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.: 1601-0038-16
BARNEDIA DRAYTON, Employee	
	Date of Issuance: August 20, 2018
v.	
	Arien P. Cannon, Esq.
DISTRICT OF COLUMBIA FIRE AND EMERGENCY MANAGEMENT SERVICES, Agency	Administrative Judge

Bruce A. Johnson, Jr., Esq., Employee Representative[1]
Jhumur Razzaque, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Barnedia Drayton ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 18, 2016, challenging the District of Columbia Fire and Emergency Management Services' ("FEMS" or "Agency") decision to remove her from her position as an Emergency Medical Technician ("EMT"). Employee's removal was effective at the close of business on February 26, 2016.[2] I was assigned this matter on May 31, 2016.

A Prehearing Conference was initially scheduled in this matter for January 27, 2017. On January 23, 2017, Employee, by and through her representative, filed a Motion to Extend Prehearing Deadlines and to reschedule the January 27, 2017, Prehearing Conference.[3] Employee's motion was granted, and the Prehearing Conference was rescheduled for February 17, 2017.

[1] Employee was initially represented by Christina Quashie, Esq. On April 7, 2017, Ms. Quashie submitted a Notice of Withdrawal to this Office. Mr. Johnson was subsequently designated as Employee's attorney on May 1, 2017.
[2] Agency Answer, Exhibit 28 (April 18, 2016).
[3] Employee's basis for this motion was that the parties were close to reaching a settlement agreement.

On February 17, 2017, in anticipation of the parties reaching a settlement agreement, another Status Conference (telephonic) was scheduled for March 7, 2017, to address the pending settlement agreement. During a conference call convened on April 3, 2017, the undersigned was advised that Employee's then-representative, Ms. Quashie, was withdrawing from the case and that a settlement agreement had not been finalized nor signed by the parties.

On May 1, 2017, Employee, through her newly retained counsel, filed a Consent Motion to Extend the Prehearing Statement deadline and to reschedule the pending Prehearing Conference. Accordingly, the Prehearing Conference was rescheduled for June 6, 2017. On the same date, a Post Prehearing Conference Order was issued, which ordered the parties to submit written legal briefs addressing the issues in this matter.

After drawn out discovery disputes, Agency submitted its brief on August 21, 2017. Subsequently, various discovery disputes arose again, which prompted Employee to file a Motion to Compel on November 13, 2017, followed by an Opposition to Employee's Motion to Compel, filed November 30, 2017. Employee submitted a Reply to Agency's Opposition on December 7, 2017. A telephonic conference on discovery was convened on January 19, 2018. In a January 23, 2018 Post Discovery Conference Order, the parties were advised to continue working through their discovery issues without an order being issued from the undersigned. Thus, the discovery deadline was extended, and Employee was ordered to submit her brief on or before March 16, 2018. After working through the discovery disputes, Employee submitted her respective brief on March 16, 2018.[4] The record is now closed.

JURISDICTION

This 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. If so, whether removal was appropriate under the circumstances.

3. Whether Employee was subject to disparate treatment.

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.[5] "Preponderance of the evidence" shall mean:

[4] Employee's brief submitted on March 16, 2018, referenced several exhibits; however, there were no exhibits attached to the brief. Upon being informed of the oversight, Employee submitted the same brief on April 5, 2018, which included the referenced exhibits as attachments.
[5] 59 DCR 2129 (March 16, 2012).

> 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.

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.[6]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee was charged with the following:

Charge 1

Violation of D.C. Fire and Emergency Medical Services Department Rules and Regulations, Article VI, § 8, which states: "Members shall refrain from immoral conduct, deception; violation of evasion of law or official rule, regulation, or order; and from false statements;"

Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 4, which states: Any member who willfully and knowingly makes untruthful statements of any kind, or who refuses, or fails to make truthful statements in a verbal or written report pertaining to his official duties as a Fire & EMS Department employee is subject to disciplinary action, including dismissal.

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(6), which states: Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include: Misfeasance.[7]

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(d), which states: Any knowing or negligent material misrepresentation on other document given to a government agency.[8]

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty.[9]

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[6] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[7] *See also* District Personnel Manual ("DPM") §1603.3(f)(6)
[8] *See also* DPM § 1603.3(d) (August 27, 2012).
[9] *See also* DPM § 1603.3(f)(3) (August 27, 2012).

Charge 2

Violation of D.C. Fire and Emergency Medical Services Department Order Book Article XI, Part I, § 1(7), Prohibited Conduct, which states: All employees are prohibited from outside employment while on Sick Leave, Administrative Leave- Sick (POD), or while on continuation of pay or leave without pay due to a work related injury or illness; for those employees serving on boards, commissions or other duty authorized appointments, the Fire Chief will give permission on a case by case basis.

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty.[10]

Charge 3

Violation of D.C. Fire and Emergency Medical Services Department Order Book Article III, § 15, which states, in pertinent part: All members of the Department that are engaged in outside employment paid or unpaid/volunteer, are required to complete and submit through proper channels F&EMSD Form 14. In addition to this requirement, members performing policy making, contracting and/or purchasing functions as determined by the Fire/EMS Chief, are required to complete and submit DC Form 35-A, and or 35-B, "Statement of Financial Interest," as appropriate….

Action on the Form 14 will be taken promptly by those concerned. Members will not perform any outside employment until such outside employment request has been approved.

Further violation of D.C. Fire and Emergency Medical Services Department Memorandum 83, Series 2013 (issued 6/12/2013), Outside Employment, which states, "All members of the Department, including new appointees, are required to complete and submit through proper channels an F&EMS Form 14, Request for or Cancellation of Conditional Permission to Engage in Outside Employment…Members will not perform any outside employment until such outside employment request has been approved."

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty.[11]

[10] *See also* DPM § 1603.3(f)(3) (August 27, 2012).
[11] *See also* DPM § 1603.3(f)(3) (August 27, 2012).

Charge 4 Violation of DPM § 1807.1(b), which states: A District government employee shall not engage in any outside employment or other activity incompatible with the full and proper discharge of his or her duties and responsibilities. Activities or actions that are not compatible with government employment include, but not limited the following:

(a) Engaging in any outside employment, private business activity, or other interest that is reasonably likely to interfere with the employee's ability to perform his or her job, or which may impair the efficient operation of the District government.
(b) Using government time or resources for other than official business, or government approved or sponsored activities.

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty.[12]

Agency's Position

Employee was removed from her position as an EMT with Agency after it discovered that she was working full time as a nurse at Fort Washington Medical Center ("Center") while simultaneously being employed by Agency. Employee's outside employment was not self-reported, but rather, discovered by Agency while preparing for litigation in a separate discrimination case filed by Employee. In the separate discrimination case, Employee asserted that she was medially incapacitated during the same time frame when she was working full time at the Center.

Agency's former Assistant General Counsel, Joshua Henline, contacted Fort Washington Medical Center to verify Employee's employment. Mr. Henline received a letter from Corporate Director of Human Affairs of the Center, confirming that Employee was a full-time employee at the Center from January 27, 2014, through June 29, 2015.[13] During the same time frame that Employee was employed at the Center, she claimed that she was sick or otherwise "medically incapacitated" to work her EMT position with FEMS from February 7, 2014, through June 24, 2015. While Employee was out on either sick leave, emergency annual leave, absent without leave, or leave without pay when scheduled to work at FEMS based on her assertion that she was medically incapacitated, she worked at the Center on the following dates: January 30; February 8-10, 17, 18, 23-25; March 3, 5, 14, 19, 29, 30; April 13-15, 23, 28; May 1, 7, 14, 15, 22, 31; June 1, 10, 15, 24, 25; July 1-4, 9, 10, 12, 17, 20, 26-28; August 10, 11,18, 19, 29; September 4, 6, 13, 20, 21, 27; October 7, 8, 13, 14; November 6, 14-16, 25, 30; December 2, 8, 11, 16, 24-27 **(2014)** and January 11, 12, 18-20, 25-27; February 2, 3, 5, 10, 19; March 8, 9, 15-17, 22-24, 30;

[12] *See also* DPM § 1603.3(f)(3) (August 27, 2012).
[13] Agency Answer, Tab 22, Attachment 1 (April 18, 2016).

April 7, 16, 26; May 3, 4, 12, 17, 20, 25, 26, 28; June 2, 11, 19, 28, 29 **(2015)**.[14] Employee returned to full duty status with Agency on June 24, 2015.[15]

While on "medical leave," Employee represented to Agency that she was not physically able to return to duty or perform the functions of her job. Further, while Employee was employed full-time at Fort Washington Medical Center she also continued to receive employee benefits through Agency. Although Employee indicated that she was taking sick leave by marking "Sick Leave Taken" on Agency's calendar sheets (Telestaff), she did not have any sick leave to her credit, thus she was placed on absent without leave (AWOL) status by Agency. Employee was AWOL from February 8, 2014, through June 20, 2015.

Pursuant to the D.C. Fire and EMS Order Book, when Employee was on extended sick leave, she was required to report in person to the Police and Fire Clinic ("PFC") for progress evaluations as directed by the attending medical care provider with PFC.[16] Employee reported to the PFC for progress evaluations as required. On the Clinic Data Record Consent forms that Employee was required to complete while reporting to the PFC, the following is conspicuously written in bold and capital letters on the first page: "Non full-duty members are not allowed to engage in outside employment per Departmental orders."[17] On every form filled out by Employee, she checked the box "No" in response to the question, "Are you engaged in outside employment?"[18] Additionally, Employee signed the first page of the Clinic Data Record Consent Forms on December 9, 2014, and January 9, February 12, March 3, April 3, April 29, May 8, June 3, and June 17, 2015.[19] By affixing her signature to the Clinic Data Record Consent Forms, Employee was certifying that the content of the document was true and accurate to the best of her knowledge.

Agency further asserts that Employee did not complete a requite Form 14, notifying Agency of her outside employment, as required by Agency policy. Based on the aforementioned allegations Employee was charged with several counts of misconduct which led to her removal.

Employee's position

Employee maintains that Agency did not have cause to take adverse action against her because she was on medical leave for a series of health-related issues from February 2014, through June 2015. During this time, Employee was unable to perform the physical demands of her position with Agency as an EMT. Employee asserts that it is common knowledge that most civilian single role employees maintain outside employment while simultaneously maintaining their position with Agency, and without filing any particular paperwork. Employee acknowledges that for employees covered by specific guidelines, such as the PFC Policy, there is a strict requirement for employees to apprise Agency of any outside employment. However,

[14] Agency Answer, Tab 20.
[15] Agency Answer, Tab 15.
[16] Agency Answer, Tab 22, Attachment 13 to the Investigative Report. The requirement is cited under Article 11, Section 11 of the FEMS Order Book. A copy of the relevant section in cited in Attachment 13.
[17] *See* Agency Answer, Tab 8.
[18] *Id*.
[19] *Id*.

Employee avers that EMTs with Agency are not subject to the PFC policy requirement of reporting outside employment through Form 14.

Employee does not dispute that she was employed with Fort Washington Medical Center from January 2014 through June 2015. Employee does assert that her position with the Center was far less demanding than her EMT position with Agency.

Employee maintains that on February 7, 2014, she fell ill with abdominal pain and nausea while on duty with Agency. Employee was granted permission to leave early after falling ill. Employee further explains that she underwent surgery shortly after falling ill and subsequently contacted Agency notifying them of her condition and the need to be placed on sick leave. Employee asserts that on February 19, 2014, upon encountering medical complications, she requested to be "placed on sick leave of absence due to worsening medical complications and uncertainty of her recovery." It is Employee's contention that EMS Captain Supervisor agreed to place Employee on sick leave of absence in Agency's online personnel system, Telestaff.

Employee acknowledges that she continued working at Fort Washington Medical Center to provide for herself while out on extended sick leave without pay. Employee asserts that her position at the Center was sedentary and not physically demanding like her position with FEMS. Employee goes on to elaborate on her health issues and diagnoses during her extended sick leave with Agency.

On October 17, 2014, while Employee was out on extended sick leave, Lt. Carey, reported Employee for abandonment of her position. On November 27, 2014, Agency issued a Proposed Notice of Removal to Employee for failing to report to duty.[20] Employee responded to the Proposed Removal demonstrating that she was under doctor's care and not physically fit to return to her position as an EMT with Agency in September and October of 2014.

With respect to Employee's signatures on the Clinic Data Record Consent forms indicating that she was not engaged in outside employment, she argues that these forms were typically pre-completed and only required Employee's signature. Employee further argues that the box indicating a lack of outside employment was inconsistently marked by the PFC clerk throughout the records. Employee maintains that when she personally completed the form, she did not represent a lack of outside employment.[21]

On December 8, 2014, Employee filed an internal discrimination complaint based on retaliation, discipline, and harassment. On February 25, 2015, Employee filed a Charge of Discrimination complaint with the D.C. Office of Human Rights ("OHR") based on disability and violation of D.C. Family and Medical Leave.[22] In April of 2015, after consideration of Employee's response to the Proposed Removal Notice, the proposed adverse action was dismissed with prejudice by Agency. Thereafter, Employee withdrew her complaint with OHR.[23]

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[20] Employee's Brief, Exhibit 18 (April 5, 2018).
[21] Employee's Brief, at p. 6 (April 5, 2018).
[22] *Id.*, Exhibit 17.
[23] By way of background, Employee was previously charged, and issued a Proposed Adverse Action of Removal in December 2014, by Agency for misconduct by failing to report to duty for ten (10) consecutive days in September

Employee returned to full duty status on June 24, 2015. In Employee's Brief, she addresses several arguments beyond the relevant time frame for which the instant matter is under consideration. Furthermore, these arguments are more appropriately classified as grievances and do not have a direct bearing on the allegations levied against Employee in the instant case.

Discussion

The first charge levied against Employee is based primarily on Employee being misleading and untruthful with Agency regarding outside employment. Employee was charged with violation of Agency's Rules and Regulations, Agency's Order Book, and the District Personnel Manual ("DPM"). With respect to violations of the DPM, Agency bases its charges on misfeasance, providing any knowing or negligent misrepresentation on a document given to a government agency, and neglect of duty.[24]

Because Employee was out on extended sick leave, she reported to the PFC for progress evaluations as directed by her attending physician with the PFC. On every Clinic Data Record Consent form that Employee completed while reporting to the PFC, she marked "No" in response to the question "Are you engaged in outside employment."[25] There are a total of nine Clinic Data Record forms submitted by Agency demonstrating that Employee indicated that she was not engaged in outside employment, when in fact she was employed by Fort Washington Medical Center during the same time period.

Employee argues that these forms were pre-completed and only required Employee's signature. It seems that Employee is asserting that because the forms may have been pre-completed by a PFC clerk, that it absolved, or somehow excused her, from assuring the accuracy of the form bearing her signature. This argument must fail. The Clinic Data Record is a straightforward two-page document that conspicuously states, "Non full-duty members are not allowed to engage in any outside employment per departmental orders." The first page of this document also asks a very straight forward question, "Are you engaged in outside employment?" On every Clinic Data Record form, Employee's response is "No" to this question. Employee avers that when she personally completed the form, she did not represent a lack of employment.

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and October of 2014, and every day she was scheduled to report to work until December 2014. Subsequently, Employee filed a Charge of Discrimination with the District of Columbia Office of Human Rights on February 25, 2015. In her Charge of Discrimination, Employee asserted that during the time of her alleged abandonment, she was under doctor's medical care and not physically fit to return to duty or perform the essential functions of her job as an EMT (*See* Employee's Brief, Exhibit 17, filed April 5, 2018). Employee submitted medical documents to support her claim and the proposed removal action was withdrawn by Agency. Employee then withdrew her complaint with OHR.

A large portion of Employee's arguments focuses on the reasons she believes Agency inappropriately initiated an adverse action against her in December 2014, for job abandonment, rather than the issues in the instant case surrounding engaging in outside employment while out on sick leave. These arguments seem to address allegations of disability discrimination, which were already filed with the District of Columbia Office of Human Rights. Because OEA is not the proper forum for the discrimination arguments raised by Employee, these allegations are not addressed in this decision.

[24] *See* DPM §§§ 1603.3(f)(6), 1603.3(f)(3), 1603.3(d)

[25] *See* Agency Answer, Tab 8.

However, Employee does not provide or point to any form in the record that shows where she once indicated to Agency that she was engaged in outside employment. Every document that is a part of the record shows that Employee marked "No" in response to being asked if she was engaged in outside employment. At minimum, Employee had at least constructive knowledge that engaging in outside employment without the proper authorization was prohibited. As such, Employee's argument is flawed. Accordingly, I find that Agency has satisfied its burden with respect to charge 1.

The second charge levied against Employee is based on Agency's prohibition against outside employment while on sick leave, administrative leave-sick, or while on continuation of pay or leave without pay due to a work-related injury or illness, pursuant to FEMS Order Book Article XI, Part I, § 1(7).[26] Agency also classifies the second charge as "neglect of duty" as provided in the DPM.[27] Agency provides confirmation from Fort Washington Medical Center that Employee was employed at the Center from January 27, 2014, through June 29, 2015.[28]

Employee acknowledges that she was employed full time at the Center while simultaneously out on leave with Agency. Employee argues that she was never informed of any requirement, restriction, or regulation pertaining to employees' ability to engage in outside employment. Employee further asserts that it is "common knowledge" that most civilian single role employees maintain outside employment while simultaneously maintaining their position with Agency. However, Employee provides no support other than a bare bones assertion that most civilian single role employees maintain outside employment. Employee attempts to bolster her argument by making an assertion that Lieutenant Michael Cary confirmed that the PFC regulations do not apply to civilian employees.[29] In making this assertion, Employee cites to an undated statement she wrote describing when she fell ill in February of 2014, while on duty and the subsequent events following her illness. Employee's statement simply reiterates that Lt. Carey confirmed her own statement that she was not required to go to the PFC because she was a civilian EMS and because her illness was personal in nature and not related to her job. Despite this argument, Employee visited the PFC on at least nine occasions while out on extended leave between February 2014 through June 2015.

Agency's Order Book clearly states that all employees are prohibited from outside employment while on sick leave.[30] The Clinic Data Record form also conspicuously states that non full-duty members are not allowed to engage in any outside employment per departmental orders, while out on sick leave. Employee signed this form on at least nine occasions and marked "No" on the same form when asked whether she was engaged in outside employment. Employee attempts to argue that the box marked in response to the question about engaging in outside employment is inconsistently marked. However, the record directly contradicts her assertion. All nine of the Clinic Data Record forms in the record provide the conspicuous notice that members are not to engage in outside employment while out on extended leave and each

[26] A copy of Memorandum 83 regarding Outside Employment is attached between Tabs 13 and 14 of Agency's Answer. The document itself is behind an unnumbered tab.
[27] *See* DPM § 1603.3(f)(3).
[28] Agency Answer, Tab 22, Attachment 1 (April 18, 2016).
[29] Employee Brief, at 16.
[30] See Agency Answer, Tab 14, Article XI, Part I, § 1(7), Prohibited Conduct.

time the question regarding outside employment is asked, it is marked "No." There is no evidence in the record that Employee ever represented to Agency that she was engaged in outside employment.

Although Employee indicates that she was taking "sick leave" on FEMS calendar sheets (Telestaff), she did not have any sick leave to her credit; thus, she was placed on absence without leave (AWOL) status. Employee further argues that she was never apprised of the PFC policies which prohibit employees from engaging in outside employment while out on sick leave and insists that the PFC policies are not applicable to civilian single role employees. Even if it is true that Employee was not apprised of the specific PFC policy prohibiting outside employment while out on sick leave, the Clinic Data Record form boldly and conspicuously advises Employee that FEMS members are not to engage in any outside employment while out on extended leave, per departmental orders. Thus, Employee had at least constructive notice of this prohibition. Accordingly, I find that Agency had cause to take adverse action against Employee for Charge 2—engaging in outside employment while out on sick leave.

The third charge against Employee was levied for Employee's failure to complete a Form 14 to apprise Agency that she was engaged in outside employment. Article III, § 15 of Agency's Order Book requires all members of FEMS who are engaged in outside employment to complete a Form 14. This misconduct is further set forth in DPM § 1603.3(f)(3)—Neglect of Duty. Additionally, the following polices requires Employee to familiarize herself with Department issuances: Rules and Regulations, Article III, § 7, Order Book Article III, § 9, and Order Book Article III, § 10.[31] Because Employee was obligated to familiarize herself with the issuances of FEMS regarding Form 14 as a prerequisite to engaging in outside employment, her assertions that she was not notified of such requirement must fail.

The fourth and final charge levied against Employee is based on Employee being scheduled to work at Agency on various dates, but was out on sick leave, emergency annual leave, absent without leave (AWOL), or leave without pay from Agency, claiming that she was not "physically fit" to perform the essential functions of her job as an EMT.[32] However, Employee worked at Fort Washington Medical Center on these same dates.[33]

Although Employee acknowledges working at Fort Washington Medical Center while out on leave with Agency, she maintains that her work as a nurse with the Center was less physically demanding than her work with Agency as an EMT. Employee was scheduled and expected to work in her capacity as an EMT, but-for her claiming "sick leave" status. Employee's claim of being too sick and unable to work in her capacity as an EMT, but well enough to work her position with Fort Washington Medical Center is not compelling enough to overcome the Charge 4—Neglect of Duty. Employee continued to receive Agency-paid benefits while working at Fort Washington Medical Center while claiming that she was physically unfit to carry out her duties as an EMT. Employee cannot claim to be "sick," yet well enough to work in a different capacity. Employee's misuse of "sick leave" to engage in outside employment misapplies the

[31] Agency Answer, Tab 29, page 15.
[32] Agency also classifies this charge as "neglect of duty." *See* DPM § 1603.3(f)(3).
[33] *See* Agency Answer, Tab 22, Attachment 8

intended purpose of permitting employees to use sick leave as an employee benefit. Thus, I find that Agency had cause to take adverse action against Employee for Charge 4.

Appropriateness of the penalty

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 Appropriate Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Additionally, in assessing the appropriateness of the penalty, this Office is limited to ensuring that "managerial discretion has been legitimately invoked and properly exercised."[34] Here, as discussed above, I find that Agency had cause to charge Employee for Charges 1, 2, 3, and 4. Charges one through four are rooted in the District Personnel Manual's causes for Neglect of Duty, Misfeasance, and providing any knowing or negligent misrepresentation on a document given to a government agency.

The Table of Appropriate Penalties in the District Personnel Manual ("DPM")[35] provides guidance for such adverse action as charged in the instant case. An appropriate penalty for a first-time offense for "Neglect of Duty" ranges from a reprimand to removal.[36] An appropriate penalty for a first-time offense for "misfeasance" is a 15-day suspension.[37] An appropriate penalty for a first-time offense for providing any knowing or negligent misrepresentation on a document given to a government agency ranges from a 5-day suspension to a 15-day suspension.[38] Here, I have found that Agency had cause to take adverse action against Employee for neglect of duty, misfeasance, and providing any knowing or negligent misrepresentation on a document given to a government agency. All four charges against Employee are based in "Neglect of Duty." Because the Table of Appropriate Penalty provides that removal is appropriate for a first-time offense for neglect duty, I find that Agency properly invoked its managerial discretion in implementing the penalty levied against Employee.

Disparate treatment

Employee attempts to raise a disparate treatment argument contending that other employees who engaged in similar conduct were treated differently. 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

[34] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[35] DPM § 1619.
[36] DPM § 1619.6(c) (Effective August 27, 2012).
[37] DPM § 1619.6(f).
[38] DPM § 1619.4.

> 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 [his] 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 employees.[39] If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[40] "In order to prove a disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[41]

Here, Employee asserts that it is common practice for single role civilian employees to maintain outside employment while employed with Agency. Specifically, Employee states that a male Lieutenant by the name of Clifton Humphrey, was found to be engaged in outside employment at a private club and was simply demoted to a lower rank, rather than being terminated from his position with Agency. Employee fails to satisfy her burden that Lieutenant Humphrey was a similarly-situated employee. Employee's position as an EMT is not that of an employee holding the rank of a Lieutenant. Thus, I find that the comparator employee provided by Employee in her brief, submitted March 16, 2018, is not a similarly-situated employee; thus, her argument for disparate treatment must fail.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee from her position as an Emergency Medical Technician is **UPHELD**.

FOR THE OFFICE:

_____

Arien P. Cannon, Esq.
Administrative Judge

[39] *See Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).
[40] *Id*.
[41] *Social Sec. Admin. v. Mills*, 73 M.S.P.B. 463 (1991).