by letter dated September 3, 2015, (although as noted earlier, dismissal was not considered), and notified in the same letter of a pre-determination hearing on September 15, 2015 (Respondent's Ex. 1).

32. A pre-termination hearing was held on Tuesday, September 15, 2015, at 10:30 a.m. The Appellant appeared at the pre-termination hearing (Respondent's Exhibit 1; Respondent's Ex. 2; Respondent's Ex. 14).

33. Appellant was notified of his 80-hour suspension by letter dated September 17, 2015 (Respondent's Ex. 3).

34. On October 1, 2015, Appellant, through his attorney, timely requested an appeal of the 80-hour suspension (Respondent's Ex. 4).

35. On November 3, 2015, Respondent, through its attorney, submitted a Motion to Dismiss, stating that there was no legal basis for the appeal.



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36. On November 9, 2015, Appellant, through his attorney, submitted a Response to Respondent's Motion to Dismiss.

37. On November 9, 2015, the Hearing Officer denied the Motion to Dismiss and asked parties to argue the facts and circumstances of the case under *Maricopa County Sheriff Office v. Maricopa County Employee Merit System Commission*, 211 Ariz. 219, 119 P 3d. 1022 (2005) and Arizona Revised Statutes, §§38-1101 through 38-1114, as raised in the Motion to Dismiss and Response to the Motion to Dismiss, at the November 13, 2015, hearing.

38. A closed hearing was held on November 13, 2015. The Appellant appeared and was represented by counsel. MCSO was represented by the Maricopa County Attorney's Office. The witness rule was invoked. Due to time constraints, closing argument and argument pertaining to the Hearing Officer's request above in Fact #37, were submitted in writing on November 30, 2015. The hearing was continued until that submission.

**CONCLUSIONS OF LAW**

1. This matter is within the jurisdiction of the Maricopa County Law Enforcement Officer's Merit Systems Commission, as Appellant is a regular employee of the Maricopa County Sheriff's Office.
2. The written notice provided to the Appellant informing him of his 80-hour suspension was sufficient to apprise Appellant of the grounds on which the suspension was based.
3. The actions of Respondent in seeking Appellant's response to the allegations of misconduct and inviting his participation accorded Appellant full due process as

1 required by *Cleveland Board of Education vs. Loudermill*, 488 U.S. 946 (1988) and  
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3 *Zavala vs. Arizona State Personnel Board*, 159 Ariz. 256 (1988)  
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6 4. The actions of the Appellant, as described in the Findings of Fact, in using excessive  
7 speed and employing emergency driving in a MCSO vehicle without a siren and  
8 emergency lights, constitute Neglect of Duty, as defined by Maricopa County Law  
9 Enforcement Officer's Merit Systems Resolution Section 15 (C) (5), MSCO Critical  
10 Policy, CP-2, Code of Conduct, Section 3, *Conformance to Established Laws* and  
11 Critical Policy, CP-4, section 2, *Emergency and Pursuit Driving*.  
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13 5. MCSO has implemented the "Just Cause" standard in its Employee Disciplinary  
14 Procedure Policy, GC-17. The Just Cause standard is enunciated in the Officers' Bill  
15 of Rights in A.R.S. §§38-1101-1114 that became effective January 15, 2015.  
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17 6. Under the "Just Cause" standard, discipline cannot be excessive and must be  
18 reasonably related to the seriousness of the offense and the law enforcement officer's  
19 service record.  
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21 7. Two officers committing the same offense were treated differently by MCSO, leading  
22 to the conclusion that Appellant was investigated and disciplined because of the  
23 motorist fatality. As tragic as the collision was, the MSCO Policy does not state that  
24 employees who speed and run red lights will only be disciplined in the event of a  
25 traffic fatality. One Deputy cannot be disciplined while another is not disciplined for  
26 committing exactly the same violation of law and performing emergency driving in a  
27 MCSO vehicle that is not equipped with lights or siren.  
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29 8. The reasons given by the Deputy Chief for waiting to investigate and discipline  
30 Appellant on the actual first offense that occurred on December 16, 2013, could not  
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be reconciled with the following fact: Even if Appellant had not pled guilty, the Deputy Chief stated that he would have determined that Critical Policy-2, Code of Conduct, Section 3, was violated, with MCSO not needing a guilty plea from Appellant to discipline. At Respondent's request, the Hearing Officer took judicial notice of A.R.S. §38-1110, which allows a law enforcement agency to extend time limits of its investigation and discipline while awaiting the results of a criminal investigation

9. Without enunciating convincing reasons for waiting to investigate and discipline Appellant, MCSO utilized Appellant's reprimand, which occurred eight months after the first offense, to increase Appellant's discipline to 80 hours. The increase to 80 hours, based on a reprimand that occurred eight months after the original first violation, renders the discipline excessive under the "just cause" provision of MCSO Policy GC-17, Employee Disciplinary Procedure.

10. The Deputy Chief's testimony that because there was a traffic fatality, he would have imposed an 80-hour discipline, even if the violation were a first offense was not credible and does not withstand logic. If that was truly his intent at the time, why did the Deputy Chief delay his ruling while he contacted MCSO Human Resources to about whether it should be a first or second offense? If he had already concluded that the traffic fatality increased Appellant's to an 80-hour suspension, it would not have mattered to him if it were a first or second offense.

11. Even if MCSO had not adopted the "just cause" disciplinary standard, their actions would fail under the Arizona Supreme Court's reasoning in *MCSO v. Maricopa County Employee Merit System Commission and Daniel Juarez*, 211 Ariz. 219 (2005).

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This is the standard under which Respondent’s attorney moved to dismiss this appeal.

The Court in *Juarez* requires that discipline, imposed by the Maricopa County Employee Merit System Commission/Maricopa County Law Enforcement Officer’s Merit Systems Commission, cannot be “arbitrary and without reasonable cause.”

The Court specifically allows for a finding that discipline is arbitrary when discipline differs for two similarly situated employees. That exact situation exists in the facts presented in the current appeal.

12. MCSO’s identification of conduct occurring eight months after the first violation in 2014, as a “first offense” and the earlier 2013 conduct as a “second offense” would also meet the definition of arbitrary as explained by the Court in *Juarez*, as an action taken “without adequate determining principle.”

13. The action taken by Respondent in disciplining Appellant with an 80-hour suspension instead of a 40-hour suspension was inappropriate based upon the evidence presented.

**RECOMMENDATION**

It is the recommendation of the undersigned that the appeal be sustained and that the 80-hour suspension be reduced to a 40-hour suspension.

Although the evidence proffered demonstrates by a preponderance that the Appellant violated Critical Policies of the Sheriff’s Office, the application of discipline fails both the “just cause” standard and the *Juarez* standard. MCSO policies prohibit violation of speed laws and emergency driving without sirens and emergency lights. Appellant violated these policies as did a similarly situated employee who was not investigated nor disciplined. The difference is that Appellant was involved in a collision resulting in a tragic traffic fatality. If that is the policy that

1 MCSO wishes to enforce, then MCSO should insert wording into the policy that requires  
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3 investigation and discipline if a Deputy is involved in a traffic fatality. It cannot investigate and  
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5 discipline one Deputy but not another by assuming it will be upheld because of the tragedy of the  
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7 motorist's death. That type of discipline violates the MCSO "just cause" standard enunciated in  
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9 its disciplinary policy. No employee could know from Merit Policy, etc. that being involved in a  
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11 traffic fatality would warrant "extra" discipline that wasn't meted out to an employee who  
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13 violated exactly the same policies and received no discipline. Further, to wait almost two years  
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15 to impose discipline and then use a reprimand that occurred after the original incident to increase  
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17 the amount of discipline constitutes an arbitrary action. Although Respondent's attorney argues  
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19 that statute allows it to wait to investigate and discipline an employee until criminal proceedings  
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21 are completed, MCSO used that statute to justify an increase in the amount of discipline  
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23 imposed.  
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27 The actions of the Maricopa County Sheriff's Office were arbitrary; they were taken in  
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29 disregard of the facts and circumstances or without adequate determining principle. The actions  
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31 of the Maricopa County Sheriff's Office were taken without reasonable cause and violate  
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33 MCSO's Employee Disciplinary Procedure, Policy GC-17, which requires "just cause."  
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36 Accordingly, the undersigned recommends that Appellant's appeal be sustained and the  
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38 80-hour suspension be reduced to a 40-hour suspension.  
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42 Respectfully submitted this 10th day of  
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44 December, 2015

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47 Prudence Lee,  
48 Hearing Officer  
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