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:	
	OEA Matter No.: 1601-0028-23
EMPLOYEE[1], Employee	
	Date of Issuance: September 4, 2024
v.	
	MICHELLE R. HARRIS, ESQ.
D.C. OFFICE OF UNIFIED COMMUNICATIONS, Agency	Senior Administrative Judge

Carisa B. Carmack, Esq., Employee Representative[2]
Madeline Terlap, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 13, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Office of Unified Communications' ("Agency" or "OUC") decision to terminate her from service from her position as a Dispatcher. The effective date of Employee's separation from service was January 13, 2023. Following a letter from OEA dated February 14, 2023, requesting an Agency Answer, Agency filed a request for an Extension of Time on March 16, 2023, requesting an extension of time for which to file its Answer.[3] On March 20, 2023, Agency again contacted OEA and requested an extension of time through March 24, 2023, to file its Answer. On March 20, 2023, OEA Executive Director, Sheila Barfield, Esq., granted Agency's request. Agency filed its Answer on March 24, 2023. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on March 27, 2023. On April 4, 2023, I issued an Order Convening a Prehearing Conference for May 11, 2023. Prehearing Statements were due on or before May 5, 2023. On May 5, 2023, Employee, by and through her representative, filed a Consent Motion to Continue, citing to a schedule conflict. On May 8, 2023, I issued an Order granting the Motion and rescheduled the Prehearing Conference to May 22, 2023. Prehearing Statements were now due on or before May 22, 2023.

Both parties appeared for the Prehearing Conference on May 22, 2023, as required. During that conference, it was determined that discovery was incomplete. That same day, I issued a Post

---

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Both Employee and Agency had prior representatives of record during the course of this proceeding before OEA. The prior Employee representative was Lateefah Williams, Esq., and the previous Agency representative was Rashaan Dickerson, Esq.
[3] These requests were made and granted via email from Agency to OEA's Executive Director, Sheila Barfield, Esq.

Prehearing Conference Order noting that discovery in this matter should be completed by June 30, 2023. Further, that Order required that Amended Prehearing Statements be submitted on or before July 14, 2023. On July 14, 2023, Employee filed a Consent Motion to Reschedule Deadlines. Employee required that discovery be extended through August 11, 2023. On July 18, 2023, I issued an Order granting this request. Discovery was to be complete by August 11, 2023, and Amended Prehearing Statements were due on or before August 25, 2023. Additionally, that Order scheduled a Status Conference for August 31, 2023. Both parties appeared for the Status Conference on August 31, 2023. During the conference, the parties requested another extension to complete discovery. Both parties noted that absent extenuating circumstances, this would be the last request to extend the time for discovery. On August 21, 2023, I issued a Post Status Conference Order requiring that discovery in this matter be completed by or before September 30, 2023. Additionally, Amended Prehearing Statements were now due by October 6, 2023, and a Status Conference was scheduled for October 11, 2023.

Both parties appeared for the Status Conference on October 11, 2023, as required. Prior to this Conference, Agency sent email correspondence on October 6, 2023, to advise the undersigned that there had been an issue with discovery and the submission of Amended Prehearing Statements. During the October 11th Status Conference, it was determined that discovery would extend through October 13, 2023, and that Amended Prehearing Statements would be due by October 30, 2023. The undersigned issued an Order on October 11, 2023, which cited to this schedule and ordered that a Status Conference be held on November 7, 2023. The parties completed discovery and submitted their Amended Prehearing Statements and attended the November 7th Status Conference, as required. On November 7, 2023, I issued a Post Prehearing Conference Order setting a schedule for briefs to be submitted in this matter.[4] Based upon the parties' schedules and the upcoming holidays, it was determined that Agency's brief would be due on or before January 9, 2024, Employee's brief would be due by February 12, 2024, and Agency had the option to submit a sur-reply by February 23, 2024.

On January 11, 2024, Agency filed a Consent Motion for an Enlargement of Time to file briefs. Agency cited therein that its representative had post-surgery complications which delayed a return to work and more time was needed to submit its brief. On January 12, 2024, I issued an Order granting this request. Agency's brief was now due by January 23, 2024, Employee's brief was due by February 23, 2024, and Agency had the option to submit a sur-reply by March 8, 2024. On January 24, 2024, Employee filed an updated Designation of Representation in this matter. Additionally, on February 7, 2024, Employee's representative filed an Unopposed Motion for an Extension of Time to File. Employee's counsel cited therein that the previous representative had taken a leave of absence and that this matter had been reassigned and that more time was needed to review the record. Employee's counsel requested an extension of time of 45 days to submit its brief to April 8, 2024. On February 7, 2024, I issued an Order granting Employee's Motion. Employee's brief was now due by April 8, 2024, and Agency's sur-reply brief was due by April 22, 2024.

On April 17, 2024, Agency filed a Consent Motion for an Extension of Time to submit its Sur-reply brief. Agency cited therein that a new representative had recently been assigned to this matter, and that more time was needed to prepare the brief. On April 23, 2024, I issued an Order granting Agency's Motion. Agency's Sur-reply brief was now due by May 8, 2024. Both parties have submitted their respective briefs. Upon review of the record and submissions of the parties, I have determined that an Evidentiary Hearing is not warranted. The record is now closed.

[4] This Order also required Agency to provide additional information to Employee regarding comparator employees by November 14, 2023.

JURISDICTION

The Office has jurisdiction 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; and
2. Whether Agency followed all applicable laws, rules and regulations in its administrative of the adverse action; and
3. Whether the penalty of termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "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.

OEA Rule 631.2 *id.* states:

For appeals filed under §604.1, 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.

SUMMARY OF PARTIES' POSITION

Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it followed all applicable laws, rules and regulations in the administration of the instant action. Agency avers that Employee was rightfully terminated for Neglect of Duty and Failure to Follow Instructions. Agency further asserts that these charges were levied against Employee because Employee "failed to perform her duties as a dispatcher for Agency on August 11, 2022, and September 27, 2022."[5] Agency cites that Employee's role as dispatcher "was a critical link between 911 callers whose information is obtained by Agency's Telecommunications Equipment Operators ("TEO") then transmitted to dispatchers like Employee, who were then responsible for communicating the information from the TEOs to in-service FEMS and MPD units."[6] Further, Agency explains that "Employee's role with Agency also required her to utilize a computer aided dispatch ("CAD") console equipped with several computer terminals, controls, and radio frequencies to dispatch police, fire and emergency medical services units to the scene of emergencies to safeguard life and property."[7] Additionally, Agency provides that "Employee's duties further included…monitoring *all* radio transmission that

[5] Agency's Brief at Page 1 (January 24, 2024).
[6] *Id*. at Page 2.
[7] *Id*.

went over the air on her assigned radio channel."[8] (Emphasis in original). Agency contends that "Employee's critical, time-sensitive position required her to diligently monitor her channels and to maximally use technology to timely disseminate information to FEMS and/or MPD units in the field to ensure the best possible outcomes for individuals in need of medical or law enforcement services."[9]

Agency asserts that on August 11, 2022, "Employee was assigned to radio/tactical channel 12." Agency contends that on that day, "two FEMS ambulances attempted to contact Employee to inquire about a current run assignment." Agency avers that "Employee was assigned to Channel 12 when the two ambulances inquired; Employee failed to acknowledge the FEMS units for three-plus minutes, which prompted FEMS' Emergency Liaison Officer to contact Agency to find out who was assigned to/monitoring Channel 12."[10] Agency cites that its "operations manager spoke with all dispatchers who were on duty during the period when the FEMS units' calls were not acknowledged and Employee was identified as the dispatcher who was assigned to Channel 12 when the calls were missed." Agency further asserts that "Employee admitted to failing to respond to the calls on Channel 12 and further provided the excuse that she did not acknowledge the calls because she heard another dispatcher advise that they were on Channel 12."[11] Agency notes that on August 16, 2022, Operations Manager Karl Millard notified Agency's Chief Administrative Officer of "Employee's problematic conduct of August 11, 2022," and another incident where Employee was purported to have walked away from her station.[12] Agency further asserts that on September 17, 2022, Employee again had an incidence of radio silence. Agency explains that on this date, Employee was assigned to Channel 11. Agency contends that "FEMS Engine 32 contacted Channel 11 requesting a welfare check on Channel 11 due to the Channel 11's dispatcher's failure to respond to several calls from FEMS units over a two-plus minute span, which caused service delays for multiple units."[13]

Agency avers that because of these incidences, on November 21, 2022, it served Employee with a Notice of Proposed Separation ("Proposed Notice"). Agency asserts that the Proposed Notice advised Employee of her right to submit a response to the proposed action in writing to the Hearing Officer assigned to the matter. Agency contends that "Employee's response to the [Proposed]Notice did not contain a denial of the alleged misconduct; rather, Employee stated that she never intended to neglect her position as a dispatcher, but she had "been going through a lot" in her personal life, and "[when it was brought to [her] attention that [her assigned] channel went unanswered, [she] answered the units."[14] Agency further asserts that the charge for Neglect of Duty "includes failure to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks for duties, careless work habits; conducting personal business while on duty; and abandoning an assigned post."[15] Agency also cites that the charge of Failure/Refusal to Follow Instructions "includes allegations of negligence including careless failure to comply with rules, regulations, written procedures or proper supervisory instructions." Agency avers that at the time of the incidents of misconduct "Employee was in her seventeenth year as a dispatcher with OUC." To this end, Agency contends that "Employee undoubtedly knew the duties and responsibilities of her position, and she was certainly cognizant of the critical, time-sensitive

---

[8] I*d*. at Page 3.
[9] *Id.*
[10] *Id.*
[11] *Id*. at Page 3-4.
[12] *Id*. at Page 4.
[13] *Id*.
[14] *Id*. at Pages 4-5.
[15] *Id*. at Page 6.

nature of her work." Agency also adds that "prior to being terminated, Employee had been counseled on several occasions for repeatedly neglecting her duties as a dispatcher, and she had also served a five-day suspension for performance-related deficiencies."[16]

Agency avers that termination was the appropriate penalty under the circumstances. Further, Agency asserts that the Deciding Official considered the *Douglas* factors in the review of this matter and noted the nature and seriousness of Employee's misconduct.[17] Agency contends that the DO determined that Employee's actions also "undermined OUC's mission, which is to provide a fast, professional, and cost-effective response to emergency and non-emergency calls in the District."[18] Agency contends that "Employee received several instances of coaching and feedback on her performance deficits, yet she continued to violate OUC's policy via her repeated acts of neglect." Agency avers that it "exercised managerial discretion when it disciplined Employee for her failure to satisfactorily perform the duties of her position" and that its penalty was aligned with the Table of Illustrative actions and should be upheld."[19]

Agency further contends properly weighed the *Douglas* factors, and "conscientiously" evaluated all the *Douglas* factors.[20] Agency avers that the August 11, 2022, incident was Employee's third offense and the September 27, 2022, was her fourth. Agency asserts that the DPM penalty range for subsequent occurrences is a five-day suspension to removal.[21] Agency further asserts that there is no evidence in the record to suggest that Employee was treated differently than comparators when evaluating the *Douglas* Factor 7.[22] Agency contends that Employee was "terminated while the comparator employees were retained [because] Employee had two previous instances of discipline for the same infraction – neglect of duty – and all four purported comparators either had only one prior occurrence or no prior occurrences."[23] Agency also avers that Employee's argument that "there is no evidence provided by Agency that an [Employee's] supervisors made it clear to [Employee] her behavior was unacceptable after the first incident is unreasonable."[24] Agency avers that "as a long time employee of OUC, Employee should have known that she should not have been unavailable during her work hours." Further, Agency asserts that Employee makes an unfounded claim in stating that Agency waited "to see if any other potential incidents would occur so they could choose the harshest disciplinary action allowable instead of using a progressive discipline after the August incident." Agency argues that "[n]ot only does this assertion appear to contradict the Employee's previous statement that it was unclear what the proposed fifteen-day suspension was for by identifying the 'August incident' as an impetus for discipline, it is completely unsupported."[25] Agency avers that Employee neglected her duties and as such, there was cause for discipline and its penalty of termination should be upheld.

[16] *Id*. at Page 7.
[17] *Id*. at Page 8.
[18] *Id*. at Page 9.
[19] I*d*. at Pages 9- 10.
[20] Agency's Sur Reply Brief (May 8, 2024).
[21] Id. at Page 2.
[22] *Id*. at Page 4-5.
[23] *Id*.
[24] *Id*. at Page 6.
[25] *Id.*

Employee's Position

Employee avers that Agency has not met its burden of proof to justify termination. Employee asserts that she has twenty-three years of District Government service. Employee notes that she has served in several positions with District Government and that in 2003, she became a 911/FEMS operator.[26] Employee contends that she "always took her job as FEMS dispatcher seriously, which is evidenced by her twenty-year tenure." Further, Employee avers that Agency "falsely asserts that in 2022, this former EMT and longtime dispatcher suddenly began neglecting her duties."[27] Employee provides that "on March 1, 2022, [Employee] contacted the Agency's Information Technology (IT) department after she was working with a trainer and "could hear them through the radio we had sitting in the cup holder between us", but could not hear the caller through her headset."[28] Employee avers that the IT technician told her "it's your headset." Employee avers that she "memorialized this incident in an email she sent on April 1, 2022, to Union VP Carolyn Morris and copied Gerald Woody." Employee further asserts that her April 1, 2022, email noted the equipment issues, and that IT opened a ticket on March 29, 2022, which noted "user not able to hear units" and that the ticket was closed that same day."[29]

Employee cites that on August 11, 2022, she was performing her duties as usual. Employee explains that "[t]he dispatchers have a system for taking their allotted 45-minute and 15-minute breaks throughout their shift." Employee further asserts that when she "thought it was time for her 15-minute break…she then heard another dispatcher yell out that she had Channel 12, which was the channel [Employee] had been monitoring, so this seemed to confirm that it was her break, as other dispatchers pick up their colleague's channel when that person is on break."[30] Employee explains that "it seemed that it was not time for [her] 15-minute break, but no one corrected her on her error when she left for her break."[31] Employee cites that five (5) days later on August 16, 2022, "Agency Official Karl Millard made a complaint, although he did not witness the incident."[32] Employee argues that "Agency seems to insinuate that this is a serious incident, yet Mr. Millard, a management official, allowed [Employee] to continue working as a dispatcher without mentioning the alleged infraction for five (5) more days, until he reported the incident."[33] Employee avers that her disciplinary record does not "show any other assertions that she took an improper break or walked away from her radio.

Employee argues that Agency alleges that "on or around September 27, 2022, [Employee] failed to respond to her channel for over two (2) minutes." Employee maintains that she "never heard any calls come in on her headset for those two (2) minutes" and that her "immediate supervisor was aware of her prior issue with the headset."[34] Employee further asserts that "the mouse tends to knock off the entire radio channel a dispatcher is on because it is bumping into another mouse…[w]hen this happens, it can deselect the channel." Employee cites that if this happens, "the dispatcher can stay off the channel until they realize that a transmission has not come in …[t]hen

---

[26] Employee's Reply Brief at Page 3 (April 8, 2024).
[27] *Id*.
[28] *Id*. at page 4.
[29] *Id*.
[30] *Id.*
[31] *Id.*
[32] *Id*. at Page 4-5.
[33] *Id*. at Page 5.
[34] *Id.*

the dispatcher starts checking their equipment to ensure everything is operable."[35] Employee maintains that "she raised the equipment issue again during this time." Employee avers that "not only did Agency disregard the issues [Employee] raised about the equipment and improperly terminate her, it has done nothing to correct the problem as evidenced by a news report in March 2023."[36] Employee also explains that "during this time [she] was the caretaker for her ailing father, which the Agency was aware of and should have been a mitigating factor." "[Employee], as explained in the response to the Hearing Officer, had [sic] experience days where she became distracted and weary…[s]he became overwhelmed with heavy emotions thinking about her father."[37] Further, Employee notes that "[her] father passed away nine (9) days after she was given her proposed termination."[38] Employee further asserts that in speaking with Agency and in her response to the Hearing Officer, that she "took responsibility for the actions and also clarified that at no point was it her intent to neglect her duties."[39]

Employee contends that Agency's removal action was unreasonable and that there was no cause for the action. Employee avers that "assuming arguendo that Agency did have cause to discipline the Employee, the penalty of removal in this case was unreasonable for many reasons." Employee asserts that Agency did not consider mitigating factors and that the "allowable range of penalties for a first offense for the two charges was counseling to removal."[40] Employee reiterates that she was suffering from "severe stress due to her father being in hospice and her being the caretaker." Employee argues that Agency was "aware of this, however it does not seem to be factored into the Proposed/Final discipline anywhere as a potential mitigating factor." Further, Employee argues that the "equipment issues of the Agency are undisputed and that Agency "continuously lacked in providing a solution to the issues brought to light by Employees."[41]

Employee also avers that she was disciplined more harshly than other comparator employees. Employee argues that there "are four other employees the Agency identified in its interrogatory responses and subsequent information." Comparator employee #1 – "was suspended for 5 days for neglect of duty when the employee's radio was silent due to their failure to acknowledge or respond to a medic unit for a total time of over two (2) minutes." Employee asserts that this employee had "multiple failures to acknowledge …which Agency made sure to note occurred on the same day during one tour of duty." Further, Employee contends that Comparator employee #1 also was suspended for similar conduct in a three-year span.[42] To this end, Employee argues that "while Agency believes it is different that [Employee's] incidents are different, they are not. Employee further notes that "although this [comparator employee #1] seemingly engaged in the same conduct as [Employee], the Agency only charged [comparator employee #1] with Neglect of duty, while the Agency charged [Employee] with an additional charge of Failure/Refusal to Follow Instructions.

Similarly, Employee asserts that the other comparator employees were not disciplined as harshly. Comparator employee #2, "was reprimanded for neglect of duty for failing to carry out their assigned duties in response to a radio request during their tour of duty and continued to dispatch." Comparator employee #3 "failed to respond to multiple attempts to contact them on their dispatch

---

[35] *Id.*
[36] *Id.*
[37] *Id*. at Page 5.
[38] *Id.* at Page 5-6
[39] *Id*. at Page 6.
[40] *Id.*
[41] *Id*. at Pages 6 -7.
[42] *Id.* at Page 7.

channel during their tour of duty…and was previously reprimanded within a three-year window for neglect of duty." Employee asserts that while Comparator employee #3 "received a one day suspension for a second occurrence, she received a five (5) day suspension."[43] Employee also avers that Comparator employee #4, was "suspended for 20 days for (1) neglect of duty (2) Failure/Refusal to Follow Instructions and (3) False statements/Records where the [comparator employee #4] failed to upgrade the priority of a call which cause a delay in appropriate and timely dispatch to units."[44] Employee asserts that even though Comparator #4 was charged with more causes of action, they were disciplined less harshly than she was.

Employee also contends that Agency's consideration of the *Douglas* factors in this matter were not considered appropriately, nor did Agency consider all factors. Employee asserts that Agency considered nearly all the *Douglas* Factors (1,2,3,5,7,8,9,10, 12) as "Aggravating" and the others as "Neutral" and that none were designated as "Mitigating". Employee asserts that Factor 1 (seriousness and nature of conduct) should have been listed as mitigating because she "is remorseful and acknowledged her lapse in response to the field and accepts responsibility for her actions."[45] Similarly, Employee asserts that other factors should have been designated as mitigating, including consideration of her work history, and confidence in Employee. Employee argues that Factor Five (confidence in employee) should be mitigating because she "acknowledged her error and took full responsibility for her actions."[46] She contends that Agency "should have more confidence in an employee who was remorseful and have confidence moving forward that [Employee] is committed to not having another incident of this nature."[47] Employee also asserts that Factor Eight (agency reputation) should be listed as mitigating because "this accidental incident did not cause or create any harm to any employee or citizen of the district, nor was it publicized anywhere that affected agency's reputation."[48] Employee argues that in total "Agency listed nine of twelve *Douglas* Factors as aggravating and determined the remaining three to be neutral…[t]he Agency did not consider any factors to be mitigating."[49] Employee further avers that OEA "has reversed an adverse action when it held an Agency failed to consider relevant factors in its assessment of an action, whereby the Agency overlooked mitigating factors, noting the mitigating factors as neutral and indicated there were no mitigating factors."[50]

Employee asserts that for these reasons, the penalty of termination was unduly harsh and unnecessary in this matter. Employee asserts that a "lesser penalty would remediate Employee and allow her to finish out the decorated and long-standing career she had with the Agency."[51] Employee avers that this adverse action should be rescinded because Agency has not met its burden of proof.

FINDINGS OF FACT, ANAYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Dispatcher and had worked in this capacity for 19 years at the time of the instant adverse action.[52] In a Final Notice dated December 21, 2022,

---

[43] *Id.* at Pages 8.
[44] *Id.*
[45] *Id*. at Page 9.
[46] *Id.*
[47] *Id*. at Pages 9-10.
[48] *Id*. at Page 10.
[49] *Id*.
[50] *Id.* at Pages 10-11. Employee cited to "OEA Matter. No. 1601-0010-21".
[51] *Id*. at Pages 11-12.
[52] Employee's Petition for Appeal (February 13, 2023).

Employee was terminated from her position for violation of DPM 1607.2(e) Neglect of Duty and Failure/Refusal to Follow Instructions. These charges stemmed from incidents on August 11, 2022, and September 27, 2022, wherein Agency asserts that Employee failed to answer calls on her assigned channel. The effective date of the termination was January 13, 2023.[53]

ANALYSIS[54]

Whether Agency had cause for Adverse Action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added)*.

Pursuant to OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee's termination was levied for the aforementioned causes of action and the effective date of the termination was January 13, 2023.

Neglect of Duty and Failure/Refusal to Follow Instructions

In the instant matter, Employee was charged with Neglect of Duty, DPM §1607.2(e) and Failure/Refusal to Follow Instructions, DPM 1607.2(d)(1).[55] The charges stemmed from two (2) incidents wherein Employee was not responsive on her assigned dispatch channel. District of Columbia Personnel Regulations provide that there is a neglect of duty in the following instances: "failing to carry out official duties or responsibilities as would be expected of a reasonable individual

---

[53] It should be noted that the Final Notice indicates a date of January 13, 2022, however the undersigned finds that this is a scrivener's error regarding the date, and that the date is January 13, 2023. Employee subsequently filed her Petition for Appeal at OEA on February 13, 2023.

[54] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See. Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[55] Charge 1 -DPM 1607.2 (e) – Neglect of Duty – "Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; sleeping or dozing on-duty or loafing while on duty." Charge 2 – DPM 1607.2 (d)(1) Failure/Refusal to Follow Instructions – Negligence, include the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions."

in the same position and failure to perform assigned tasks or duties."[56] Additionally, this Office has held that a Failure/Refusal to follow instructions includes the negligent and careless failures to comply with instructions and directives. As was previously mentioned, Employee's charges were based on two incidents wherein she was not responsive and/or was away from her assigned dispatch post.

On August 11, 2022, Agency asserts that "Ambulance 11 and Ambulance 9 attempted to raise the Fire Dispatcher (Fire and EMS/FEMS) assigned to Channel 12 with a request relating to their current assignment."[57] Further, Agency cited that from 10:02am until 10:05am, these calls went unacknowledged by Employee who was assigned to Channel 12. This resulted in the check of both Channels 11 and 12 to see whether the transmissions were acknowledged. Employee concedes that she was assigned to Channel 12 on this date. However, Employee avers that she believed it was time for her 15-minute break and heard another person state that they had Channel 12, which happens when a colleague assumes a channel while another is on break.[58] Employee notes that it "seems it was not time for her break" but that "no one corrected her on the error when she left for her break." Employee asserts that it was not until five (5) days later that she received a complaint. Employee also avers that while Agency "seems to insinuate that this is a serious incident" that she was able to continue working as a dispatcher without any mention of this incident until five (5) days later.[59] Further Employee cites that in March of that year, she made a complaint about her equipment and not being able to hear.

On September 27, 2022, Employee was involved in another instance of failing to respond to her assigned channel for over two (2) minutes. Agency avers that on this date, "Engine 32 contacted Channel 12 requesting a welfare check on Channel 11 because there were multiple units who had been calling Channel 11 several times and there was no response."[60] Employee was assigned to Channel 11 on this date. Employee asserted that she again raised equipment issues. Employee also cited that during the timeframe of both incidents, "she was a caretaker for her ailing father, which the Agency was aware of and should have been a mitigating factor." Further, Employee noted that she explained to the Hearing Officer, that she had experienced "days where she became distracted and weary…[s]he became overwhelmed with heavy emotions thinking about her father."[61]

In the instant matter, the undersigned finds that Employee was assigned to Channel 12 and Channel 11 on the August and September incidents, respectively. It is also clear from the record that on August 11, 2022, Employee was away from her assigned station at a time that was not her break time and failed to acknowledge the calls as required. Further, in September she also failed to answer her Channel for over two (2) minutes. In both matters, the undersigned finds that there is no dispute of Employee's assignments and/or her job duties required as a dispatcher. The record clearly reflects that on these two instances, Employee failed to perform her duties as required and as instructed. Additionally, Employee admits to making the errors, but cites to mitigating circumstances surrounding those errors. Employee also avers that there were equipment issues; however, the undersigned finds that the previously reported equipment issues in March 2022, were several months prior to the incidents for which she was charged. While the undersigned is sympathetic to the

---

[56] *See.* DPM Table of Illustrative Penalties 1607.2 (e) (2019). See also *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014).
[57] Employee's Petition for Appeal at Final Notice dated December 21, 2022. (February 13, 2023). F
[58] Employee's Brief at Page 4.
[59] *Id*. at Page5.
[60] Final Notice dated December 21, 2022.
[61] Employee's Brief at Page 5.

personal challenges she was facing during the time of the incidents, it does not mitigate her failure to perform her duties and tasks as required. It is of further note that given Employee's tenure with Agency of 19 years, that she was acutely aware of the requirements of her position. As a result, I find that Agency has met is burden of proof to sustain both the charges of Neglect of Duty and Failure to Follow Instructions.

Appropriateness of Penalty

Based on the aforementioned findings, I find that the adverse action was for taken cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[62] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM § 1607; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[63] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[64] In the instant matter, Employee asserts that Agency's penalty was too harsh and that Agency failed to appropriately address the *Douglas* Factors in its consideration of the penalty. Further, Employee avers that her penalty was different than that of other Employees.

Disparate Treatment

OEA has held that, to establish disparate treatment, an employee "*must* show that [they] worked in the same organizational unit as the comparison employees." (Emphasis added). 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 (Emphasis added). Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty." (Emphasis added). 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…[i]f a showing is made,

---

[62] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[63] *See. Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[64] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

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."[65]

Accordingly, an employee who makes a claim of disparate treatment has the burden to make a prima facie showing that they were treated differently from other similarly situated employees.[66] To support this contention, Employee asserts that there were four (4) comparator employees who received far less harsh disciplinary consequences than she received for similar incidents. As was previously outlined, Employee cites to the following regarding comparator employees:

> Comparator employee #1 – "was suspended for 5 days for neglect of duty when the employee's radio was silent due to their failure to acknowledge or respond to a medic unit for a total time of over two (2) minutes." Employee asserts that this employee had "multiple failures to acknowledge …which Agency made sure to note occurred on the same day during one tour of duty." Further, Employee contends that comparator employee #1 also was suspended for similar conduct in a three-year span.[67] To this end, Employee contends that "while Agency believes it is different that [Employee's] incidents occurred during two different tours of duty" it is not. Employee further notes that "although this [comparator employee #1] seemingly engaged in the same conduct as [Employee], the Agency only charged [comparator employee #1] with Neglect of duty, while the Agency charged [Employee] with an additional charge of Failure/Refusal to Follow Instructions.
>
> Similarly, Employee asserts that the other comparator employees were not disciplined as harshly. Comparator employee #2, "was reprimanded for neglect of duty for failing to carry out their assigned duties in response to a radio request during their tour of duty and continued to dispatch." Comparator employee #3 "failed to respond to multiple attempts to contact them on their dispatch channel during their tour of duty…and was previously reprimanded within a three-year window for neglect of duty." Employee asserts that while Comparator employee #3 received a one day suspension for a second occurrence, she received a five (5) day suspension."[68] Comparator employee #4, was "suspended for 20 days for (1) neglect of duty (2) Failure/Refusal to Follow Instructions and (3) False statements/Records where the [comparator employee #4] failed to upgrade the priority of a call which cause a delay in appropriate and timely dispatch to units."[69] Employee asserts that even though comparator #4 was charge with more, they were disciplined less harshly than her.

Agency avers that Employee was not treated differently than the others. Agency asserts that the reason "Employee was terminated while comparator employees were retained was because

---

[65] *Sheri Fox v. Metropolitan Police Department*, OEA Matter No. 1601-0040-17 (January 13, 2020). Citing to *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[66] *See. John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing to Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994). *See also*. *Sheri Fox v Metropolitan Police Department*, OEA Matter No. 1601-0040-17 (January 13, 2020).
[67] Employee's Brief at Page 7.
[68] *Id*. at Page 8.
[69] *Id.*

Employee had two previous instances of discipline for the same infraction – neglect of duty – and all four purported comparators either had only one prior occurrence or no prior occurrences."[70] Agency further contends that "for one of the employees with a single prior occurrence – Comparator employee # 3- Employee goes so far as to challenge the consistency of her *prior* discipline." (Emphasis added in original). Additionally, Agency provides that "propriety of discipline is not at issue here…and Employee's attempt to connect the prior discipline to the instant case-arguing that, if she had received only a one-day suspension for the April 19, 2022, incident, she would not have been terminated for her third and fourth offenses-is unsupported."[71] As such Agency avers that Employee cannot demonstrate that she was treated differently.

In the instant matter, I find that Employee has shown that similarly situated employees were disciplined differently from her. Thus, pursuant to case law, since Employee has exhibited this difference, the burden now shifts to Agency to produce evidence that establishes a legitimate reason for imposing a different penalty on Employee. Agency asserts and the record supports Agency's assertion, that Employee had a different prior disciplinary record than the other similarly situated employees. Based on the foregoing, I find that although Employee has satisfied the test for a *prima facie* showing of disparate treatment, Agency has established a legitimate reason for imposing a different penalty on Employee. Therefore, I conclude that Employee's disparate treatment argument must fail and is not applicable in this matter.

Douglas Factors

OEA has consistently held that "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[72] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[73] Here, Employee avers that Agency failed to appropriately designate certain factors as mitigating instead of neutral or aggravating.

Specifically, Employee asserts that Agency considered nearly all the *Douglas* Factors (1, 2, 3, 5, 7, 8, 9, 10, 12) as "Aggravating" and the others as "Neutral" and that none were designated as "Mitigating". Employee asserts that Factor 1 (seriousness and nature of conduct) should have been

---

[70] Agency's Sur Reply Brief at Page 4.
[71] *Id*. at Page 4 Footnote 1.
[72] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[73] *Love* also 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)).

listed as mitigating because she "is remorseful and acknowledged her lapse in response to the field and accepts responsibility for her actions."[74] Similarly, Employee asserts that the other factors should have been designated as mitigating, including consideration of her work history, and confidence in Employee. Employee argues that Factor Five (confidence in employee) should be mitigating because she "acknowledged her error and took full responsibility for her actions."[75] She contends that Agency "should have more confidence in an employee who was remorseful and have confidence moving forward that [Employee] is committed to not having another incident of this nature."[76] Employee also asserts that Factor Eight (agency reputation) should be listed as mitigating because "this accidental incident did not cause or create any harm to any employee or citizen of the district, nor was it publicized anywhere that affected agency's reputation."[77]

Agency avers that it properly considered all the *Douglas* Factors. Agency avers that Employee had two previous charges of neglect of duty, one on April 25, 2021, and another on April 19, 2022. Agency avers that the August 11, 2022, and September 27, 2022, incidents represented her third and fourth offenses, respectively. Wherefore, Agency contends that its consideration of the *Douglas* factors and the applicable recommended penalties in the DPM were properly considered. Agency also asserts that Employee's assertions that she was "remorseful and acknowledged her lapse in responding to the field units to be insufficient to make either factor mitigating considering the seriousness of the offense which endangered the public by delaying service to the Fire and EMS responders."[78] Moreover, Agency asserts that weighed the other factors and employed due consideration of progressive discipline. Additionally, Agency cites that contrary to Employee's claims that they failed to consider her personal circumstances, it did "consider Employee's circumstances." That noted, Agency asserts that Employee had the responsibility to "take advantage of protected leave or the Employee Assistance Program."[79] Agency also avers that it did properly weigh Factor 11 (mitigating circumstances) as neutral because "Employee's personal problems do not rise to the level of mitigating her punishment." Additionally, Agency asserts that it did not "fail to consider the alleged equipment issues, as it was unnecessary for Agency to consider whether equipment issues played a role in Employee's failure to respond during both incidents." Agency contends that Employee did not initially raise equipment concerns, but instead "stated that her failures to respond were due to human error, specifically her being in a "weary state of mind" and being deep in thought."[80]

As was previously cited, OEA has consistently held that "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[81] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this

---

[74] Employee's Brief at Page 9.
[75] *Id*.
[76] *Id.* at Pages 9-10.
[77] *Id*. at Page 10.
[78] Agency's Sur-Reply brief at Page 2.
[79] I*d*. at Page 3.
[80] *Id*.
[81] *See. Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

Office.[82] [83] In the instant matter, I find that Agency's consideration and assessment of the *Douglas* factors was appropriate. While the undersigned is sympathetic to Employee's assertions regarding her personal circumstances int the timeframe surrounding the incidents, the undersigned finds that Agency's consideration of that, along with the options Employee had to seek out leave or other assistance, do not invalidate Agency's considerations of the *Douglas* Factors in this matter.

As a result, I find that Agency reasonably and appropriately relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.[84] Further, Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions ("TIA") provides that the appropriate penalty for subsequent offenses for neglect of duty and failure/refusal to follow instructions ranges from a five (5) day suspension to removal.[85] As a result, I find that Agency's action of terminating Employee from service was for cause and the penalty of removal was appropriate under the circumstances.

---

[82] *Love* also 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)).

[83] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[84]*Douglas v. Veterans Administration,* 5 M.S.P.R. 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 in the future by the employee or others.

[85] 6-B DCMR §§1607.2 (d)(4), 1607.2(e)(2019).

ORDER

It is hereby **ORDERED** that Agency's action of terminating Employee from service is hereby **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge