

# **Merit System Protection Board Annual Report FY2009**

**Members:**

**Bruce Ervin Wood, *Chair***  
**Rodella E. Berry, *Vice Chairperson,***  
**Charla Lambertsen, *Associate Member***

***Executive Director:***

**Kathleen J. Taylor**

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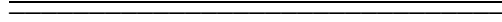
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**FY 2009**  
**ANNUAL REPORT OF THE**  
**MONTGOMERY COUNTY**  
**MERIT SYSTEM PROTECTION BOARD**

**COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD**

The Merit System Protection Board (Board) is composed of three members who are appointed by the County Council, pursuant to Article 4, Section 403 of the Charter of Montgomery County, Maryland. Board members must be County residents, and may not be employed by the County in any other capacity. One member is appointed each year to serve a term of three years.

The Board members in 2009 were:

Bruce Ervin Wood	-	Chair
Rodella E. Berry	-	Vice Chairperson
Charla Lambertsen	-	Associate Member

**DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD**

The duties of the Merit System Protection Board are contained in: 1) Article 4, *Merit System and Conflicts of Interest*, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County; 2) Chapter 33, Article II, *Merit System*, of the Montgomery County Code; and 3) Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005 and October 8, 2008).

1. Section 404 of the Charter establishes the following duties for the Board:

Any employee under the merit system who is removed, demoted or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the

administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

2. Section 33-7 of the Montgomery County Code defines the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the [B]oard is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the [B]oard granted herein shall be fully exercised by the [B]oard as needed to rectify personnel actions found to be improper. The [B]oard shall comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The [B]oard, subject to the appropriation process, shall be responsible for establishing its staffing requirements necessary to properly implement its duties and to define the duties of such staff.

...

(c) *Classification standards.* . . .The [B]oard shall conduct or authorize periodic audits of classification assignments made by the [C]hief [A]dministrative [O]fficer and of the general structure and internal consistency of the classification plan, and shall submit audit findings and recommendations to the [C]ounty [E]xecutive and [C]ounty [C]ouncil.

(d) *Personnel regulation review.* The [M]erit [S]ystem [P]rotection [B]oard shall meet and confer with the [C]hief [A]dministrative [O]fficer and employees and their organizations from time to time to review the need to amend these regulations.

(e) *Adjudication.* The [B]oard shall hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(f) *Retirement.* The [B]oard may from time to time prepare and recommend to the [C]ouncil modifications to the [C]ounty's system of retirement pay.

(g) *Personnel management oversight.* The [B]oard shall review and study the administration of the County classification and retirement plans and other aspects of the merit system and transmit to the [C]hief [A]dministrative [O]fficer, [C]ounty [E]xecutive and the [C]ounty [C]ouncil its findings and recommendations. The [B]oard shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the [C]ounty [C]ouncil. All [C]ounty

agencies, departments and offices and [C]ounty employees and organizations thereof shall cooperate with the [B]oard and have adequate notice and an opportunity to participate in any such review initiated under this section.

(h) *Publication.* Consistent with the requirements of the Freedom of Information Act, confidentiality and other provisions of law, the [B]oard shall publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

(i) *Public forum.* The [B]oard shall convene at least annually a public forum on personnel management in the [C]ounty [G]overnment to examine the implementation of [C]harter requirements and the merit system law.

3. Section 35-20 of the Montgomery County Personnel Regulations states:

(a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

(b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate corrective action, or report the matter to:

(1) the MSPB, if the individual involved in the alleged illegal or improper action is a merit system employee; or

(2) the Ethics Commission, if the individual involved in the alleged illegal or improper action is not a merit system employee or is an appointed or elected official or a volunteer.

# **APPEALS PROCESS**

## **DISCIPLINARY ACTIONS**

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. To initiate the appeal process, Section 35-4 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005) requires that an employee file a simple notice of intent to appeal a removal, demotion or suspension. In accordance with MCPR Section 35-3, the employee must file the notice of intent to appeal within ten (10) working days after the employee has received a notice of disciplinary action involving a demotion, suspension or removal.

Once the notice of intent to appeal has been filed, the Board's staff provides the Appellant with an Appeal Form to be completed within ten (10) working days. After the completed Appeal Form is received, the Board sends a notice to the parties, requiring each side to submit a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which the parties' lists of witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision on the appeal.

The following disciplinary cases were decided by the Board during fiscal year 2009.

# **DISMISSAL**

## **CASE NO. 08-09**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Department of Correction and Rehabilitation (DOCR) Director, to dismiss Appellant.

### **FINDINGS OF FACT**

#### **Background**

At all times applicable to this decision, Appellant was a Correctional Officer III (Corporal) at the Montgomery County Correctional Facility (MCCF). As a Correctional Officer, Appellant is responsible for providing security, custody, care, order and discipline for a segment of the inmate population at MCCF. On October 8, 2007, Appellant was assigned to work shift #3, which runs from 3:00 p.m. to 11:00 p.m., at the MCCF, in the segregation unit (N-1-1). The segregation unit, which is a sixty-four bed unit,<sup>1</sup> houses DOCR's disciplinary segregation population of up to thirty-two individuals who are there for acts of violence against staff, and non-compliance with the rules. In addition, N-1-1 has some of the most vulnerable populations in protective custody and special management individuals who may be victimized or could be viewed as predatory. These latter groups account for up to an additional thirty-two individuals.

Each pod has a command station,<sup>2</sup> where the Daily Log<sup>3</sup> is kept. Supervisors who enter the area during security rounds sign the Daily Log. Each cell has a call box, which

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<sup>1</sup> The housing unit is also referred to as a pod. The pod is composed of various cells on the ground tier and on an upper tier. Each cell houses two inmates. The incident at issue in this case took place in B Pod.

<sup>2</sup> The Warden testified that the inmates in cell B3, where the incident at issue in this case took place, have a good view of the command station.

<sup>3</sup> The Daily Log is a two page form, wherein the names of the officers who are on duty at a particular post are noted. The log has places to enter the names of the various supervisors who conducted rounds of the post during a shift, as well the time when they did so. The log also contains an inventory section, which is to be completed showing the quantity and the condition of the equipment in the area. In addition, officer meal break times are indicated on the log, as well as the name of the officer relieving the post officers while they have their meal break. The log provides space for the entry of the times fire door checks are conducted; the times window/wall checks are conducted; the time the sanitation



allows an inmate inside the cell to contact the command station. The door into the pod slams open and shut; therefore, inmates are aware when a supervisor comes into the area.

One of the duties a Correctional Officer is expected to do in N-1-1 is a window/wall check in each cell. On shift #3, two window/wall checks are required to be done. A window/wall check consists of looking at the windows, the walls, and the interior of the cell so as to ensure there has been no breach of security. The Correctional Officer is expected to enter the cell, check the window to ensure it is solid, make sure there are no holes in the wall and observe the cell's upkeep to ensure the inmates are safe.

Because N-1-1 houses potentially violent individuals, DOCR policy requires that two officers conduct the window/wall check. DOCR policy also requires the inmates in a cell be handcuffed when a window/wall check is to be conducted. Each cell door has a food pass, which is a flap that comes down in front of the cell door. In order to handcuff an inmate before the window/wall check is conducted, the inmate must come to the cell door, lean down with his hands behind his back, and place his hands in front of the food pass. The Correctional Officer then opens the food pass, reaches through the food pass, handcuffs the inmate's hands and then the inmate stands up and moves away. The second inmate then comes to the cell door and is handcuffed in the same manner. Once the two inmates in a cell are handcuffed, the cell door is opened,<sup>4</sup> the inmates exit the cell and one of the two Correctional Officers goes inside the cell to conduct the window/wall check while the other Correctional Officer watches the two inmates and pats them down. Once the window/wall check is completed, the inmates are returned to the cell. The cell door is shut. Then, each inmate leans down to the food pass to be unhandcuffed by one of the Correctional Officers. The two Correctional Officers then proceed on to the next cell to do the window/wall check.

Another duty of a Correctional Officer is the passing of food trays. Normally, the evening meal occurs between 4:30 p.m. and 5:00 p.m. According to the Warden, when feeding an inmate in N-1-1, the Correctional Officer is expected to pass the food tray through the food pass to each inmate individually. By following this process, the Correctional Officer has the opportunity to ensure the tray goes to the inmate and that the inmate is all right.

#### The Handcuffing Incident on October 8, 2007

On the night in question, Appellant was assigned to N-1-1 along with Corporal (Cpl.)

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inspection occurs; the times shakedown are conducted; and when the nurse enters the unit with meds. The second page of the Daily Log has a place where various events that occur during the shift may be entered, along with the time of occurrence.

<sup>4</sup> The cell doors are operated remotely by a third officer, unless a key is used to open them. Even if a key is used to open the cell door, the slider cell door which allows entry into the segregation unit must be opened remotely from the command post by the third officer.

A, the Senior Floor Officer,<sup>5</sup> for shift #3. According to the Daily Log for the shift, Lieutenant (Lt.) B, Lt. C, and Sergeant (Sgt.) D conducted security rounds of Appellant's post. Lt. B visited the post at approximately 5:22 p.m.; Lt. C visited at 8:24 p.m.; and Sgt. D visited at 8:45 p.m.<sup>6</sup> While the officers do not check every cell when they conduct rounds, the inmates are aware when an officer enters a pod as they can hear the large cell door slamming after the officer enters. The inventory for shift #3 reflects there were five sets of handcuffs during shift #3.

According to the footage of the video tape,<sup>7</sup> the first window/wall check for B Pod occurred between 4:27 p.m. and 4:31 p.m. on October 8, 2007.<sup>8</sup> Cpl. E operated the panel that unlocked the cell doors during the window/wall check. The video tape shows the two inmates in cell B3 – Inmate F and Inmate G – were handcuffed by Appellant. The two inmates came out of the cell and Appellant entered the cell to begin the window/wall check. Then, the two inmates reentered the cell and Appellant uncuffed one of the inmates – Inmate F. While Appellant was doing this, Cpl. A began bringing the next two inmates out of their cell. Appellant failed to unhandcuff the second inmate in cell B3 – Inmate G. As the window/wall check was ending, Appellant left B Pod because Cpl. E informed Appellant that Lt. B had an inmate in the sallyport area who needed to be returned to his cell in B Pod.

The video tape indicates that the feeding of the inmates in B Pod, by passing food trays into each cell, began at 4:55 p.m. and lasted until 5:00 p.m. Appellant passed trays out on the ground floor of the pod, including cell B3, while Cpl. A passed trays out on the upper tier of the pod. According to the investigation report, Appellant did place two food trays into B3 cell.<sup>9</sup> Appellant was relieved by Cpl. E at approximately 5:15 p.m. so that Appellant could eat Appellant's evening meal. The food trays were picked up in B Pod between 5:38 p.m. and 5:41 p.m. according to the video tape. Appellant was not present at the time the

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<sup>5</sup> A Senior Floor Officer is the Correctional Officer who has seniority on an assigned post in the MCCF and is responsible for informing the Sergeant on duty if anything is happening in the assigned post. As the Senior Floor Officer for shift #3 on October 8, 2007, Cpl. A completed the Daily Log for the shift.

<sup>6</sup> Sgt. D testified that he was in B Pod at least four times on the night in question.

<sup>7</sup> Each pod has a video camera which tapes what is occurring in the pod.

<sup>8</sup> The window/wall check is normally conducted earlier, around 3:00-3:30 p.m., but could not be conducted then as Cpl. E, who needed to operate the cell doors remotely, was in another area of the facility.

<sup>9</sup> Appellant indicated that when Appellant first went to place the food trays in cell B3, inmate G was on the toilet with a sheet blocking Appellant's view of the area. Appellant stated Appellant passed a food tray to Inmate F and continued to feed the rest of the inmates on the ground floor. Appellant returned to cell B3 and observed Inmate G on the stool at the desk facing away from Appellant. Appellant stated that Appellant saw Inmate G had a food tray. Therefore, Appellant gave the food tray to Inmate F and exited the pod.

food trays were being retrieved from the cells; rather, Cpl. A and Cpl. E removed the food trays.

Sometime after the first window/wall check during shift #3, Inmate G asked Cpl. A if he could clean up. Cpl. A testified that if an inmate cleans up the segregation day area, he is rewarded for doing so by being allowed to use the phone. Inmate G was not permitted to clean up. However, Cpl. A stood at the cell door for B3 holding a conversation with Inmate G over the matter and then during the shift held another conversation with someone in cell B3.

The Nurse entered B Pod shortly after 8:00 p.m. to pass out medications. The Nurse testified that Inmate G never notified her that he was handcuffed.

Sgt. D testified that during shift #3, Sgt. D had to return some property to one of the inmates in cell B2. Sgt. D also dealt with an inmate in cell B4, who had concerns over some of his property. At no time did Inmate G say anything to Sgt. D, nor did any of the inmates say anything to Sgt. D about Inmate G. Moreover, during shift #3, there was an incident involving Inmate H. At approximately 10:20 p.m., there was flooding in Inmate H's cell, B6, and he had to be relocated to another cell. Sgt. D and Cpl. A moved the inmate who became verbally abusive and refused to be unhandcuffed.

Thus, the record of evidence indicates that at no time during shift #3 did Inmate G inform any other officer, i.e., Cpl. A, Cpl. E, Sgt. D, Lt. B or Lt. C, or the Nurse, that he was handcuffed.<sup>10</sup>

No second window/wall check was conducted on shift #3 on October 8, 2007. According to Cpl. A, the Senior Floor Officer, second window/wall checks are not usually conducted on shift #3.<sup>11</sup>

Shift #1 at MCCF commences at 11:00 p.m. and continues until 7:00 a.m. the next day. The Daily Log for October 8, 2007 reflects that Cpl. I and Private (Pvt.) J were assigned to shift #1 for N-1-1 and that there were five sets of handcuffs. Cpl. I and Pvt. J conducted a security round check at 11:00 p.m. During this check, neither officer was made aware that Inmate G was in handcuffs.

At approximately 11:40 p.m., Cpl. I and Pvt. J began their window/wall check for B Pod on the top tier. Cpl. I testified that when they began the window/wall check on the ground floor of B Pod, there was a commotion by the inmates. The inmates yelled out that the officers needed to check cell B3, as someone had handcuffs on him.

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<sup>10</sup> Although the officers conducting security rounds do not enter into the pod to check each cell, when they are in the command post signing the Daily Log, they may be summoned by an inmate. The inmate simply needs to press the call box button.

<sup>11</sup> Cpl. E confirmed that second window/wall checks are not typically conducted.

When Cpl. I and Pvt. J reached cell B3, they handcuffed Inmate F but noted Inmate G was already handcuffed. When they entered the cell, they noted that Inmate G had apparently urinated on himself. Cpl. I contacted Sgt. K, who immediately reported to B Pod. Sgt. K asked Inmate G what had happened and he reported that he had been “beefing” with a shift #3 officer who was doing a window/wall check and the officer did not take off his handcuffs. Hearing Transcript (H.T.) at 102. According to Sgt. K, Inmate G informed Sgt. K that Inmate G asked Appellant to take off the cuffs and Appellant replied that “[y]ou’re on my time and I’ll take them off when I get ready.” Id. When Inmate G was asked which officer it was, he replied that he did not know the officer’s name but he was the white officer. Id. at 103.

Cpl. I and Pvt. J completed the window/wall check, and then removed the handcuffs from Inmate G. Inmate G was given the opportunity to take a shower and was then checked by medical staff. Sgt. K notified Sgt. K’s superior, Lt. L, about the incident. Lt. L forwarded an Incident Report, DCA #36, to management, indicating there was a possible violation in the use of restraining equipment. Inmate G subsequently filed a grievance about being handcuffed on October 9, 2007.

#### The Investigation Into The Handcuffing Incident

Captain (Capt.) M was assigned to conduct an investigation into the incident. Capt. M began by interviewing Inmate G, who indicated he had been left handcuffed for over six-seven hours by Appellant. According to the investigation report, Inmate G told Capt. M that he and Appellant were involved in a verbal disagreement. Inmate G stated that he told Appellant to take the “[t]ight ass cuffs off!” County Exhibit (C. Ex.) 2 at 1. According to Inmate G, Appellant responded: “You are on my time, Inmate G,” and placed Inmate G back in the cell still handcuffed. Id. Inmate G indicated to Capt. M that he thought Appellant was joking. Id. Inmate G then refused to talk any further with Capt. M.

Capt. M then interviewed Inmate F who did not wish to talk to Capt. M. Inmate F did indicate “[t]hat was messed up, what happened; leaving that man in handcuffs.” Id. at 2.

Capt. M proceeded to review the video tape for B Pod. He noted that no second window/wall check occurred on shift #3, despite the fact that the check was listed in the Daily Log as being completed at 10:30 p.m.

Capt. M then interviewed both Appellant and Cpl. A. Appellant initially denied leaving Inmate G handcuffed after completing the window/wall check of cell B3. Id. at 2. Appellant told Capt. M that Appellant wasn’t sure who handcuffed Inmate G, as Appellant and Cpl. A alternated cells. Joint (Jt.) Ex. 1 at 4. Capt. M then spoke to the Warden who instructed Capt. M to show Appellant the video tape. Upon seeing the tape, Appellant acknowledged it was Appellant who was responsible for failing to unhandcuff Inmate G.

Cpl. A, when interviewed, denied any knowledge that Inmate G had been left in handcuffs during shift #3. C. Ex. 2 at 3. Sgt. D and Cpl. E were both interviewed by Capt. M, and they denied any knowledge about Inmate G being left in handcuffs during shift #3 or him asking either of them to assist in having the handcuffs removed. Id. at 4.

Capt. M also asked both Appellant and Cpl. A about the second window/wall check. According to Capt. M's investigation report, both individuals made reference to the second window/wall check. Id. at 7. Capt. M testified that Appellant then cleared it up and said that Appellant hadn't done a second window/wall check<sup>12</sup> and hadn't put it in the log because Cpl. A was the Senior Floor Officer. Capt. M asked Cpl. A about the second window/wall check and Cpl. A told Capt. M it was done at 10:05. Cpl. A subsequently admitted Cpl. A didn't conduct a second window/wall check although Cpl. A logged the check.<sup>13</sup>

Capt. M interviewed various inmates in B Pod. Capt. M's notes for Capt. M's interview with the inmate in cell B2 indicate this inmate didn't notice anything. J. Ex. 1 at 14. The inmate stated he "[d]idn't hear Inmate G or anyone saying anything. Did hear the roommate say this is 'F. . . up what's going on in here.'" Id. Capt. M's notes for Capt. M's interview with the inmate in cell B4 indicate the inmate "[h]eard talking but wasn't sure. He heard an inmate say get this off my hands. States he thought it was just the inmates' joking." Id. Capt. M's notes regarding the interview of one inmate in cell B7 states "[d]idn't hear anything but did notice inmate cuffed in the back." Id. at 15. The notes for the interview with the other inmate in cell B7 indicate the inmate started kicking the door around 11:00 p.m. for the next shift officers. Id. Finally, Capt. M's notes for another inmate, whose cell number is not indicated, state: "Yelled out the door for them to take the MF handcuffs off." Id.

It appears that Capt. M completed the investigation on October 11, 2007. Capt. M testified that Capt. M wrote up Capt. M's report and gave it to Capt. M's superior for review. The actual investigation report is dated November 14, 2007, almost five weeks after the conclusion of the investigation. Capt. M made the following recommendation:

The complaint that was made by Inmate G is sustained. Appropriate disciplinary action should be taken against Appellant as the person responsible for placing handcuffs on Inmate G and then refusing to remove them following a disagreement between them; and Cpl. A as the Senior Officer who should have been aware of this action and should have ensured that the handcuffs were removed from the inmate, and for putting false information in the Log about having completed the second required window and wall check for Shift #3 without this requirement being done at all. It should also be noted that both Officers denied any responsibility for leaving handcuffs on Inmate G during their first interview during this investigation and made reference to making the second required window and wall check when they both knew

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<sup>12</sup> Capt. M's notes of Capt. M's interview with Appellant do not support Capt. M's statement that Appellant made any reference to a second window/wall check. Rather, the notes state: "Didn't enter cell for 2nd W/W. Cpl. A is the Senior Officer." Jt. Ex. 1 at 4.

<sup>13</sup> Capt. M's interview notes support Capt. M's testimony concerning Cpl. A. The notes indicate: "Stated 4:25 W/W conducted – 2nd W/W 10:05 . . . Didn't conduct a second W/W. It was logged and [Cpl. A] logged window/wall. States [Cpl. A] or other doesn't conduct 2nd W/W." Jt. Ex. 1 at 12.

they had not completed this task.

C. Ex. 2 at 7. Capt. M testified during the hearing that both Appellant and Cpl. A were equally responsible for what happened to Inmate G on October 8, 2007. H.T. at 194. Capt. M also testified that the same type of disciplinary action was forwarded for both individuals. H.T. at 197.

The Warden testified that Cpl. A received a 30-day suspension, with a last chance agreement.<sup>14</sup> H.T. at 67. However, Appellant received a Statement of Charges – Dismissal, dated November 28, 2007, on December 3, 2007. C. Ex. 12. Appellant apparently responded on or about December 10, 2007. See Appeal, Appellant’s Written Statement of Events; Appeal Form, Block 7. Appellant received a Notice of Disciplinary Action – Dismissal, dated December 26, 2007, on January 26, 2008. C. Ex. 11.

This appeal followed.

### **APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 33, Disciplinary Actions**, which states in applicable part:

**33-2. Policy on disciplinary actions.**

...

- (d) ***Consideration of other factors.*** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:
- (1) the relationship of the misconduct to the employee’s assigned duties and responsibilities;
  - (2) the employee’s work record;
  - (3) the discipline given to other employees in comparable positions in the department for similar behavior;
  - (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
  - (5) any other relevant factor.

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<sup>14</sup> The Warden testified that a last chance agreement is a formal written document between the employee and the County wherein the employee agrees that if the employee does anything that is similar to the misconduct for which the employee is being disciplined, the employee will immediately be terminated. H.T. at 67.

**33-5. Causes for Disciplinary Action.** The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

...

(c) violates an established policy or procedure;

...

(e) fails to perform duties in a competent or acceptable manner;

...

(g) knowingly makes a false statement or report in the course of employment;

(h) is negligent or careless in performing duties;

...

(q) engages in discriminatory, retaliatory, or harassing behavior; . . .

**33-6. Disciplinary Process.**

(b) *Statement of charges.*

(1) Before taking a disciplinary action other than an oral admonishment, a department director must give the employee a statement of charges that tells the employee:

...

(B) the specific reasons for the proposed disciplinary action including the dates, times, and places of events and names of others involved, as appropriate;

...

...

(c) *Notice of disciplinary action.*

(1) A notice of disciplinary action must contain the following information:

...

- (C) the specific reasons for the disciplinary action including dates, times, places, and names of others involved, as appropriate; . . .

**Montgomery County Department of Correction and Rehabilitation Detention Division Policy and Procedure Manual, Policy Number: 1300-10, *Use of Force* (June 10, 2006), which states in applicable part:**

**VIII. INSTRUMENTS OF RESTRAINT**

. . .

- H. Medical guidelines regarding the application of restraint equipment include the following:

. . .

- 4. Individuals in restraints will be offered liquids each hour. If security permits, at least some of the restraints should be removed so that the inmate may take nourishment. Staff will document these actions in the Daily Log.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct, effective date March 26, 2007, which states in applicable part:**

**V. RELATIONSHIP OF DEPARTMENTAL PERSONNEL WITH VISITORS/DEFENDANTS/ INMATES/ RESIDENTS/ PARTICIPANTS:<sup>15</sup>**

. . .

- B. Brutality in the treatment of visitors/defendants/inmates/residents/ participants shall not be tolerated and is cause for disciplinary action, to include, up to dismissal and possible criminal charges.

**POSITIONS OF THE PARTIES**

County:

- Appellant was dismissed for using excessive force against Inmate G by allowing Inmate G to be handcuffed for nearly eight hours during which time Inmate G was unable to defend himself, feed himself or perform regular hygiene functions.
- Appellant allowed the cuffs to remain on Inmate G to punish Inmate G after a verbal confrontation.

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<sup>15</sup> Both the Statement of Charges and Notice of Disciplinary Action incorrectly cited to Section IV.B of this regulation as being violated.



- Appellant refused to acknowledge Appellant's role in handcuffing Inmate G and a review of the video tape indicates that Appellant's actions were intentional.
- Appellant failed to offer the inmate liquids each hour while Inmate G was handcuffed.
- Appellant also failed to perform a second window/wall check as required.

Appellant:

- Appellant accidentally left Inmate G in handcuffs; had Inmate G notified Appellant that Inmate G was handcuffed, Appellant would have unhandcuffed Inmate G.
- Inmate G failed to alert any staff that entered B Pod during shift #3 that Inmate G was handcuffed.
- Appellant did not lie during the investigation; when first asked about Inmate G. Appellant was unaware that Appellant had left Inmate G in handcuffs.
- Appellant acknowledges that Appellant made a mistake and asks that the MSPB reinstate Appellant's employment with a suspension of not more than 30 days.

**ISSUE**

Has the County proven, by a preponderance of the evidence, that the dismissal of Appellant was reasonably justified and consistent with applicable law and regulatory provisions?

**ANALYSIS AND CONCLUSIONS**

**The Board Finds That There Were Five Charges Adequately Set Forth In The Statement Of Charges.**

The Board notes that the Statement of Charges (SOC) and the Notice of Disciplinary Action (NODA) differ markedly in their recitation of the various charges against Appellant. The NODA sets forth fourteen separate charges and provides detail to substantiate each of the violations charged. See C. Ex. 11 at 5-8. This is the type of detail the Board has counseled is necessary to be provided to employees, as explained in previous decisions involving DOCR. See MSPB Case Nos. 07-10, 07-13.

However, this detail was not present in the SOC. Rather, the SOC, with far less preciseness, set forth six charges in a bulleted fashion. See C. Ex. 12 at 5. In response to the SOC, Appellant responded to what Appellant believed were the five charges against Appellant.<sup>16</sup> See Appellant's Written Statement of Events.

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<sup>16</sup> Appellant did not respond to the first of the bulleted charges which is readily understandable as the first bulleted charge simply informed Appellant that Appellant violated the MCPR Section 33-5(c) by violating the departmental policies and procedures (1300-10, Use of Force, 3000-7, Standards of Conduct, and Post Order No. 16, Special Management/Disciplinary). This charge provided no further detail so as to enable Appellant

The County, when it proposes to discipline an employee, must notify the employee of the conduct with which the employee is charged “in sufficient detail to permit the employee to make an informed reply.” Pope v. United States Postal Service, 114 F.3d 1144, 1148 (Fed. Cir. 1998). MCPR Section 33-6(b)(B) requires the SOC contain the specific reasons for the proposed disciplinary action, to include dates, times and places of events and names of others involved. As the Board has previously opined, to fulfill this responsibility to give adequate notice to the employee, the County should designate a particular charge and accompany the charge with a narrative description which sets forth the details of the charged misconduct. See MSPB Case No. 07-13. The Board has cautioned the County that failure to give adequate notice so as to enable an employee to make an informed response could lead to the invalidation of the charge and/or discipline appealed. Id. Adequate notice and the chance to respond are basic due process requirements provided by the County’s personnel regulations. The County cannot meet its due process responsibilities by detailing new charges in the NODA, after the employee has responded to different charges that have been set forth in the SOC.

Accordingly, based on what was contained in the SOC and Appellant’s response, the Board finds that Appellant adequately was placed on notice of five charges against Appellant.

**The County Established The First Charge In The SOC By A Preponderance Of The Evidence But Failed To Include The Charge, As Required, In The NODA.**

The first charge<sup>17</sup> in the SOC states as follows:

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to make an informed response. Because of the lack of detail, the Board finds the charge was defective and will not consider it.

<sup>17</sup> No such rendition of this charge appears in the NODA. Rather, the charge in the NODA most similar to this charge reads:

Post Order No. 16, Special Management/Disciplinary, Section E. Duties, 6. Any time an inmate exits from his cell, he is to be accompanied by two Correctional Officers and handcuffed behind the back unless a medical excuse exists requiring the inmate to be handcuffed in the front (This should be confirmed with the medical staff before moving the inmate). Two Correctional Officers also must be present while conducting window wall checks; shakedown or anytime a door must be open when an inmate is inside of the cell”; 9. “Cell checks/window and wall checks will be conducted two times per shift, as well as a plumbing chase check on the #1 shift. During these checks the officer will remove anything that should not be in the cell”: You violated this policy when you did not conduct a second window wall check as is required.

C. Ex. 11 at 8. As can readily be seen, this charge deals with Appellant’s failure to conduct the second window/wall check as opposed to the charge in the SOC, which concerns

You violated the Montgomery County Personnel Regulations, 33-5(e), for failing to perform duties in a competent or acceptable manner by failing to follow established procedures while conducting a window/wall check two times during your shift and by failing to have a second officer with you while performing this duty.

C. Ex. 12 at 5. A fair reading of this awkwardly phrased charge is that Appellant failed to follow procedure when Appellant did not have Cpl. A with Appellant while performing the window/wall check.

Appellant admitted during Appellant's investigatory interview that Appellant and Cpl. A alternated doing the window/wall checks. Jt. Ex. 1 at 4. Thus, this charge is established by a preponderance of the evidence.

However, the MCPR requires that the NODA contain the specific reasons for the disciplinary action. Section 33-7(c)(1)(C). The NODA issued to Appellant clearly states the following: "A list of each violation you have been charged with and the detail to substantiate each violation is as follows: . . ." C. Ex. 11 at 5. The NODA then lists 14 charges, none of which reflect the information contained in the first charge of the SOC as listed above. See C. Ex. 11 at 5-8. Accordingly, the Board finds that the County did not rely on the first charge in the SOC when it issued the NODA, dismissing Appellant from Appellant's employment.

**The County Failed To Prove The Second Charge In The SOC By A Preponderance Of The Evidence.**

The second charge<sup>18</sup> in the SOC states as follows:

You violated Montgomery County Personnel Regulations, 33-5(g) regarding making a false statement or report in the course of your employment when you refused to acknowledge your role in handcuffing an inmate behind their back and leaving the handcuffs on for over seven (7) hours. In addition, after a review of the video tape, it became clear that your actions were *intentional* rather than accidental or an oversight as you professed during the investigation.

C. Ex. 12 at 5.

While it is true that Appellant failed to acknowledge Appellant's role in handcuffing Inmate G when first interviewed by Capt. M, once Appellant was allowed to review the video tape of the incident, Appellant did acknowledge that it was Appellant who left Inmate G in handcuffs. Appellant claims that Appellant simply forgot to unhandcuff Inmate G.

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Appellant's failure to have a second officer assist Appellant in conducting the window/wall check.

<sup>18</sup> A similar rendition of this charge is found in the NODA. C. Ex. 11 at 5.

While acknowledging that this was a mistake and indicating Appellant's regret, Appellant asserts that it was unintentional. If Appellant did not know Appellant had in fact left the inmate in handcuffs, then it follows that Appellant would deny doing so when first interviewed. Because Appellant did admit Appellant's culpability after reviewing the video tape, the Board finds that Appellant did not make a false statement.

The Board also had the opportunity during the hearing to review the video tape and does not agree with the assertion in this charge that it is clear from the video tape that Appellant's actions were in fact intentional as opposed to accidental or an oversight. Accordingly, the Board finds that the County did not prove this charge by a preponderance of the evidence.

**The County Proved The Third Charge In The SOC By A Preponderance Of The Evidence.**

The third charge<sup>19</sup> in the SOC states:

You violated Montgomery County Personnel Regulations, 33-5(h) concerning your negligence and carelessness in performing your duties and in failing to ensure the inmates under your direct care were not placed in harms way by blocking their ability to protect themselves, if needed, or even to perform normal bodily functions in a sanitary and routine manner.

C. Ex. 12 at 5.

Even accepting Appellant's claim that Appellant did not intentionally leave Inmate G in handcuffs, it is clear from the record of evidence that Appellant was negligent in Appellant's duty to Inmate G. Because of this negligence, Inmate G was unable to eat and could not perform normal bodily functions in a sanitary and routine manner. Also, Inmate G would have been unable to protect himself had Inmate G's roommate chosen to assault Inmate G. Accordingly, the Board finds that the County proved this charge by a preponderance of the evidence.

**The County Failed To Prove The Fourth Charge In The SOC By A Preponderance Of The Evidence.**

The fourth charge<sup>20</sup> in the SOC states:

You violated Montgomery County Personnel Regulations, 33-5(q) based on the fact that you and the inmate in question had some words before you handcuffed the inmate. When the inmate asked you to remove the handcuffs, you retaliated by deliberately leaving handcuffs on inmate's wrists. You also were discriminating

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<sup>19</sup> A similar rendition of this charge is found in the NODA. C. Ex. 11 at 5.

<sup>20</sup> A similar rendition of this charge is found in the NODA. C. Ex. 11 at 5.

against the inmate for the exchange of words earlier in the shift just prior to handcuffing the inmate, and after handcuffing the inmate when the inmate's choice of words offended you.

C. Ex. 12 at 5.

In support of this charge, the Warden testified during the hearing that the Warden believed that there was an exchange of words between Appellant and Inmate G:

ASSISTANT COUNTY ATTORNEY:

Warden, you say you looked at the tape, so, you saw eight hours of the shift. You saw an eight hour day?

THE WITNESS:

I looked at – these tapes are based – I pretty much what you saw but I looked at in between times. I wanted to see the total movement, the tenor of the day. Did I look at every second of every eight hours, no. I looked at points where there were movements, there were activities. I scanned time frames that I wanted to know what was occurring. But, sat down and let it play for an eight hour time true,<sup>21</sup> no ma'am, I did not. What I found significant, to further answer the Assistant County Attorney's questions, are a couple of things. One, we did indeed put cuffs on the inmate and we cuffed the inmate in the back. That correlates with the statements and things that you replied.

...

Undoubtedly we left them on. There appears to me based on the correlation of the witness statements and other evidence we will present today a correlation between the inmate – yes, I believe the inmate requested to have those off. I believe something occurred. There were words exchanged

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<sup>21</sup> The Board notes that Appellant sought in discovery to obtain an unedited version of the security tape for B Pod including the entire shift #3 and the first hour of shift #1, when Inmate G was discovered still handcuffed. This discovery request sought information that was clearly relevant to this proceeding. The Board is deeply concerned that the County did not preserve as evidence the entire eight-hour tape of Appellant's shift as well as the portion of the tape for the following shift showing the events leading up to the discovery that Inmate G was still in handcuffs. While the County provided testimony about the limitations of its taping equipment, including the fact that it needs to shut down the security cameras while downloading the video onto a VHS tape, the Board urges the County to obtain technical assistance so as to ensure that relevant evidence is preserved without the need to shut down the MCCF's security cameras. The County is warned that its failure to preserve relevant evidence and produce it in discovery could lead to a negative inference by the Board.

between Appellant and the inmate and Appellant chose not to take those cuffs off and Appellant made a horrible choice.

At that point, when you choose not to take them off, it is no longer security, it's punishment. And that's unacceptable.

BOARD MEMBER:

We will hear that evidence –

THE WITNESS:

I guess you will as the Assistant County Attorney puts the case forward.

BOARD MEMBER:

So the inmate asked for the handcuffs to come off?

THE WITNESS:

Yes.

ASSISTANT COUNTY ATTORNEY:

Well, I do not have a voice tape but I do have the individual that conducted the investigation and people who found inmate subsequently. I do not have the inmate.

THE WITNESS:

You do not have – may I clarify my statement? You do not have an audio. I think we will present a case that will bring to light a reasonable person to judgment that that person, that inmate didn't want those cuffs on. We had a duty to take them off . . . .

H.T. at 40-42. However, contrary to the Warden's assertion, the Board did not hear conclusive evidence that Inmate G asked Appellant to take off the handcuffs.

Other evidence submitted by the County to support this charge were the interviews conducted by Capt. M with the other inmates in the pod, some of whom purportedly heard statements by Inmate G saying Inmate G wanted the cuffs off. However, the notes documenting the interviews with the various inmates do not reveal when Inmate G purportedly made the statements or to whom they were made. Significantly, as the Assistant County Attorney noted, the Assistant County Attorney did not have Inmate G as a witness.

Capt. M also testified concerning the purported exchange between Appellant and Inmate G. Capt. M described the video tape of the incident thusly:

THE WITNESS:

Right. Before they come out they're handcuffed behind their back. Now, here's the handcuffs. All right. Now, Inmate G didn't say that there was a large exchange of words. Inmate G said he made one comment to you in reference to taking these f'ing tight handcuffs off or something like that and you made a comment back to Inmate G in passing that Inmate G was on your time, all right, and Inmate G didn't make it sound like there was a whole lot of verbal so you're not going to be able to tell it without audio.

APPELLANT:

There was not a big verbal exchange, Capt. M, you were mentioning about non-verbal communications as far as gestures and whatnot. Can you show us on this video tape where those gestures and body language can attest the fact there was some kind of a verbal exchange of words or altercation of some kind?

THE WITNESS:

Unfortunately, the way the tape also it bounces a little bit so it doesn't totally pick up complete time movement. Let me go the right and see if we can get it. We'll start right here. Okay. Here you have Appellant. When they bring Inmate G out Appellant's checking Inmate G which Appellant really should be – they should be together. At this point in time you can't tell or can't be certain where they have the exchange at. You're not going to be able to be certain where the exchange was because this is blocked.

It doesn't take a whole lot to see a little bit of conversation that was allegedly said. Appellant's patting Inmate G down. Now, Inmate G goes in the cell. All right. Unfortunately it's pretty much free willy because Inmate G comes back out. Inmate G's still got both hands handcuffed behind Inmate G's back. Appellant goes in front. Closes it up. Goes to the slot. One inmate steps down, Appellant unhandcuffs one inmate.

H.T. at 166-67. Thus, Capt. M acknowledged that there was no way to be certain where the purported exchange between Appellant and Inmate G occurred.

Significantly, Cpl. A, who was present at the time the incident occurred, testified that Cpl. A heard no verbal confrontation between Inmate G and Appellant. H.T. at 208.

Accordingly, based on the record of evidence before the Board, the County has failed to prove this charge by a preponderance of the evidence.

**The County Failed To Prove The Fifth Charge In The SOC By A Preponderance Of The Evidence.**

The fifth charge<sup>22</sup> in the SOC reads:

Under departmental Policy and Procedure 1300-10, Use of Force, you totally violated Section H, 4 by failing to ensure that the inmate was offered water. Under Policy and Procedure 3000-7, Section IV, B, it could be construed that your act of refusal to remove handcuffs from an inmate was an act of brutality, subject to dismissal.

C. Ex. 12 at 5.

In order to sustain this charge, the County needed to prove that Appellant was aware that Appellant had left Inmate G in handcuffs. This the County failed to do. The record of evidence indicates that not a single officer on duty during shift #3, nor the Nurse who visited the pod, was aware that Inmate G was in handcuffs. Accordingly, the Board concludes that the County did not prove this charge.

**Based On The Charge That Has Been Sustained, The Board Finds That The Penalty Of Dismissal Is Not Appropriate.**

The Board notes at the outset that in imposing discipline, the Department Director testified that the Department Director did not consider either Appellant's past work record or prior disciplinary action in determining the penalty in this case. Rather, according to the Director, the case stood on its own merits. H.T. at 112. The Board cautions the Director that, in taking disciplinary action, the Department Director is expected to consider the various factors outlined in MCPR Section 33-2(d) in determining the level of discipline to be taken in a given situation.

Of particular concern to the Board is the fact that the Department Director should have considered the discipline given to Cpl. A, the Senior Floor Officer, in this case. See MCPR, Section 33-2(d)(3). The officer in charge of the DOCR investigation, Capt. M, who has 28 years of experience with DOCR, testified that Cpl. A and Appellant were both **equally** responsible for what happened to Inmate G on October 8, 2007. H.T. at 194. However, the Warden only imposed a 30-day suspension on Cpl. A while the Department Director dismissed Appellant. This level of disparity in discipline between individuals deemed by the investigating officer to be equally guilty simply cannot be sustained.

The Board acknowledges that Appellant's misconduct was serious. Nevertheless, even if the Board had sustained all of the charges leveled against Appellant in the SOC, it would be required to overturn Appellant's dismissal based on fairness. The Board notes Appellant has acknowledged Appellant's culpability and has expressed regret. Therefore,

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<sup>22</sup> Portions of this charge are found in two separate charges in the NODA. C. Ex. 11 at 6.



having only sustained one charge, the Board will grant Appellant's request in Appellant's Appeal and impose a 30-day suspension for Appellant's misconduct. However, the Board will also require Appellant execute a last chance agreement identical to the one signed by Cpl. A.

**ORDER**

Based on the foregoing, the Board hereby orders the following:

1. The Board sustains the appeal, and orders that the County revoke Appellant's dismissal, and make Appellant whole for lost wages and benefits. Appellant shall be reinstated within 10 days from the date of this decision.
2. The Department Director is ordered to issue a 30-day suspension based solely on the charge of Appellant's negligence when Appellant placed Inmate G in harms way by blocking Inmate G's ability to protect himself and to perform normal bodily functions in a sanitary and routine manner. This suspension shall be issued within 10 days of the date of this decision.
3. Appellant, in exchange for receiving a reduced discipline, will execute a last chance agreement identical to the one executed by Cpl. A with the County.

## **CASE NO. 09-10**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of Mr. A, President, Fire Department (FD or Appellee), to dismiss Appellant, effective February 16, 2009. Section 21-16 of the Montgomery County Code provides the services of the Board to the local fire and rescue departments, including FD.<sup>1</sup>

### **FINDINGS OF FACT**

FD is a volunteer corporation, providing fire and rescue services for its geographical location. FD is governed by a Board of Directors, headed by a President. Currently, Mr. A is serving his second term as President. Appellant has worked for FD since 1999. In 2001, Appellant became FD's Administrative Officer. As the Administrative Officer, Appellant was responsible for various administrative functions for all of FD's Stations. Appellant also served as the Purchasing Officer for FD and was responsible for paying vendors and maintaining FD's financial and banking records.

At the start of his second term in February 2008, Mr. A decided to devote his attention to internal FD matters, including infrastructure and improved financial reporting.<sup>2</sup> Hearing Transcript for June 1, 2009 (H.T.) at 29. He began by creating a Strategic Planning Committee, to be led by Director B. He also added to the responsibilities of the Facilities Committee, chaired by Mr. C, and the Administration, Management and Finance Committee, co-chaired by Treasurer D and Director E.

These structural changes in the Committees and their functions directly affected Appellant's responsibilities as Administrative Officer. Previously, Appellant had spent a significant amount of Appellant's time overseeing various projects at all of the FD Stations, which required extensive contacts with contractors and MCFRS personnel. This role would now be assumed by Mr. C. Mr. A had discussed with Appellant the changes he anticipated making to Appellant's responsibilities in December 2007 and indicated to Appellant that he

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<sup>1</sup> Appellant, as an employee of FD, is subject to the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR). MCFRCPR Section 30-2 provides that a merit system employee of a local fire and rescue department has the right to appeal a dismissal to the Board.

<sup>2</sup> Mr. A testified that during his first term from 2006 to January 2008 he focused on external matters as FD had poor relationships with the Montgomery County Fire and Rescue Service (MCFRS), and other organizations. Therefore, he worked on rebuilding these relationships.

wanted Appellant to focus on the accounting,<sup>3</sup> purchasing and administrative areas. In addition, Appellant would continue with facilities' repairs.

In addition to the Committees' structural changes, Mr. A indicated he wanted to institute a new process for on-line purchase requisitions. The goal of this new system would be to track purchase requests and approval.<sup>4</sup> Appellant was given the assignment of working on development of FD's website. H.T. at 191. Moreover, Mr. A determined that he wanted to improve internal security by transferring all of FD's internal data from a laptop used by Appellant, which Appellant had been bringing home with Appellant, to a desktop computer. Finally, Mr. A directed that the keys to Appellant's office be provided to Mr. C, Director E, and Mr. D.

According to the testimony elicited at the hearing from several Directors and the President,<sup>5</sup> Appellant did not readily adapt to the changes initiated by Mr. A and in some cases stymied Mr. A's initiatives. The various issues with Appellant's performance are detailed below.

#### Appellant's 2007 Rating

In April 2008, Appellant had received Appellant's performance evaluation for 2007. Appellant received an overall rating of 3.9 on a 5 point scale.<sup>6</sup> Only one Director was

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<sup>3</sup> Mr. A conveyed to Appellant that he wanted all of FD's accounting and finance records to be on a QuickBook system. H.T. at 254. While Appellant had been using QuickBooks for a while, Appellant had learned it through trial and error. H.T. at 208.

The County used QuickBook Enterprise for its accounting system. H.T. at 210. The County told the local fire corporations that they needed to use QuickBook Enterprise and gave the corporations three days to learn the program and then have it downloaded. H.T. at 211.

<sup>4</sup> Mr. A testified that the FD Board had received complaints from the station commanders that when they ordered things they had trouble figuring out why the orders were being held up. See, e.g., Appellee's Ex. 11. Mr. A hoped that by developing this on-line system, the FD Board could determine where the holdups were and fix them. H.T. at 50.

<sup>5</sup> The Board had the opportunity to assess the credibility of the various witnesses during the hearing. Based on his demeanor, memory, perception, narration and sincerity, the Board found Mr. A to be a very credible witness. See Bailey v. U.S., 54 Fed. Cl. 459 (2002).

The Board also had the opportunity to assess Appellant's credibility during the hearing. The Board found that Appellant was evasive and less than forthcoming during Appellant's testimony and that some of Appellant's testimony contradicted other parts of Appellant's testimony.

<sup>6</sup> Although Appellant provided the Board with forty-eight proposed exhibits in Appellant's Prehearing Submission, none of the exhibits, including Appellant's evaluation

dissatisfied with Appellant's performance for 2007, having rated Appellant 1.7. Thus, for 2007, Appellant's performance was deemed to be very close to Excellent. Appellee's Ex. 3 at 2. Mr. A indicated that he worked fairly closely with Appellant during his first term as President and, while there were issues, he considered Appellant a valued employee.

Although giving Appellant a very good 2007 rating,<sup>7</sup> Mr. A testified that there had been a history with Appellant of complaints from vendors. Mr. A recalled that when he was Treasurer for FD in 2004-2006, there had been complaints. In 2007, there were again complaints about late payments.<sup>8</sup> To deal with this issue, Mr. A had asked Mr. R, another Director, to come into the office on a daily basis and open the mail so that if vendors were complaining about late payments, these complaints could be addressed. H.T. at 28.

### Facilities Issues

According to Mr. C, one of the projects he assumed upon becoming Chair of the Facilities Committee was the station house watch project. While the first station had been completed, another station had been going on for months and months. Mr. C testified that with regard to the delay at the other station, he discovered there was a common theme with the vendors – Appellant was not communicating with the vendors, there was a lack of coordination with no one knowing what was going on and what had to be staged next and, therefore, the job languished. H.T. at 141.

Another of the facilities projects transferred from Appellant to Mr. C was the station signs project. The contract clearly stated that FD needed a 15 amp dedicated circuit for each of the signs. As Purchasing Officer, Appellant was responsible for communicating with the bidders the specifications for the job. However, when the bids came in for the project, Mr. C realized that they were too low given what needed to be done. Accordingly, Mr. C repeatedly questioned Appellant about what information had been conveyed to the bidders. H.T. at 143. Appellant repeatedly assured Mr. C that Appellant had accurately conveyed the specifications for the job. Id.

Nevertheless, when the first sign was scheduled to be hooked up, it was discovered that the electrical work had not been completed. Appellant got the vendor out to do the hook up but when Mr. C looked at what had been done, he concluded that all the vendor did was

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for 2007, were moved into evidence during the hearing. However, there was testimony regarding Appellant's overall 3.9 rating during the hearing, and one of Appellee's exhibits, which was admitted during the hearing, references the 3.9 rating. See Appellee's Exhibit (Ex.) 3 at 1.

<sup>7</sup> Mr. A testified that Appellant did a "tremendous" job during the rating period with regard to an incident involving a broken sewer pipe at one of FD's stations. H.T. at 98.

<sup>8</sup> Mr. A reported that one vendor, the hardware store, cut off service to FD in early 2007 because of late payments. H.T. at 96.

take the electrical wire from the old sign to the new sign, which was not in accordance with the contract. He brought this to Appellant's attention and Appellant insisted that the vendor had put in a dedicated circuit. However, after the first sign was hooked up, when the microwave in the station was turned on, the sign blew up. H.T. at 144.

Around the same time, the second sign was hooked up at another station. A different electrical company did the hookup as Appellant was not satisfied with the vendor for the first sign. However, every time it rained, the station's sign blew. H.T. at 145. Appellant, when questioned about this, insisted that the electrician had in fact put in a dedicated circuit. Mr. C, along with another member of the Facilities Committee, checked the sign at the station and reported there was no dedicated circuit. When Mr. C called Appellant, Appellant again assured Mr. C that the sign had a dedicated circuit. It was ultimately necessary to hire electrical contractors to come back in and do the electrical work correctly. H.T. at 146.

Another facet of the station signs project was obtaining permits. FD had received permits for all the signs from the County before it began the sign work. However, at some point, FD received a violation notice with regard to the sign at one of its stations which was deemed by an inspector to be too close to the road. At the same time, the issue was raised as to whether a permit had been obtained for the sign. Mr. C knew that the permit had been obtained and asked Appellant for it. Appellant indicated Appellant didn't have it. H.T. at 147. Mr. C asked Appellant to recheck Appellant's files. Appellant subsequently informed Mr. C that Appellant had done a search and could not locate the permit. Mr. C left his job to come to Appellant's office, asked Appellant to pull the file on the station signs and together with Appellant went through the file page by page looking for the permit. The permit was in fact in the file. H.T. at 147-48.

An issue arose regarding the landscaping for all FD's stations. Captains from each of the Stations had asked the FD Board to do something about the matter. Appellant was asked over and over to do something to get the landscaping done but failed to follow through. Accordingly, Mr. A finally asked Mr. C to take over the project. A request for proposals (RFP) was issued, bids were received, and a vendor selected. Appellant then indicated to Mr. C that Appellant had made arrangements with a Montgomery County Firefighter, Mr. F, to do the work. H.T. at 149-50. Mr. C reminded Appellant that as a policy the Board did not want Firefighters doing the work. Appellant persisted that Appellant had made a commitment to the person and would appreciate being allowed to honor it with regard to this one station. Mr. C agreed.

Appellant then asked to be allowed to deal with the landscaping for another station. Mr. C agreed; however, the landscaping did not get done. After several months without the work being accomplished, Mr. C finally called the vendor, Landscaper, which he had previously selected and had them do the work. H.T. at 150. Landscaper then submitted its bill to Mr. C, who approved it and sent it to both the Treasurer and Appellant for payment. Subsequently, Landscaper called Mr. C to complain that it had not been paid. Mr. C called Appellant to ask why the vendor had not been paid and Appellant told Mr. C the vendor had been paid. H.T. at 150-51. The vendor subsequently called Mr. C again a few weeks later to complain about lack of payment. When Mr. C contacted Appellant about the matter,

Appellant told him Appellant had not gotten the check signed yet. Id. at 151. Mr. C then contacted Mr. A to ensure that the check would be issued immediately.

Mr. C, in his role as Facilities Chair, was to head up the HVAC replacement system, a project costing \$250,000. H.T. at 162. However, there were meetings on this project which Appellant never informed Mr. C about; instead, Mr. D would ask him after the fact why Mr. C had not attended. Id.

### Financial Issues

Mr. D, as Treasurer, established new reporting formats and timelines for reporting on private, County tax and State AMOSS funds.<sup>9</sup> As previously noted, the County expected its tax funds to be accounted for through the use of QuickBook Enterprise. FD used the accounting system QuickBook Pro for its private funds. H.T. at 120, 231. Appellant was given instructions to have everything accounted for in both of these accounting systems and to have it work to produce reports. H.T. at 120. Appellant was expected to furnish these reports to Mr. D in a timely manner.

Mr. D testified that at the time he began working with Appellant, he had been impressed with Appellant's work and respected Appellant. However, starting in April 2008, he testified his work relationship with Appellant changed. Specifically, the FD Board of Directors wanted more reports on financial matters and he needed Appellant to provide him with this information. Appellant responded by slowly getting him the information or not getting him the information, or not getting him correct information. H.T. at 119. He reported getting some information five minutes before a FD Board meeting which was too late, as he could not be prepared to respond to questions from FD Board members. Therefore, Mr. D moved Appellant's deadline for generating a report back to the Friday before the following Thursday's FD Board meeting. Even then, Appellant had a lot of excuses and when Mr. D followed up with questions on the report, it would be late coming back to him. H.T. at 124. According to Mr. D, it took Appellant an inordinate amount of time to catch on to what was wanted in the way of reports. H.T. at 123.

Mr. D also testified about an incident involving a check written when there were insufficient funds to cover it. According to Appellant, this incident occurred when Appellant was scheduled to go out of town. Prior to departing, Appellant prepared a check for ABC, one of the contractors to FD, for \$4500. Under FD procedures, all checks require two signatures from the FD Board's Executive Committee. Appellant obtained the needed signatures. However, Appellant recognized at the time Appellant obtained the two signatures by members of the FD Board of Directors that there were insufficient funds in the FD checking account to cover the check. H.T. at 299. Appellant explained that there were sufficient funds in FD's savings account which needed to be transferred to cover the check. Id. Appellant testified that Appellant asked Mr. C to give Appellant a date to be put on the check so Appellant would know when the check was going to be cashed and could ensure sufficient funds were available.

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<sup>9</sup> Mr. A testified that State AMOSS funds were State grants for specific projects.

According to Appellant, Mr. C did not respond to Appellant before Appellant left. Therefore, Appellant did not date the check, but did put it in an envelope with the Treasurer's name on the outside of the envelope. Appellant did so in order to make it available to the Treasurer. H.T. at 290. While Appellant was gone, the Treasurer opened the envelope, noted the signatures and gave the check to ABC. When ABC went to cash the check, it bounced, due to lack of sufficient funds.

As Appellant's performance had deteriorated so much, Mr. D gave Appellant a notice of unsatisfactory performance in the early summer of 2008, which dealt with among other things, the \$4500 check to ABC. Appellant, on the advice of counsel, refused to sign the notice as Mr. D was not Appellant's supervisor.<sup>10</sup> However, Appellant acknowledged that Mr. D did discuss with Appellant the incidents cited in the notice. H.T. at 265.

### The Continuing Issue Of Late Payments To Vendors

In an email to Mr. A, dated May 5, 2008, Appellee's Ex. 17, Ms. G from the accounting department of Fire Equipment, requested that FD pay two outstanding invoices dated December 31, 2007. Ms. G indicated that several letters had been sent. Mr. A testified that Fire Equipment is an extremely important vendor that assists FD in maintaining its fire apparatus. He asked Appellant what the cause of the delay was and did not get an adequate response. H.T. at 44. Appellant could not recall the specifics about the delay with regard to this particular vendor but did note that there were issues about receipts<sup>11</sup> and some questions about payments. H.T. at 259.

Also on May 5, 2008, FD received an overdue notice for payment for FD's website. Appellee's Ex. 13. Mr. A asked Appellant why it had not been paid. Appellant told him that it had been missed and had not been properly filed. H.T. at 43.

According to Mr. A, Chief H, the volunteer chief of FD, asked Mr. A to ensure that his invoices got paid as there was a chronic history of them not being paid. See, e.g., Appellee's Ex. 10. Mr. A spoke with Appellant about ensuring that Chief H's invoices were paid in a timely manner. H.T. at 45.

Mr. A also noted that there was a delay in paying Oxygen Company, which supplies oxygen for the fire apparatus to use for patients or staff. This vendor's credit department sent an email in October 2008, noting that its invoices for April, June, July and August 2008 were still open and had not been paid. Appellee's Ex. 18. According to Mr. A, Appellant had no explanation for the delays. H.T. at 54. Appellant stated that the reason the account was delinquent was due to a combination of things. Appellant sent the vendor two checks for the

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<sup>10</sup> Mr. A testified that he was aware of and collaborated with Mr. D on the notice Mr. D gave to Appellant. H.T. at 57.

<sup>11</sup> Mr. A testified that Appellant was allowed to pay bills even absent a receipt. If Appellant had an issue about paying a bill absent a receipt, Appellant could and did come to Mr. A for guidance. H.T. at 93, 95-96.

same thing. H.T. at 260. Also Appellant didn't get all the receipts.

Significantly, Appellant's own witness, Chief I, testified that there was no consistency to how vendors were paid by Appellant or when they were paid. H.T. at 324. He would let Appellant know that contractors' bills were not getting paid because failure to pay them resulted in FD not getting services or pieces of equipment when needed prospectively. Even after notifying Appellant, Appellant did not always resolve the matter. Consequently, there would be concerns months later that a bill had not been paid and, therefore, FD was having difficulty getting the things that were needed to accomplish its mission. Id. at 323. Chief I summed up Appellant's approach as being "scattered" in terms of which situations were resolved in a timely manner. Id. at 324.

### Computer and Website Issues

Mr. A testified that in May 2008 in a meeting with Appellant, himself and Mr. D, he instructed Appellant to purchase a desktop computer and transfer FD's files from the laptop to the desktop. H.T. at 46. However, the desktop was not purchased until September of 2008. Id. at 47. The delay in purchasing the desktop was due to the fact that Appellant informed FD's computer consultant, Mr. J, that the desktop was to function as a backup to the laptop and would not be the primary computer. Mr. A had to intervene and instruct Appellant that the desktop was to be the primary computer, with the laptop as a back up.

Mr. A also testified that he had instructed Appellant that the FD Board wanted to move forward with the on-line purchase system. FD hired a consulting firm to provide the support for the website. However, there were repeated delays getting the system up and running. Appellant informed Mr. A that the delays were related to the computer consultant and the web consultant. As Mr. A was later to discover, after he sat down with the computer consultant, it was Appellant who had delayed the start dates and delayed the consultant from getting the system done. H.T. at 51.

### The Audit

Mr. A testified that FD's fiscal year goes from July 1 of the preceding year to June 30<sup>th</sup> of the next year. Mr. A told Appellant that he wanted FD's fiscal 2008 audit to be completed by October 2008, as he wanted to be one of the first of the nineteen local fire corporations to be done. Appellant repeatedly assured Mr. A in the summer and fall of 2008 that Appellant was doing everything Appellant could to get the audit completed. H.T. at 108.

The audit was scheduled for October 2008; however, it was delayed. Appellant informed Mr. A that the auditors had delayed it as they were not ready. H.T. at 49. The audit was moved to November, and then December. It was finally done in January 2009. Mr. A subsequently discussed the delay with the auditors and the auditors indicated that they were prepared to do it in October 2008 but Appellant had delayed it saying Appellant wasn't ready. Id. This was the reason the audit kept being pushed back.



## Complaints About Mr. C

In March 2008, Appellant complained to Mr. A concerning Mr. C. Specifically, Appellant complained about his rude and disrespectful conduct towards Appellant.<sup>12</sup> H.T. at 52. Mr. A met with Mr. C to discuss this complaint. Mr. A asked Mr. C to work collaboratively with Appellant. Id. Mr. A also asked Mr. C to copy him on all of Mr. C's emails to Appellant. However, Mr. A also indicated to Mr. C that if he needed something done by Appellant he should ask for it.

In April 2008, Mr. A had a meeting with Appellant, Mr. C, and Mr. D. H.T. at 74. Mr. A described it as a contentious meeting as Mr. C was asking Appellant for certain things and wasn't getting them. Therefore, in the meeting, Mr. C said if Appellant was reporting to him he would fire Appellant because he wasn't getting what he needed to do his job. Id. Mr. A responded by asking Mr. C could he work with Appellant and Mr. C responded he could. Id.

In May 2008, Appellant again complained to Mr. A about Mr. C. H.T. at 106. At this point, Mr. C became concerned that he wasn't getting the assistance from Appellant he needed, and he agreed with Mr. A's suggestion that he copy Mr. A on all emails where there were deficiencies in Appellant's performance. See, e.g., Appellee's Ex. 15; H.T. at 106.

Appellant complained again about Mr. C to Mr. A and Mr. L, another FD Director, in July of 2008. H.T. 75, 106. Appellant specifically told them that Mr. C was creating a hostile work environment. Both Mr. A and Mr. L responded it was not a hostile work environment simply because Mr. C was demanding and making requests. H.T. at 75. Rather, Mr. C expected things to be done in a timely fashion. Mr. A and Mr. L conveyed to both Mr. C and Mr. D what had occurred at the meeting with Appellant. However, Mr. A also conveyed that he expected them to continue to make requests to Appellant so that FD could build its infrastructure.

Because of the difficulty Mr. C was having in getting Appellant to respond to him, Mr. D decided to attempt to mediate. Specifically, when Mr. C would not hear back from Appellant about questions he had sent Appellant, Mr. D would follow-up with Appellant to ascertain if Appellant had answered Mr. C's questions or done what he had requested. H.T. at 122; see, e.g., Appellee's Ex. 14. Eventually, Mr. D became frustrated with Appellant. H.T. at 122.

Appellant again raised a complaint about Mr. C on November 2, 2008, a Sunday, via an email to Mr. A. H.T. at 106, 232. Mr. A responded by asking to meet with Appellant the next morning. H.T. at 232. At that meeting, however, instead of addressing Appellant's

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<sup>12</sup> Significantly, Appellant's own witness, Ms. K, indicated that she had no problems working with Mr. C. H.T. at 312.

complaint against Mr. C,<sup>13</sup> Mr. A discussed Appellant's poor performance.

#### Appellant's September 2008 Rating and Work Improvement Plan

Between January 1, 2008 and September 2008, Mr. A indicated that Appellant displayed a series of shortcomings in terms of adequately producing financial reports. In addition, Mr. C had been trying to move facilities projects forward and was being stymied in some cases. Accordingly, Mr. A decided to ask the various FD Board Directors to provide input into Appellant's annual evaluation in September 2008. Appellant's performance was rated by some of the Directors. Appellee's Ex. 3 at 2. Appellant's average rating decreased from 3.9 to 2.3. Mr. A concluded that the FD Board had lost confidence in Appellant and he needed to put Appellant on a Work Improvement Plan. Id.

Mr. C sent an email to Mr. A indicating that Appellant's performance should be measured in terms of Appellant's "egregious" errors. Appellee's Ex. 2. One error cited was Appellant's failure to follow FD's policies and procedures, when Appellant ordered an emergency generator without approval. Mr. A explained that Appellant had ordered the generator for the station without informing either Mr. C or Mr. A, and without FD Board approval. H.T. at 56. The generator was a significant expenditure.

Mr. C also noted that Appellant had failed to report honestly to the FD Board, when Appellant informed the FD Board Appellant had submitted a bill to the County and, in fact, had not. According to Mr. A, this occurred when Appellant told the FD Board that a bill for the emergency repair at a station had been submitted but was not. H.T. at 56.

As previously noted, Mr. A set up a meeting with Appellant for November 3, 2008. Mr. D and Director E were also at the meeting. Appellant was provided Appellant's 2008 performance evaluation and a Work Improvement Plan and Mr. A went through both documents with Appellant. Appellant was shocked at the performance evaluation and Work Improvement Plan. H.T. at 237. According to Mr. A, Appellant asked him if this was a way

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<sup>13</sup> According to Appellant, when Appellant tried to raise the issue regarding Mr. C with Mr. A on November 3, Mr. A indicated he wanted to talk with Appellant about something else and then provided Appellant with Appellant's evaluation and work plan. H.T. at 232.

Thereafter, on or about November 10, 2008, Appellant contacted Ms. M to initiate an equal employment opportunity (EEO) complaint. H.T. at 276. However, Ms. M was unable to meet with Appellant until December 13, 2008. As part of the complaint, Appellant provided Ms. M with the information in Appellant's November 2 email to Mr. A. H.T. at 277.

Appellant met with Mr. N, who was designated to do the investigation into Appellant's EEO complaint on February 10, 2009. H.T. at 276. However, it was not until FD received a letter on February 27, 2009 about Mr. N's investigation into Appellant's EEO allegations, that it became aware of Appellant's complaint. H.T. at 82-84.

to get rid of Appellant. H.T. at 61. Mr. A assured Appellant it was not; it was being done to improve Appellant's performance. Specifically, Mr. A told Appellant FD was bringing in Ms. O, a person with QuickBooks accounting experience, to teach Appellant the accounting and reporting that FD needed Appellant to do. H.T. at 61, 70.

Appellant's Work Improvement Plan contained four expectations. Appellee's Ex. 4. The first expectation required Appellant to change Appellant's work hours to 9:00 a.m. to 5:00 p.m. Mr. A explained this change would allow Appellant to be at FD during the hours when most vendors are available. H.T. at 65. In addition, Appellant, as part of this expectation, was required to respond to messages left at the station voice mail within 24 hours of receipt of the call.

The second expectation required Appellant to support the Treasurer and Chairs of the Facilities and AMF Committees. Appellant was expected to meet the requirements for timely production and formatting of financial information reports for the Treasurer and AMF Chair on County tax, private and AMOSS funds. Appellant was also required to implement the computer and accounting system controls and satisfactorily complete various audits. Appellant was advised that Appellant was required to meet the Facilities' Chair's requirements for timely availability of information and timely processing of related paperwork. Appellant was instructed that Appellant needed to ensure full implementation of the on-line purchase requisition system.

Appellant's third expectation was to improve the neatness of the administrative offices at the station, which were cluttered. As part of this expectation, Appellant was required to fully implement the requirement that keys be made available for the Treasurer and Committee Chairs.

Appellant's fourth expectation dealt with Appellant's continued use of the laptop computer. Appellant was again informed<sup>14</sup> that it was unacceptable to have FD's data leaving everyday on Appellant's laptop and again instructed to cease using the laptop or taking files home with out approval by the Treasurer. Appellant was reminded that Appellant had been requested in August to change Appellant's email address from a personal one to a FD email address. Appellant was told to implement these requirements by November 24, 2008. Id.

As part of Appellant's Work Improvement Plan, Mr. A held biweekly work sessions with Appellant. Mr. D testified that while he thought this was an excellent idea, things actually got worse. At the first work session, Mr. A discussed the need for a private funds report. He actually drew up a spread sheet, indicating what the columns should contain and what the rows should indicate. H.T. at 130. However, the report never was developed.

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<sup>14</sup> Mr. A noted in the Work Improvement Plan that in August he and the Treasurer had indicated to Appellant it was unacceptable to have FD's data leaving everyday on the laptop computer. See Appellee's Ex. 4 at 2-3. At that time, Appellant had been requested to stop using the laptop or taking any files home unless approved by the Treasurer.

Ms. O started on November 11, 2008. However, Appellant failed to give Ms. O full access to the accounting records or the laptop. Instead Ms. O was given other duties, such as filling out donation receipt cards or researching the lease of a new copier. Id. at 71, 230. Ms. O was so frustrated by the work Appellant was giving her that Ms. O quit. Id. at 131. Mr. D had to call Ms. O and get her to agree to come back. Id.

#### Appellant's Placement on Administrative Leave

Mr. A testified that there were three precipitating events which led to placing Appellant on administrative leave on November 26, 2007. The first was Appellant's failure to give Ms. O access to the accounting records Ms. O needed to do her job. H.T. at 71. Appellant was not giving Ms. O total access to the laptop. H.T. at 71, 131. FD had brought on Ms. O to help Appellant improve Appellant's QuickBook skills but Ms. O was being stymied. H.T. at 112.

Secondly, Mr. A had instructed Appellant not to deal with Mr. P, an auditor who supported FD. Specifically, Mr. A wanted to deal directly with Mr. P as Mr. A was not getting the reports he wanted. Appellant was telling Mr. A that Mr. P disagreed with regard to whether the report could be done. Mr. A believed that something was being lost in the discussions between Appellant and Mr. P and so instructed Appellant not to deal with Mr. P.<sup>15</sup> H.T. at 71-72. While Mr. A was out of the country, he received a call from Mr. P about certain accounting formats FD was using. During the conversation with Mr. P, it became clear to Mr. A that Appellant had spoken with Mr. P despite being ordered not to do so. H.T. at 72.

Finally, there was the issue of passwords. Mr. D called Mr. A while he was out of the country to report that there was a problem with passwords and that FD wasn't being given the passwords to the computers and the AOL account. H.T. at 72. Mr. D testified that FD's computer person, Mr. J, who was setting up the desktop, called to report a problem with the password. When Mr. J tried to access the laptop, the password given to him did not work, despite his trying several times. H.T. at 131-32. Appellant then took the laptop computer, typed in a password and gained entry into the laptop. Mr. D stated that this "was just a little too fantastic for us." H.T. at 132.

Mr. A testified that he never got the password to access FD's email in "ABCDE@AOL".<sup>16</sup> Appellant's testimony regarding the AOL password was contradictory.

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<sup>15</sup> Appellant testified that Appellant believed Mr. A only wanted Appellant not to talk to Mr. P about the private funds statement which there was trouble balancing. Appellant acknowledged speaking with Mr. P about other issues. H.T. at 222. Appellant indicated that this was a misunderstanding.

<sup>16</sup> This email address was Appellant's. Appellant testified that Appellant set the AOL account up as a personal account. H.T. at 269. FD began paying for the account and Appellant allowed them to send Appellant emails on the account. Id. Appellant repeatedly

Appellant acknowledged at first failing to provide Appellant's AOL password but later denied being specifically asked to provide the AOL account password. Cf. H.T. at 241-42, 244 (failed to provide AOL password) with H.T. at 270, 289 (never asked to provide AOL password).

Because of these three issues with Appellant, and the fact that Mr. A was out of the country, Mr. A made the decision to put Appellant on administrative paid leave until he could return and figure out what was going on. Mr. D notified Appellant on November 26, 2008 that Appellant was being placed on administrative leave. According to Mr. A, it took some time to investigate what was going on; it took six to eight weeks to straighten out the accounting issues. H.T. at 81, 82.

After Appellant was placed on administrative leave, Director B called Appellant several times on Appellant's cell phone<sup>17</sup> to obtain FD's keys from Appellant, as well as the corporate credit cards. He left messages on Appellant's cell phone which Appellant never returned. H.T. at 135-36. As of the date of the hearing, FD had not received the credit cards or the keys. H.T. at 74, 135.

Appellant's testimony regarding the keys was confusing. Appellant stated Appellant never received a call about the mailbox key and then stated Appellant might have had a conversation with Director B about the post office key.<sup>18</sup> H.T. at 273-74. Appellant stated at the hearing Appellant believed Appellant still had keys that belonged to FD. H.T. at 249. Appellant also testified that the two FD credit cards had expired. Id. at 250. Appellant denied receiving calls from FD about the credit cards, or anything else. H.T. at 273 -74.

Lacking the keys to the closet in Appellant's office, Mr. A testified that FD hired a locksmith to break the lock and replace all the locks. H.T. at 77. Upon gaining access to the closet, several thermal imagers<sup>19</sup> were discovered which belonged to one of the stations. The station had requested they be repaired, and Appellant, when previously questioned about the status of the imagers on several occasions, had insisted that the imagers had been sent to the vendor for repair.

FD also made additional discoveries about problems while Appellant was on administrative leave. The bank signature cards were discovered to be six years old, with signatures from individuals no longer functioning as officers. H.T. at 77.

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asserted that the account was Appellant's personal account, even after FD began paying for it. H.T. at 269, 287, 288.

<sup>17</sup> FD paid for Appellant's cell phone and continued to do so while Appellant was on administrative leave.

<sup>18</sup> Mr. A testified that FD had to pay the post office to drill the post office box in order to get access to the mail. H.T. at 73.

<sup>19</sup> A thermal imager allows a Firefighter, when entering a building fire, to determine if there is a victim lying in the building.

A significant number of fund-raising checks were discovered in Appellant's desk, which had not been deposited. Mr. A estimated they totaled \$1,000. H.T. at 78.

Appellant acknowledged that Appellant created some accounting problems. H.T. at 220. For example, checks were misprinted and so there was a series of voided checks. H.T. at 221. The fact that the checks printed out on regular paper was due to the fact that Appellant failed to put the checks in the printer. H.T. at 270.

Director B was asked to help assist with some of the accounting and clean up issues in Appellant's office in late November 2008. Mr. A forwarded an email to Director B from Chief I. Chief I indicated that ALS supplies were in dire need, and an engine with a medic would have to be put out of service because of low supplies. H.T. at 134-35. Director B immediately ordered the supplies which came within two to three days. Director B discovered that the supplies had originally been requested by Lieutenant Q in July 2008 and was unable to determine why the supplies had not been ordered by Appellant.

An audit was conducted of FD's cash management. It was discovered that the tax fund account was overdrawn by \$41,168 on June 30, 2008. Appellee's Ex. 7 at 2; H.T. at 79. FD, in response to the audit, noted that Appellant had been instructed to write all checks using QuickBooks so as to preclude writing a check that would overdraw an account. Id. at 79-80. However, Appellant failed to do so.

As part of the audit which occurred after Appellant was placed on administrative leave, it was also discovered that certain fuel and apparatus expenses which had to be submitted to the County by a specific date in order to receive reimbursement were not submitted. H.T. at 80. This resulted in FD not receiving reimbursement for \$12,000 of expenses. Id.

The auditors noted that when they arrived onsite in December 2008, many checks, invoices, supporting documents, and bank statements were missing. Appellee's Ex. 7 at 3. The auditors indicated that in many instances the check numbers in QuickBooks did not match the actual check number attached to the invoice. Id. Mr. A testified that he found the same exact entry in three different accounts. H.T. at 81.

### Appellant's Termination

On February 9, 2009, Mr. A issued a letter to Appellant, terminating Appellant's employment for cause. Appellee's Ex. 6. Specifically, he listed the following charges: 1) failure to perform duties in a competent or acceptable manner; 2) insubordination based on failure to obey lawful directions given to you by a supervisor; 3) violation of established policies and procedures; 4) negligence and carelessness in the performance of duties; and 5) knowingly making false statements and reports. Appellant's termination was effective February 16, 2009.

This appeal followed.

## POSITIONS OF THE PARTIES

### Fire Department:

- There is no question that Appellant was a valued employee for a number of years; however, there came a time when Appellant's duties were refocused and deficiencies came to light.
- An audit completed for fiscal year 2008 indicated there were significant problems with the accounting procedures and work being done by Appellant.
- When Appellant complained about Mr. C, Mr. A had meetings with Mr. C to discuss Appellant's concerns.
- There was a significant decline in Appellant's performance from being rated almost Excellent in 2007 to being rated near Lacking in September 2008.
- When FD gave Appellant Appellant's performance evaluation in early November 2008, along with a Work Improvement Plan, it was committed to assisting Appellant in improving Appellant's performance.
- However, due to subsequent concerns over how Appellant was treating the individual brought in to assist Appellant in improving Appellant's accounting skills, Appellant's failure to cooperate with trying to change the computer system, and Appellant disobeying an order not to contact Mr. P, Appellant was placed on administrative leave.
- After Appellant was placed on administrative leave, FD moved forward to prepare for the yearly audit. During the process, significant irregularities were discovered and a decision was made to terminate Appellant.
- FD has a fiduciary responsibility to the County and the communities it serves and could not meet that responsibility based on Appellant's accounting practices.
- Appellant's placement on administrative leave and subsequent termination were not the result of Appellant's filing an EEO claim against Mr. C.

### Appellant:

- Appellant worked for eight years at FD and prized Appellant's job.
- The needs of FD when Appellant first began Appellant's job were very different from what the needs became over the last year.
- Appellant received an evaluation in April 2008 that was very positive.
- Appellant knew Appellant needed to upgrade Appellant's skills and asked to take some courses in September 2008.
- Appellant found Mr. C's rude treatment of Appellant unacceptable. Appellant repeatedly complained to Mr. A about it.
- When Mr. A put Appellant on the Work Improvement Plan, he told Appellant he would give Appellant 45 days to improve. However, before Appellant could really do anything, Appellant was placed on administrative leave and then terminated.
- Up until the date of the hearing, Appellant was never told in great detail what was so wrong with Appellant's performance.
- Termination is too severe a penalty given Appellant's years of service; there was no

- progressive discipline.
- Appellant was placed on administrative leave and then terminated after Appellant filed an EEO claim with the County.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part,

...

- (d) **Burden of going forward with the evidence.** The charging party shall have the burden of going forward with the production of evidence at the hearing before the hearing authority.

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-10. Decisions**, which states in applicable part,

...

- (b) **Evidence required.** All recommendations and/or decisions of the hearing authority shall be based upon and supported by a preponderance of the evidence of record.

**MCFRCPR (originally adopted 08/25/1988; reprinted 03/10/97), Section 28, Disciplinary Actions**, which states in applicable part:

Section 28-1. Policy. A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. Except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary actions must be progressive in severity. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors.

Section 28-2. Causes for disciplinary action. The following, while not all-inclusive, may be cause for disciplinary action:

...

- (e) Failure to perform duties in a competent or acceptable manner;

...

- (g) Insubordinate behavior by failure to obey lawful directions given by a supervisor;



- (h) Violation of an established policy or procedure;
- (i) Negligence or carelessness in the performance of duties;
- ...
- (p) knowingly making false statements or reports in the course of employment . . . .

**ISSUES**

1. Has FD proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of a dismissal excessive?

**ANALYSIS AND CONCLUSIONS**

**The Board Finds That There Were Four Charges Adequately Set Forth In Appellant’s Notice Of Termination.**

FD, as the charging party, bears the burden of proving its charges by a preponderance of the evidence. FD based Appellant’s termination on five charges: 1) failure to perform Appellant’s duties in a competent or acceptable manner; 2) insubordination based on Appellant’s failure to obey lawful directions given Appellant by a supervisor; 3) violation of established policies and procedures; 4) negligence and carelessness in the performance of Appellant’s duties; and 5) knowingly making false statements and reports during Appellant’s employment.

The Board has previously ruled that a charge of failure to perform duties in a competent or acceptable manner is nearly identical to the charge of negligence and carelessness in the performance of duties and will treat the two charges as one. See MSPB Case No. 07-10 (2007); MSPB Case 09-04 (2008). Accordingly, the Board has determined that there are four basic charges in this case.

**The Board Finds That FD Proved By A Preponderance Of The Evidence That Appellant Was Negligent And Careless In The Performance Of Appellant’s Duties.**

The record of evidence is replete with examples that clearly establish Appellant was negligent and careless in the performance of Appellant’s duties. Appellant wrote a check for ABC, knowing that there were insufficient funds in FD’s checking account to cover the check, and obtained two signatures as required from FD Board members. Although Appellant didn’t date it, Appellant put the check in an envelope with the Treasurer’s name on the outside of the envelope and then left on leave. Significantly, Appellant left no note in the envelope telling the Treasurer not to disburse the check as there were insufficient funds.

Appellant acknowledged that Appellant wrote two checks to the Oxygen Company for the same thing. Appellant failed to update the bank signature cards, which were discovered to be six years old. There was a history of chronic late payments to vendors. The

tax fund account was overdrawn by \$41,168 on June 30, 2008. Appellant failed to timely deposit checks from FD's fund-raising activities. The auditors discovered many checks, invoices, supporting documents, and bank statements were missing. Mr. A testified that it took six to eight weeks to sort out the accounting matters. Accordingly, the Board finds that FD proved this charge by a preponderance of the evidence.

**The Board Finds That FD Proved By A Preponderance Of The Evidence That Appellant Was Insubordinate.**

Appellant was well aware that the reason Ms. O was hired was to help Appellant improve Appellant's QuickBook skills and produce reports needed by the Board. As the record of evidence indicates, Appellant failed to use Ms. O in an appropriate way. Rather, Appellant gave Ms. O menial tasks to perform. Appellant thwarted Ms. O's ability to perform her assigned duties.

Appellant was also directed not to speak with Mr. P. Nevertheless, Appellant did so, claiming Appellant was only not allowed to speak with him about the private funds statement. Appellant's explanation that this was just a misunderstanding is simply not credible.

Similarly, the Board finds that FD proved by a preponderance of the evidence that Appellant was insubordinate when Appellant failed to return FD's keys even after several messages were left for Appellant by Director B. As previously noted, FD had to hire a locksmith to gain access to the closet in Appellant's office and had to have the post office drill a hole in its mailbox to gain access. While Appellant denies having received any calls about the keys, it defies logic that FD would have hired a locksmith without first attempting to obtain the return of its keys from Appellant.

Likewise, FD proved that Appellant failed to give all passwords to various individuals as requested. Clearly, Appellant denied Mr. J the password to the laptop. It is also evident that Appellant never gave FD the password to the AOL account, for which FD, not Appellant, was paying.<sup>20</sup> Based on the record of evidence, FD proved this charge.

**The Board Finds That FD Proved By A Preponderance Of The Evidence That Appellant Violated Established Policies And Procedures.**

Mr. A testified that Appellant failed to follow FD procedures when Appellant ordered an emergency generator without either he or Mr. C knowing about it much less Appellant receiving approval from the Board to do so. Mr. A stated that this was a substantial expenditure for FD and should have been run through the approval process. Significantly, Appellant never denied that Appellant ordered the generator without telling FD management or receiving authorization.

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<sup>20</sup> Despite Appellant's protestations to the contrary, once FD began paying for the AOL account, it became FD's property not Appellant's. As the owner of the account, FD was entitled to the password.

Similarly, Appellant was responsible for timely submitting to the County for reimbursement certain expenses at the end of each fiscal year pursuant to County procedures. After Appellant was placed on administrative leave, it was discovered that certain fuel and apparatus expenses which had to be submitted to the County by a specific date in order to receive reimbursement were not submitted. Appellant's violation of this policy resulted in FD not receiving reimbursement for \$12,000 of expenses. Clearly, based on the record of evidence, FD proved this charge.

**The Board Finds That FD Proved By A Preponderance Of The Evidence That Appellant Made False Statements And Reports During Appellant's Employment.**

FD offered undisputed evidence that Appellant had repeatedly assured FD management that the thermal imagers from the station, which needed repair, had been sent out to the vendor for fixing. Yet, when FD management finally gained access to the locked closet in Appellant's office, it discovered the thermal imagers had not been sent out. Clearly, Appellant made false statements to FD about the status of these imagers.

Likewise, Appellant made a false report to Mr. C when Appellant told him that Appellant did not have the permit for the station sign for a station. When Mr. C took off from work, came to Appellant's office and they went through the station sign file together, the permit was located.

Similarly, the record of evidence establishes that Appellant made false statements to Mr. A about the fiscal year 2008 audit. Appellant told Mr. A that the audit was being delayed at the request of the auditors when in fact Appellant was the one who requested the auditors to delay the audit. Accordingly, the Board finds that FD proved this charge by a preponderance of the evidence.

**The Board Finds That Appellant's Complaints Against Mr. C, Including Appellant's Filing An EEO Claim After Appellant Was Placed On Administrative Leave, Played No Role In Appellant's Dismissal.**

On Appellant's appeal form, when asked to explain why FD was wrong in taking its disciplinary action against Appellant, the form indicated:

I never received a statement of charges. I was an excellent, highly-evaluated employee, and was suspended because I had filed a hostile work environment claim against a Fire Dep't Board Member, Mr. C, and filed an EEO claim with the County. It was shortly after my filing that I was forced into Administrative Leave, with no meeting or hearing until notice of my termination, which was mailed to my attorney and not me.

Appeal Form at 2, dated 02/12/09.

Appellant acknowledged Appellant signed the appeal form. H.T. at 282. Appellant further acknowledged that Appellant signed the appeal form without it being completely

filled out and expected that Appellant's attorney's office would fill it in. Id. at 283. Appellant never looked at the statements that were placed on Appellant's appeal form. Id. at 287. Nevertheless, Appellant has not withdrawn this assertion, so the Board will address it.

Significantly, as the record of evidence indicates, Mr. C was not the only Board member who had problems with Appellant's performance. Mr. D<sup>21</sup> tried to give Appellant a notice of unsatisfactory performance in May 2008, with Mr. A's agreement. Mr. R complained to Mr. A about Appellant's performance, specifically with regard to a nonpayment issue. H.T. at 59.

It is also clear from the record of evidence that Appellant did not even begin to initiate the EEO process until after FD gave Appellant the 2008 evaluation and placed Appellant on a Work Improvement Plan. While it may be true that Appellant contacted the EEO office prior to being placed on administrative leave as Appellant alleges, Appellant concedes that Appellant did not file an EEO complaint until December 13, 2008, H.T. at 276, well after Appellant was placed on administrative leave. The Board finds that at the time Appellant was placed on administrative leave, FD had valid reasons for doing so. It was clear to Mr. A that Appellant was not willing to work to improve Appellant's performance. Appellant was blocking Ms. O's efforts to assist Appellant; refused to provide passwords and complete access to the laptop as ordered; and had spoken with Mr. P even after being directed not to do so.

Moreover, it is also clear from the evidence adduced that FD management at the time it made the decision to dismiss Appellant, had no knowledge of the EEO complaint. Appellant acknowledged Appellant did not even meet with Mr. N, the investigator for Appellant's complaint, until February 10, 2009, a day after Appellant's termination letter was sent to Appellant's attorney. FD was not notified about the investigation until February 27, 2009, well after the effective date of Appellant's termination.

**Given the Charges Sustained, The Board Finds That The Penalty Of Dismissal Is Appropriate.**

A. Normally, Discipline Should Be Progressive.

As Appellant correctly points out, MCFRCPR policy states that disciplinary actions must be progressive in severity. The only exceptions are in cases of serious violations of policy or procedure that create a safety risk. In the instant case, it is undisputed that, after Appellant was placed on administrative leave, FD discovered several thermal imagers in the closet in Appellant's office which supposedly had been sent out for repair. Appellant had been queried several times about their status and assured Mr. A that they were at the vendor's for repair. These imagers are used to detect the presence of victims at a fire scene. Thus,

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<sup>21</sup> Mr. D, who the Board found to be a credible witness, testified that when he began working with Appellant, he had been impressed with Appellant's work and respected Appellant. Yet, subsequently, after working with Appellant, he too became frustrated with Appellant's performance.

they are crucial safety tools. The fact that Appellant took no action to send these tools out for repair, and repeatedly informed FD management that they were at the vendor's represents a significant safety risk to public served by FD.

Moreover, in July 2008, a request was made by Chief I for ALS supplies but Appellant never ordered them. FD management was alerted that the ALS supplies were in dire need in late November 2008, and an engine with a medic would have to be put out of service because of low supplies. Absent quick action by Director B to obtain the supplies, a significant safety risk would have occurred due to Appellant's failure to follow procedure and order the supplies. Accordingly, based on the safety risks created by Appellant's failure to follow procedures, FD had the right to determine that Appellant's discipline should not be progressive in nature.

B. Normally, An Employee Should Be Given The Opportunity To Improve Their Performance.

It is well established that supervisors should assist employees in improving their work performance. Therefore, a written work improvement plan is usually developed when the employee's overall performance fails to meet the performance standards. Appellant argues that although Appellant was placed on a Work Improvement Plan and told Appellant had a reasonable opportunity to improve Appellant's performance, Appellant was never actually given the opportunity to improve Appellant's performance.

Clearly, the record of evidence indicates that FD management had every intention of giving Appellant a reasonable opportunity to improve. Appellant, through Appellant's own actions, denied Appellant this opportunity. Appellant put road blocks in the way of the person brought in to help Appellant improve Appellant's QuickBook and accounting skills. Appellant refused to provide passwords to those needing them to access the laptop and complete the transition from the laptop to the desktop. Appellant disobeyed an order not to speak with Mr. P. These actions culminated in FD placing Appellant on administrative leave. Once Appellant was on leave, FD discovered other issues about Appellant's conduct and performance.

In dismissing Appellant, FD not only relied on Appellant's poor performance but also on acts of misconduct – i.e., insubordination, violation of policy and procedure, and false statements. Where acts of misconduct are coupled with poor performance, an employer has the right to discipline an employee without giving the employee the opportunity to improve the employee's performance. See, e.g., Shorey v. Dep't of the Army, 77 M.S.P.R. 239 (1998). The Board finds that in the instant case, FD had the right not to provide Appellant an opportunity to improve Appellant's performance after it discovered additional acts of misconduct.

C. Given The Totality Of Appellant's Negligent Performance, Insubordination, Violation Of Policies And Procedures, And False Statements, Appellant's Dismissal Was Warranted.

Appellant's negligent performance adversely affected FD's ability to perform its mission. By failing to timely submit FD's expenses to the County for reimbursement, Appellant denied FD \$12,000. Appellant overdrew the tax account by \$41,168, which was deemed to be a significant deficiency by the auditors. There were chronic problems with late payments to vendors.

As previously noted, Appellant's actions created potential safety risks. Appellant's failure to timely order ALS supplies almost resulted in an engine with a medic being put out of service because of low supplies. Appellant failed to send the thermal imagers for repair. As previously noted, this equipment was relied on in order to locate victims inside a fire scene.

Appellant's insubordination and false statements adversely affected management's ability to trust Appellant. Instead of helping Mr. A in his plans to fix FD's infrastructure, Appellant stymied a variety of projects. Accordingly, based on the totality of circumstances, the Board finds that dismissal was an appropriate penalty.

**ORDER**

Based on the foregoing, the Board denies Appellant's appeal from Appellant's dismissal.

# **DEMOTION**

## **CASE NO. 09-03**

### **DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Director, Department of Correction and Rehabilitation (DOCR), to demote Appellant from the position of Residential Supervisor I to the position of Correctional Officer II.

### **FINDINGS OF FACT**

Appellant has worked for DOCR since August 6, 2006. Appellant began work as a Correctional Officer at the Montgomery County Correctional Facility (MCCF). In October 2007, Appellant interviewed for the position of Resident Supervisor I located at the Pre-Release Center, which is part of the Pre-Release and Reentry Services (PRRS). The Pre-Release Center (PRC) is a DOCR correctional facility without significant physical control measures.<sup>1</sup> PRC is located in a two-story brick building in the community, close to transportation and work opportunities. Inmates (or residents as they are called at the PRC) generally are placed at the PRC one year before they are scheduled for release from incarceration. The purpose of the PRC is to decrease recidivism by assisting inmates in transitioning into the community prior to their release. PRC assists its residents with their employment searches, aids them as they reconcile with their family members, assists them in dealing with their addiction issues, and helps the residents to identify resources in the community to assist them when they are no longer in custody. Hearing Transcript (H.T.) at 30. While the residents of the PRC are still considered incarcerated, they are able to enjoy many privileges in the community, such as going out to work and visiting family members. H.T. at 31. Each time a resident goes out into the community, it is with pre-approval from the PRC, which maintains full accountability for the whereabouts of all residents at all times. Id.

The PRC provides for twenty-four hour Resident Supervisor coverage,<sup>2</sup> seven days a week, three hundred and sixty five days a year. There are four living units in the PRC that house residents, with Resident Supervisors assigned to each of the units. Each unit has a

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<sup>1</sup> The PRC does have a video surveillance system which monitors the common areas and hallways.

<sup>2</sup> There are three shifts at PRC – the one-shift (11:00 p.m. – 9 a.m.); the two-shift (8 a.m. – 4:30 p.m.); and the three-shift (3 p.m. – 11:30 p.m.). County Exhibit (C. Ex.) 12; C. Ex. 20 at 5. Appellant worked the one-shift during the time the incidents occurred which form the basis of this case.

checklist which indicates the various tasks a Resident Supervisor must complete during his/her shift. C. Ex. 10; H.T. 64-65.

Because the PRC facility has visitors, there is a lot of traffic in the building. Resident Supervisors are there to ensure the building is safe and secure, through random personal and room searches. H.T. at 35. Resident Supervisors are expected to monitor the movement of inmates into and out of the facility by making scheduled and unscheduled counts<sup>3</sup> periodically during each twenty-four hour period to account for the whereabouts of all residents. Resident Supervisors are required to do walk-throughs, where they walk the entire living unit. H.T. at 45. During the walk-throughs, Resident Supervisors are expected to choose three rooms at random to check by entering them and assuring that nothing unusual is going on and the residents in the room are safe.<sup>4</sup> Id.

Resident Supervisors are also charged with assisting and providing guidance to residents on a wide variety of issues.<sup>5</sup> Accordingly, Resident Supervisors need to have a

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<sup>3</sup> Counts are the process through which PRC reconciles that it has the correct number of individuals at PRC. H.T. at 51. Unlike the MCCF, where everyone is locked up in a facility, a community correctional program has a greater challenge in doing a count as individuals can be in their rooms, in common areas in the PRC, at work, on home pass, or some other place in the community. Id. That is why PRC does so many counts during the day to ensure that they can account for all the residents. Id.

For each resident, there is a locator card, with the resident's picture and information concerning the resident's schedule. Id. at 53. The cards are placed in one of three bins – one bin is labeled “work”, the other “community”, and the third “in house”. Id. However, it is not sufficient to merely count the cards. Rather, the locator cards in the “in house” bin are brought with the Resident Supervisor when doing a count. Id. The locator cards in the “work” bin are also checked periodically to note when the resident is due to return to PRC from work. If the locator card indicates that a resident should be back by 5:00 p.m. and the resident has not returned by 7:00 p.m., then the Resident Supervisor knows there is a problem. Id. at 54.

<sup>4</sup> These checks are referred to as life safety checks. H.T. at 44. During a life safety check, the Resident Supervisor randomly enters a room to ascertain whether the occupants are safe and to ensure that they are not engaging in inappropriate behavior. Id. at 45. For the one-shift, because most of the residents are sleeping and the rooms are dark, the Resident Supervisor uses a flashlight to ascertain how many individuals are in the room and whether they are safe. Id. at 47.

<sup>5</sup> The class specification for a Resident Supervisor lists the following examples of duties: “Provides crisis intervention for offender-residents by defusing potentially threatening, and disruptive concerns of both offender-residents and, as necessary, their family members or other persons present; distributes medication per medical staff instructions; provides guidance and ‘contract monitoring’ for assigned offender-residents covering such areas as work, family, substance abuse, leisure, health, finances as well as anger management



rapport with the residents and are expected to exercise sound judgment and discretion in dealing with problems which may arise with the residents.

Finally, Resident Supervisors are required to maintain a Daily Log of activities and occurrences during their period of duty.<sup>6</sup> Logs are expected to be time stamped and an entry made. C. Ex. 10; H.T. at 88. Counts and walk throughs are required to be logged.<sup>7</sup> Logs serve as a communication device for PRC staff who are coming on and off of a shift. H.T. at 42. Resident Supervisors coming on shift can scan the log and note any issues that occurred on the preceding shift. Id.

Appellant was promoted to the Resident Supervisor I position on December 9, 2007. Appellant began a one-month on-the-job training program in Appellant's new position. See C. Ex. 23. Appellant was trained in Unit I and then subsequently reassigned to Unit II at PRC in March. Appellant received a PRRS Staff Orientation/Training Verification Form which Appellant was to complete upon the end of Appellant's orientation training. C. Ex. 7. Appellant signed Section A of the Verification Form on January 15, 2009, indicating Appellant had received training in various matters, including offender supervision (counts, searches, drug/alcohol control, accountability, contraband control, etc.). Id.

Appellant states that PRC was short-staffed and so Appellant's training was somewhat haphazard. C. Ex. 2 at 4; H.T. at 173; Appellant's Pre-Hearing Submission at 1. Appellant asserts that Appellant only worked night shift twice out of a four-week period. H.T. at 173. Moreover, on one of the night shifts, Appellant worked alone during Appellant's training. Id. at 124, 173. According to Appellant, Appellant received training from Resident Supervisor A on how to do logs, walk-throughs, counts, urine collection, and perimeter checks. C. Ex. 2 at 4. Subsequently, Resident Supervisor B allegedly told Appellant that Appellant could perform counts and walk-throughs by using the camera system. H.T. at 161.

On May 12, 2008, the acting Unit Manager for Unit II, Manager C, informed Manager C's supervisor, Supervisor D, that Manager C had received an anonymous note, indicating that some of the log times in the Daily Log had been handwritten. H.T. at 61; C. Ex. 6A. Upon reviewing the Daily Log, Manager C and Supervisor D discovered that some

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and possible depression; helps offender-residents with their reading and writing in job searches; and administers Alco Sensor test and collects urine samples for drug screening." C. Ex. 22.

<sup>6</sup> The Daily Log is a chronology of events in the living unit. H.T. at 41. It is required by the State of Maryland. Id. The log notes if an alcohol test or urine test has been done; if anything significant, such as the discipline of a resident has occurred; and any other unusual event. Id. at 42.

<sup>7</sup> One-shift is expected to conduct three counts. H.T. at 54. In addition, walk-throughs are to be done at intervals of no more than every thirty minutes between midnight and 5:30 a.m. Id.; C. Ex. 12 at 3.

time stamps were whited-out and written over. Supervisor D, concerned that there might be a breach in safety and security, notified the Department Director. Supervisor D also instructed Manager C to investigate whether more logs had been altered and to review the video surveillance system to determine whether Appellant had actually done walk-throughs. H.T. at 61-62. Manager C reviewed the video surveillance system and confirmed that several of the entries for the period May 1, 2008 – May 11, 2008 were fraudulent as no Resident Supervisor could be observed on video doing the walk-throughs documented in the log. Id. at 62-63; C. Ex. 6B.

The Department Director determined to launch a formal investigation into the matter and assigned the Investigator, Mr. E, to conduct it. H.T. at 62, 114. On May 14, Mr. E and Manager C met with Appellant to conduct an interview into Appellant's conduct. Id. at 63. Appellant received a memorandum from Supervisor D, placing Appellant on administrative leave, as soon as Appellant's interview was finished. Id. at 64; C. Ex. 21.

During Mr. E's interview with Appellant on May 14, Mr. E informed Appellant that Appellant was expected to cooperate with DOCR's internal investigation and respond truthfully to questions. Appellant acknowledged that Appellant did not always do a physical walk through; rather, Appellant used the camera system to observe whether something was occurring in the unit. C. Ex. 2. Mr. E subsequently obtained the video surveillance tapes for PRC for the period May 1-12 and began reviewing them to compare them with the information recorded on the Daily Logs completed by Appellant. H.T. 118-19. Mr. E again interviewed Appellant on May 21, 2008, regarding the training Appellant received when Appellant started at PRC and how Appellant had conducted counts at MCCF. C. Ex. 2 at 3-5. During the course of the second interview, Appellant informed Mr. E that it was Resident Supervisor B who informed Appellant that it was acceptable to do walk-throughs and counts by using the video surveillance system. C. Ex. 2 at 4.<sup>8</sup>

By memorandum dated June 13, 2008, Mr. E submitted the results of Mr. E's investigation to the Department Director. C. Ex. 2. Mr. E concluded that log entries were fabricated as Appellant did not perform the duties described in the logs (i.e., security counts, walk-throughs, and random room checks) of the unit. C Ex. 2 at 6; H.T. 118. Mr. E also

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<sup>8</sup> Significantly, Mr. E never interviewed Resident Supervisor B to determine whether Appellant was telling the truth. H.T. at 129, 130. Mr. E stated that during the time the investigation was occurring, Resident Supervisor B was out on approved leave. Id. at 129. However, according to Appellant, Mr. E saw Resident Supervisor B while Resident Supervisor B was on approved leave but failed to ask Resident Supervisor B anything about what Resident Supervisor B might have told Appellant regarding walk-throughs and counts. Id. at 167. The Board is at a loss to explain why a trained investigator like Mr. E would have failed to interview a material witness. Moreover, given the fact that the County was derelict in its duty to interview Resident Supervisor B, it should never have stated in the Statement of Charges and Notice of Disciplinary Action that Appellant's "claim that other Resident Supervisors told you that you could conduct a count by using the camera system is unsubstantiated". C. Ex. 18 at 2; C. Ex. 20 at 2.

concluded that Appellant used the County internet service to access numerous websites during the two week period between May 1-May 10.<sup>9</sup> C. Ex. 2 at 6. A review of Appellant's internet usage indicated Appellant spent over eleven hours on the internet over the two-week period. Id.; C. Ex. 4D.

On July 1, 2008, the Department Director issued Appellant a Statement of Charges (SOC), proposing to demote Appellant to a Correctional Officer II based on Appellant's misconduct. C. Ex. 18. The SOC contained five charges. Specifically, Appellant was charged with the following violations:

- Charge 1:<sup>10</sup> Montgomery County Personnel Regulations were violated as indicated in the Departmental Policy and Procedure sites below. MCPR (o) specifically relates back to Fact # 8 in that you inappropriately used the County's e-mail system during your shifts and at times when you should have been performing your official duties.
- Charge 2: Fact[s] # 4, 5 & 6 clearly indicate that you were knowledgeable about the importance and procedures to conduct counts, yet Facts # 1, 2, 3, & 7 demonstrate that you did not conduct counts, and in fact improperly altered the log to indicate that you had done so. This misconduct jeopardized the program's ability to hold residents accountable and put in jeopardy the safety of staff in the building at the times that you failed to carry out your duties and those staff on succeeding shifts who were misled by your logs that these counts and walk[-throughs] had been conducted.
- Charge 3: Fact[s] # 4, 5 & 6 clearly indicate that you were knowledgeable about the importance and procedures to conduct counts, yet Facts # 1, 2, 3, & 7 demonstrate that you did not conduct counts, and in fact improperly altered the log to indicate that you had done so. This misconduct jeopardized the program's ability to hold residents accountable and put in jeopardy the safety of staff, both in the building at the times that you failed to carry out your duties, and those staff on succeeding shifts who were misled by your logs that these counts and walk[-throughs] had been conducted. You did not physically observe residents during counts, nor did you walk through the Center or unit and identify each resident who should be present. When conducting walk-throughs, you

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<sup>9</sup> The Department Director requested the Department of Technology Services (DTS) conduct an investigation into Appellant's internet use. H.T. at 16. Mr. F, the DTS forensic investigator, did the investigation. Id. The DTS investigation produced a Websense report of Appellant's internet use. Id.; C. Ex. 8.

<sup>10</sup> Although the charges were not numbered in the SOC, they are numbered in this Final Decision for ease of reference.

did not walk through the entire unit and randomly check a portion of rooms. The three counts required during your shift and logged as such were fabricated since the correct procedures were not followed.

Charge 4: Video surveillance data and a review of log entries as mentioned in Facts # 1, 2, & 7 clearly demonstrate that you fabricated log entries and failed to communicate honestly and clearly with other program staff. Such misconduct jeopardized the safety of staff and the integrity of the program.

Charge 5: Your performance of duties was not in line with Departmental Policies and Procedures and County Personnel Regulations. You failed to clarify conflicting information given to you by professional peers with your supervisor. You did not submit all reports in accordance with departmental policy and procedures ([i.e.,] daily log) and in fact, falsified those reports. Untruthful statements were made regarding your training. Fact[s] # 4, 5 & 6 clearly indicate that you were knowledgeable about the importance and procedures to conduct counts, yet Facts # 1, 2, 3, & 7 demonstrate that you did not conduct counts, and in fact improperly altered the log to indicate that you had done so. This misconduct jeopardized the program's ability to hold residents accountable and put in jeopardy the safety of staff both in the building at the times that you failed to carry out your duties, and those staff on succeeding shifts who were misled by your logs that these counts and walk[-throughs] had been conducted. Additionally, Fact # 8 revealed that you spent an excessive and improper amount of time on the internet when you should have been carrying out your resident supervisor duties.

C. Ex. 18.

Appellant responded to the SOC, acknowledging that Appellant did not perform the walk-throughs and counts as required. C. Ex. 19. Appellant asked to be given another chance to demonstrate that Appellant could perform Appellant's Resident Supervisor duties in a satisfactory manner. *Id.* The Department Director issued a Notice of Disciplinary Action (NODA), demoting Appellant effective August 31, 2008. C. Ex. 20. This appeal followed.

### **POSITIONS OF THE PARTIES**

County:

- Appellant underwent four weeks of training with a number of experienced Resident Supervisors.

- While PRC made sloppy record-keeping mistakes regarding documentation of Appellant's training, Appellant's supervisor, Supervisor D, is one hundred percent certain Appellant was properly trained.
- Appellant's assertion that Appellant was told by Resident Supervisor B that Appellant could do walk-throughs and counts by using the video surveillance system is not reliable.
- Appellant made false entries in the Daily Log.
- Appellant failed to properly perform counts.
- Appellant failed to do walk-throughs and life safety checks.
- Appellant improperly used the internet.
- Appellant's neglect of duty placed every resident and staff person at the PRC at risk.
- Because Appellant was serving a probationary period, the proper thing to do when Appellant failed to do Appellant's Resident Supervisor duties correctly was to restore Appellant to the lower level position of Correctional Officer.

Appellant:

- While serving as a Resident Supervisor, Appellant never received any kind of negative feedback about Appellant's performance prior to the events in May.
- Appellant was honest and truthful during the investigation.
- Appellant is extremely remorseful and admits that Appellant made a mistake.
- Appellant does not regard the handwritten entries in the Daily Log as a fabrication, as Appellant was told that it was permissible to use white-out to make corrections.
- There is no actual record of the training Appellant received; Appellant was on night shift for only two days out of a four-week period and one of those nights Appellant worked alone.
- Appellant's training wasn't adequate, as PRC was short-staffed. In fact, Appellant's training was haphazard.
- Given the negativity of Appellant's supervisors, Appellant does not want to be restored to PRC but does want the demotion off of Appellant's record and Appellant's salary restored to the level it was at before the demotion.

**APPLICABLE REGULATIONS**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 33, Disciplinary Actions, which states in applicable part:**

...

**33-5. Causes for disciplinary action.** The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

...

- (c) violates an established policy or procedure;

...

- (e) fails to perform duties in a competent or acceptable manner;
- (f) behaves insubordinately or fails to obey a lawful direction from a supervisor;
- (g) knowingly makes a false statement or report in the course of employment;

...

- (o) takes, steals, misuses, or misappropriates County funds or property or the property of a client, patient, citizen, or other person with whom the employee deals while on duty.

**Montgomery County Department of Correction and Rehabilitation, Pre-Release and Reentry Services Division Policy and Procedural Manual, Policy Number: 2000-10, Subject: Duties of Resident Supervisors and Monitoring Specialists, effective August 18, 2006**, which states in applicable part:

I. PROCEDURE

...

C. Specific Duties of Resident Supervisors and Monitoring Specialists:

...

- 3. Resident Supervisors will make counts to ensure proper accountability of the residents assigned to the correctional unit.
- 16. Resident Supervisors conduct personal searches, vehicle searches and room shakedowns.

**Montgomery County Department of Correction and Rehabilitation, Pre-Release and Reentry Services Division Policy and Procedural Manual, Policy Number: 2000-13, Subject: Counts, Walk-Throughs and On-Site Verifications, effective August 18, 2006**, which states in applicable part:

- I. PROCEDURES: The Pre-Release Center shall provide for twenty-four (24) hour Resident Supervisor coverage in each Unit to ensure continuous facility supervision and to perform necessary security duties and responsibilities. Resident supervisors shall monitor the movement of offenders into and out of the facility by making scheduled and unscheduled counts periodically during each twenty-four (24) period to account for the whereabouts of all residents.

Monitoring Specialists, with the supplemented support of Resident Supervisors, are primarily responsible for providing direct oversight and supervision of home confinement residents. Support Services staff shall perform inside and outside perimeter checks randomly throughout the day and assist PRRS staff when problems arise and a resident cannot be located. At least one walk-through will follow each count.

- A. Scheduled formal counts within the Pre-Release Center, where each resident must be physically observed or his location outside of the facility noted, shall be made and documented in the unit Daily Log by the Resident Supervisor coming on duty at the change of shift. Resident Supervisor shift changes occur daily at 8am, 3pm and 11pm. Monitoring Specialist will perform one scheduled count of all home confinement residents daily at 12 midnight.
- B. Unscheduled formal counts within the Pre-Release Center shall be made at least once on each of the three shifts noted above. These shall be random counts made at different times each day so that residents will not be able to anticipate a routine count time or procedure.
- C. Every resident in PRRS programs must be accounted for at all times. A resident's whereabouts will be indicated in one of the following ways: a) In-house - the resident is present in the facility, b) Employment - the resident is stamped out for work, c) Community - the resident is stamped out to a community pass authorized by staff and d) Home Confinement - the resident resides at home in the community under home confinement supervision. . . .
- D. A daily count record shall be maintained on each unit in the Pre-Release Center and in the Monitoring Specialists Office. For each twenty-four (24) hour period beginning at midnight, a separate daily count record shall be initiated. This form shall become a permanent record. Every count within the Pre-Release Center shall be a head (formal) count. Resident Supervisors shall be responsible for knowing the names and faces of each resident in their Unit and shall identify each resident during the count, noting his/her presence or absence.
- E. Formal counts shall be conducted as follows:
  - (1) Pre-Release Center: Determine the total number of residents assigned to the unit by checking the total from the previous count, add the number of intakes/admissions to that total, and subtract the number of discharge or releases. Any special releases (e.g., hospital) shall be noted. The staff member conducting the count shall then walk through the unit or Center and identify each resident who should be present in the facility. If the count is not clear, the public address system in the

Center will be used to announce the name of any resident unaccounted for and instruct that resident to report to their unit immediately.

...

H. Walk-throughs at the Pre-Release Center: A walk-through occurs when a Resident Supervisor, at randomly timed intervals, walks through the entire unit and randomly checks a portion of the residents' rooms. Walk-throughs are in addition to counts. While walking through the unit, Resident Supervisors shall check staff offices, unassigned resident rooms, door and windows to ensure that they are secure.

I. Minimum Counts and Walk-throughs:

- (1) Pre-Release Center: Three formal counts shall be accomplished on the one-shift (11pm - 9am) and noted in the Daily Log. In addition, between the hours of 12 midnight and 5:30 am, walk-throughs shall be conducted at intervals of no more than every 30 minutes and noted in the Daily Log. One formal count plus two walk-throughs shall be conducted on the two-shift (8am - 4:30 pm) and noted in the Daily Log. Three counts plus six walk-throughs shall be conducted on the three-shift (3 pm - 11:30 pm) and noted in the Daily Log.

**Montgomery County Department of Correction and Rehabilitation, Pre-Release and Reentry Services Division Policy and Procedural Manual, Policy Number: 2000-15, Subject: Daily Logs, effective December 10, 2004, which states in applicable part:**

- I. PROCEDURE: The Daily Log is an official record of Pre-Release Services operations, is the key to effective communication between shifts, and provides all staff with knowledge of important occurrences during their non-duty hours.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, STANDARDS OF CONDUCT/CODE OF ETHICS, effective March 26, 2007, which states in applicable part:**

## **VII. DEPARTMENT RULES FOR EMPLOYEES**

...

D. Specific Departmental Rules:

1. Conformance to Law:

Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery



County Code, and to conform to all laws applicable to the general public.

2. Compliance with Orders:

- a. Employees shall obey a superior's lawful order. If a superior issues an order which conflicts with a previously issued order or directive, the employee shall respectfully call attention to the conflicting order and if not rescinded by the superior, the order shall stand. Responsibility for the order shall rest with the issuing superior and the employee shall not be answerable for disobedience of any previously issued order.
- b. Superiors shall not issue any order which they know would require a subordinate to commit any illegal, immoral, or unethical acts.
- c. Employees shall not obey any order which they know would require them to commit illegal, immoral, or unethical acts.

...

4. Integrity of the Reporting System:

Employees shall submit all necessary reports in accordance with established departmental policy and procedures. These reports shall be accurate, complete, and timely and shall be submitted before the end of the employee's tour of duty whenever possible. Unless an operational emergency or injury precludes this, employees will be compensated for working beyond their scheduled shift to complete reports, before leaving the facility.

...

9. Conduct Unbecoming:

- a. No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, civil, dishonest or improper conduct.
- b. Examples of conduct unbecoming include falsifying a written or verbal report, excessive absenteeism, assault

on a fellow employee, sexual harassment, misuse of a county owned radio, and the failure to cooperate with an internal investigation.

10. Neglect of Duty/Unsatisfactory Performance:

Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee's rank, grade, or position.

...

14. Untruthful Statements:

Employees shall not make untruthful statements, either verbal or written.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-61, Use of County-Provided Internet, Intranet, and Electronic Mail Services (email), effective April 26, 2006, which states in applicable part:**

**POLICY:**

...

- B. Employees must use County-provided internet, intranet, and email services responsibly and professionally, and must not use [i]nternet, intranet, or email services in a manner that violates any applicable federal, State, or Montgomery County law, regulation, or policy, including administrative procedures contained in the [I]nformation Technology Administrative Procedures Manual:  
[http://portal.mcgov.org/content/departments\\_intranet/omb/forms/APS/ap6-\[1\].pdf](http://portal.mcgov.org/content/departments_intranet/omb/forms/APS/ap6-[1].pdf)
- C. A County employee may use County-provided [i]nternet, intranet, or email services for personal purposes on only a limited, reasonable basis, and in accordance with this policy. However, employees must act reasonably to minimize personal use of County-provided internet, intranet, and email services. Such use must be kept to a minimum and must not disrupt the conduct of service or performance of official duties.

...

**RESPONSIBILITIES:**

...

C. County Employees

...

2. Ensure use of County-provided internet, intranet, and email services is in accordance with Administrative Procedure 6-1.

**ISSUES**

1. Has the County proven its charges by a preponderance of the evidence?
2. Based on the charges sustained, is the penalty of a demotion excessive?

**ANALYSIS AND CONCLUSIONS**

**The Board Finds That There Were Four Basic Charges Adequately Set Forth In The Statement Of Charges.**

The County, when it proposes to discipline an employee, must notify the employee of the conduct with which employee is charged “in sufficient detail to permit the employee to make an informed reply.” *Pope v. United States Postal Service*, 114 F.3d 1144, 1148 (Fed. Cir. 1998). To fulfill this responsibility to give adequate notice to the employee, the County should designate a particular charge and accompany the charge with a narrative description which sets forth the details of the charged misconduct. The Board cautions the County that failure to give adequate notice so as to enable an employee to make an informed response could lead to the invalidation of the charges that form the basis for the discipline appealed.

As previously noted, the SOC contains five charges. Charge 1 alleges Appellant made inappropriate use of email during work time when Appellant should have been performing Appellant’s official duties. Charge 2 states that Appellant failed to conduct counts, as required, and also charges that Appellant altered the log to indicate Appellant had done the counts. Charge 3 alleges that Appellant failed to conduct counts, altered the log to show Appellant had done so, and failed to do walk-throughs.<sup>11</sup> Charge 3 also states that when Appellant did conduct walk-throughs, Appellant failed to walk through the entire unit and randomly check a portion of rooms. Charge 4 alleges Appellant fabricated log entries

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<sup>11</sup> The only part of this charge which is not redundant with the misconduct contained in Charge 2 is Appellant’s failure to do complete walk-throughs.

and failed to communicate honestly and clearly with staff.<sup>12</sup> Charge 5 states that Appellant failed to clarify conflicting information given to Appellant by professional peers with Appellant's supervisor.<sup>13</sup> Charge 5 also alleges that Appellant falsified reports<sup>14</sup> and made untruthful statements regarding Appellant's training.<sup>15</sup> Charge 5 additionally asserts that Appellant failed to conduct counts and altered the log to indicate Appellant had done so.<sup>16</sup> Finally, Charge 5 states that Appellant spent an excessive and improper amount of time on the internet when Appellant should have been carrying out Appellant's duties.

In the instant case, several of the charges (i.e., Charges 2, 3, 4 and 5) are in fact compound charges – i.e., they contain separate acts of misconduct, which are not dependent upon each other, and therefore, actually constitute separate charges. See Chauvin v. Department of the Navy, 38 F.3d 563, 565 (Fed. Cir. 1994); Walker v. Dep't of the Army, 102 M.S.P.R. 474, 477 (2006).

Also, as noted above, some portions of the various charges are redundant (e.g., Charges 2 and 3; Charges 2 and 4 and 5). The Board has previously ruled that it will merge charges that are based on the same conduct and proof of one charge automatically constitutes proof of another. MSPB Case No. 09-04 (citing Southers v. Veterans Administration, 813 F.2d 1223, 1225-26 (Fed. Cir. 1987) (the court found that an agency's nineteen charges of false testimony were duplicative because they involved answers to the same question, slightly rephrased); Ruffin v. Dep't of Army, 35 M.S.P.R. 499, 502-03 (1987), aff'd, 852 F.2d 1293 (Fed. Cir. 1989); Delgado v. Dep't of Air Force, 36 M.S.P.R. 685, 688 (1988); Barcia v. Dep't of Army, 47 M.S.P.R. 423, 430 (1991)).

The Board has determined that the SOC adequately sets forth the following charges:

*Charge 1: Appellant made inappropriate use of email during work time when*

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<sup>12</sup> Charge 4 contains similar misconduct to that contained in Charge 2 (i.e., making false entries in the logs). The only additional misconduct cited herein is Appellant's failure to communicate honestly and clearly with other program staff. However, the facts relied upon to support this misconduct (i.e., Fact ## 1, 2 & 7) fail to discuss any communication issue.

<sup>13</sup> Although the Statement of Charges does not cite to any fact to support this statement, it appears that the County is referring to the information contained in Fact # 4 regarding how to conduct counts and walk-throughs.

<sup>14</sup> The Charge indicates that the false reports are the Daily Logs. Thus, this part of the Charge is redundant with the misconduct cited in Charge 2 and Charge 4.

<sup>15</sup> The County appears to be relying on the information in Fact # 3 to support the later part of this statement.

<sup>16</sup> This appears to be the same misconduct cited in Charge 2.

*Appellant should have been performing Appellant's official duties.*

*Charge 2: Appellant neglected (or failed to perform competently) Appellant's duties as a Resident Supervisor.<sup>17</sup>*

*Specification A: Appellant failed to conduct counts.*

*Specification B: Appellant failed to do thorough walk-throughs.*

*Specification C: Appellant failed to clarify conflicting information given to Appellant's by professional peers with Appellant's supervisor.*

*Charge 3: Appellant provided false information during the course of Appellant's employment.<sup>18</sup>*

*Specification A: Appellant falsified the Daily Logs.*

*Specification B: Appellant made untruthful statements about Appellant's training.*

*Charge 4: Appellant spent an excessive and improper amount of time on the internet when Appellant should have been carrying out Appellant's duties.<sup>19</sup>*

### **The County Failed To Prove The First Charge By A Preponderance Of The Evidence.**

The County introduced no evidence that Appellant misused Appellant's County-provided email account. Accordingly, the Board concludes that the County failed to prove its first charge by a preponderance of the evidence.

### **The County Proved The Second Charge By A Preponderance Of The Evidence.**

Charge 2 consists of three separate things that Appellant failed to do as a Resident Supervisor. The first two – walk-throughs and counts – are an integral part of a Resident Supervisor's job. Appellant readily acknowledged in Appellant's response to the SOC that Appellant failed to perform the walk-throughs and counts. C. Ex. 19 at 1. Thus, the Board concludes that the County proved Specification A and Specification B of Charge 2 by a preponderance of the evidence.

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<sup>17</sup> This reformulated charge encompasses parts of Charge 2, Charge 3 and Charge 5 in the SOC.

<sup>18</sup> This reformulated charge encompasses parts of Charge 2, Charge 3, Charge 4 and Charge 5.

<sup>19</sup> This reformulated charge encompasses part of Charge 5.

Specification C charges that Appellant failed to clarify conflicting information given to Appellant by Appellant's peers with Appellant's supervisor. In this regard, Appellant alleged that Appellant received guidance from another Resident Supervisor, Resident Supervisor B, that Appellant could perform the walk-throughs and counts using the camera system.<sup>20</sup> C. Ex. 2 at 4; H.T. 160-62. Appellant acknowledged during Appellant's interview with Mr. E that Resident Supervisor A had demonstrated to Appellant how to do the counts and walk-throughs; that Resident Supervisor A had walked around, opened the door to residents' rooms and used a flashlight to make sure the residents were in their rooms. C. Ex. 2 at 4. Also, Appellant received a copy of DOCR Policy 2000-13 dealing with counts and walk-throughs. Thus, the advice received from Resident Supervisor B was clearly at odds with the training Appellant had received. Significantly, Appellant acknowledged in Appellant's reply to the SOC that Appellant should have sought clarification regarding whether Resident Supervisor B's advice on how to do a count and walk-through on the one-shift was acceptable. C. Ex. 19 at 1. Based on the foregoing analysis, the Board finds that the County proved Specification C of Charge 2.

**The County Proved Part Of The Third Charge By A Preponderance Of The Evidence.**

A. The County Proved Specification A – That Appellant Falsified The Daily Logs.

Specification A of Charge 3 alleges that Appellant falsified the Daily Logs. Appellant asserts that Appellant did not falsify the logs. Appellant insists that Appellant merely used white-out on the time stamp and provided a handwritten time to ensure the accuracy of the entry. According to Appellant, Resident Supervisor B told Appellant it was permissible to white-out entries.

However, it is clear from the record of evidence that Appellant did not perform actual checks of various rooms as Appellant recorded on the Daily Logs. As Manager C noted when Manager C conducted the investigation, Appellant certified that Appellant had checked various rooms, when in fact Appellant could not be observed moving throughout the unit on the video surveillance for the period in question. See, e.g., County Ex. 4B, Daily Log, May 2, 2008, 2:08 a.m. Rms #205-209 checked, 5:00 a.m. Rms 223 & 224, 102 checked; Daily Log, May 5, 2008, 2:23 a.m. Rms #206-212 checked; see also C. Ex. 6B. As Appellant acknowledged during the hearing, the video surveillance system allowed Appellant to look at only the outside of a resident's room; there was no ability to check inside the room as the camera can't see inside the room. H.T. at 162, 167. Appellant even conceded that it would be possible to have a person hiding inside a room and this would not have been seen by the video surveillance system. Id. at 167. Thus, even if Appellant mistakenly believed that Appellant could do walk-throughs by sitting at Appellant's desk and observing the unit through the camera, Appellant knew Appellant could not actually check a room through the camera system. To check a room, Appellant needed to physically enter the room.

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<sup>20</sup> Appellant also alleged that another Resident Supervisor, Resident Supervisor G, would check the cards to do the counts; however, Appellant acknowledged that Resident Supervisor G would sometimes do walk-throughs. C. Ex. 2 at 6.

Accordingly, the Board concludes that Appellant falsified the logs when Appellant said Appellant checked various rooms but did not physically do so. Therefore, the County proved Specification A of Charge 3 by the preponderance of the evidence.

B. The County Failed To Prove Specification B – That Appellant Made Untruthful Statements About Appellant’s Training.

The County alleges that Appellant did not truthfully respond regarding Appellant’s training on how to conduct counts and room checks. See C. Ex. 18, SOC, Fact # 3 at 1-2. Specifically, the County charged that Appellant’s “response that [Appellant was] unaware of the PRRS procedures to conduct counts and room checks and had not been trained is not truthful. A review of training records maintained by Training Administrator H reveals that [Appellant was] properly trained in the area of Security Counts and Tour Watches.” SOC at 2.

However, as indicated in the investigation report prepared by Mr. E, the training for Appellant with regard to Security Counts and Tour Watches occurred while Appellant was a Correctional Officer, not a Resident Supervisor. See C. Ex. 2 at 6. What Mr. E noted was that Mr. E uncovered nothing to suggest that the process for counts was different at the PRRS. Id. Significantly, Mr. E, when asked if Appellant made false statements to Mr. E, specifically testified that during both Appellant’s first and second interviews with Mr. E, “[A]ppellant’s statements to me, to my questions, were accurate.” H.T. at 120. Accordingly, based on the record of evidence, the Board concludes the County did not prove Specification B of Charge 3 by a preponderance of the evidence.

**The County Failed To Prove The Fourth Charge By A Preponderance Of The Evidence.**

A. The Department’s Internet Policy On Limited Personal Use Of The Internet Is Unduly Vague And Subject To Various Interpretations.

The County alleges that Appellant used the internet for personal reasons approximately eleven hours and thirty-eight minutes over a ten-day period.<sup>21</sup> C. Ex. 2 at 6. According to Supervisor D, eleven hours over a ten-day period is excessive. H.T. at 56. However, Supervisor D did note that a Resident Supervisor may use the internet for professional reasons as much as a Resident Supervisor wants. Id. Supervisor D explained that Resident Supervisors may use the internet for assisting residents by accessing Mapquest, and obtaining information on a company. Id. at 55-56. The Resident Supervisor also may use the internet professionally for procuring goods for the facility. Id. at 56.

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<sup>21</sup> Mr. E acknowledged that some of this time was used by Appellant to access Appellant’s County email account, but did not indicate how much of the time was spent doing so. H.T. at 127. Rather, Mr. E merely opined that the majority of Appellant’s internet use was for personal reasons. Id.

The County's DTS expert, Mr. F, testified that employees use the internet during lunchtime or breaks and this is an acceptable use. H.T. at 23. Mr. F noted that the County's internet policy permits the "reasonable" use of the internet for personal reasons; however, the policy does not define what "reasonable" means. Id. Rather, because there are so many diverse business processes at the County, what might be reasonable for one employee in a recreation center may not be reasonable for someone in a legal office. Id. Therefore, it is up to Departments to define what they consider reasonable use for their employees. Id. Mr. F declined to speculate whether Appellant's internet use was reasonable.<sup>22</sup> Id. at 24.

The Board has had the opportunity to previously review the County's internet policy recently and found it unduly vague and readily subject to various interpretations. See MSPB Case No. 09-04. Unfortunately, DOCR's policy on internet use is just as vague as the County's and provides no further guidance on what "reasonable" use is. According to Supervisor D, "our policy is the County's policy. It is no different." H.T. at 56.

B. The County Did Not Prove That Appellant Violated The County's Or DOCR's Internet Policy.

The Board notes that Appellant, while receiving training on the use of the internet for Appellant's professional duties at PRC, H.T. at 94-95, never received any specific training from PRC on use of the internet for personal reasons. H.T. at 95. Rather, according to Supervisor D, training regarding personal use is done by the County. Id. However, the County never introduced evidence that Appellant was trained by the County as to what was acceptable personal use.

In a recent case, the Board found that, under the County policy, County employees are free to use the internet without concern about limited use during their meal break or when they are not on official time. MSPB Case No. 09-04. The County indicated that Appellant is covered by a union contract and receives thirty minutes for lunch and two fifteen-minute breaks. H.T. at 170-71. Thus, under the County internet policy, which according to Supervisor D is also PRC's, Appellant was free to use the internet for up to an hour a day (i.e., during lunch and/or breaks) without exceeding the County's policy.

The Board notes that in some cases a violation of the County's internet policy is obvious such as in MSPB Case No. 07-13, wherein the appellant during one week spent more than 40% of his work time on the internet. Where, however, it is not obvious that an employee has exceeded the bounds of reasonableness and the Department where the employee is working has not defined in its business processes what is "reasonable" or

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<sup>22</sup> Mr. F did state that Mr. F believed Appellant's internet use was for personal reasons as Appellant accessed Yahoo email, visited shopping sites, job search sites, and Lumber Liquidators. H.T. at 17-18. However, based on Supervisor D's testimony, it is quite possible that certain of the internet sites accessed by Appellant could have been business-related, as Appellant might have been accessing job search sites for residents and Lumber Liquidators is a company that does business locally.



“limited” use of the internet, the Board has previously held that it will examine whether the employee’s use disrupted the conduct of services or the employee’s performance of official duties.<sup>23</sup>

Appellant testified that because PRC was short-staffed Appellant had many administrative tasks Appellant had to do, including paperwork, which is why Appellant didn’t do walk-throughs. H.T. at 164-65. Even Supervisor D acknowledged that on one-shift there were many tasks to be done by a Resident Supervisor. *Id.* at 57. When asked by Mr. E what Appellant was doing during the time Appellant should have been conducting walk-throughs, Appellant indicated sometimes Appellant was on the internet or looking at emails and at other times Appellant was monitoring the security cameras. C. Ex. 2 at 2. Based on the totality of evidence, the Board cannot say that Appellant’s internet use disrupted Appellant’s performance of official duties, as Appellant sincerely, albeit mistakenly, believed that Appellant could conduct counts and walk-throughs using the video surveillance system. Accordingly, the Board concludes that the County did not prove this charge by a preponderance of the evidence.

**Given The Seriousness of Appellant’s Misconduct, Demotion To A Correctional Officer Position Is An Appropriate Penalty.**

While the Board has not sustained all of the charges against Appellant, the ones sustained are significant. Appellant neglected Appellant’s duties as a Resident Supervisor. As the Department Director testified, Appellant abrogated Appellant’s responsibilities. H.T. at 136. Most egregious of all, Appellant falsified the Daily Log, indicating Appellant had checked rooms when Appellant had not. A charge involving falsification of documents involves serious misconduct which affects the employee’s reliability, veracity, trustworthiness and ethical conduct. *See Brown v. Dep’t of Treasury*, 61 M.S.P.R. 484, 490-93 (1994). The Board finds that Appellant’s falsification jeopardized the safety of staff and residents at PRC.

The Board has considered Appellant’s remorsefulness. Moreover, the Board has also considered the fact that based on Appellant’s un rebutted testimony, a more experienced Resident Supervisor, Resident Supervisor B, told Appellant that it was permissible on one-shift to do walk-throughs and counts by using the camera system. While it is true that Resident Supervisor A informed Appellant of the correct manner to do walk-throughs and counts, the Board is troubled by the haphazard training Appellant received during Appellant’s one-month training at PRC and the fact that PRC relied on other Resident Supervisors instead of Unit Managers to train Appellant. H.T. at 71, 124, 139. Significant

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<sup>23</sup> Nothing in this Final Decision precludes the County or individual Departments from henceforth more precisely defining the terms “limited”, “reasonable”, and/or “minimum” through the use of specific time designations (e.g., spending no more than 20-30 minutes of official time during a work day on the internet for personal reasons). Such refinement of the County’s internet policy would clearly put employees on notice as to what constitutes unreasonable use of the County-provided internet.

also is the fact that Appellant only worked twice on the one-shift during Appellant's training period, and one of the two times Appellant was alone.

Nevertheless, despite the various mitigating factors, the Board has determined that Appellant's demotion to the position of Correctional Officer II is warranted based on the seriousness of Appellant's misconduct. Because of the Board's concerns over the poor training provided Appellant, the Board, while sustaining the demotion, will order that it be changed to reflect a voluntary demotion after a period of one year from the date of this decision, so long as Appellant is not charged with any further misconduct during the one-year period.

### **ORDER**

Based upon the foregoing analysis, Appellant's demotion is sustained. However, the Board hereby orders the County to change Appellant's disciplinary demotion to a voluntary demotion one year from the date of this Final Decision, so long as Appellant is not charged with any misconduct during the one-year period following the date of this Final Decision. No change to Appellant's salary shall be made based on the County changing the disciplinary demotion to a voluntary demotion.

# **SUSPENSION**

## **CASE NO. 09-04**

### **DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Director, Department of Correction and Rehabilitation (DOCR) to suspend Appellant for a fifteen-day period.

### **FINDINGS OF FACT**

Appellant is a Supervisor<sup>1</sup> at the Montgomery County Detention Center (MCDC), DOCR. As a Supervisor, Appellant supervises several Technicians and oversees the day-to-day operations of the Unit within the Detention Center. See C. Ex. 18. The Unit is responsible for processing documents for DOCR, including those involving inmates. Id. As the supervisor, Appellant reviews, verifies, corrects, and approves all computations conducted by subordinate staff. Id. Appellant's immediate supervisor<sup>2</sup> during all times applicable to this matter was Deputy Warden and Appellant's second-level supervisor was the Warden. Appellant is assigned to Shift #3 at MCDC, which runs from 2:30 p.m. to 11:00 p.m.

According to the Deputy Warden, a Union Steward for the Municipal and County Government Employees Organization (MCGEO or Union), Local 1994, approached the Deputy Warden concerning Appellant's internet usage. The MCGEO Steward presented the Deputy Warden with copies of an email communication to Appellant, dated April 7, 2008, found in a DOCR Unit printer along with 4 service work orders for Appellant's spouse. See C. Ex. 8. The Union Steward informed the Deputy Warden that Appellant's subordinates were concerned that if they made a mistake on the paperwork they handled, Appellant might fail to correct it because Appellant was not doing what Appellant was suppose to be doing during the work day. Hearing Transcript (H.T.) at 113. Subsequently, the Warden requested that the Department of Technology Services (DTS) research Appellant's internet usage. See C. Ex. 10.

On April 7, 2008, the DTS Forensic Investigator met with the Warden, the Deputy Warden, and an Investigator for DOCR, to discuss DTS' research. See C. Ex. 1, C. Ex. 11. The Forensic Investigator gave the Investigator a USB Flash Drive containing Appellant's history of internet access for the period January 17, 2008 to April 7, 2008. C. Ex. 1. The

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<sup>1</sup> Supervisor is the working title for the position. See County Exhibit (C. Ex.) 18.

<sup>2</sup> Appellant normally reports to the Manager. However, the Manager position was vacant during the time period at issue in this case and Appellant began reporting to the Deputy Warden.

internet access report contained more than 2,500 pages of data. H.T. at 22. At the request of DOCR Director, the Investigator initiated an investigation into Appellant's conduct.

On May 28, 2008, the Investigator met with Appellant to interview Appellant about Appellant's internet usage. Appellant was specifically advised by the Investigator that Appellant's failure to be truthful in response to questions during the interview could subject Appellant to disciplinary action. C. Ex. 1 at 1; H.T. at 83.

By memorandum dated June 20, 2008, the Investigator forwarded the Investigator's investigation to the Department Director. The DOCR investigation concluded that over a four-month period (i.e., 48 work days) Appellant spent approximately 57 hours on the internet. C. Ex. 1 at 5. During the same time frame, Appellant worked overtime in the amount of 43 hours. Id. The investigation revealed that on the days that Appellant worked overtime (i.e., 30 days,<sup>3</sup> see C. Ex. 1 at 11), Appellant spent 23 hours and 17 minutes on the internet during the course of the day. Id. The other 34 hours spent on the internet during the four-month period were during Appellant's normal working hours. Id.

After the Director reviewed the investigation, the Director forwarded it to the Warden for action on June 27, 2008. On July 23, 2008, Appellant was issued a Statement of Charges (SOC) for a fifteen-day suspension by the Warden.<sup>4</sup> Appellant responded to the Warden, indicating that Appellant believed the charges were unwarranted and trumped up. See Appeal, email from Appellant to the Warden, dated 07/31/08. The Warden responded that the Warden would not rescind the 15-day suspension. See Appeal, email from Warden to Appellant, dated 08/01/08.

Subsequently, on August 5, 2008, the Warden informed Appellant that the SOC issued to Appellant was an error, and Appellant would be receiving an Amended SOC. On the same day, Appellant was issued an Amended Statement of Charges by the Department Director. The new Amended SOC only included ten charges,<sup>5</sup> some of which had been reformulated from those contained in the SOC. Specifically, Appellant was charged with the following violations:

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<sup>3</sup> Although the chart prepared by the Investigator indicates thirty-three days of overtime, as the Investigator explained on three days there was no internet usage (i.e., 2/3/08, 2/21/08, and 3/7/08) as Appellant worked from home those days and was not actually working at the facility. H.T. at 108.

<sup>4</sup> The July 23, 2008 SOC had eleven basic charges. See C. Ex. 10 at 2-5.

<sup>5</sup> The Amended SOC dropped the charge alleging a misappropriation of funds contained in the original SOC. Compare C. Ex. 10 at 3 with C. Ex. 11.

Charge 1:<sup>6</sup> Montgomery County Personnel Regulations, Section 33-5, Causes for disciplinary action, (c) “violates an established policy or procedure”: Specific to Policy and Procedure 3000-61 Policy C. “A County employee may use County-[p]rovided [i]nternet, intranet, or e-mail services for personal purposes on only a limited, reasonable basis, and in accordance with this policy. However, employees must act reasonably to minimize personal use of County-provided internet, intranet, and e-mail services. Such use must be kept to a minimum and must not disrupt the conduct of service or performance of official duties.”

The investigation disclosed that your use of the internet for personal reasons cannot be considered to be reasonable and your usage was to such an extent that your regular duties were not performed and resulted in unnecessary overtime.

Charge 2: Montgomery County Personnel Regulations, Section 33-5, Causes for disciplinary action, (g) “knowingly makes a false statement or report in the course of employment”: During the investigation you denied that you had used the County-[p]rovided [i]nternet for the purpose of operating a personal business; however, the evidence established otherwise. This showed that you were untruthful during the course of employment.

Charge 3: Departmental Policy and Procedure 3000-7, VII. Department Rules for Employees. D. Specific Departmental Rules: 1. Conformance to Law: “Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public”: The investigation disclosed that you were using the County-[p]rovided [i]nternet and [e]mail<sup>7</sup> extensively for personal reasons. It was also disclosed that you were using the County-[p]rovided [i]nternet extensively to conduct business related to your private businesses on County time.

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<sup>6</sup> Although the charges were not numbered in the Amended SOC, they are numbered in this Final Decision for ease of reference.

<sup>7</sup> Although certain charges (e.g., Charges 3, 7 and 8) indicate Appellant misused not only the County-provided internet but also the County email services and intranet services, no such evidence about misuse of the County email services or intranet services was presented during the course of the hearing. Accordingly, the Board will only address Appellant’s purported misuse of the County-provided internet in this Final Decision.

- Charge 4: Departmental Policy and Procedure 3000-7, VII. Department Rules for Employees. D. Specific Departmental Rules: 9. Conduct Unbecoming: (a) “No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, civil, dishonest or improper conduct”: The investigation disclosed your conduct to be unbecoming and improper.
- Charge 5: Departmental Policy and Procedure 3000-7, VII. Department Rules for Employees. D. Specific Departmental Rules: 10. Neglect of Duty/Unsatisfactory Performance: “Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their position. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee’s rank, grade or position”: The investigation revealed that you failed to perform in a competent manner in your responsibility as the Supervisor. You used County time and salary to perform other personal tasks unrelated to the job to which you have been entrusted.
- Charge 6: Departmental Policy and Procedure 3000-7, VII. Department Rules for Employees. D. Specific Departmental Rules: 14. Untruthful Statements: “Employees shall not make untruthful statements, either verbal or written”: The investigation disclosed you to be untruthful during your interview when you responded to a questions and stated that you didn’t recognize the websites, but that you had accessed numerous websites during the four month period that were not related to your duties and responsibilities associated to your Montgomery County position via your personal e-mail account and links.
- Charge 7: Departmental Policy and Procedure 3000-61, Use of County-Provided Internet, Intranet, and Electronic Mail Services (email): The investigation disclosed that you have violated departmental policy in regard to use of County-[p]rovided [i]nternet, [i]ntranet, and [e]lectronic [m]ail [s]ervices.
- Charge 8: Departmental Policy and Procedure 3000-61, POLICY: (B) “Employee must use County-provided internet, intranet, and e-mail services responsibly and professionally, and must not use internet, intranet, or e-mail services in a manner that violates any applicable Federal, State, or Montgomery County law, regulation, or policy, including administrative procedures contained in the information Technology Administrative Procedures Manual”:

[http://portal.mcgov.org/content/departments\\_intranet/omb/forms/APs/ap6-6.pdf](http://portal.mcgov.org/content/departments_intranet/omb/forms/APs/ap6-6.pdf): The investigation disclosed that you violated Administrative Procedure 6-1, Use of the County-Provided Internet, Intranet, and Electronic Mail Services. Personal use must be kept at a minimum and must not disrupt the conduct of service or performance of other duties.

Charge 9: Departmental Policy and Procedure 3000-61, GENERAL: (B) Prohibited User Conduct, “Employees must use County-provided internet, intranet, and e-mail services in accordance with this policy, Montgomery County Administrative Procedure 6-1, and all applicable laws, regulations, and policies: Personal use must be kept at a minimum and must not disrupt the conduct of service or performance of other duties and not used for personal gain or profit.

Charge 10: Departmental Policy and Procedure 3000-61, RESPONSIBILITIES: (C) County Employees 2. “Ensure use of County-provided internet, intranet and e-mail services is in accordance with Administrative Procedure 6-1”: As a Supervisor, you hold a position of trust and responsibility that should not be compromised in any way. While you were on the internet conducting your personal business and accessing various websites, you were neglecting your responsibilities as Supervisor. Your actions indicate that you cannot be accountable while you are at work and the expectation that you are competently managing your duties and responsibilities of your position is questionable.

On September 12, 2008, DOCR’s the Department Director issued Appellant a Notice of Disciplinary Action (NODA), imposing a 15-day suspension effective September 29, 2008. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### County:

- The County has produced volumes of evidence that Appellant’s internet use was neither limited nor reasonable.
- Appellant used the internet to operate Appellant’s personal business – the Company – and to access information related to Appellant’s spouse’s employment (i.e., spouse’s job assignments) in violation of the prohibition on using the County–provided internet for personal gain or profit.
- Appellant was aware of the County’s internet policy as Appellant admitted Appellant received training on the policy.
- Appellant, as a supervisor, is only entitled to a 30-minute meal period. Appellant has no entitlement to any rest breaks.

- Because of such extensive internet usage, Appellant neglected Appellant’s duties.
- During the investigation, Appellant was not truthful concerning Appellant’s internet use when Appellant denied using the County-provided internet for the purpose of operating a personal business.
- During the investigation, Appellant was untruthful when Appellant indicated Appellant didn’t recognize certain websites that Appellant had accessed.

Appellant:

- The charges against Appellant should be dismissed as the County failed to issue the Statement of Charges within 30 days of when it became aware of Appellant’s alleged misconduct. Instead, Appellant received the SOC 107 days after management learned of Appellant’s conduct; and the Amended SOC 120 days after management learned of Appellant’s misconduct.
- The first SOC Appellant received wasn’t signed by the Department Director and, therefore, was invalid. Appellant did not sign the Amended SOC so it is not valid.
- Most of Appellant’s internet usage occurred during Appellant’s 30-minute meal break and/or Appellant’s two 15-minute rest breaks.
- Appellant’s staff of eight also access and actively use the internet during the course of the work day and while they are working overtime but management has never complained about their use.
- Appellant never used the County-provided internet to operate Appellant’s Company business.
- At no time did Appellant neglect Appellant’s job, as demonstrated by Appellant’s most recent performance appraisal,<sup>8</sup> which Appellant received after being interviewed for the DOCR investigation.
- The charges against Appellant constitute an act of retaliation by the DOCR Director because Appellant filed a grievance against the Director with the Board over Appellant’s retirement coverage and because Appellant has filed complaints about the Director with the Human Rights Commission.

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<sup>8</sup> Appellant’s most recent performance rating indicates an overall rating of Successful with “Exceptional” ratings on six of Appellant’s performance expectations; “Highly Successful” ratings on ten of Appellant’s performance expectations; and “Successful” ratings on three of Appellant’s performance expectations. See Appellant’s Ex. 1. In addition to Appellant’s performance rating, Appellant submitted an email from the Warden to Appellant stating: “Appellant congratulation[s] on your exceptional evaluation[] submitted by the Deputy Warden.” Id. The Board questions why Appellant’s overall rating was only “Successful” given the amount of “Exceptional” and “Highly Successful” ratings Appellant received on Appellant’s individual performance expectations and the fact that the Warden congratulated Appellant on Appellant’s exceptional evaluation.



## APPLICABLE REGULATIONS

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 33, Disciplinary Actions, which states in applicable part:**

...

### **33-2. Policy on disciplinary actions.**

...

#### **(b) *Prompt discipline***

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.<sup>9</sup>
- (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

#### **(c) *Progressive discipline.***

- (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:
  - (A) the severity of the employee's misconduct and its actual or possible consequences; or
  - (B) the employee's continuing misconduct or attendance violations over time.

...

- (d) ***Consideration of other factors.*** A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

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<sup>9</sup> As a preliminary matter, Appellant orally requested at the Prehearing Conference and then again at the Hearing that the charges against Appellant be dismissed based on the County's failure to adhere to this provision of the personnel regulations. At the close of the Hearing, the Board denied Appellant's request.

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulations that the employee is charged with violating; and
- (5) any other relevant factors.

...

**33-5. Causes for disciplinary action.** The following, while not all-inclusive, may be cause for a disciplinary action by a department director against an employee who:

...

- (c) violates an established policy or procedure;

...

- (g) knowingly makes a false statement or report in the course of employment;

**Montgomery County Administrative Procedure No. 6-1, Use of County-Provided Internet, Intranet, and Electronic Mail Services**, dated 6/14/2004, which states in applicable part:

**POLICY**

...

3.2 A County employee may use County-provided [i]nternet, intranet, or email services for personal purposes on only a limited, reasonable basis, and in accordance with this administrative procedure. However, employees must act reasonably to minimize personal use of County-provided [i]nternet, intranet, and email services. Such use must be kept to a minimum and not disrupt the conduct of service or performance of official duties.

...

**GENERAL**

...

**PROHIBITED USER CONDUCT**

4.3 Employees must use County-provided [i]nternet, intranet, and email services in accordance with this administrative procedure and all applicable laws, regulations, and policies. Prohibited conduct includes:

...

D. Using the County’s [i]nternet, intranet, or email services for private gain or profit.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, STANDARDS OF CONDUCT/CODE OF ETHICS, effective March 26, 2007, which states in applicable part:**

...

**VII. DEPARTMENT RULES FOR EMPLOYEES**

...

D. Specific Departmental Rules:

1. Conformance to Law:

Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public.

...

9. Conduct Unbecoming:

a. No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, civil, dishonest or improper conduct.

...

10. Neglect of Duty/Unsatisfactory Performance:

Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee's rank, grade, or position.

...

14. Untruthful Statements:

Employees shall not make untruthful statements, either verbal or written.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-61, Use of County-Provided Internet, Intranet, and Electronic Mail Services (email), effective April 26, 2006, which states in applicable part:**

**POLICY:**

...

B. Employees must use of County-provided internet, intranet, and email services responsibly and professionally, and must not use [i]nternet, intranet, or email services in a manner that violates any applicable federal, State, or Montgomery County law, regulation, or policy, including administrative procedures contained in the [I]nformation Technology Administrative Procedures Manual:  
[http://portal.mcgov.org/content/departments\\_intranet/omb/forms/APS/ap6-\[1\].pdf](http://portal.mcgov.org/content/departments_intranet/omb/forms/APS/ap6-[1].pdf)

C. A County employee may use County-provided [i]nternet, intranet, or email services for personal purposes on only a limited, reasonable basis, and in accordance with this policy. However, employees must act reasonably to minimize personal use of County-provided internet, intranet, and email services. Such use must be kept to a minimum and must not disrupt the conduct of service or performance of official duties.

...

**GENERAL:**

...

**B. PROHIBITED USER CONDUCT**

1. Employees must use County-provided [i]nternet, intranet, and email services in accordance with this policy, Montgomery County Administrative Procedure 6-1, and all applicable laws, regulations, and policies. Prohibited conduct includes:

...

- d. Using the County-provided internet, intranet, and email services for private gain or profit.

...

**RESPONSIBILITIES:**

...

**C. County Employees**

...

2. Ensure use of County-provided internet, intranet, and email services is in accordance with Administrative Procedure 6-1.

**ISSUES**

1. Has the County proven its charges by a preponderance of the evidence?
2. Was harmful procedural error committed by the Department Director when the Department Director failed to issue the Statement of Charges as provided by MCPR Section 33-2(b)(1) within 30 days of when DOCR became aware of Appellant's misconduct?
3. Based on the charges sustained, is the penalty of a fifteen-day suspension excessive?

## ANALYSIS AND CONCLUSIONS

### The Board Denies Appellant's Motion To Dismiss The Charges Against Appellant On The Basis That The Amended SOC Was Untimely.

Appellant argues that because the County failed to issue Appellant's Statement of Charges within the 30-day time limit set forth in the personnel regulations, the charges against Appellant should be dismissed. Appellant notes that DOCR management first became aware of Appellant's conduct on April 7, 2008 and Appellant was interviewed on May 28, 2008. However, Appellant did not receive a SOC until July 23, 2008, 107 days after management initially became aware of Appellant's misconduct. As the County correctly notes, Section 33-2(b) of the Montgomery County Personnel Regulations, while requiring a Department Director to issue a Statement of Charges within 30 calendar days of when the supervisor became aware of the employee's conduct, provides an exception. Specifically, the Department Director may wait more than 30 calendar days to issue the Statement of Charges if there is an investigation of the employee's conduct or other circumstances which justify a delay.

In the instant case, the record of evidence shows that on or about April 7, 2008, the Deputy Warden received information from the MCGEO Steward regarding Appellant's use of the internet. Later that day, the Deputy Warden met with the DTS forensic expert to discuss DTS' research into Appellant's internet use. The DOCR Investigator subsequently conducted an investigation into the Appellant's internet use. Appellant was interviewed by the DOCR Investigator on May 28, 2008. The DOCR Investigator subsequently submitted a report on the investigation on June 20, 2008 and the Director forwarded it to the Warden for action on June 27, 2008. Within 30 days after the investigation report was sent to the Warden, the initial SOC was issued to Appellant.

Given the fact that DTS produced a 2500-page report on Appellant's internet usage, it was reasonable for the DOCR Investigator to take several months to complete the investigation. The Board notes that the DTS forensic expert testified without contradiction that it would have taken the DTS forensic expert several months to go through such a report. H.T. at 23. Accordingly, the Board finds that the initial SOC was issued in a timely fashion.

Appellant also notes that subsequently the SOC was retracted and an Amended SOC containing many of the same charges was issued. Appellant indicates that this Amended SOC was served on Appellant 120 days after management became aware of Appellant's conduct. Appellant claims that Appellant was served with an Amended SOC because the initial SOC was invalid. According to Appellant, the initial SOC was invalid because the Director had failed to sign it and no where in the original SOC did it state that the Warden had been delegated authority to issue the SOC. H.T. at 119.

However, the Board notes that there was no need for the initial SOC to indicate that the Warden had been delegated the authority to issue the SOC. This is because on June 12, 2008, the Director signed a delegation of authority regarding SOC's and NODAs, which

delegated the Director's authority to DOCR Division Chiefs.<sup>10</sup> As the Warden is one of the Division Chiefs, the Warden was thus authorized to issue the original SOC. Thus, the Board rejects Appellant's argument that the initial SOC was invalid.

Moreover, Appellant acknowledged that the Amended SOC appeared to be very similar to the original SOC and Appellant was on notice of what the charges were. H.T. at 7. There is nothing in the personnel regulations that prohibits the County from amending a SOC. The Board notes that Appellant was given a new period within which to respond to the Amended SOC. Thus, Appellant has failed to show any procedural violation or substantive harm due to rescission of the original SOC and issuance of an Amended SOC.<sup>11</sup> See Lawson v. Veterans Administration, 53 M.S.P.R. 153, 155 n.4 (1992) (no showing that an amended notice of proposed discipline violated any law, rule, or regulation or that it cause appellant substantive harm).

Based on the record of evidence before the Board, the Board finds that the County acted in a prompt manner in issuing the Statement of Charges in the instant case and had the right to issue an Amended SOC. Accordingly, the Board denies Appellant's motion to dismiss the charges against Appellant.

**The Board Finds That There Were Three Basic Charges Adequately Set Forth In The Amended Statement Of Charges.**

An agency may take a single instance of misconduct and prepare a SOC based on several specifications. For example, if an employee does not show up for work and fails to call their supervisor to advise that they will not be reporting to work, a day of absence without leave (AWOL) may appear in a SOC as an AWOL charge and a charge of failure of the employee to follow regulations by reporting the absence to Appellant's supervisor. However, the Board will merge charges that are based on the same conduct and proof of one charge automatically constitutes proof of another. See, e.g., Southers v. Veterans Administration, 813 F.2d 1223, 1225-26 (Fed. Cir. 1987) (the court found that an agency's nineteen charges of false testimony were duplicative because they involved answers to the same question, slightly rephrased); Ruffin v. Dep't of Army, 35 M.S.P.R. 499, 502-03 (1987), aff'd, 852 F.2d 1293 (Fed. Cir. 1989); Delgado v. Dep't of Air Force, 36 M.S.P.R. 685, 688 (1988); Barcia v. Dep't of Army, 47 M.S.P.R. 423, 430 (1991). In the instant case, the County has set forth ten charges, many of which are duplicative and therefore, will be merged, as discussed below.

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<sup>10</sup> The Board is aware of this fact as it was copied on the Director's Delegation of Authority.

<sup>11</sup> Appellant also tried to argue that the Amended SOC was not valid as Appellant failed to sign the record of delivery and receipt. However, no where in the personnel regulations is it mandated that an employee must sign anything acknowledging receipt of a disciplinary action. Thus, the Board finds that Appellant's failure to sign for the Amended SOC, which Appellant acknowledges receiving, does not render it invalid.

A. Charges 1, 3, 7, 8 And 9 All Deal With Appellant's Misuse Of The Internet In Contravention Of County And Departmental Policies.<sup>12</sup>

The gravamen of Charge 1 is that Appellant's use of the internet for personal reasons was not reasonable and to such an extent that Appellant's regular duties were not performed and resulted in unnecessary overtime.<sup>13</sup> Charge 3 states that the investigation revealed that Appellant was using the internet for personal reasons and for conducting Appellant's private business on County time.<sup>14</sup> Charge 7 indicates that Appellant violated Departmental policy regarding the use of County-provided internet. Charge 8 states that Appellant violated an Administrative Procedure with regard to the use of the County-provided internet as personal use must be kept at a minimum and must not disrupt the conduct of service or performance of other duties. Charge 9 states that Appellant violated Departmental Policy as personal use of the internet must be kept to a minimum and must not disrupt the conduct of service or the performance of other duties and the internet must not used for personal gain or profit.

The Board has determined to merge the foregoing five charges into one charge with two separate specifications:

*Charge #1 – Appellant's use of the County-provided internet violated County and Departmental policies.*

*Specification A – Appellant violated the County's and Department's policies by failing to use the County internet services for personal purposes on only a limited, reasonable basis.*

*Specification B – Appellant violated the County's and Department's policies on use of the County-provided internet when Appellant used such services for personal gain or profit.*

B. Charges 2 And 6 Deal With Appellant's Untruthfulness During Appellant's Interview With The DOCR Investigator.

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<sup>12</sup> As discussed *infra*, the County's and Department's policies governing use of the County-provided internet are almost identical.

<sup>13</sup> Charge 1 is the only charge alleging that, because of Appellant's internet use, Appellant did not perform Appellant's regular duties and Appellant's failure to do so resulted in unnecessary overtime. The Board notes that the County never established that any of Appellant's overtime work was unnecessary. Accordingly, the Board finds that the portion of Charge 1 dealing with Appellant's unnecessary overtime was not proven by the County. The portion of Charge 1 dealing with Appellant's failure to perform Appellant's regular duties will be merged with Charge 5 and Charge 10, as discussed *infra*.

<sup>14</sup> Charge 1 and Charge 3 are very similar as they both charge that Appellant used the internet for personal reasons extensively. To the extent Charge 3 also deals with Appellant's use of the internet for conducting Appellant's private business on County time it, will be merged with that portion of Charge 9 discussed *infra* which charges the same misconduct.



Charge 2 indicates that Appellant knowingly made a false statement or report in the course of employment when Appellant denied Appellant had used the internet for the purpose of operating a personal business. Charge 6 states that the DOCR investigation disclosed that Appellant was untruthful during Appellant's interview when Appellant indicated Appellant didn't recognize the websites Appellant had accessed.

As both charges deal with Appellant's untruthfulness during Appellant's DOCR interview, the Board has determined to merge them into one charge with the following two specifications:

*Charge # 2 – Appellant made untruthful statements during Appellant's DOCR interview.*

*Specification A – Appellant was untruthful about not using the internet to operate a personal business.*

*Specification B – Appellant was untruthful about not recognizing websites Appellant had accessed.*

C. Charges 5 And 10 Deal With Appellant's Neglect Of Appellant's Duties As A Supervisor.

Charge 5 states that the investigation revealed that Appellant failed to perform in a competent manner Appellant's responsibilities as Supervisor, as Appellant used County time and salary to perform other personal tasks unrelated to the job to which Appellant has been entrusted. Charge 10 indicates that Appellant neglected Appellant's duties as a Supervisor. As the Board has previously opined, it views a charge of failure to perform in a competent manner and a charge of negligent performance of duties, where both charges deal with the same act of misconduct, to be nearly identical and will treat the two charges as one. See MSPB Case No. 07-10.

Accordingly, the Board has determined to merge the two charges<sup>15</sup> into the following charge:

*Charge #3 – Appellant neglected Appellant's duties as a Supervisor.*

D. Charge 4, Which Alleges That Appellant's Conduct Was Unbecoming And Improper, Is Deemed Merged Into The More Specific Charges Set Forth By The Board.

Charge 4 states that the investigation disclosed Appellant's conduct to be unbecoming and improper. However, it does not specifically state what conduct was deemed unbecoming and improper – i.e., misuse of the internet, neglect of duties, or providing untruthful

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<sup>15</sup> As previously noted, to the extent that Charge 1 also contained an allegation of failure to perform Appellant's regular duties, that allegation is merged into this charge.

statements during Appellant's interview. The Amended SOC does not allege any other misconduct by Appellant which could be deemed encompassed solely by this charge. Therefore, the Board has determined that this charge, which must involve the same misconduct as set forth in the more specific charges, is deemed merged with those charges. See Mann v. Dep't of Health and Human Services, 78 M.S.P.R. 1, 6-7 (1998); Wolak v. Dep't of Army, 53 M.S.P.R. 251, 261 (1992).

**The County Proved Part Of The First Charge By A Preponderance Of The Evidence.**

A. The County Failed To Prove Specification A of Charge 1 – I.E., That Appellant Violated The County's And Department's Policies By Failing To Use The County-Provided Internet Services For Personal Purposes On Only A Limited, Reasonable Basis.

1. The County's internet policy on limited personal use of the internet is unduly vague and subject to various interpretations.

The County's DTS expert testified that the County's internet policy, which is found in Administrative Procedure 6-1, see C. Ex. 7, permits use of the internet for personal reasons "within reason"; however, the policy does not define what "within reason" means. H.T. at 50. Rather, DTS leaves it up to managers to do so. Id. This is because the Departments differ with regard to their work environments; therefore, it is up to Departments to define in their business processes what they consider reasonable use for their employees. Id. at 52. Moreover, according to the DTS expert, it varies widely as to what the different Departments consider reasonable. Id.

The DTS expert opined that it was reasonable use of the County-provided internet to check a personal email account during the lunch hour, or go on eBay and buy a Christmas present for a child during the lunch hour. H.T. at 51. The DTS expert went on to elaborate that it is possible and within reason to spend the entire lunch hour actively browsing a site not related to business. Id.

The Board has reviewed the County's policy and finds it is unduly vague and readily subject to various interpretations. The Board does note that the County policy indicates that personal use must not disrupt the conduct of services or performance of duties. Thus, it appears that the policy governs personal use during the time a County employee is on official time. Accordingly, it would appear that County employees are free to use the internet without concern about limited use during their meal break or when they are not on official time. Indeed, the DTS expert indicated there was no restriction on coming into work at 4:00 a.m. in the morning to browse the internet and, as previously noted, it was reasonable to spend the entire lunch break on the internet. H.T. at 51, 52.

As discussed above, no where in the County's policy on internet use is the term "reasonable" defined. Likewise, neither are the terms "limited", or "minimum" defined. Unfortunately, DOCR's policy on internet use is just as vague as the County's and provides no further guidance on what "reasonable" use is. As Appellant testified, there is no

definition of what is a limited, reasonable time or if Appellant could use it during Appellant's lunch time or not on Appellant's lunch time. H.T. at 120. While the DOCR Director testified that the County's guidelines are crystal clear with regard to use of the internet, even the DOCR Director admitted there was some room for interpretation. H.T. at 60. However, according to the DOCR Director, if an employee was unsure they should just ask. Id. Unfortunately, the Board sincerely doubts that an employee is ever going to ask their supervisor whether their internet usage is reasonable.

Appellant, upon being asked whether Appellant considered Appellant's 89 on-line sessions, totaling 57 hours and 18 minutes, as limited, testified thusly:

Since it did not disrupt the work environment, nor did it stop the flow of work or created any infractions, I see that it's, to me, that was normal because it was based on what I felt was my allowance for lunch breaks. Everyone may analyze a limited amount. Some people may say it's two minutes, some people may say it's my whole half an hour lunch, some people may say it's my half an hour and two 15 minute breaks. It's not defined.

H.T. at 152.

The Board notes that in some cases a violation of the County's internet policy is obvious such as in MSPB Case No. 07-13, wherein the appellant during one week spent more than 40% of the appellant's work time on the internet. Where, however, it is not obvious that an employee has exceeded the bounds of reasonableness and the Department where the employee is working has not defined in its business processes what is "reasonable" or "limited" use of the internet, the Board will examine whether the employee's use disrupted the conduct of services or the employee's performance of official duties.<sup>16</sup>

2. Appellant's use of the County-provided internet did not disrupt the conduct of services or Appellant's performance of official duties.

As previously noted, the County presented evidence that Appellant's total internet usage was 57 hours and 18 minutes during the period 01/17/08-04/07/08.<sup>17</sup> The Board notes

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<sup>16</sup> Nothing in this Final Decision precludes the County or individual Departments from henceforth more precisely defining the terms "limited", "reasonable", and/or "minimum" through the use of specific time designations (e.g., spending no more than 20-30 minutes of official time during a work day on the internet for personal reasons). Such refinement of the County's internet policy would clearly put employees on notice as to what constitutes unreasonable use of the County-provided internet.

<sup>17</sup> In addition, the County provided over 2500 pages of a Websense report on Appellant's usage. However, as the DTS expert testified, it is possible to produce an inch of such a report based on ten minutes of activity or even three binders worth of material based on ten minutes of activity depending on what the internet user is doing. H.T. at 29-30. Thus,

that during the same period, Appellant worked 458 hours (including overtime) while present at the MCDC facility. See C. Ex. 9, Appellant's time sheets. Thus, it would appear at first glance that Appellant spent approximately 12.5% of Appellant's work time on the internet.

The DOCR Director testified that Appellant's use of the internet was egregious. The Board disagrees. As set forth in the investigation report, Appellant's use of the internet on certain days was extremely minimal (see, e.g., C. Ex. 1, Attach. 1, entries for 2/6/08 – 3 minutes; 2/25/08 – 1 minute; 3/20/08 – 3 minutes) and on other work days Appellant never even accessed the internet (e.g., 2/11/08; 3/6/08; 3/14/08; 3/21/08; 3/27/08). Compare C. Ex. 1, Attach. 1 with C. Ex. 9. The Board does note that on other days, Appellant's use was more than just a few minutes (e.g., 2/4/08 – 3 hours 28 minutes; 2/12/08 – 3 hours 25 minutes; 3/5/08 – 3 hours 4 minutes).<sup>18</sup>

Appellant argues that much of Appellant's use occurred when Appellant was at lunch or on break. Appellant notes that as a Supervisor, Appellant has no set lunch time but is free to take it whenever Appellant wants during Appellant's shift. Appellant further argues that Appellant's lunch period was one hour – the thirty-minute normal meal period plus the combining of two fifteen-minute rest breaks to which Appellant claims Appellant is entitled.<sup>19</sup> The County argues that only those employees covered by the MCGEO contract in DOCR are entitled to rest breaks in addition to the normal half-hour meal period. See MCGEO contract available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=1&c=4>. Appellant testified that it has been the policy of DOCR ever since Appellant began working there over fifteen years ago to give Appellant a thirty-minute meal period and two fifteen-minute breaks and Appellant has been allowed to combine the two.<sup>20</sup> H.T. at 154. Appellant

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the Board finds that based on this testimony the sheer volume of the report does not demonstrate unreasonable usage.

<sup>18</sup> The Board does regard several hours of use of the internet during a work day as more than limited use. See MSPB Case No. 07-13. The Board notes, however, that Appellant was not charged with more than limited use of the internet on any given day; rather Appellant was charged with using the internet during 89 on-line sessions, for a total amount of 57 hours and 18 minutes, between January 17, 2008 and April 7, 2008. See C. Ex. 11 at 1.

<sup>19</sup> Appellant also notes that Appellant is entitled to an additional fifteen-minute rest break if Appellant works overtime on a twelve-hour shift.

<sup>20</sup> The Board notes that when Appellant began work at DOCR, Appellant was in the bargaining unit. Only when Appellant became a Supervisor did Appellant come out of the bargaining unit. The Board also notes that the MCGEO contract clearly spells out that employees covered by the contract are entitled to two fifteen-minute rest breaks in addition to the half-hour meal period. MCGEO Contract, Article 13.2(c). While it is true that the personnel regulations do not discuss rest breaks or an employee entitlement thereto, there is nothing in the personnel regulations that forbids management from granting non-represented employees rest breaks similar to those granted to bargaining unit employees pursuant to the contract.

asserted, without contradiction, that, under prior management, Appellant has on occasion left DOCR during Appellant's one-hour lunch/rest break to get lunch outside the facility with Appellant's supervisor's knowledge. Id.

If one accepts Appellant's argument that Appellant's internet use occurred during Appellant's lunch or break periods, then only those days where Appellant exceed 1 hour of total internet use are subject to scrutiny. Under this theory, Appellant only used a total of 21 hours and 48 minutes on the internet or 4.8% of Appellant's work time. Less than 5% of work time involving internet use does not appear to be in violation of County's internet policy, concerning limited, reasonable use. It certainly cannot be characterized as egregious misuse.

Significantly, the County has produced no evidence that Appellant's internet use disrupted the conduct of services or Appellant's performance of Appellant's official duties. As noted above, Appellant put into evidence Appellant's most recent performance appraisal, which Appellant received after the investigation was conducted. The performance appraisal did not criticize Appellant for negligence; rather, the Warden congratulated Appellant on Appellant's exceptional performance during the rating period.

Accordingly, based on the foregoing analysis, the Board finds that the County failed to prove Specification A of Charge 1.

B. The County Proved Specification B Of Charge 1 – I.E., That Appellant Violated The County's And Department's Policies On Use Of The County-Provided Internet When Appellant Used Such Services For Personal Gain Or Profit.

While the County's internet policy may be vague about what constitutes limited, reasonable use of the County-provided internet, it is crystal clear as to what the County-provided internet may never be used for – i.e., for personal gain or profit. While the County argued that Appellant used the County-provided internet to operate Appellant's personal

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The County has been on notice since DOCR interviewed Appellant on May 28, 2008, that Appellant claimed Appellant accessed the internet while on Appellant's lunch break or during Appellant's fifteen-minute breaks. See C. Ex. at 2, Appellant's response to Question #8. As the County presented no evidence that Appellant was informed upon becoming a supervisor that Appellant was only entitled to Appellant's thirty-minute meal period, the Board finds that the practice at DOCR is to allow Appellant a thirty-minute meal period and two fifteen-minute breaks. The Board would note that nothing in this Final Decision prevents DOCR management from henceforth limiting Appellant to only Appellant's thirty-minute meal period, so long as DOCR ensures that all supervisors at DOCR are also limited to only a thirty-minute meal period.

business – the Company – the only proof<sup>21</sup> it offered was that Appellant accessed Appellant’s web-site many times and also accessed websites that might have been of aid to Appellant in the conduct of Appellant’s business.

Nevertheless, it is undisputed that Appellant used the County-provided internet to access Appellant’s personal email account and obtain Appellant spouse’s work orders from spouse’s employer so as to assist Appellant’s spouse. Indeed, Appellant testified that Appellant read the email on Appellant’s personal account regarding the assignments and printed them out for the spouse. H.T. at 146.

While Appellant may have been unclear as to what the definition of limited, reasonable use of the internet for personal reasons is, Appellant acknowledged that Appellant could not use the internet to make a profit. H.T. at 125. Clearly, assisting Appellant’s spouse by obtaining spouse’s work orders for the spouse through the County-provided internet and then printing them out resulted in personal gain for Appellant, as Appellant’s spouse needed to have the work orders to perform the spouse’s job. Accordingly, the Board concludes that Appellant violated the ban on using the County-provided internet for personal gain.

**The County Proved Part Of The Second Charge By A Preponderance Of The Evidence.**

A. The County Failed To Prove Specification A Of Charge 2 – I.E., That Appellant Was Untruthful About Not Using The Internet To Operate A Personal Business.

Appellant adamantly denied ever using the internet to operate the Company. Appellant did acknowledge that Appellant had a personal web site, the Company, which Appellant repeatedly visited.<sup>22</sup> But as the DOCR Investigator testified, while the DOCR Investigator

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<sup>21</sup> While both the DTS forensic expert and the DOCR Investigator testified that it was their opinion that Appellant operated Appellant’s personal business while on County time, the County failed to provide evidence of this. The DTS forensic expert stated that it was his opinion that Appellant did so, based on the fact that replaying the footsteps of Appellant on the internet, one was taken to the Company website very often. H.T. at 27. However, as the DOCR Investigator testified, there was no way of knowing what Appellant did when Appellant accessed the Company website. H.T. at 89.

Likewise, the DOCR Investigator indicated in the investigation report that many websites Appellant accessed for technical assistance with business. See C. Ex. 1 at 4-5. One such website the DOCR Investigator listed was vistaprint.com. Id. at 5. However, the material provided by the DOCR Investigator for vistaprint.com, see C. Ex. 15, indicates that one can not only purchase business cards there, one can also purchase invitations and announcements, wall decals, t-shirts, etc. Therefore, there is no proof that Appellant’s access of this website was related to Appellant’s Company business.

<sup>22</sup> Appellant claimed to the DOCR Investigator that Appellant accessed Appellant’s website at the request of two individuals, the Warden and a Corporal, to obtain information

knew that Appellant was spending time at Appellant’s website, the DOCR Investigator could not determine exactly what Appellant was doing there. H.T. at 89. The County also asserted that Appellant visited websites that assisted Appellant in operating Appellant’s business. C. Ex. 1 at 2. The investigation report listed a number of sites which provide technical assistance with business solutions, inventory controls, marketing, etc. Id. However, the Board concludes based on the evidence presented that Appellant’s reason for visiting various “business” sites is mere speculation on the part of the County. While the County can demonstrate that Appellant accessed a site, it has failed to demonstrate that Appellant’s purpose in visiting any particular site was to obtain assistance in running Appellant’s business.<sup>23</sup> As previously noted, the website vistaprint.com sells products that could assist an individual in their business or in their personal life. Accordingly, the Board has determined that the County failed to prove this specification.

B. The County Proved Specification B Of Charge 2 – I.E., That Appellant Was Untruthful About Not Recognizing Websites Appellant’s Had Accessed.

According to the investigation report, Appellant adamantly denied accessing the website “lafemmeffashion.com”. C. Ex. 1 at 3; H.T. at 93. However, the Websense Report for Appellant’s logon identification indicates it was the first website Appellant accessed on January 17, 2008 and had at least 18 hits on the website over a four minute period. See C. Ex. 3, Websense Report with Full URL at page 1-2; H.T. at 93.

Likewise, the investigation report states that Appellant adamantly denied ever going to the website “cleaners.com”, but the internet report associated with Appellant’s logon identification revealed a Google search was initiated on January 17, 2008 to identify “how to clean” and “cleaners.com (Dry Cleaners)” was accessed. See C. Ex. 1 at 3; H.T. at 93. A review of the Websense Report for Appellant’s logon identification does indeed verify that Appellant initiated such a search on January 17, 2008. See C. Ex. 3, Websense Report with Full URL at page 2-3. Thus, the Board concludes that the County proved this specification by the preponderance of the evidence.

**The County Failed To Prove The Third Charge By A Preponderance Of The Evidence.**

The County asserts that Appellant was negligent in performing Appellant’s duties as a Supervisor. In support of this charge, the County asserts that while Appellant was on the

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for them. C. Ex. 1 at 2; H.T. at 88. The DOCR Investigator questioned the Warden about this, and stated that the Warden denied asking Appellant for any Company information. H.T. at 89. However, the DOCR Investigator failed to question the Corporal. Id.

<sup>23</sup> This case is in marked contrast to MSPB Case No. 07-13, which also involved the use of the internet to conduct a personal business. In that case, the County proved that the appellant spent a significant amount of work time purchasing goods for appellant’s private business on the internet. In addition, the appellant downloaded significant amounts of material that would help appellant in running appellant’s business. The appellant also provided appellant’s County email address as appellant’s business and billing email address.

internet Appellant was neglecting Appellant's responsibilities. However, the County has not articulated any specific task which Appellant failed to perform.<sup>24</sup> Indeed, as previously noted, Appellant received an excellent performance rating for the period during which Appellant has been charged with neglect. The Deputy Warden noted on Appellant's appraisal that Appellant "[w]orks well with little or no supervision;" and "[d]oes a great job in reducing the number of . . . errors by reviewing and catching the mistakes." A. Ex. 1. The Warden congratulated Appellant on Appellant's exceptional evaluation. Accordingly, based on the record of evidence before the Board, it has determined that the County failed to prove this specification.

**Appellant Failed To Prove That Management Imposed A 15-Day Suspension Against Appellant Due To Retaliation.**

Appellant alleged in Appellant's appeal that discipline was imposed on Appellant by the Director in retaliation for Appellant having previously filed a grievance which was affirmed by the Board concerning Appellant's retirement coverage. See Appeal, Block 10. Subsequently, during the hearing, Appellant alleged that the discipline was imposed by the Director based on a personal vendetta against Appellant for having filed complaints about the Director with the Human Rights Commission. H.T. at 131.

With regard to Appellant's claim that discipline was imposed against Appellant for having filed a previous appeal with the Board, the Board notes that it issued its Final Decision in MSPB Case No. 07-12 on July 19, 2007, over a year before Appellant was issued the original SOC in this case. Besides Appellant's allegation in Appellant's appeal, Appellant has offered no direct evidence to demonstrate Appellant's allegation of retaliation by linking the instant discipline to Appellant's prior appeal. Significantly, DOCR management only initiated an investigation into Appellant's internet use after a Union Steward complained to the Deputy Warden about Appellant's usage and provided the Deputy Warden with the four work orders for Appellant's spouse, which were found in the Unit's printer. Given these circumstances, the Board finds that Appellant failed to demonstrate Appellant was disciplined based on Appellant's prior appeal to the Board. See, e.g., Dobruck v. Department of Veterans Affairs, 102 M.S.P.R. 578 (2006) (appellant's bare assertions of retaliation, without more, are insufficient to prove that the employment action was taken because of protected activity).

With regard to Appellant's allegation that the discipline was based on a personal vendetta against Appellant by the Director, again Appellant offered no evidence besides Appellant's allegation. Accordingly, the Board finds that Appellant failed to demonstrate that the discipline imposed was based on retaliation.

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<sup>24</sup> Again, this is in sharp contrast to the appellant in MSPB Case No. 07-13 who was charged with neglect of appellant's duties because of appellant's internet use. In that case, the County was able to demonstrate that the appellant failed on two days to visit several posts as required.



**Based On The Charges That Have Been Sustained, The Board Finds That The Penalty Of A 15-Day Suspension Is Not Appropriate.**

Appellant supervises eight Technicians. H.T. at 130. As the Board has previously held, a higher standard of conduct is required of a supervisor. MSPB Case No. 05-07 (2005); MSPB Case No. 07-08 (2007); MSPB Case No 07-13 (2007); see also Fowler v. U.S. Postal Service, 77 M.S.P.R. 8, 13 (1997); Fischer v. Department of Treasury, 69 M.S.P.R. 614, 619 (1996). The charges which the Board has sustained are serious ones. Appellant provided false information during DOOCR's investigation. The Supreme Court has held that employees are obliged to respond truthfully in agency investigations or suffer discipline for making a false statement. LaChance v. Erickson, 522 U.S. 262, 268 (1998).

Likewise, using the County-provided internet for personal gain is prohibited. As we previously opined in MSPB Case No. 07-13, the County has the right to expect an employee to devote their work hours to official duties. "To conduct personal business when the agency presumes you are performing the official duties of your position violates the trust that the agency has placed in its employee. Such conduct destroys the confidence established in the employer-employee relationship." Cohen v. Internal Revenue Service, 7 M.S.P.R. 57, 61 (1981); Biniak v. Social Security Administration, 90 M.S.P.R. 692 (2002).

Despite the seriousness of Appellant's misconduct, there are several mitigating factors that need to be considered. First, the Board did not sustain all of the County's charges. Moreover, the Board notes that Appellant has never had any discipline before this during Appellant's over eighteen years of service. Finally, Appellant received an exceptional rating for Appellant's performance during the period of time at issue in this case. The Board believes that Appellant has potential for rehabilitation. Accordingly, weighing the seriousness of Appellant's misconduct together with the foregoing mitigating factors, the Board has determined that in consonance with the concept of progressive discipline, the appropriate penalty for Appellant's misconduct is a ten-day suspension.

**ORDER**

On the basis of the above, the Board sustains the appeal and orders the County to revoke Appellant's 15-day suspension and substitute a 10-day suspension based solely on the charges upheld by the Board. The County is also ordered to make the Appellant whole for lost wages and benefits for the five days not sustained. The County will complete the actions ordered by the Board no later than 45 days after the date of this Final Decision.

## **CASE NO. 08-12**

### **DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Department of Health and Human Service's (HHS's) Director, to suspend Appellant for a fifteen-day period.

### **BACKGROUND**

Appellant is a Social Worker II in HHS. One of the missions of HHS is to protect children.<sup>1</sup> As a Social Worker II, Appellant provides assistance to Appellant's minor clients, who are children in Maryland's child welfare system under court supervision, residing in a group home or residential treatment facility. The residential unit where Appellant works within HHS performs two main tasks – case management and planning. Case management involves assessing what the needs are of a particular child and then coordinating to ensure the needs are met. Case management also involves ensuring that court orders for a particular case are being met. The second main function of the residential unit – planning – involves the Social Worker recommending to the court a plan for where the child will live on a permanent basis. Because Appellant is a Social Worker,<sup>2</sup> Appellant is a mandated reporter.<sup>3</sup>

One of Appellant's clients is Client A, who was fourteen-years old at the time of the events at issue in this case. Client A resides in a group home for children who are 14 years old through 16 years old, in Maryland. The Group Home Director is Ms. B. Ms. B, who formerly worked in a position in payroll operations, has completed some college.

Sometime in September 2007, Client A was in Client A's room at the Group Home, lying on the bed, when three other children entered the room. According to Client A,

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<sup>1</sup> Safety is a paramount concern as the children assigned to HHS have been abused and neglected.

<sup>2</sup> As a Social Worker, Appellant is a member of the bargaining unit covered by the Collective Bargaining Agreement between the Municipal and County Government Employees Organization (MCGEO or Union), Local 1994, and the Montgomery County Government.

<sup>3</sup> The Maryland Family Law Code requires that "all persons, including all professionals, are mandated to make an oral report as soon as possible to the Department of Health and Human Services (DHHS), when they have reason to believe that a child has been subjected to abuse or neglect." County Exhibit (C. Ex.) 8. Anyone having a duty to report is a "mandated reporter". As a Social Worker, Appellant is expected to report any suspicion of child abuse or neglect to the screening unit within HHS, which is responsible for doing investigations.

someone turned off the lights and closed the bedroom door. Then two of the children held Client A face down on the bed while the third child (“the bully” or “the instigator”) attempted to commit an assault upon Client A. The bully was unsuccessful<sup>4</sup> and then the three children left Client A’s room. Client A did not tell any of the staff of the Group Home about the incident.

Approximately three weeks later, Ms. B, while driving Client A and one of the three children involved in the incident with Client A to a fishing outing, overheard Client A speak about the incident with the other child. Ms. B asked Client A to explain to her what had happened to Client A and Client A did so. Upon returning to the Group Home after the outing, Ms. B immediately reported the incident to Appellant. Ms. B testified that she expected that Appellant would investigate the matter. Ms. B also reported the incident to Client A’s psychotherapist, who is a mandated reporter.

Appellant claims Appellant learned of the incident on a Friday. Upon learning of the incident, Appellant did nothing at first. The following Monday, Appellant met with Client A at a court hearing on another matter. Because Client A was concerned about the court appearance, Appellant did not discuss the incident with Client A. Instead, Appellant discussed with Client A generally whether Client A felt safe at the Group Home. Appellant indicated that Client A said Client A did feel safe. Appellant never actually had a discussion with Client A regarding the incident.

While Appellant never spoke with Client A about the incident, Appellant did speak to the Group Home Director. Ms. B and Appellant discussed Client A’s safety, including the whereabouts of the three children involved in the incident with Client A.<sup>5</sup> According to Appellant, Ms. B indicated that Client A was safe as Client A now had Client A’s own room which no other children were allowed to enter.<sup>6</sup>

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<sup>4</sup> According to information provided by Client A to the investigators much later, when the bully attempted to commit the assault on Client A, Client A took action to prevent the assault from being completed. C. Ex. 14.

<sup>5</sup> There is a dispute in the testimony regarding whether Appellant was told by Ms. B that all three children had been removed from the Group Home when Ms. B reported the incident to Appellant. Ms. B states that the bully was removed approximately one week after Ms. B learned of the incident, with one of the other two children being removed from the home approximately three to four months thereafter, and the third child still in the group home as of the date of the hearing in this matter. Hearing Transcript (H.T.) at 219, 225-26. Appellant states that Appellant was told by Ms. B that all three of the children had been removed from the home. H.T. at 242-43; Appellant’s Exhibit (A. Ex.) 3. As discussed in greater detail *infra*, because of this factual dispute, as well as others, the Board has made credibility determinations with regard to the witnesses. The Board finds Ms. B to be credible; it does not find Appellant’s testimony credible.

<sup>6</sup> According to Ms. B’s testimony, at the time of the incident, Client A already had a room of Client A’s own. H.T. at 225.

Client A's psychologist, Dr. C, while performing an evaluation of Client A on December 8, 2007, also learned from Client A about the incident.<sup>7</sup> Dr. C subsequently informed Appellant about the incident, and Appellant informed Dr. C that Appellant was aware of the incident.

Dr. C then notified the screening unit of HHS about the incident involving Client A on December 27, 2007. Ms. D of the screening unit took the information down on an intake worksheet, C. Ex. 13, and then contacted Appellant. Appellant acknowledged to Ms. D that Appellant was aware of the incident but had not reported it nor had Appellant instructed Ms. B to report it. Appellant then asked Ms. D whether Appellant was in trouble. H.T. at 38. Ms. D subsequently contacted Ms. B who verified that she had been told by Client A about the incident. Ms. B also informed Ms. D that she had reported the incident to Appellant. Ms. B told Ms. D that the instigator of the incident was no longer in the home, that one of the children was in the home and another was in the process of being removed from the group home. C. Ex. 13.

Supervisor E, Appellant's supervisor, received the report of the incident involving Client A from the screening unit on the day the psychologist filed it. Supervisor E began to gather information about the incident and spoke with Appellant, Ms. B, and the psychologist.<sup>8</sup> Appellant told Supervisor E Appellant was aware of the incident. Ms. B informed Supervisor E that she had told Appellant about the incident in early November and that Appellant had told Ms. B that this "was out of Appellant's field." H.T. at 61. Ms. B informed Supervisor E that she had assumed that Appellant would file a report with the screening unit about the incident and was surprised when no one from HHS came out to talk with her about the case. *Id.* When Supervisor E spoke with the psychologist who reported the incident, Dr. C told Supervisor E that Dr. C had informed Appellant about the incident and Appellant had told Dr. C Appellant was already aware of it and gave the psychologist the phone number of HHS so the psychologist could make a report. Supervisor E also spoke with Supervisor E's supervisor, Manager F, about the situation.

Because the report of the incident which Ms. D had received raised several issues, Ms. D discussed the matter with her second-line supervisor so as to determine the proper course of action. She was instructed to mark on the intake worksheet the decision to screen out, with the explanation for the screen out as "ODO", which stands for otherwise disposed of, based on the fact that no actual abuse occurred and the incident happened over three months ago. Ms. D noted on the reason for the screen out that a HHS employee "will speak

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<sup>7</sup> Ms. B testified that Dr. C asked her if there were any incidents involving Client A that Dr. C needed to know about and Ms. B shared with Dr. C the incident involving the bully. H.T. at 220.

<sup>8</sup> Supervisor E also spoke with Mr. G, of the Maryland Board of Social Work Examiners, to determine whether Appellant's lack of reporting of the incident involving Client A had to be reported to the Board of Social Work Examiners. H.T. at 62-63. Supervisor E was informed it had to be reported and subsequently filed a Complaint with the Board of Social Work Examiners on January 28, 2008. *See* C. Ex. 17.

to all parties involved to emphasize mandated reporting and determine if anything else may have occurred.” C. Ex. 13 at 5.

However, in early January 2008, during a court proceeding involving another incident in which the bully was the perpetrator, the judge became aware of the incident with Client A and the bully and ordered an investigation into the matter. Accordingly, on January 17, 2008, Social Worker H, and Detective I of the Montgomery County Police, conducted an investigation into the incident involving Client A. Based on their investigation, child abuse of Client A was “ruled out”<sup>9</sup> due to insufficient evidence to support another finding – i.e., unsubstantiated or indicated, in that there were conflicting accounts of what had occurred. C. Ex. 14.

On January 8, 2008, Supervisor E, Manager F, Manager J, Appellant and Appellant’s Union Representative, Mr. K, attended an investigative examination concerning Appellant’s failure to report the incident involving Client A. Attendees at the meeting recalled Appellant claiming Appellant did not know Appellant was a mandated reporter.<sup>10</sup> H.T. at 67, 68; 139, 141; 169-70. Appellant also claimed that Appellant didn’t report the incident because it was hearsay; Appellant had heard of the incident from the Group Home Director and not directly from the child and therefore, did not need to report it. Appellant claimed that Client A was safe as all three children had been removed from the home and Client A had been given a separate room. When asked by Manager F whether Appellant had spoken to Client A directly about the incident, Appellant indicated Appellant had not. Appellant stated that Appellant’s philosophy was that if Client A wanted to tell Appellant about the incident, Client A would.

After the meeting, Manager F, Supervisor E, and Manager J discussed what had occurred at the meeting and the different ranges of penalties based on Appellant’s conduct. All three individuals indicated that they were considering some type of suspension action.

In a memorandum dated January 24, 2008, the Department Director provided Appellant with a Statement of Charges (SOC) – Fifteen (15) Day Suspension in accordance with the provisions of Section 33-6(b) of the Montgomery County Personnel Regulations, 2001 (MCPR) and Article 28.4(b) of the MCGEO Office, Professional and Technical, Local

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<sup>9</sup> The term “Ruled out” is defined as meaning a “finding that abuse or neglect did not occur.” See Code of Maryland Regulations (COMAR) 07.02.07.02.A(38). The term “Unsubstantiated” means “a finding that there is insufficient evidence to support a finding of indicated or ruled out.” COMAR 07.02.07.02.A(44). The term “Indicated” connotes “a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse or neglect occurred.” COMAR 07.02.07.02.A(21).

<sup>10</sup> Appellant denied making such a statement, H.T. at 230; Appellant’s Union Representative indicated that Appellant did in fact indicate on January 8, 2008 that with regard to the incident involving Client A, Appellant did not know Appellant was a mandated reporter. H.T. at 185.

1994, Collective Bargaining Agreement (CBA). The SOC was based on two charges: 1) Appellant's failing to perform duties in a competent or acceptable manner based on Appellant's failure to report to local law enforcement or HHS the attempted assault of one of Appellant's clients as required of a mandated reporter; and 2) Appellant's violation of an established policy when Appellant failed to do a safety assessment for every child-group or residential placement (SAFE-C GRP)<sup>11</sup> based on the attempted assault of Appellant's client.

Appellant responded to the charges on February 20, 2008 and acknowledged that Appellant did not make a formal report of the incident involving Client A. A. Ex. 3. However, in Appellant's response, Appellant stated that an actual assault of Appellant's client never occurred; rather, by Client A's own account, Client A was bullied. *Id.* Appellant acknowledged that Appellant was well aware of Appellant's duty as a mandated reporter. *Id.* However, Appellant indicated Appellant was not required to report the incident because it did not involve an "other person legally responsible" for Client A. *Id.* Appellant insisted that Appellant was told by Ms. B that the children involved in the incident no longer resided in the group home. *Id.* Finally, Appellant stated that "[t]he child later informed this worker that three children entered the room and two of the three children held Client A while the third child, unsuccessfully, attempted to . . . commit an assault. The child stated the assault never occurred."<sup>12</sup> *Id.*

The Department Director issued a Notice of Disciplinary Action (NODA) – Fifteen (15) day Suspension on March 3, 2008. The NODA was based on the same two charges contained in the SOC and provided Appellant with the right to appeal the action to the Board.

On March 25, 2008, Appellant filed an appeal with the Board, challenging the decision to suspend Appellant for fifteen days. As attachments to Appellant's appeal, Appellant also included, *inter alia*, a copy of the NODA and a copy of an Alternative Dispute Resolution (ADR) Settlement Conference Intake Form (Settlement Form), which was completed on February 20, 2008. The NODA indicates that Appellant's Union<sup>13</sup> requested a

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<sup>11</sup> A SAFE-C GRP assessment is an assessment tool developed by the State of Maryland for social workers to assess the safety of clients in group homes. A SAFE-C GRP is done for three separate reasons during the life of a case – first when a child is placed in a facility or replaced in a facility; every six months during case reconsideration; and when circumstances suggest that a child's safety may be in jeopardy. The SAFE-C GRP is to be completed by the Social Worker and approved by the Social Worker's supervisor. C. Ex. 11.

<sup>12</sup> The Board notes that this statement is directly contradicted by the testimony of Appellant that Appellant never spoke with Client A specifically about the incident. H.T. at 253-54.

<sup>13</sup> Appellant, as a member of the bargaining unit covered by the CBA between MCGEO and the County, may use the ADR process as set forth in the CBA. *See* CBA for the period July 1, 2007 – June 30, 2010. Specifically, Appellant, after receiving the SOC but before receiving the NODA, may participate in a Pre-Discipline Settlement Conference. CBA, § 10.14(a). The CBA provides that utilization of the Settlement Conference option

Pre-Discipline Settlement Conference on Appellant’s behalf. The Settlement Form reflects the results of the Pre-Discipline Conference, wherein Appellant rejected the Pre-Discipline Conference Committee’s recommendation.

**APPLICABLE LAWS, REGULATIONS AND CONTRACTUAL PROVISION**

**Annotated Code of Maryland, Family Law, Title 5, Subtitle 7**, which states in applicable part:

§ 5-701. Definitions

(b) Abuse. – “Abuse” means:

...

(2) abuse of a child, whether physical injuries are sustained or not.

...

(k) Household member. – “Household member” means a person who lives with, or is a regular presence in, a home of a child at the time of the alleged abuse or neglect.

...

§ 5-702. Legislative policy

The purpose of this subtitle is to protect children who have been the subjects of abuse or neglect by:

(1) mandating the reporting of any suspected abuse or neglect; . . .

...

§ 5-704. Reporting of abuse or neglect – By health practitioner, police officer, educator or human service worker

(a) In general. – Notwithstanding any other provision of law, including any law on privileged communications, each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State:

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will be considered part of the informal resolution process and by using the process the employee waives any right to file with the MSPB over suspensions, demotions and dismissal actions. CBA, § 10.14(a)(7). The Settlement Form likewise contains a similar provision about the employee waiving the right to appeal to the MSPB.

(1)(i) who has reason to believe that a child has been subjected to abuse, shall notify the local department or the appropriate law enforcement agency; . . .

. . .

§ 5-706. Investigation

. . .

(b) Time for initiation; actions to be taken. – Within 24 hours after receiving a report of suspected physical or sexual abuse of a child who lives in this State that is alleged to have occurred in this State, . . . the local department or the appropriate law enforcement agency shall:

(1) see the child;

(2) attempt to have an on-site interview with the child’s caretaker;

(3) decide on the safety of the child, wherever the child is, and of other children in the household; . . .

**Department of Human Resources, Circular Letter SSA# 05-4, Maryland’s Safety Assessment For Every Child-Group or Residential Placement (SAFE-C GRP), dated 06/20/2005, which states in applicable part:**

. . .

**PURPOSE:**

The Safety Assessment for Every Child-Group or Residential Placement (SAFE-C GRP) is a tool used to assess the safety of children in Maryland’s child welfare system who reside in or will be placed in a group or residential child care facility licensed or contracted by DHR/SSA. . . .

. . .

**REQUIRED ACTION:**

Caseworkers are required to assess the safety of every child receiving services. This assessment is completed when the child lives in a group or residential facility. Caseworkers will make a report to child protective services when child abuse/neglect is suspected. Each caseworker is responsible for assessing the safety of each child in his/her caseload with the information available. . . Caseworkers will document that safety was assessed for all children in their caseloads served by a



group or residential facility using the SAFE-C GRP.  
(DHR/SSA SAFE-C GRP 1).

...

### **SAFETY ASSESSMENT PROCESS**

Families and children should be assessed for safety at each of the following points:

- When circumstances suggest that the child's safety may be jeopardized; . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 33, Disciplinary Actions**, which states in applicable part:

#### **33-3. Types of disciplinary actions**

...

(e) *Suspension.*

...

(2) A department director may not:

- (A) suspend an employee for more than 10 days without the approval of the CAO; . . .

**Agreement Between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County Government, Montgomery County, Maryland, July 1, 2007 through June 30, 2010, Article 10, Grievances**, which states in applicable part:

#### 10.2 Discipline Grievances

Oral admonishments and written reprimands are not subject to review under this procedure. Any employee initiating a grievance under this procedure regarding suspension, demotion, or removal waives any right to have that action reviewed by the Montgomery County Merit System Protection Board.

...

#### 10.14 Alternative Dispute Resolution Processes

The Union and the Employer share a joint interest in resolving disputes arising from the implementation of discipline and other terms and conditions of employment.

In order to minimize these disputes and improve the efficiency of governmental operations, the parties agree to voluntarily utilize the following processes.

(a) Pre-discipline Settlement Conferences

- (1) After a statement of charges (includes intent to terminate actions based on unsatisfactory performance) is issued but before the notice of disciplinary action is issued, the parties may voluntarily agree to a pre-disciplinary settlement conference.
- (2) Up to 2 standing committees (with alternates) to review proposed discipline may be established.
- (3) Committee makeup – 3 members (1 Management rep., 1 OHR rep. and 1 Union rep.)
- (4) Participation is voluntary; the Office of Human Resources makes the final decision on whether to participate.
- (5) The Committee reviews the recommended level of discipline and the facts of the case and makes a non-binding recommendation. Each side is permitted to make a brief presentation before the Committee. Presentation and format shall be established by the Committee.
- (6) If parties agree with the recommendation of the Committee, Notice of Discipline is issued with no grievance. If Union disagrees with the committee's recommendation, it is free to grieve the Notice of Disciplinary Action. If County disagrees, it may go forward with the notice as originally proposed.
- (7) The settlement conference option will be considered a part of the informal resolution process of the contract grievance procedure, in using this process an employee waives any right to file with MSPB on suspensions, demotions and dismissal actions.

**Agreement Between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County Government, Montgomery County, Maryland, July 1, 2007 through June 30, 2010, Article 28, *Disciplinary Actions*, which states in applicable part:**

28.2 Types of Disciplinary Actions

Disciplinary actions shall include but are not limited to:

...

(e) Suspension

- (1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct. A suspension shall not exceed 5 work days unless authorized by the Chief Administrative Officer. . . .

...

- 28.5 An employee may appeal any disciplinary actions, with the exception of oral admonishments and written reprimands, in accordance with this Agreement.

**POSITIONS OF THE PARTIES**

County:

- Appellant was suspended for failing to report suspected abuse of Appellant's client as required by a mandated reporter.
- Appellant was aware Appellant was a mandated reporter as Appellant received training in the requirement to report.
- Appellant failed to perform a SAFE-C GRP assessment, as required by policy, when Appellant learned of the incident involving Client A.
- The County has elected to waive its rights under Section 10.14(a)(7) of the CBA to seek dismissal of the instant appeal due to Appellant's participation in the Settlement Conference; as the Board has already held a hearing on this case it should render a decision on the merits.

Appellant:

- Appellant was not required to report the incident involving Appellant's client as there was no abuse. Moreover, the incident did not involve a person legally responsible for Appellant's client.
- The screening unit ruled the incident as "ODO" and did not send it for investigation. When the incident was investigated by HHS, child abuse was "ruled out".
- Appellant did not need to perform a SAFE-C GRP assessment as Client A was safe; the Group Home Director told Appellant the three children involved had been removed from the home and Client A had been given Client A's own room.
- The Department Director lacked the delegated authority to suspend Appellant for more than ten (10) days. Rather, the Department Director needed to obtain the CAO's approval to effect a fifteen (15) day suspension.
- Appellant concurs with the County's position that the Board has jurisdiction over the instant appeal.

## ISSUES

1. Does the Board have jurisdiction in this case to adjudicate this appeal?
2. If the Board has jurisdiction, has the County proven, by a preponderance of the evidence, that the fifteen day suspension of Appellant was reasonably justified and consistent with applicable law and regulatory provisions?

## ANALYSIS AND CONCLUSIONS

### **The Board Has Determined It Has Jurisdiction To Hear This Case.**

The Board notes that the MCGEO CBA provides for a Pre-Discipline Settlement Conference (Conference). CBA, Article 10.14. The Conference is to be held after a Statement of Charges is issued but before a NODA is issued. *Id.* During the Conference, a Committee reviews the disciplinary action and makes a non-binding recommendation. CBA, Article 10.14(a)(5). If the parties agree to the non-binding recommendation, then the NODA is issued with no grievance rights. If the Union disagrees, it may file a grievance over the NODA. If the County disagrees, it may issue the NODA as originally proposed.

In the instant case, the record of evidence before the Board indicates that, on February 20, 2008, Appellant, along with Appellant's Union Representative, participated in an ADR Settlement Conference. It appears from the Settlement Form that the Conference Committee members reached agreement to recommend a 10-day suspension for Appellant in lieu of the 15-day suspension proposed. *Id.* The Settlement Form indicates that the Department agreed to the Committee's recommendation. *Id.* Appellant and Appellant's Union Representative signed the form, rejecting the Committee's Recommendation. *Id.* The Settlement Form indicates that the Settlement Conference option is considered part of the informal resolution process of the contract grievance procedure and, in using this process, an employee waives the right to file with the MSPB on any suspension, demotion or dismissal actions.<sup>14</sup> *Id.* Thus, under the contract provisions, the Union was free to file a grievance over the NODA ultimately issued. This it did not do. Rather, Appellant appealed the NODA to the Board.

The Board currently has before it on appeal another disciplinary action wherein the appellant also participated in the ADR Settlement Conference process pursuant to the MCGEO CBA. *See* MSPB Case No. 08-14. In that case, the County had asked the Board to dismiss the appeal as the appellant waived the right to appeal to the Board by the appellant's participation in the Pre-Discipline Settlement Conference. The Board noted that the Settlement Form in MSPB Case No. 08-14 is identical to the one filed with the Board in the instant case. Nevertheless, in the instant case, the NODA issued to Appellant told Appellant that Appellant had the right to challenge Appellant's suspension by filing an appeal with the Board.

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<sup>14</sup> This is consistent with Section 10.14(7) of the CBA.

Therefore, before making a determination regarding the merits of the instant appeal, the Board ordered the County to provide a statement of such good cause as exists for why the Board has jurisdiction in the instant case if it lacks jurisdiction in MSPB Case No. 08-14.<sup>15</sup> The County responded to the Board arguing that in MSPB Case No. 08-14 the appellant agreed to the recommendation to reduce the proposed discipline, while Appellant in the instant case rejected the proposed reduction. The County noted that the Board has held a hearing in this case. Finally, the County asserted that it has elected to waive its rights under section 10.14(a)(7) of the CBA<sup>16</sup> and therefore, has not moved to dismiss the instant case.

The right of a merit employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal action is granted by the Montgomery County Charter. Montgomery County Charter, Section 404. The Charter also provides that employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system to the extent those provisions are made subject to collective bargaining. Montgomery County Charter, Section 401. The MCGEO CBA allows an employee who wishes to challenge a suspension action to elect between filing a grievance under the CBA grievance procedure or appealing the suspension to the Board. CBA, § 10.2.

It is well established law that in order to effectuate an enforceable waiver of a statutory right, the waiver must be the result of an informed, intentional abandonment of a known right, free of any coercion or duress. See McCall v. United States Postal Service, 839 F.2d 664, 668 (Fed. Cir. 1988) (citing Ferby v. United States Postal Service, 26 M.S.P.R. 451, 455-56 (1985)). In the instant case, the Board is unpersuaded that Appellant made an informed, intentional abandonment of Appellant's right to appeal to the Board concerning Appellant's suspension.

The Board notes that the ADR Settlement Form is confusing, with the waiver provision found at the bottom of the form. More importantly, there is no evidence that the employee is specifically informed of the waiver of the employee's rights prior to entering into the Settlement Conference. Indeed, the Board notes that the County has conceded that even it, a signatory to the CBA, has never before focused upon the language of Section 10.14(a)(7) of the CBA and ADR Settlement Form so as to move to dismiss other employees' appeals to the Board, after their participation in the Settlement Conference. If the County was unaware that an employee participating in the Settlement Conference was waiving their rights, the Board questions how an employee could be expected to be aware of the waiver. Therefore, based on the totality of evidence, the Board holds that the absence of advance knowledge and written agreement by

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<sup>15</sup> The Board issued a similar Show Cause Order in MSPB Case No. 08-14.

<sup>16</sup> Significantly, in the County's Response to the Board's Show Cause Order in MSPB Case No. 08-14, the County conceded that it has in other cases, including MSPB Case No. 08-12, notwithstanding the CBA provision and language on the Settlement Form, not opposed an employee's subsequent appeal to the Board. In those prior cases, the County has not focused on the language in § 10.14(a)(7) of the CBA and so these prior waivers were not intentional. County Response to Show Cause Order at 3.

Appellant that Appellant was waiving Appellant's right to appeal to the Board by participating in the Settlement Conference demonstrates that Appellant did not make an informed, intentional abandonment of Appellant's right.<sup>17</sup> Accordingly, the Board has determined that it has jurisdiction over the instant case.

### **The County Has Proven Its Charges By A Preponderance Of The Evidence.**

#### A. The Board Finds That Appellant's Testimony Is Simply Not Credible.

As previously noted, Appellant's testimony and that of other witnesses disagree on several key points in this case. Accordingly, the Board needs to determine the issue of credibility. Credibility is "the quality that makes something (such as a witness or some evidence) worthy of belief." Haebe v. Department of Justice, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002) (quoting Black's Law Dictionary 374 (7th ed. 1999)).

In Bailey v. U.S., 54 Fed. Cl. 459 (2002), the Claims Court noted that in evaluating credibility

[i]t is proper for the [fact finder] to take into account the appearance, manner, and demeanor of the witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or uncertainty in testifying.

Id. at 462 n.2 (quoting 81 Am. Jur. 2d § 1038 at 848-49 (1992)). The Bailey court also noted that credibility determinations include an evaluation of the witness' demeanor, perception, memory, narration and sincerity. 54 Fed. Cl. at 462 n. 2 (citing 40 Case W. Res. L. Rev. 165, 174 (1989/1990)).

The Third Circuit has held that "[d]emeanor is of utmost importance in the determination of the credibility of a witness." Government of the Virgin Islands v. Aquino, 378 F.2d 540, 548 (1967). "Demeanor reflects a way of acting, behavior, bearing and outward manner." Paramasamy v. Ashcroft, 295 F.3d 1047, 1052 (9<sup>th</sup> Cir. 2002) (citing Shorter Oxford English Dictionary 628 (1973)). Likewise, demeanor denotes "outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions." Haebe, 288 F.3d at 1300 n. 27 (quoting Black's Law Dictionary at 442). Thus, in assessing demeanor, the Board considers the carriage, behavior, manner, and appearance of a witness during her testimony. See Hillen v. Department of the

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<sup>17</sup> The Board expects the County to ensure, henceforth, that all employees, **prior** to participating in the Settlement Conference, sign a specific acknowledgement that they are waiving their rights to appeal to the Board by participating in the Settlement Conference. Failure of the County to ensure a knowing waiver by the employee will result in the Board accepting any subsequent appeal by the employee of the disciplinary action.

Army, 35 M.S.P.R. 453, 462 (1987) (citing Dyer v. MacDougal, 201 F.2d 265, 268-69 (2d Cir. 1952)).

The Board had the opportunity to directly observe the demeanor of Appellant and the other witnesses during their testimony. The Board finds that Appellant was defensive and less than forthcoming during Appellant's testimony – rather, Appellant's testimony was self-serving and even flippant.

For example, at the hearing, Appellant was less than forthcoming when asked by the County's attorney whether Appellant told Supervisor E that after learning of the incident involving Client A, Appellant did in fact do a SAFE-C assessment in Appellant's head:

Q: Did you, in fact, tell Supervisor E and others that you did the Safe-C in your head?

A: That was actually a phrase I got from my office mate because we were discussing safety issues, and the office mate says, told me, it's not like every time you go into a place we don't do a safety assessment in our head. That's always at the top of our list. We look at whether or not the child is in immediate danger as the questions in the Safe-C state. They all state, are they in immediate danger. Client A was not in immediate danger.

Q: Okay, so in fact you did have some concerns about Client A's safety if you did this Safe-C at least in your head, correct?

A: We do [S]afe[-C] every time you enter a placement. So it's just regular practice to go into a place and to determine whether or not if the place is overrunning with cockroaches, yeah, there is something to be concerned about.

H.T. at 250-51.

Appellant was also asked by the County's attorney whether Appellant sought advice from anyone as to the need to report the incident and Appellant flippantly responded:

Q: Did you confer with anybody in the screening unit?

A: No, but hindsight is 20/20.

H.T. at 255.

Appellant was questioned about whether Appellant actually went to the Group Home after learning about the incident involving Client A to observe Client A and determine whether the three children were in fact still in the home and provided the following self-serving response:

Q: You did not go to Client A's home to observe Client A there, correct?

A: No, I did not.

Q: And you did not, in not going to the home you did not observe whether or not the three perpetrators were still in the home, correct?

A: If I had went at 8:30 in the morning, they wouldn't have been home anyway, they'd be at school.

Q: Well, who would say you'd need to go at 8:30? Did you go at some point and see who was in that home?

A: No. But also due to confidentiality I didn't know anything about the other kids in the home.

H.T. at 52.

In contrast, Ms. B was sincere and frank in her testimony. It was obvious that Ms. B was sincerely troubled by the incident involving Client A. It is impossible to believe that Ms. B did not convey her concerns over the incident involving Client A to Appellant. Likewise, Supervisor E, Manager F and Manager J were forthcoming and consistent in their testimony. At no time were Supervisor E, Manager F or Manager J defensive or flippant as compared to Appellant.

B. The County Proved The First Charge By A Preponderance Of The Evidence.

The first charge against Appellant involves Appellant's failing to perform Appellant's duties in a competent or acceptable manner based on Appellant's failure to report to local law enforcement or HHS the attempted assault of Client A as required of a mandated reporter. The gravamen of Appellant's defense is that no abuse occurred to Client A and, therefore, Appellant had no duty to report. In addition, Appellant argued that the incident did not involve a parent or other person who has permanent or temporary custody or responsibility for supervision of a child, so therefore it does not equate to attempted assault. The Board rejects Appellant's arguments.

The statute clearly requires the reporting of any suspected abuse. Maryland Code Annotated, § 5-702(1). Under the statute, Appellant is a mandated reporter. Maryland Code Annotated, § 5-704(a). The Board finds that the attempt to commit an assault on Client A constitutes attempted abuse pursuant to the statute.

The fact that the screening unit determined to screen out the report of the incident does not undermine the fact that there was an attempted assault. Indeed, the explanation for the ultimate determination of "ODO" was that no actual abuse occurred and the matter happened over three months ago. C. Ex. 13. The ODO does not state that attempted abuse did not occur. Indeed, as Ms. D explained, the statement no actual abuse occurred refers to the fact that Client A indicated the bully was not successful in actually committing the assault. H.T. at 41.



Likewise, the Board does not find dispositive the fact that the assessment unit, which ultimately investigated the matter, “ruled out” that abuse occurred. Ms. H testified that when she investigated the matter, there were varying, conflicting accounts of what occurred. H.T. at 157. She explained that the incident did not meet the criteria for child abuse as there was no physical abuse and she couldn’t prove intent. Id. What is clear from the evidence is that there was an attempt to abuse but it was unsuccessful. Additionally, since the bully and two other children involved in the incident remained in the system, the Appellant’s failure to report the incident put other children in the system at risk.

Appellant testified that Appellant never reported the incident with Client A to the screening unit as Appellant didn’t feel that it was a form of abuse. H.T. at 240. In stark contrast is the testimony of Ms. B, Appellant’s own witness, who is not a professional as Appellant is, about the need to report the incident involving Client A:

BOARD MEMBER L: Have you ever received any training about what things should be reported as the responsibility for overseeing a group home?

Ms. B: Yes. It doesn’t take an Einstein to figure out things that should be reported, and I felt that that [the incident with Client A] was something that really needed to be reported.

BOARD MEMBER L: Was that because of just your own knowledge or of training that you received?

MS. B: I would say my own knowledge. It doesn’t, I mean, like I said, again, it doesn’t take a Einstein to figure that one out.

BOARD MEMBER L: Thank you.

BOARD MEMBER M: Let me just follow up in that. You’re saying it didn’t take an Einstein. Did you feel that this was just something that was terrible that happened to this young child? How did you feel about it?

Ms. B: And I still have, you know, it still bothers me as of this day. And it’s not, it’s like, to me it was like someone holding fire in your face, being tortured, and I just, you know, my heart just goes out to what the kid was going through. . . .

H.T. at 223. Ms. B indicated that she felt she needed to report the incident to everybody who needed to know, to include Appellant and the child’s therapist, as Ms. B did not know what type of trauma the incident would cause Client A at a later stage. H.T. at 213.

Appellant’s argument that Appellant did not need to report the incident because Appellant’s knowledge about it was through “hearsay” is totally unfathomable. Even if it

were true that the screening unit prefers a report from someone who directly heard of the abuse from the child, Appellant's reporting would have led the screening unit to contact Ms. B, one of the people who heard about the incident directly from Client A.

Accordingly, based on the foregoing, the Board finds that Appellant failed to perform Appellant's duties as a Social Worker and mandated reporter in a competent manner when Appellant failed to report the attempted assault of Client A upon learning of the incident.

C. The County Proved The Second Charge By A Preponderance Of The Evidence.

The second charge involves Appellant's violation of an established policy when Appellant failed to do a safety assessment for every child-group or residential placement (SAFE-C GRP) based on the attempted assault of Appellant's client, Client A. Based on the foregoing analysis, the Board has determined that an attempted assault of Appellant's client occurred. Clearly, based on HHS policy, Appellant was required to do a SAFE-C GRP assessment.

Pursuant to State guidance, the SAFE-C GRP assessment process involves gathering information through observation and interviews, observing the child in the facility, and assessing the facility staff's understanding and ability to meet the child's needs. C. Ex. 11 at 5. Based on these guidelines, it was incumbent upon Appellant, once Appellant learned of the attempted assault of Appellant's client, to interview Client A about the incident. However, Appellant freely admits that Appellant did not actually question Client A about the incident; such conduct is totally unacceptable. Nor did Appellant visit the group home to do an assessment of Client A's safety, upon learning of the incident. Instead, Appellant relied on what Ms. B purportedly told Appellant about Client A being safe. Accordingly, the Board finds that the County proved this charge by a preponderance of the evidence.

**The County Failed To Prove That The 15-Day Suspension Was Consistent With Applicable Regulatory And Contractual Provisions.**

The Board views Appellant's failure to report the attempted assault of one of Appellant's clients and the failure to do a safety assessment based on the attempted assault of one of Appellant's clients as a very serious matter. As a Social Worker, Appellant is expected to protect the children under Appellant's care – this is a fundamental duty of being a Social Worker. It is quite obvious to the Board that Appellant utterly failed to do so in this case. The Board finds that it is essential that the County be able to rely on Appellant to carry out Appellant's duties in a competent matter.

However, the County committed a procedural error in imposing the 15-day suspension as discussed *infra*. The County has been on notice about this procedural issue since March of 2007 when the Board was forced to overturn another 15-day suspension which contained the same procedural defect. *See* MSPB Case No. 07-05. Yet, since then, the County has failed to take one of the two simple actions necessary to cure this defect – i.e., the issuance of a viable delegation by the CAO to Department Directors to suspend

employees for more than 10 days (or 5 days if the employee is covered by the MCGEO collective bargaining agreement) or, in the alternative, obtaining the approval of the CAO to take the suspension action. Rather, the County continues to rely on the same outdated delegation that was discredited by the Board in MSPB Case No. 07-05. Therefore, the Board cannot affirm the instant 15-day suspension.

A. Both The MCPR And The CBA Require The CAO To Approve Suspensions Of Fifteen Days.

Appellant raised the issue of the authority of the Department Director to issue a 15-day suspension during the course of the hearing. See H.T. at 175. Specifically, Appellant's counsel cited to a previous MSPB case<sup>18</sup> for the proposition that the CAO had to approve any suspension over 10 days and noting that the Personnel Action Form (PAF), C. Ex. 4, effecting Appellant's 15-day suspension was not signed by the CAO.<sup>19</sup>

In response, the County, recognizing that it was the Collective Bargaining Agreement that controls the instant disciplinary action, provided the Board during the hearing with a Memorandum of Understanding between the Union and the County regarding the Delegation of CAO Authority, which was executed on May 10, 2007.<sup>20</sup> The document reads as follows:

This memorandum of understanding between the Montgomery County Government and the Municipal and County Government Employees Association, United Food and Commercial Workers, Local 1994 (the parties) is intended to memorialize the longstanding understanding of the parties in regard to the CAO's ability to delegate authority under the collective bargaining agreement. Specifically, where the language of the collective bargaining agreement requires actions or approvals of the Chief Administrative Officer (CAO), the parties understand that the CAO **may delegate** such authority without incurring a violation of the terms of the collective bargaining agreement.

C. Ex. 23 (emphasis added).

Near the close of the hearing in this matter, the County indicated it wanted to leave the record open concerning whether the CAO has delegated the CAO's approval authority. Subsequent to the hearing, the County filed an additional document, labeled Delegation of

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<sup>18</sup> The Board notes that the actual case number, which was not cited by Appellant's counsel, was MSPB Case No. 07-05.

<sup>19</sup> The Board does not agree with Appellant's assertion that to approve the 15-day suspension, the CAO would have had to sign the PAF. The CAO could signify the CAO's approval simply by annotating it on the SOC and NODA.

<sup>20</sup> Although the County did not move this document into evidence, the Board has determined to accept it as an exhibit and will label it County Exhibit 23 for ease of reference.

Authority (Delegation), dated 10/28/92.<sup>21</sup> In its cover letter submitting this document, the County cites to action 12 in the Delegation for the proposition that the Department Director had authority to impose a 15-day suspension.<sup>22</sup> The Board notes that this is the very same delegation which the Board previously found has no force or effect in a case decided by the Board last year:

The Board notes that the Montgomery County Personnel Regulations have been reissued twice since this Delegation took effect. The last issuance was in 2001, and was approved by the County Council. The 2001 issuance specifically superseded the 1994 personnel regulations and Administrative Procedure 4-10. Section 27 of the 2001 Personnel Regulations deals with the subject of promotion compensation. Authority to take disciplinary actions is currently found in Section 33. There is no provision in the current regulations for CAO approval to impose greater than a 5 work day suspension as cited in the Delegation; instead, as previously noted, Section 33-3(e) provides that the CAO's approval is now needed for more than a 10-day suspension.

While it is true that the current Personnel Regulations permit the CAO to delegate authority in writing to implement "**these Regulations,**" see MCPR Section 2-4(b)(1)(A), the County has provided no evidence of a new delegation since the promulgation of these regulations. Moreover, if the 1992 Delegation were still in effect, there would be no need for Section 33-3(e). Accordingly, the Board finds that under the current Personnel Regulations there is no operable delegation from the CAO to the Department Director to impose more than a 10-day suspension.

MSPB Case No. 07-05 n.11 (emphasis in the original).

Moreover, just like in MSPB Case No. 07-05, it is the provisions of the Collective Bargaining Agreement which govern this matter, not the personnel regulations cited by Appellant's counsel. See MCPR, Section 2-9. The Collective Bargaining Agreement clearly states that the CAO must authorize a suspension in excess of 5 work days. See Agreement Between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County Government, Montgomery County, Maryland, July 1, 2007 through June 30, 2010, Article 28, Section 2(e)(1) available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=1&c=4>.

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<sup>21</sup> In response, Appellant filed a pleading asserting the Delegation submitted by the County was "grossly insufficient" and noting that the Delegation was over 15 years ago and the County had submitted no evidence that it remains viable today. See Appellant's Notice Concerning the Agency's Lack of Delegation of Authority at 2.

<sup>22</sup> Section 12 of the Delegation indicates that a suspension of more than 5 work days, as found in Personnel Regulation Section 27-3(d), is delegated to the Dept./Agency Head. The comment accompanying this Delegation states that the action is reviewed by the "Personnel Office for procedural compliance. See A[dministrative] P[rocedure] 4-10."

B. The County Failed To Prove That The CAO Has Delegated The CAO's Authority To Approve More Than A Five-Day Suspension Under The Collective Bargaining Agreement.

The County has introduced evidence that the CAO may delegate the CAO's authority under the Collective Bargaining Agreement without violating the agreement. C. Ex. 23. However, it has failed to demonstrate that in fact the CAO has done so since the Memorandum of Understanding permitting the CAO to delegate the CAO's authority was signed in May 2007.<sup>23</sup> Likewise, the County has introduced no evidence showing the CAO approved the Department Director's decision to suspend Appellant for more than five (5) days. Accordingly, the Board finds that the Department Director lacked the authority to suspend Appellant for fifteen (15) days.

**Given The Totality Of Circumstances In This Case, The Board Finds That A 5-Day Suspension And Forfeiture Of Forty (40) Hours Of Appellant's Annual Leave Is Appropriate.**

As previously noted, Appellant's misconduct was serious. Moreover, Appellant showed no remorse nor any acceptance of responsibility for Appellant's conduct. However, given the procedural mistake committed by the County in effecting Appellant's discipline despite being on notice about the procedural issue, the Board cannot sustain a 15-day suspension. The Board notes that under the Collective Bargaining Agreement it is within the Department Director's authority to impose a 5 work day suspension on Appellant without the need to obtain CAO approval. Therefore, based on the gravity of Appellant's offense, the Board will order the Director to impose a 5-day suspension. In addition, due to the egregiousness of Appellant's misconduct, the Board will order the forfeiture of 40 hours of annual leave by Appellant – a disciplinary action which is also within the Director's authority without receiving approval from the CAO.

**ORDER**

On the basis of the above, the Board orders the County to reduce Appellant's 15-day suspension to a 5-day suspension based on both charges contained in the original NODA. The County is also ordered to make the Appellant whole for lost wages and benefits for the ten days not sustained.

Appellant is also ordered to forfeit forty (40) hours of annual leave based on Appellant's misconduct.

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<sup>23</sup> The Board notes that the instant Collective Bargaining Agreement went into effect in 2007, fifteen years **after** the effective date of the Delegation submitted by the County. If the Delegation was still operable and applied to the Collective Bargaining Agreement as claimed by the County, there would have been no need for the parties to have included Section 28.2(e)(1) in the Collective Bargaining Agreement nor to sign a Memorandum of Understanding indicating the CAO may delegate the CAO's authority.

# **APPEALS PROCESS**

## **DENIAL OF EMPLOYMENT**

Montgomery County Code Section 33-9(c) permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with Section 6-11 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, and October 21, 2008), an employee or an applicant may file an appeal directly with the Board alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors or that the announced examination and scoring procedures were not followed.

Section 35-3 of the MCPR specifies that the employee or applicant has ten (10) working days to file an appeal with the Board in writing after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position. The employee or applicant need only file a simple written statement of intent to file an appeal. Upon receipt of the notice of intent, the Board's staff will provide the employee or applicant with an Appeal Form which must be completed within ten (10) working days. Upon receipt of the completed Appeal Form, the Board's staff notifies the County of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the denial of employment or promotion.

During fiscal year 2009, the Board issued the following decisions on appeals concerning the denial of employment.

# **EMPLOYMENT**

## **CASE NO. 09-01**

### **FINAL DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County's Department of Health and Human Services (HHS), not to select Appellant for the position of Manager.<sup>1</sup>

### **FINDINGS OF FACT**

On April 8, 2008, Appellant applied for the position of Manager in HHS. The Office of Human Resources (OHR) received thirty-one applications for the Manager position. OHR reviewed the applications and determined that only fourteen of the thirty- one applicants met the minimum qualifications for the position.

Those applications which met the minimum qualifications for the Manager position were referred to two subject matter experts chosen by HHS to rate the applications using the five preferred criteria listed in the job vacancy announcement.<sup>2</sup> A total of six applicants, including Appellant, were rated as "Well Qualified." One of the six applicants rated "Well

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<sup>1</sup> From the record of evidence before the Board, it would appear that the selecting supervisor, the Chief, has been the immediate supervisor of Appellant and, at the time of the selection, was the immediate supervisor of the Selectee.

<sup>2</sup> The five preferred criteria in the announcement were:

1. Experience in and knowledge of social work principles, theories, and methods required to effectively provide a wide range of services to disabled adults and the frail elderly;
2. Experience using diagnostic/clinical skills related to interventions and services to disabled adults and the frail elderly;
3. Experience in providing management oversight or direct clinical services in intake or crisis intervention through a crisis service such as adult protective services, child protective services, suicide intervention services, or another program providing services to adults with disabilities or frail elderly;
4. Experience providing leadership on a human services project, or supervision of a human services program; and
5. Experience with management of a program budget or grant funds.

Qualified” withdrew from consideration. The remaining five “Well Qualified” applicants withdrew from consideration. The remaining five “Well Qualified” applicants were referred to HHS management.

HHS determined to conduct structured interviews of the “Well Qualified” applicants by a three member panel.<sup>3</sup> All of the panel members, according to the County, were subject matter experts. All of the interviewees were provided with a copy of the questions to be asked by the panel prior to their interview and all were asked the same questions. The three panel members individually rated each of the applicants based on their responses to the questions. According to the County, the panel members then caucused and decided to offer the Manager position to the Selectee. The County asserts it was the consensus evaluation by the panel that the Selectee performed better during the structured interview than Appellant.

The record of evidence indicates that Appellant has two Master’s Degrees, thirty years of experience with HHS, fifteen years as a program manager, and over five years of experience in grants. The Selectee has a Master’s Degree, twenty years of experience with HHS, five years as a program manager, and has managed a HHS program, which is based on a grant from the State.

On July 2, 2008, the Chief informed Appellant by letter that Appellant had not been selected for the Manager position. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant is a highly credentialed candidate for promotion to the Manager position. Appellant holds two Master’s Degrees. These credentials along with Appellant’s professional experience qualify Appellant over the candidate selected for the Manager position.
- The selection process was flawed and biased because the current supervisor of the Selectee (the Chief) and a former supervisor of the Selectee were two of the three interview panel members.
- Appellant’s selection would have increased the diversity among the Manager cohort.
- The interview process was not objective; rather, it was based on subjective opinion.

#### County:

- The Selectee performed better during the structured interview.
- Appellant cannot meet Appellant’s burden of showing that the County’s decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced

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<sup>3</sup> From the rating sheets provided to the Board by the County, it appears that the three panel members were: Supervisor A, Supervisor B and the Chief. From the record of evidence before the Board, it appears that Supervisor A previously supervised the Selectee and Supervisor B has not supervised either Appellant or the Selectee.



- examination and scoring procedures, or non-merit factors.
- Appellant has not demonstrated that Appellant’s qualifications were “plainly superior” to the Selectee’s. There was no requirement in the announcement for a Master’s Degree.
- One panel member supervised the Selectee six years earlier. Another panel member supervised both Appellant and the Selectee. One panel member did not supervise either Appellant or the Selectee. Allowing former or current supervisors of any of the applicants to sit on the interview panel is not inconsistent with law or regulation, or otherwise improper.

**APPLICABLE LAW AND REGULATION**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action**, which states in applicable part,

...

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. . . Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the Merit System Protection Board. . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005), Section 7, Appointments, Probationary Period, and Promotional Probationary Period**, which states in applicable part:

- 7-1. Use of eligible list.** If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.
  - (a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

**ISSUE**

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

## ANALYSIS AND CONCLUSIONS

The MCPR provides that a selecting official may choose any individual from the highest rating category. Thus, management was free to select anyone in the “Well Qualified” category, including Appellant, as long as the selection process is consistent with law or regulation, or not otherwise improper. Appellant alleges that the selection process was improper for two reasons – first, the current supervisor of the Selectee (the Chief) and a former supervisor of the Selectee were two of the three interview panel members; and second, the interview process was not objective; rather, it was based on subjective opinion.

The Board notes that there is nothing in the personnel regulations governing the makeup of an interview panel. The County has asserted and Appellant does not challenge that all of the panel members were subject matter experts. As the County has noted, one panel member had previously supervised the Selectee, one panel member had supervised both the Selectee and Appellant, and one panel member had supervised neither the Selectee nor Appellant. While Appellant argues that two of the three members of the panel were predisposed in their judgment to choose the Selectee as they had been the Selectee’s direct supervisor, the Board finds this argument unpersuasive. Having directly supervised the Selectee, the two panel members would have been aware of both the Selectee’s strengths and weaknesses. Thus, having supervised the Selectee, both panel members could have just as easily been predisposed not to select the Selectee.

Appellant also challenges whether quantitative objective criteria were used to determine the outcome of the structured interview process. The courts have long recognized that where, as here, the selection process involves a managerial position, the use of subjective criteria is generally acceptable. Casillas v. U.S. Navy, 735 F.2d 338, 345 (9<sup>th</sup> Cir. 1984); Bauer v. Bailar, 647 F.2d 1037, 1047 (10<sup>th</sup> Cir. 1981). The Board notes that subjectivity in the selection of a manager is inevitable, as the qualities of a good manager are not readily susceptible to quantification. See Hamilton v. Thompson, EEOC Appeal No. 01996946 (Apr. 4, 2002); Taips v. Herman, EEOC Appeal No. 01993712 (Mar. 17, 2000). The Board has reviewed the interview questions and finds they are relevant to the managerial position at issue and designed to ascertain the management skills of the applicants, skills which are not readily measurable by objective means. Liu v. Caldera, EEOC Appeal No. 01981085 (Nov. 13, 1998).

There is no doubt that Appellant’s credentials are impressive; however, so are the Selectee’s. The courts have consistently held that where there are equally desirable candidates, absent a prohibited reason,<sup>4</sup> a trier of the fact should not substitute its judgment for the legitimate exercise of managerial discretion. Bauer v. Bailar, 647 F.2d at 1048. An

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<sup>4</sup> Appellant argues that management should have considered that Appellant’s selection would have increased the diversity among the manager cohort. The Board notes that the personnel regulations require the County to “conduct all employment activities in a manner that ensures equal employment opportunity for all persons without regard to race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status.” See MCPR, Section 5-2(b)(2).

employer has the discretion to choose among equally qualified candidates. See Canham v. Oberlin College, 666 F.2d 1057, 1061 (6<sup>th</sup> Cir. 1981), cert. denied, 456 U.S. 977 (1982). Moreover, an employer has greater discretion when filling a management level position. Wrenn v. Gould, 808 F.2d 493, 502 (6<sup>th</sup> Cir. 1987). In assessing a challenge to a selection decision as arbitrary and capricious, the Board will not substitute its judgment for that of the selecting official unless the Appellant demonstrates that Appellant's qualifications were plainly superior to those of the Selectee. MSPB Case No. 06-02 (2006); see also Bauer v. Bailar, 647 F.2d at 1048. Appellant has failed to do this.

Appellant asserts that Appellant has far more supervisory experience than the Selectee. However, greater years of experience do not automatically make one candidate more qualified than another. Childs v. Department of Veterans Affairs, EEOC Appeal No. 01A13871 (Oct. 24, 2002); Taips v. Herman, EEOC Appeal No. 01993712 (Mar. 17, 2000); McGettigan v. Department of the Treasury, EEOC Appeal No. 01924372 (February 24, 1993). Accordingly, based on the record of evidence before the Board, the Board concludes that Appellant has failed to meet Appellant's burden of showing that the County's decision was arbitrary, capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

### **ORDER**

Based on the above, the Board denies Appellant's appeal from Appellant's nonselection for the position of Manager.

## **CASE NO. 09-02**

### **DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Director of the Office of Human Resources (OHR) to rescind a conditional offer of employment made to Appellant based on the results of a pre-employment physical.

### **FINDINGS OF FACT**

Appellant applied for the position of Bus Operator with the Montgomery County, Maryland Department of Public Works and Transportation on October 16, 2007. According to the class specification for the Bus Operator position, in order to successfully perform the Bus Operator position, an incumbent must have the ability to operate transit vehicles, which requires "the physical ability to twist and turn upper body, reach, bend, move hands and arms to operate hand controls, and move feet and legs to operate foot controls." County Response, Exhibit (Ex.) 2 at 2. In addition, the duties of a Bus Operator include "continuous driving for two to three hours at a time without a break." Id. The class specification specifically requires the successful completion of a medical examination.

Appellant subsequently received a conditional offer of employment, subject to the completion of a medical examination. On April 2, 2008, Appellant was examined by the County's Medical Examiner. During the examination, the County Medical Examiner found Appellant had orthopedic problems in Appellant's knees which limited Appellant's range of motion and ability to sit and move. County Response, Ex. 6. Appellant admitted to the County Medical Examiner that Appellant had orthopedic problems with Appellant's knees for an extended period and had been evaluated by an orthopedist, who recommended treatment but Appellant did not follow the treatment.<sup>1</sup> Id. The County Medical Examiner told Appellant that the County Medical Examiner could not medically clear Appellant for hire without Appellant's knees receiving treatment and without knowing the success of the treatment.

Appellant subsequently submitted Appellant's orthopedist's evaluation to the County Medical Examiner and the County Medical Examiner concluded that, given the duties of a Bus Operator, which require prolonged sitting in one position, and which would result in orthopedic stress to the knees, Appellant should be rated "Not Fit For Duty". On April 28, 2008, the County Medical Examiner informed OHR of the County Medical Examiner's determination. Subsequently, by letter dated May 1, 2008, the Director of OHR notified Appellant that the OHR Director was withdrawing Appellant's conditional offer of employment.<sup>2</sup> County Response, Ex. 3.

Appellant contacted the County Medical Examiner directly on May 30, 2008 and found out the County Medical Examiner had not cleared Appellant. Appellant informed the County Medical Examiner that when Appellant had last seen Appellant's primary care doctor Appellant was informed that Appellant's knees were fine. Appellant's Appeal, Fax Cover Sheet to Appellant's doctor from the County Medical Examiner. According to Appellant, the County Medical Examiner informed Appellant that the County Medical Examiner would need Appellant's doctor's findings in order to determine whether based on any new/additional information the County Medical Examiner should change the County Medical Examiner's determination. The County Medical Examiner subsequently contacted Appellant's doctor via facsimile. The County Medical Examiner sent Appellant's doctor a copy of the orthopedic evaluation the County Medical Examiner had previously received from Appellant, together with a copy of the job description for the position of Bus Operator.

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<sup>1</sup> Based on the record of evidence before the Board, Appellant was seen by an orthopedic physician on October 1, 2007. County Response, Ex. 7 at 7. The orthopedist concluded that Appellant had a "constellation of problems" – i.e., Appellant's right leg was a combination of knee and hip arthritis and Appellant's left knee possibly had a meniscal tear, which might require surgery. The orthopedist recommended anti-inflammatory drugs and a cortisone shot, which Appellant agreed to do. The orthopedist also recommended Appellant schedule an MRI. However, Appellant did not go through with the MRI due to Appellant's lack of insurance.

<sup>2</sup> According to Appellant, Appellant never received the letter that was sent to Appellant by OHR. Instead, some time after, Appellant picked up OHR's letter at the Ride On office.

The County Medical Examiner asked the Appellant's doctor to provide the County Medical Examiner with a written summary of the Appellant's doctor's physical examination findings, any relevant test results, acknowledgment that Appellant's doctor had reviewed the essential functions of the Bus Operator position, and any restrictions or limitation to duty that Appellant might have. Appellant's Appeal, Memorandum, dated 05/30/08, subject: Medical Information Request.

By letter dated July 8, 2008, Appellant's doctor subsequently responded to the County Medical Examiner. County Response, Ex. 7. Appellant's doctor stated that Appellant's doctor saw Appellant on May 15, 2008 and based on Appellant's doctor's examination concluded Appellant's knees were stable. Appellant's doctor concluded that Appellant had had "an acute episode of knee pain likely due to osteoarthritis and possibly a meniscus tear." Id. Appellant's doctor noted that Appellant's doctor did not believe that Appellant had had the MRI recommended by Appellant's orthopedist. Appellant's doctor concluded that Appellant appeared to be doing well since the last cortisone shot Appellant received from Appellant's orthopedist and would be able to perform the essential functions of a Bus Operator. Id. However, Appellant's doctor did note that if "any further follow up is needed I would have Appellant see the orthopedist again and get the MRI as recommended." Id.

Based on the information received from Appellant's doctor, the County Medical Examiner reaffirmed the County Medical Examiner's determination that the County Medical Examiner could not find Appellant fit for duty as a Bus Operator absent Appellant undergoing an MRI. The County Medical Examiner informed Appellant that the County Medical Examiner would not change the County Medical Examiner's determination and Appellant appealed to the Board.

### **POSITIONS OF THE PARTIES**

#### **Appellant:**

- The County Medical Examiner informed Appellant that if Appellant's family doctor would clear Appellant for duty as a Bus Operator, the County Medical Examiner would change the County Medical Examiner's determination. Even though Appellant's doctor cleared Appellant, the County Medical Examiner did not change the County Medical Examiner's determination.
- Appellant's doctor performed an extensive exam of Appellant and found Appellant was fine.
- Appellant was advised by Appellant's orthopedist to get an MRI, but was also told Appellant could wait several weeks to see how Appellant felt after receiving anti-inflammatory drugs and a cortisone shot. Appellant has not needed treatment since then.

#### **County:**

- Appellant failed to undergo the treatment prescribed for Appellant by Appellant's orthopedist and could not be medically cleared.

- Appellant’s doctor failed to provide any new/additional information to change the County Medical Examiner’s determination.

**APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002), Section 8, Medical Examinations and Reasonable Accommodation**, which states in applicable part:

**8-3. Medical requirements for employment.**

- (a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position.

...

**8-6. Required medical examinations of applicants; action based on results of required medical examinations.**

- (a) *Medical and physical requirements for job applicants.*

- (1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class.

**ISSUE**

Was the County justified in rescinding the conditional offer of employment made to Appellant?

**ANALYSIS AND CONCLUSIONS**

It is undisputed that Appellant has a history of knee problems dating back to 2007. Appellant’s primary care doctor saw Appellant for right knee pain and swelling on July 20, 2007. On October 7, 2007, Appellant saw an orthopedist. The orthopedist doctor diagnosed a “constellation of problems”. The orthopedist doctor indicated that Appellant suffered from a combination of knee and hip arthritis in Appellant’s right leg and suspected that Appellant had a meniscal tear, which might require surgery in Appellant’s left knee. The orthopedist doctor recommended an MRI to diagnose the tear but Appellant, lacking insurance, did not go ahead with the MRI. Appellant was placed on anti-inflammatory drugs and received a cortisone shot for Appellant’s right knee.

When the County Medical Examiner examined Appellant in April 2008, the County Medical Examiner found orthopedic problems with Appellant’s knees which limited Appellant’s range of motion and ability to sit and move while weight bearing. Appellant

indicated to the County Medical Examiner Appellant had seen an orthopedist but had not had the MRI recommended by Appellant's orthopedist. As the County Medical Examiner noted, the duties of a Bus Operator require the incumbent to get on and off a bus several times during a day. While driving the bus, the incumbent's knees and legs would be somewhat cramped and could remain so for 2-3 hours at one time. County Response, Ex. 7 at 12-13. Based on this anatomical position which a Bus Operator must maintain, there would be orthopedic stress on the knees. Accordingly, the County Medical Examiner made the determination not to clear Appellant based on Appellant's orthopedic problems.

Subsequent to the County Medical Examiner's determination, Appellant again saw Appellant's primary care physician on May 15, 2008. Appellant's doctor noted Appellant's knees were stable with no notable tenderness. Appellant's doctor concluded that Appellant had had an acute episode of knee pain likely due to osteoarthritis and possibly due to a meniscus tear. Appellant appeared to have done well since receiving a cortisone shot. Nevertheless, Appellant's doctor indicated that if any further follow up was needed, Appellant should see the orthopedist again and get the MRI. County Response, Ex. 7 at 1.

The information provided by Appellant's doctor to the County Medical Examiner did not change the County's Medical Examiner determination. According to the County Medical Examiner's professional opinion, Appellant needs to have an MRI to determine whether Appellant is fit for duty as a Bus Operator.

Significantly, both Appellant's doctors indicated that they suspect Appellant has a meniscus tear. In order to determine if Appellant has such a tear and whether Appellant needs surgery, an MRI is necessary. Even Appellant's doctor concluded that if Appellant needed to follow up with regard to Appellant's knee problems, Appellant would need to have the MRI.

Therefore, based on the record of evidence before the Board, the Board finds that it was reasonable for the County Medical Examiner to conclude that because of Appellant's history of knee problems, Appellant needed to have an MRI before the County Medical Examiner could fully assess Appellant's fitness for duty as a Bus Operator. Accordingly, the Board finds that the OHR Director was justified in rescinding Appellant's conditional offer of employment.

### **ORDER**

Based on the above, the Board denies Appellant's appeal of OHR's rescission of Appellant's conditional offer of employment as a Bus Operator.

## **CASE NO. 09-05**

### **DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Interim Fire Chief to withdraw an offer of employment as a Manager III made to Appellant by the Office of Human Resources (OHR).

### **FINDINGS OF FACT**

Appellant has been an Administrative Officer (Grade 23) with the Local Fire Department (LFD) since 1984. Appellant also serves as a volunteer Firefighter at LFD.

On January 7, 2008, because of budgetary reasons, the Chief Administrative Officer (CAO) of Montgomery County, Maryland instituted a hiring freeze for positions within the Executive Branch of the County. The hiring freeze permitted case-by-case exemptions. On February 28, 2008, the Montgomery County Fire and Rescue Service (MCFRS or Fire and Rescue Service) received an exemption to the hiring freeze, allowing it to fill the position of MLS<sup>1</sup> Manager III.<sup>2</sup>

On May 22, 2008, the County Council approved the FY09 operating budget for Montgomery County. C. Ex. 3. As part of the resolution approving the FY09 budget, the County Council directed the County Executive to take actions to reduce personnel costs or implement increased efficiencies in County government operations so as to reduce appropriated expenditures by eight million dollars. Id. at 7. In response to this directive, on September 4, 2008, the County Executive informed the County Council of the cost reductions he was proposing to meet the eight million dollar target. C. Ex. 4. Among the various actions, he proposed a two-day furlough for County employees.<sup>3</sup> Id. at 3. The

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<sup>1</sup> MLS stands for Management Leadership Service. MLS is a program for merit system employees in high level positions, who have the responsibility for managing County programs and services. MLS includes a broadband classification system, performance-based pay, and professional development opportunities. See Montgomery County Personnel Regulations (MCPR), 2001 (as amended), Section 1-36.

<sup>2</sup> In requesting the exemption, MCFRS indicated that while it did not know the exact salary level of the incumbent, the target salary would focus on the mid-range and below. County Exhibit (C. Ex.) 2 at 2. Mid-range for the position was \$105,887. Id.

<sup>3</sup> Although proposing a two-day furlough, the County Executive indicated that because of the economic volatility and the potential for revenues to decline below current estimates, he would withhold implementing the furlough until a more complete picture of the County's fiscal status was available. C. Ex. 4 at 3. He noted that additional furlough days might be needed. Id.



County Executive also noted a projected gap of over two hundred and fifty million dollars in the County budget for FY10.

Appellant applied for the Manager III position. In October 2008, Mr. A, MCFRS Division Chief, contacted Ms. B in OHR by phone.<sup>4</sup> Mr. A indicated to Ms. B that he had authorization to make an offer to Appellant for the Manager III position. C. Ex. 8. Mr. A asked Ms. B to make the official offer of employment to Appellant. Id.

Ms. B subsequently contacted Appellant the same day and made the offer of employment. C. Ex. 8. At the time of the offer, Appellant's annual base salary was \$85,463 as a Grade 23 with LFD. According to Ms. B, consistent with County promotional policy, she extended Appellant an offer of employment in the Manager III position at the rate of \$94,009.<sup>5</sup> Id. Appellant, though pleased with the offer, was unhappy with the amount of compensation offered. Appellant's Appeal, Attachment (Attach.) A at 2. According to Appellant, the LFD pays Appellant a supplement of \$875 a month in addition to Appellant's base salary. Id. Appellant also receives a year-end stipend from LFD, which together with some routine overtime, brings Appellant's total compensation to just over \$100,000 a year. Id. Therefore, Appellant asked Ms. B if the salary of the position was negotiable. Appellant's Ex. 1 at 1. Ms. B told Appellant to contact Mr. A. Id.

Appellant subsequently contacted Mr. A on October 27, 2008. After speaking with Mr. A, Appellant emailed him, indicating that prior to accepting the County's offer, Appellant wanted to ask for additional consideration as to the starting salary. Appellant's Appeal, Attach. A at 2; Attach. E at 2. Appellant explained Appellant's rationale for requesting a 10% increase over Appellant's total compensation of \$100,000 a year. Id. On October 28, 2008, Mr. A forwarded a memorandum through the Fire Chief and the OHR Director to the CAO,<sup>6</sup> requesting permission to give Appellant an above the mid-grade salary appointment at \$110,000.<sup>7</sup> Mr. A notified Appellant that he had sent the salary request to the

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<sup>4</sup> There is some dispute as to the exact date that Mr. A contacted Ms. B and she subsequently extended an offer of employment to Appellant. Ms. B says it was on October 10, 2008; Appellant avers it was on October 27, 2008. The Board finds that for purposes of adjudicating this appeal, the exact date of the offer is immaterial.

<sup>5</sup> Ms. B states that it is County policy to offer an employee receiving a promotion a 10% raise in the employee's current base salary. See C. Ex. 8; MCPR Section 10-5(c)(1)(D).

<sup>6</sup> Pursuant to MCPR Section 10-5, a Department Director, in extraordinary circumstances, may recommend and the OHR Director approve an increase of compensation on promotion of up to 20 percent of base salary. See MCPR, 2001 Section 10-5(c)(E) (as amended October 21, 2008). Prior to this section of the MCPR being amended, all such requests had to go to the CAO for approval.

<sup>7</sup> The Board notes that, given the fact that Appellant's base salary was \$85,463, and the personnel regulations only permit in extraordinary circumstances an increase of

Fire Chief, OHR, and the CAO for approval. Appellant's Appeal, Attach. B.

According to the Fire Chief, during his tenure,<sup>8</sup> he approved the hiring and promotion of all MCFRS employees, in accordance with MCPFR Section 7-1(a). The Fire Chief states he never authorized Mr. A to hire Appellant, let alone offer Appellant an above the mid-salary appointment. C. Ex. 6. Accordingly, the Fire Chief went to see Ms. B after receiving the memorandum from Mr. A requesting permission to hire Appellant above the mid-grade salary. The Fire Chief told Ms. B he had not authorized Appellant's hiring and was unaware that Ms. B had made the offer pursuant to Mr. A's direction. C. Ex. 8. The Fire Chief confirmed to Ms. B that Mr. A had no authority to approve the selection of Appellant. Id.

After the Fire Chief retired, Mr. C became Interim Fire Chief on November 1, 2008. C. Ex. 7. The Interim Chief was made aware of the memorandum sent by Mr. A seeking authorization to appoint Appellant at an above the mid-grade salary. Id. The Interim Chief did not give Mr. A permission to hire Appellant and did not approve offering the Manager III position at an above the mid-grade salary. Id. Rather, on November 4, 2008, the Interim Chief wrote Appellant, withdrawing the offer of employment made to Appellant by OHR.<sup>9</sup> C. Ex. 10. On November 6, 2008, the OHR Director wrote to Appellant, stating that Appellant did not accept the job offer made to Appellant by Ms. B at an annual salary of \$94,009.<sup>10</sup> C. Ex. 11. The OHR Director indicated that neither the Fire Chief nor the Interim Fire Chief approved Mr. A's request to hire Appellant at a salary increase above the mid-point salary for the Manager III position. Id.

On November 8, 2008, Appellant received the letter from the Interim Fire Chief, withdrawing the County's offer of employment. Appellant's Exhibit (A. Ex.) 1 at 2. According to Appellant, Appellant immediately called both the Interim Chief and Mr. A and left each a voice mail. Id. Mr. A called Appellant back and acknowledged that he had been informed previously about the action the Interim Chief was taking. Id. On November 10, 2008, Appellant received the memorandum from the OHR Director. Id. Appellant then sent an email to the Interim Chief, indicating that there must be some confusion as Appellant never rejected the employment offer; rather, Appellant was seeking to determine if the salary was negotiable. Appellant's Appeal, Attach. E at 1. Appellant attached Appellant's original email about Appellant's salary request which Appellant had previously sent to Mr. A to the email Appellant sent to the Interim Chief. Id. Appellant asked for the opportunity to meet

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compensation of up to 20 percent of base salary, the most that Appellant could have been granted was \$102,556.

<sup>8</sup> The Fire Chief retired effective October 31, 2008. C. Ex. 6.

<sup>9</sup> The Interim Chief indicated in his letter that Appellant had been offered the position by OHR and had rejected the offer due to salary. C. Ex. 10.

<sup>10</sup> The OHR Director also asserted in his memorandum that Appellant rejected the job offer on the basis that a ten percent pay increase was insufficient. C. Ex. 11.

with the Interim Chief to discuss the merits of Appellant's request. Id. According to Appellant, as of the date of Appellant's appeal, Appellant had not received a response from the Interim Chief.

On November 13, 2008, the County Executive submitted to the County Council a FY09 Savings Plan, proposing savings of \$50 million from the current year's budget that would be used to close the projected gap of over \$250 million in FY10. C. Ex. 5. In the plan submitted, the County Executive warned that it was quite likely that further current year spending reductions might be necessary. Id. The savings plan included proposed reductions of \$1,909,370 for MCFRS.

On November 18, 2008, Appellant filed an appeal with the Board concerning the denial of employment to the Manager III position. Appellant asked the Board to hold the position open until the matter was resolved and provide Appellant with an opportunity to justify Appellant's salary request to the CAO. See Appellant's Appeal, Block No. 11. Subsequently, by letter dated November 20, 2008, Appellant asked the Board to require the County to stay the filling of the Manager III position. The County responded to Appellant's stay request, asserting that MCFRS had elected not to fill the Manager III position as part of its FY09 savings plan. In response, the Board indicated it saw no need to issue a stay as the County indicated it would not be filling the position at issue. Instead, the Board ordered the County to notify it should the County elect to fill the position and the Board would then determine whether to order a stay.

By memorandum dated December 1, 2008, the Director, Office of Management and Budget (OMB), notified the County Council that the projected gap for FY10 had grown to over \$515 million before implementation of the FY09 savings plan. C. Ex. 12. In the memorandum, the OMB Director noted "[w]e are considering a variety of spending reduction solutions at this point, but we consider *all* services to be under consideration for significant reductions at this point." Id. at 1.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- Appellant never rejected the County's offer of the Manager III position. Rather, Appellant simply attempted to negotiate the salary for the position offered Appellant.
- Appellant disputes the date contained in Ms. B's affidavit as to when she offered Appellant the position.
- Despite the County's assertion otherwise, Mr. A was authorized to have OHR make an offer of employment to Appellant.
- Based on the decision in the Leigh case, the County is obliged to fill a vacancy once it is advertised.

- In light of the disputes between the County and Appellant as to factual matters in this appeal, Appellant asserts Appellant is entitled to a hearing on the disputed facts.<sup>11</sup>

County:

- Mr. A lacked the authority to select Appellant; only the Fire Chief had that authority and neither the Fire Chief nor the Interim Fire Chief authorized Mr. A to make an offer.
- The County took immediate steps to retract the invalid offer of employment when it learned of Mr. A's actions.
- Dicta in the Leigh case does not bind the MSPB. Moreover, even Leigh recognized that budget issues may serve as a valid reason for not filling a vacancy.
- Due to the continued financial crisis in the County, MCFRS seeks to freeze the filling of the Manager III position.

**APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 21, Fire and Rescue Services, Section 3, Fire Chief; Division Chiefs**, which states in applicable part,

...

- (b) The Fire Chief is the uniformed department head of the Montgomery County Fire and Rescue Service, and has all the powers of a department director. . . .

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, and October 21, 2008), Section 1, Definitions**, which states in applicable part:

...

- 1-3. Appointment:** The formal assignment or promotion of an eligible applicant or employee to a full-time, part-time, term, or temporary position by a department director.

...

- 1-15. Department director:** The administrative head of a department, principal office, or office of the County government, or designee, who serves as the appointing authority.

**MCPR, 2001 (as amended January 18, 2005, December 11, 2007, and October 21, 2008), Section 6-13, Appeals by applicants**, which states in applicable part:

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<sup>11</sup> Because the Board finds that none of the facts material to its decision are in dispute, the Board has determined that a hearing is not necessary in this case.

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

**MCPR, 2001 (as amended February 15, 2005, and October 21, 2008), Section 7-1, Use of eligible list**, which states in applicable part:

If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

### **ISSUE**

Was the withdrawal by the County of its offer of employment to Appellant arbitrary and capricious, illegal, based on political affiliation or other non-merit factors?

### **ANALYSIS AND CONCLUSIONS**

#### **The Power To Appoint Includes The Power To Revoke An Appointment.**

It is well established that the power to appoint includes the power to revoke an appointment. Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961); National Treasury Employees Union v. Reagan, 663 F.2d 239, 247 (D.C. Cir. 1981). The power to revoke resides in the appointing authority. 663 F.2d at 247.

The County asserts that under the personnel regulations only the Fire Chief has the power to appoint. Appellant argues that the personnel regulations permit County officials to delegate their authority. Appellant also asserts that certain functions have been delegated by department heads to subordinates either by express authority or by custom and practice. Appellant states that if a hearing was held in this matter, Mr. A would testify that he was appropriately authorized to make the offer in this case. The Board finds that whether Mr. A was or was not authorized to make the offer to Appellant is not relevant to the disposition of this case. What is relevant and is not contested is that the Fire Chief is the person authorized under the personnel regulations to make an appointment; therefore, the Fire Chief is the person authorized to revoke an appointment or offer of appointment.

In the instant case, Appellant was offered an appointment to the position of Manager III. Significantly, by Appellant's own admission, Appellant neither accepted, nor as the County has maintained, rejected the offer. Rather, as the record of evidence reflects, Appellant specifically sought to negotiate the terms of Appellant's appointment. Appellant wrote to Mr. A, stating

[f]irst of all, I want to once again thank you for the offer of employment. I am looking forward to working out the necessary details and becoming an integral

part of your staff. As we discussed over the phone this afternoon, **prior to accepting the County's offer**, I would like to ask for additional consideration to the starting salary.

Appellant's Appeal, Attach. A (emphasis added). While Appellant was attempting to engage in this negotiation with the County, the Interim Fire Chief withdrew Appellant's offer. The Board finds that the Interim Fire Chief had the authority to revoke the offer.

**The Board Holds That Not Withstanding The Leigh Decision, The County Is Not Obligated To Fill The Manager III Position.**

Appellant has submitted the case of Leigh v. Montgomery County, Civil Action No. 170173 (Cir. Ct. for Montgomery County, MD, Aug. 28, 1998) in support of Appellant's argument that once the County advertised for the Manager III position it had to fill the position. Although it is true that Leigh holds that once a position is advertised, the County is obligated to fill the vacancy so long as there is a qualified person, Leigh also notes that there may be good and valid reasons for not filling a vacancy, such as budgetary reasons. Leigh states that such a decision should be made before the vacancy is advertised. Appellant argues that by the Fire and Rescue Service seeking an exemption to the hiring freeze, it made the determination that its budget difficulties did not preclude the filling of the Manager III position.

While it is true that the Fire and Rescue Service did receive an exemption to fill the position, what the Fire and Rescue Service could not have known at that time was the magnitude by which the County's budget deficit would grow. As the County notes, the projected deficit shortfall grew from \$250 million to approximately \$515 million. Given this extraordinary increase over the span of a few months, the Board finds that the Fire and Rescue Service had the right to determine that it was not going to fill the Manager III position at this time.

**ORDER**

Based on the above analysis, the Board denies Appellant's appeal of the Interim Fire Chief's rescission of the offer of employment as a Manager III. The Board holds that MCFRS may freeze the filling of the Manager III position.

**CASE NO. 09-09**

**DECISION AND ORDER**

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Director of the Office of Human Resources (OHR), to rescind a conditional offer of employment made to Appellant based on the results of a pre-employment physical.

## FINDINGS OF FACT

Appellant applied for the position of Mail Clerk with the Montgomery County Department of General Services on November 11, 2008. According to the class specification for the Mail Clerk position, the job is “largely manual, and includes such duties as sorting and bundling mail, and operating/maintaining mail processing equipment including automatic mailing machines, computerized accounting system, [and] U.P.S. manifest system . . . .” See County Response, Memorandum from the County Medical Examiner, dated 02/27/09, subject: Reply to the Merit System Protection Board, MSPB Case No. 09-09, appeal by Appellant, Mail Clerk Applicant (County Medical Examiner Memorandum) at 2. The incumbent is “required to operate high speed equipment that requires attention to safety precautions.” Id. A Mail Clerk’s “[w]ork includes driving a motor vehicle daily between County buildings and other facilities.” Id. The class specification specifically requires the successful completion of a medical examination. See Class Specification for Mail Clerk.

Appellant received a conditional offer of employment, subject to the completion of a medical examination in January 2009. On January 13, 2009, Appellant was examined by the County’s Medical Examiner. The County Medical Examiner was familiar with Appellant from previous exams the County Medical Examiner had conducted while Appellant was an Equipment Operator with the County. Accordingly, during the examination on January 13, 2009, the County Medical Examiner discussed Appellant’s medical conditions with Appellant. County Medical Examiner Memorandum at 1.

Specifically, Appellant has a history of back pain and underwent back surgery in June 2007. Id. Appellant’s pain has continued since then and Appellant requires daily pain medication. Id. In September 2008, Appellant, of Appellant’s own volition, visited the County Medical Examiner to discuss Appellant’s physician’s recommendations regarding Appellant’s back pain. Id. Specifically, Appellant informed the County Medical Examiner that Appellant’s physician had instructed Appellant that Appellant must not lift more than twenty-five pounds at a time and that Appellant needed to find a new job. Id. Appellant also reported to the County Medical Examiner in September 2008 that the medication Appellant was taking for Appellant’s pain made Appellant drowsy and it was difficult for Appellant to focus. Id. The County Medical Examiner reviewed the medical information Appellant had brought with Appellant and, on September 15, 2008, gave Appellant a Health Status Report which restricted Appellant from lifting more than twenty-five pounds and from driving any County vehicle. Id.

During Appellant’s examination on January 13, 2009, Appellant underwent a urine drug screen. Appellant’s urine drug screen test results indicated, and Appellant confirmed, that Appellant was taking Dolophine (Methadone) for pain. Id. at 2; see also Appellant’s Response, received by the Board on 03/19/09.<sup>1</sup> The County Medical Examiner asked

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<sup>1</sup> Appellant’s Response indicated that Appellant had been taking Dolophine (Methadone) for two and a half years.

Appellant during the examination to provide the County Medical Examiner with medical information from the physicians who were treating Appellant. County Medical Examiner Memorandum at 1. On January 14, 2009, Appellant's physician, Dr. A, indicated in a letter to the County Medical Examiner that Appellant was "being treated with a long acting opiate called Duragesic." See Appellant's Appeal, Letter from Dr. A, dated 01/14/09 (Dr. A Letter). According to the County Medical Examiner, Dolophine and Duragesic are two powerful, long acting opiates, with side effects of drowsiness with impaired attentiveness and focus. County Medical Examiner Memorandum at 1, 3.

On January 22, 2009, the County Medical Examiner informed the Office of Human Resources (OHR) of the County Medical Examiner's determination that Appellant was "Not Fit For Duty". See Appellant's Appeal, Memorandum from the County Medical Examiner to an OHR Specialist. Subsequently, by letter dated January 28, 2009, the Director of OHR notified Appellant that the OHR Director was withdrawing Appellant's conditional offer of employment.

This appeal followed.

### **POSITIONS OF THE PARTIES**

#### Appellant:

- The only medication Appellant was on at the time of Appellant's examination was Dolophine (Methadone). Dr. A indicated to the County Medical Examiner that Appellant had developed a tolerance to this medication.
- Appellant has been on Dolophine (Methadone) for two years and was cleared by the County Medical Examiner for work as an Equipment Operator in September 2007, while taking the Dolophine. As an Equipment Operator, Appellant operated various vehicles, including a dump truck and a bucket truck.
- Both of Appellant's physicians cleared Appellant for the position.<sup>2</sup>

#### County:

- The County Medical Examiner imposed a "driving restriction" on Appellant in September 2008 because of the adverse effects from the pain medication Appellant was taking. The County Medical Examiner also restricted Appellant from lifting more than twenty-five pounds at the time.
- The two drugs Appellant is taking are very powerful, with side effects of drowsiness with impaired attentiveness and focus. These side effects put Appellant at risk for self-injury or possible injury of others in the performance of Appellant's duties working on machinery and high speed equipment.

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<sup>2</sup> As part of Appellant's appeal, Appellant provided a letter from Appellant's internist, Dr. B, indicating that Appellant has a long history of benign heart murmur and there was no problem with Appellant's heart that would interfere with any job.



**APPLICABLE REGULATION**

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, December 11, 2007, and October 21, 2008), Section 8, Medical Examinations and Reasonable Accommodation, which states in applicable part:**

**8-3. Medical requirements for employment.**

- (a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position.

...

**8-6. Required medical examinations of applicants; action based on results of required medical examinations.**

- (b) *Medical and physical requirements for job applicants.*

- (1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class.

**ISSUE**

Was the County justified in rescinding the conditional offer of employment made to Appellant?

**ANALYSIS AND CONCLUSIONS**

It is undisputed that Appellant has a history of pain problems dating back several years. While it may be true that Appellant was only taking the drug Dolophine just prior to Appellant's medical examination by the County Medical Examiner, Appellant's doctor specifically informed the County Medical Examiner that Appellant was on Duragesic. See Appellant's Appeal, Dr. A Letter. The County Medical Examiner has indicated that both Dolophine and Duragesic are powerful, long acting opiates, with side effects of drowsiness with impaired attentiveness and focus.

The record of evidence indicates that as a Mail Clerk, Appellant would need to operate high speed equipment which would require attentiveness in order to follow safety precautions. Given the fact that Appellant, who admits Appellant has been on Dolophine for the past two years, had informed the County Medical Examiner in September 2008 that Appellant's pain medication was causing Appellant drowsiness and affecting Appellant's ability to focus, the Board finds that the County Medical Examiner was correct to determine that Appellant was not fit for the duties of a Mail Clerk.

Despite Appellant's assertion that both Appellant's physicians cleared Appellant to perform the duties of a Mail Clerk, the record of evidence clearly indicates that Dr. A did not

address in Dr. A's Letter to the County Medical Examiner whether Appellant could perform the Mail Clerk duties. Rather, Dr. A merely indicated that Appellant denied "significant effects with regard to cognition while under our care. Appellant has developed tolerance to this particular side effect of this family of medications." Appellant's Appeal, Dr. A's Letter. Accordingly, the Board finds that the OHR Director was justified in rescinding Appellant's conditional offer of employment.

**ORDER**

Based on the above, the Board denies Appellant's appeal of OHR's rescission of Appellant's conditional offer of employment as a Mail Clerk.

## **DISMISSAL OF APPEALS**

The County's Administrative Procedures Act (APA), Montgomery County Code Section 2A-8(J), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal. Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if the appellant fails to prosecute an appeal or fails to comply with a Board order or rule.

The Board also may dismiss an appeal if it lacks jurisdiction over the appeal.

During FY 2009, the Board issued the following dismissal decisions.

# **DISMISSAL FOR FAILURE TO PROSECUTE**

## **CASE NO. 09-07**

### **DISMISSAL DECISION**

On March 5, 2009, the Montgomery County Merit System Protection Board (Board) issued a Show Cause Order, indicating it intended to dismiss the instant appeal based on Appellant's failure to prosecute. Subsequently, the Board, as detailed below, was informed that counsel was no longer representing Appellant, and the Board notified Appellant directly that it intended to dismiss Appellant's appeal for failure to prosecute. The Board gave Appellant an opportunity to show good cause as to why it should not dismiss the instant appeal. Appellant did not respond in a timely manner.

### **FINDINGS OF FACT**

On December 18, 2008, the Board received an appeal of the decision of the Director, Department of Health and Human Services, to dismiss Appellant on December 15, 2008. The Board noted the appeal. Appellant indicated in Appellant's appeal that Appellant had counsel. Appellant also provided the Board with an email address, where Appellant could be reached, and an email address for Appellant's counsel. See Appellant's Appeal, Block Nos. 3 & 12.

The County's representative subsequently indicated to Board staff that the County representative would be on leave for several weeks. Accordingly, the County was given until January 26, 2009, to respond to the appeal and provide its Prehearing Submission.<sup>1</sup> Because the County was granted an extension of time to respond, the Board also granted Appellant, sua sponte, a similar extension of time to provide Appellant's Prehearing Submission. Appellant's Prehearing Submission was due March 2, 2009.

When the Board did not receive Appellant's Prehearing Submission on March 2, 2009, the Board's Executive Director sent Appellant's counsel an email on March 3, 2009, asking about the status of the Prehearing Submission and whether Appellant was withdrawing Appellant's appeal since no Prehearing Submission had been received. Having heard nothing in response to the email, the Executive Director called Appellant's counsel on March 4, 2009. See Memorandum to File, dated 03/04/09. The Executive Director spoke with Appellant's counsel, who was unable to explain why nothing had been submitted to the

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<sup>1</sup> Pursuant to the Board's regulations, the County must respond to an appeal within fifteen work days of the Board's notification of the appeal. See Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005 and October 21, 2008), Section 35-8(c).

Board. Appellant's counsel indicated Appellant's counsel would check into the matter and contact the Board as to its status. Id.

Having received no response from Appellant's counsel, on March 5, 2009, the Board issued a Show Cause Order. The Order gave the parties notice that the Board intended to dismiss the instant appeal for failure to prosecute and/or comply with established appeal procedures and provided Appellant until March 9, 2009, to show good cause as to why the Board should not dismiss the instant appeal.

In response, Appellant's counsel contacted the Board and in an email, dated March 9, 2009, indicated that counsel could no longer act on Appellant's behalf. See Email from Appellant's counsel to Executive Director, dated 03/09/09, subject: Appellant. Appellant's counsel suggested that with regard to the Board's Show Cause Order, the Board communicate directly with Appellant. Id.

Thereafter, on March 9, 2009, Board staff sent Appellant an email (at the email address provided on Appellant's appeal form)<sup>2</sup> in an attempt to ascertain why Appellant had not yet filed a Prehearing Submission as ordered by the Board and asking Appellant to notify the Board immediately if Appellant wished to pursue Appellant's appeal. Appellant was also given until March 12, 2009 to file any response with the Board. When Appellant did not immediately respond to the email, Board staff, on March 10, 2009, sent Appellant a letter, by certified mail and first class mail, again informing Appellant that Appellant needed to respond and provide Appellant's Prehearing Submission on or before March 12, 2009. To date, Appellant has failed to respond.

### **APPLICABLE REGULATION**

**Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, and October 21, 2008), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

**35-7. Dismissal of an appeal.**

...

- (b) The MSPB may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. The MSPB must give the County and the appellant prior notice of its intent to dismiss for lack of prosecution or compliance with an MSPB rule or order.

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<sup>2</sup> The Board's Appeal Form instructs Appellant that Appellant must notify the Board in writing of any change to Appellant's email address while Appellant's appeal is pending. See Appellant's Appeal Form, Block No. 3.

## ISSUE

Has the Appellant shown good cause why the Board should not dismiss Appellant's appeal for failure to prosecute?

## ANALYSIS AND CONCLUSIONS

It is well established that the Board may dismiss an appeal for failure to prosecute, as necessary to serve the ends of justice. See White v. Social Security Administration, 76 M.S.P.R. 447, 464-65 (1997); Wright v. Department of the Treasury, 53 M.S.P.R. 244, 249 (1992); Talbot v. Department of the Interior, 83 M.S.P.R. 325 (1999); MCPR, 2001 Section 35-7(b). Such a sanction is warranted when the appellant has failed to exercise basic due diligence in complying with a Board order or has exhibited negligence or bad faith in her efforts to comply. Logan v. Dep't of Navy, 29 M.S.P.R. 573, 577, aff'd, 809 F.2d 789 (Fed. Cir. 1986); Peck v. Office of Personnel Management, 35 M.S.P.R. 175, 178 (1987).

In the instant case, Appellant's counsel did not file Appellant's Prehearing Submission on time. When Board staff emailed counsel, no response was received. Board staff then followed up with a call to Appellant's counsel to ascertain the status of the Prehearing Submission. Counsel informed staff that counsel would look into the matter and send an email about the status. However, counsel for Appellant failed to do so. Accordingly, the Board issued a Show Cause Order, notifying the parties that it intended to dismiss Appellant's appeal based on Appellant's failure to prosecute the appeal. Appellant was given until March 9, 2009 to respond.

Appellant's counsel responded, informing the Board that they lacked the ability to act on Appellant's behalf and that the Board should communicate directly with Appellant about the Show Cause Order. Board staff expeditiously sent Appellant an email at the email address provided by Appellant, asking Appellant to respond immediately if Appellant wished to pursue Appellant's appeal. Staff included copies of the Show Cause Order and the Board's Prehearing Submission requirements as attachments to the email to Appellant.

When Appellant failed to respond, the Board staff sent Appellant a letter, with copies of the Show Cause Order and the Board's Prehearing Submission requirements as attachments. The letter was sent on March 10, 2009 by certified mail and by first class mail. To date, no response has been received.

An appellant is responsible for the actions of his/her chosen representative. Sofio v. Internal Revenue Service, 7 M.S.P.R. 667, 670 (1981); Talbot, 83 M.S.P.R. at 329-30. Appellant is required to act with due diligence, and has a duty to keep abreast of Appellant's appeal and to take personal responsibility for prosecuting it. Rowe v. Merit Systems Protection Board, 802 F.2d 434, 438 (Fed. Cir. 1986); Benton v. Department of the Interior, 47 M.S.P. R. 200, 203 (1991). In the instant case, Appellant's counsel did not timely file Appellant's Prehearing Submission. Only after several contacts by Board staff and the issuing of a Show Cause Order did counsel even inform the Board that it could no longer act on behalf of Appellant. The Board's staff then immediately attempted to contact Appellant

by email. When Appellant failed to respond, a letter was sent to Appellant by both certified mail and first class mail. Appellant again failed to respond in a timely manner. Accordingly, the Board concludes that Appellant has failed to take personal responsibility for prosecuting Appellant's appeal. Therefore, the Board has determined to dismiss Appellant's appeal for failure to prosecute.

**ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal based on failure to prosecute.

# **MOTIONS TO DISMISS**

## **CASE NO. 09-08**

### **DECISION ON COUNTY'S MOTION TO DISMISS**

On January 5, 2009, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board) from the determination of the Montgomery County, Maryland, Department of Correction and Rehabilitation's (DOCR's) Warden to terminate Appellant, effective December 31, 2008. The County filed a Motion to Dismiss the appeal, asserting that the termination of Appellant's temporary appointment complied with the personnel regulations.

Appellant also appealed the failure to be rehired by DOCR. The County seeks dismissal of this portion of the appeal based on its assertion that the determination not to rehire Appellant was made by a private contractor, the Association, and the Board lacks jurisdiction to consider the Association's decision not to hire Appellant.

### **FINDINGS OF FACT**

Appellant, prior to Appellant's termination, worked at DOCR as an Instructor in the Center. See Appellant's Appeal. The Center existed for years in DOCR pursuant to a memorandum of understanding with the Montgomery County Public Schools. County Exhibit (C. Ex.) 2 at 1. According to Appellant, Appellant was hired to work at DOCR's Center in 2001 through the Montgomery County Public Schools (MCPS). See Appellant's Response at 1.

In July 2007, the DOCR Director notified the Chief Administrative Officer that DOCR intended to change the relationship with the inmate Instructors and wanted to hire the Instructors for a period of one year until DOCR reached an agreement with Montgomery College. Id. The Director of the Office of Human Resources (OHR) informed the DOCR Director that the OHR Director was approving a 5% increase in salary to hire the group of applicants for these temporary positions. Id. One of the applicants was Appellant. Id. Appellant received a temporary appointment, effective August 10, 2007. C. Ex. 1.

Apparently, DOCR never reached an agreement with Montgomery College. Instead, DOCR reached an agreement with a private contractor, the Association, to provide instructor service to DOCR. See Appellant's Appeal, Ex. 3. In late November, the DOCR Director and the Warden met with the Instructors and informed them of the change in how the Center would be staffed. Id. After this meeting, Appellant sent an email to both DOCR Director and the Warden on December 5, 2008 about the proposed change in Appellant's employment status and Appellant's unhappiness with certain working conditions. Id. Subsequently, on December 19, 2008, Appellant was informed by the Warden that Appellant was terminated as the Association was not going to pick Appellant up as an employee. Appellant's Appeal, Ex. 2. According to Appellant, Appellant was informed Appellant was not being picked up



because of the issues Appellant had raised in Appellant's email to the DOCR Director and the Warden. Id.

Appellant was terminated, effective December 31, 2008. Appellant's Appeal, Ex. 1; C. Ex. 3. This appeal followed.

### **POSITIONS OF THE PARTIES**

#### County:

- The County's termination of Appellant complied with the personnel regulations.
- The Board lacks jurisdiction over Appellant's appeal of the Association's decision not to hire Appellant.

#### Appellant:

- Appellant was terminated after Appellant brought concerns about Appellant's employment to DOCR management's attention.
- Management's actions were arbitrary, capricious, and punitive. At no time was Appellant told Appellant was going to be a temporary appointee. Rather, Appellant was informed Appellant would be a County permanent part-time employee after a six-month probationary period.
- After Appellant's termination, the County advertised to fill Appellant's job.

### **APPLICABLE LAWS AND REGULATIONS**

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-6, Definitions**, which states in applicable part,

In this article, the following words and phrases have the following meanings:

**Board:** The Merit System Protection Board as described in Section 403 of the County Charter.

...

**Merit system employees:** All persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-7, County Executive and Merit System Protection Board responsibilities**, which states in applicable part,

...

(e) **Adjudication.** The Board shall hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

**Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action,** which states in applicable part,

...

(c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion.

...

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005 and October 21, 2008), Section 7, Appointments, Probationary Period, and Promotional Probationary Period,** which states in applicable part:

...

**7-3. Use of temporary employees.**

(a) *Temporary employees other than short-term employees.*

(1) A department director may use a temporary employee for up to 40 regularly scheduled hours per week for a maximum period of 12 months.

(2) The CAO may approve an extension of a temporary appointment for an additional 6 months.

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 21, 2008), Section 29, Termination,** which states in applicable part:

**29-7. Appeal of termination.**

...

(c) A probationary or temporary employee may not appeal a termination.

**ISSUE**

Does the Board have jurisdiction over the instant appeal?

## ANALYSIS AND CONCLUSIONS

### The Board's Jurisdiction Over An Appeal Is That Which Is Granted By Statute Or Regulation.

The Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. *See, e.g., King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

### The Board Lacks Jurisdiction Over The Termination Of Appellant's Temporary Appointment.

Even though the County has not raised the issue of the Board's jurisdiction over the termination of Appellant's temporary appointment, the Board may raise the issue of its jurisdiction *sua sponte*. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Montgomery County Code establishes the Board's jurisdiction over certain disciplinary actions. Specifically, Section 33-7(e) provides the Board with the authority to hear and decide disciplinary appeals upon the request of a **merit system employee** who has been removed, demoted or suspended. The Code defines a merit system employee as a person who is employed in a full-time or part-time year-round **permanent** career position. Montgomery County Code, Section 33-6.

In the instant case, the record of evidence clearly establishes that Appellant, at the time of Appellant's termination, was employed not in a permanent position but rather a temporary position. C. Ex. 1; C. Ex. 3, Appellant's Appeal, Ex. 1. As the personnel regulations note, a temporary employee may not appeal a termination. MCPR, 2001 (as amended), Section 29-7(c). While Appellant asserts that Appellant was never told that Appellant's position with the County was temporary but rather that it was permanent part-time, Appellant's Personnel Action Form (PAF), appointing Appellant to the position, clearly demonstrates that the appointment was temporary. *See* C. Ex. 1.

Accordingly, based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant's appeal of the termination of Appellant's temporary appointment.

### The Board Lacks Jurisdiction Over The Decision Of The Association Not To Hire Appellant.

As previously noted, the Board may hear only those actions which it has been granted jurisdiction over by statute or regulation. The Montgomery County Code grants the Board jurisdiction over appeals from applicants for employment in a merit system position with the

County. In the instant case, the record of evidence reveals that the position Appellant was denied was not a merit system position with the County; rather, it was a position with a private contractor, the Association.<sup>1</sup> As the County correctly points out, the Board lacks jurisdiction over the filling of positions with a private contractor, even if the contractor is providing services to the County.

Accordingly, based on the foregoing analysis, the Board concludes it lacks jurisdiction over Appellant's appeal of the failure of the Association to hire Appellant.

### **ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal in its entirety based on lack of jurisdiction.

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<sup>1</sup> In Appellant's response, Appellant submitted an announcement for Instructors for the DOCR facility. See Appellant's Ex. 5a&b. However, the announcement does not indicate that the positions being recruited for are in fact County positions. Rather, it simply informs candidates to email their resume to Ms. A.

The Board notes that all applicants for County positions are required to apply on-line through OHR's online application system. See OHR website available at <http://www.montgomerycountymd.gov/content/ohr/career/level4.asp?groupid=N&linkid=How+to+Apply>. OHR does not accept resumes submitted via email. Id. Thus, the record of evidence does not indicate that the positions in question are County Government positions.

## **CASE NO. 09-10**

### **DECISION ON COUNTY'S MOTION TO DISMISS**

On February 12, 2009, the Montgomery County Merit System Protection Board (MSPB or Board) received an appeal of the decision of the President, Local Fire Department, to dismiss Appellant on February 16, 2009. The Board noted the appeal and sent it to the County for response. The County filed a Motion to Dismiss, noting that Appellant was an employee of the local Fire Department (FD), and as such was not a Montgomery County merit system employee.<sup>1</sup> In support of this proposition, the County filed an affidavit from the County's Office of Human Resources Director attesting to the fact that Appellant is not a County employee. See County Motion to Dismiss, Attachment 1.

Based on the County's Motion to Dismiss, on February 24, 2009, the Board sent a letter to the President of FD, noting the appeal and instructing FD to have its attorney respond to Appellant's appeal and request for a stay.<sup>2</sup> Subsequently, on March 9, 2009, the President, Fire Department, informed the Board that the matter was in the hands of FD's lawyer. See Email from President, Fire Department to the Board's Executive Director, subject: Re: Stay Request – Appellant.

Thereafter, on March 12, 2009, FD's General Counsel, Mr. A, notified the Board that FD had retained counsel to represent it in this matter. See Email from Mr. A to Executive Director, dated 03/12/09, subject: RE: Appellant – MSPB Case No. 09-10.

FD has filed nothing in opposition to the County's Motion to Dismiss. Accordingly, based on the record of evidence in this case, the Board has determined to grant the County's Motion to Dismiss.

### **ORDER**

On the basis of the above, the Board hereby dismisses the County as a party to this case.

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<sup>1</sup> The County noted in its Motion to Dismiss that Appellant, as an employee of FD, is subject to the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR).

<sup>2</sup> Section 21-16 of the Montgomery County Code provides the services of the MSPB to the local fire and rescue departments, including FD. MCFRCPR Section 30-2 provides that a merit system employee of a local fire and rescue department has the right to appeal a dismissal to the Board.

## **CASE NO. 08-14**

### **DECISION ON COUNTY'S MOTION TO DISMISS**

On June 6, 2008, Appellant filed an appeal with the Montgomery County Merit System Protection Board (Board) from the determination of Montgomery County, Maryland, Department of Correction and Rehabilitation's (DOCR's) Director to dismiss Appellant, effective May 30, 2008. The County filed a Motion to Dismiss the appeal, asserting that because Appellant had participated in the Alternative Dispute Resolution (ADR) process set forth in Article 10.14 of the Municipal and County Government Employees Organization (MCGEO) Collective Bargaining Agreement (CBA or contract), Appellant waived Appellant's right to appeal to the Board. According to the County, Appellant accepted a thirty (30) day suspension during the ADR process and agreed not to appeal the suspension to the Board.<sup>1</sup> Appellant denied accepting the suspension or waiving Appellant's rights to appeal to the Board.

Because this case involved an ADR process identical to that which occurred in another case, MSPB Case No. 08-12, which subsequently went to hearing before the Board, the Board issued Show Cause Orders in both cases, seeking to determine whether it had jurisdiction over either case. In the instant case, the County responded to the Show Cause Order and Appellant filed a Reply. Based on the evidence before it, the Board then sought additional information from both the County and Appellant. The County subsequently replied, producing additional evidence,<sup>2</sup> but Appellant failed to reply with any documentation as requested.

### **FINDINGS OF FACT**

Appellant is a Correctional Officer at the Montgomery County Detention Center (MCDC). Appellant is a member of the bargaining unit covered by the Collective Bargaining Agreement (CBA) between MCGEO, Local 1994, AFL-CIO and the Montgomery County Government.

Appellant was issued a Statement of Charges – Dismissal on April 4, 2008. Appellant was provided with the opportunity to respond to the charges. Subsequently, a

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<sup>1</sup> According to the County, Appellant's mere participation in the ADR process waived Appellant's right to appeal Appellant's discipline to the Board. As discussed in greater detail *infra*, the Board rejects this argument.

<sup>2</sup> Specifically, the County produced a Personnel Action Form (PAF), documenting that Appellant was suspended for thirty days based on the ADR agreement reached on May 30, 2008. *See* County's Response to MSPB Request for Additional Information, Attachment 1. The County also filed an additional document, labeled Delegation of Authority (Delegation), dated 10/28/92, and contended that this Delegation provided the Department Director authority to issue a 30-day suspension.

Notice of Disciplinary Action (NODA), dated April 22, 2008, was issued to Appellant, indicating that Appellant's dismissal would be effective May 30, 2008.

The MCGEO CBA provides for a Pre-Discipline Settlement Conference. County's Motion to Dismiss, Attachment 1 at 2. The Conference is to be held after a Statement of Charges is issued but before a NODA is issued.<sup>3</sup> Id. During the Conference, a Committee reviews the disciplinary action and makes a non-binding recommendation. County's Motion to Dismiss, Attachment 2, Article 10.14(a)(5).

On May 30, 2008, Appellant, along with Appellant's Union Representative, participated in an ADR Settlement Conference. See County's Motion to Dismiss, Attachment 2. It appears from the ADR Settlement Conference Intake Form (Settlement Form) that the Conference Committee members reached agreement to recommend a 30-day suspension for Appellant in lieu of removal. Id. The Settlement Form indicates that the Department agreed to the Committee's recommendation. Id. Appellant and Appellant's Union Representative signed the Settlement Form but did not indicate whether the Committee's recommendation was accepted or rejected. Id. The Settlement Form indicates that the Settlement Conference option is considered part of the informal resolution process of the contract grievance procedure and, in using this process, an employee waives the right to file with the MSPB on any suspension and dismissal actions.<sup>4</sup> Id.

Subsequently, on June 9, 2008, the Director issued a Notice of Disciplinary Action – Thirty (30) Day Suspension, to be effective June 29, 2008.<sup>5</sup> This NODA informed Appellant that Appellant had waived Appellant's right to file with the Board concerning the suspension action.

### **POSITIONS OF THE PARTIES**

#### County:

- The evidence demonstrates that Appellant participated in the ADR Settlement Conference. By doing so, Appellant waived Appellant's right to appeal to the MSPB regarding this matter.
- The County has presented evidence in the form of affidavits from various participants

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<sup>3</sup> According to the County's Motion to Dismiss, although ADR is usually conducted prior to the issuance of the NODA, in this case the parties agreed to proceed even though the NODA had been issued.

<sup>4</sup> This is consistent with Section 10.14(a)(7) of the CBA.

<sup>5</sup> The Board sought clarification from the County as to whether the NODA effecting Appellant's dismissal was ever revoked. The County asserted the NODA was revoked by verbal agreement between the County, the Union and Appellant. Appellant subsequently submitted a PAF for Appellant to the Board, dated June 5, 2008. The PAF indicates that "AGREEMENT REACHED DURING ADR – RESCIND DISMISSAL EFF. 5/30/2008 (30 Day Suspension to come)". Thus, the Board finds that the dismissal action was withdrawn.

- in the ADR Conference that Appellant accepted the 30-day suspension.
- This case is distinguishable from MSPB Case No. 08-12, as the County had elected to waive its rights under Section 10.14(a)(7) of the CBA to seek dismissal of the appeal in that case due to the appellant’s participation in the Settlement Conference. Moreover, the Board had already held a hearing on that case. As no hearing has been held in the instant case, the County does not waive its right to seek dismissal of the instant appeal.
- Because ADR is a settlement process and not discipline, there is no need for the CAO to approve a 30-day suspension agreed to by the parties.
- To the extent that CAO approval is required to impose a 30-day suspension through the ADR process, the County asserts that the CAO has delegated authority to the Department Director to impose a suspension of more than five days based on a delegation dated October 28, 1992.

Appellant:

- Although the Department of Correction and Rehabilitation accepted the recommendation of the Committee, Appellant and Appellant’s Union Representative never accepted or rejected the recommendation.
- Appellant never waived Appellant’s appeal right to the Board.
- Appellant received a six-week suspension<sup>6</sup> and the contract does not allow a suspension to exceed 30 calendar days.

**APPLICABLE CONTRACTUAL PROVISIONS**

**Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, Article 10, Grievances**, which states in applicable part:

10.2 Discipline Grievances

Oral admonishments and written reprimands are not subject to review under this procedure. Any employee initiating a grievance under this procedure regarding suspension, demotion or removal waives any right to have that action reviewed by the Montgomery County Merit System Protection Board.

...

10.14 Pre-discipline Settlement Conferences

- (1) After a statement of charges (includes intent to terminate actions based on unsatisfactory performance) is issued but before the notice of

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<sup>6</sup> Appellant has provided no support for Appellant’s assertion that Appellant received a six-week suspension.



disciplinary action is issued, the parties may voluntarily agree to a pre-disciplinary settlement conference.

...

- (5) The Committee reviews the recommended level of discipline and the facts of the case and makes a non-binding recommendation. Each side is permitted to make a brief presentation before the Committee. Presentation and format shall be established by the Committee.
- (6) If parties agree with the recommendation of the Committee, Notice of Discipline is issued with no grievance. If Union disagrees with the committee's recommendation, it is free to grieve the Notice of Disciplinary Action. If County disagrees, it may go forward with the notice as originally proposed.
- (7) The settlement conference option will be considered a part of the informal resolution process of the contract grievance procedure, in using this process an employee waives any right to file with MSPB on suspensions, demotions and dismissal actions.

**Agreement Between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County Government, Montgomery County, Maryland, July 1, 2007 through June 30, 2010, Article 28, *Disciplinary Actions*, which states in applicable part:**

28.2 Types of Disciplinary Actions

Disciplinary actions shall include but are not limited to:

...

(e) Suspension

- (1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct. A suspension shall not exceed 5 work days unless authorized by the Chief Administrative Officer.

...

28.5 An employee may appeal any disciplinary actions, with the exception of oral admonishments and written reprimands, in accordance with this Agreement.

## ISSUE

Does the Board have jurisdiction over the instant appeal?

## ANALYSIS AND CONCLUSIONS

### **The Board Rejects The County's Assertion That Appellant's Mere Participation In The ADR Process Divests The Board Of Jurisdiction.**

As previously noted, the MCGEO CBA provides for a Pre-Discipline Settlement Conference. CBA, Article 10.14. The Conference is to be held after a Statement of Charges is issued but before a NODA is issued. *Id.* During the Conference, a Committee reviews the disciplinary action and makes a non-binding recommendation. CBA, Article 10.14(a)(5). If the parties agree to the non-binding recommendation, then the NODA is issued with no grievance rights. If the Union disagrees, it may file a grievance over the NODA. If the County disagrees, it may issue the NODA as originally proposed.

In the instant case, the record of evidence before the Board indicates that, on May 30, 2008, Appellant, along with Appellant's Union Representative, participated in an ADR Settlement Conference. It appears from the Settlement Form that the Conference Committee members reached agreement to recommend a 30-day suspension for Appellant in lieu of dismissal. *Id.* The Settlement Form indicates that the Department agreed to the Committee's recommendation. *Id.* Appellant and Appellant's Union Representative signed the form, but failed to indicate whether they accepted or rejected the Committee's Recommendation. *Id.* The Settlement Form indicates that the Settlement Conference option is considered part of the informal resolution process of the contract grievance procedure and, in using this process, an employee waives the right to file with the MSPB on any suspension, demotion or dismissal actions. *Id.* Subsequent to the completion of the ADR Settlement Conference, Appellant appealed Appellant's dismissal to the Board.

At the time of Appellant's appeal, the Board had before it on appeal another disciplinary action wherein the appellant also participated in the ADR Settlement Conference process pursuant to the MCGEO CBA. *See* MSPB Case No. 08-12. In that case, the County had not asked the Board to dismiss the appeal; rather, a hearing was held on the discipline at issue in that case. The Board noted that the Settlement Form in MSPB Case No. 08-12 was identical to the one filed with the Board in the instant case. Nevertheless, in the other case, the NODA issued to the appellant provided the right to challenge the discipline by filing an appeal with the Board.

Therefore, before making a determination regarding the County's Motion to Dismiss the instant appeal, the Board ordered the County to provide a statement of such good cause as exists for why the Board lacks jurisdiction in the instant case if it has jurisdiction in MSPB Case No. 08-12.<sup>7</sup> The County responded to the Board arguing that in the instant case,

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<sup>7</sup> The Board issued a similar Show Cause Order in MSPB Case No. 08-12.

Appellant agreed to the recommendation to reduce the proposed discipline, while the appellant in the other case rejected the proposed reduction. The County also noted that the Board had held a hearing in the other case. Finally, the County asserted that it had elected to waive its rights under section 10.14(a)(7) of the CBA<sup>8</sup> in the other case and, therefore, had not moved to dismiss that case.

The right of a merit employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal action is granted by the Montgomery County Charter. Montgomery County Charter, Section 404. The Charter also provides that employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system to the extent those provisions are made subject to collective bargaining. Montgomery County Charter, Section 401. The MCGEO CBA allows an employee who wishes to challenge a suspension action to elect between filing a grievance under the CBA grievance procedure or appealing the suspension to the Board. CBA, § 10.2.

It is well established law that in order to effectuate an enforceable waiver of a statutory right, the waiver must be the result of an informed, intentional abandonment of a known right, free of any coercion or duress. See McCall v. United States Postal Service, 839 F.2d 664, 668 (Fed. Cir. 1988) (citing Ferby v. United States Postal Service, 26 M.S.P.R. 451, 455-56 (1985)). In the instant case, the Board is unpersuaded that Appellant made an informed, intentional abandonment of Appellant's right to appeal to the Board concerning Appellant's suspension by Appellant's mere participation in the ADR process.

The Board notes that the ADR Settlement Form is confusing, with the waiver provision found at the bottom of the form. More importantly, there is no evidence that the employee is specifically informed of the waiver of the employee's rights prior to entering into the Settlement Conference. Indeed, the Board notes that the County has conceded that even it, a signatory to the CBA, has never before focused upon the language of Section 10.14(a)(7) of the CBA and ADR Settlement Form so as to move to dismiss other employees' appeals to the Board, after their participation in the Settlement Conference. If the County was unaware that an employee by merely participating in the Settlement Conference was waiving employee's rights, the Board questions how an employee could be expected to be aware of the waiver. Therefore, based on the totality of evidence, the Board holds that the absence of advance knowledge and written agreement by Appellant that

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<sup>8</sup> Significantly, in the County's Response to the Board's Show Cause Order in the instant case, the County

concedes that it has in other cases, including MSPB Case No. 08-12, notwithstanding the CBA provision and language on the Settlement Form, not opposed an employee's subsequent appeal to the Board. In those prior cases, the County has not focused on the language in § 10.14(a)(7) of the CBA and so these prior waivers were not intentional.

County Response to Show Cause Order at 3.

Appellant was waiving Appellant's rights to appeal to the Board by participating in the Settlement Conference demonstrates that Appellant did not make an informed, intentional abandonment of Appellant's right.<sup>9</sup>

**The Board Finds That It Lacks Jurisdiction Over The Instant Appeal.**

A. Appellant Agreed To A 30-Day Suspension In Lieu Of Dismissal During The ADR Process.

The County, in response to the Board's Show Cause Order, submitted four affidavits from individuals who attended the Settlement Conference on May 30, 2008. The four affidavits were from a Human Resources Specialist with the Office of Human Resources, a Conference Committee member, and two DOCR representatives. All four individuals indicated unequivocally that Appellant and Appellant's MCGEO representative agreed to a 30-day suspension in lieu of dismissal.

In contrast, Appellant has submitted no proof except for Appellant's bare allegations that Appellant did not accept the 30-day suspension. The Board afforded Appellant the opportunity to submit a statement from his MCGEO representative that no agreement was reached. However, Appellant failed to do so. Accordingly, the Board finds that based on the record of evidence, Appellant agreed to a 30-day suspension as part of the ADR settlement process.

B. The Board Finds That The Waiver Of Appellant's Appeal Rights To The Board Constituted Consideration For The Agreement By DOCR To Change Appellant's Dismissal To A 30-Day Suspension.

It is well established that a settlement agreement is a contract between the parties. See Rivas v. United States Postal Service, 72 M.S.P.R. 383 (1996) (citing to Greco v. Department of the Army, 852 F.2d 558, 560 (Fed. Cir. 1988)). To be binding and enforceable, contracts must be supported by sufficient consideration. Chernick v. Chernick, 327 Md. 470, 479, 610 A.2d 770, 774 (1992); Peer v. First Federal Savings and Loan Association of Cumberland, 273 Md. 610, 614, 331 A.2d 299, 301 (1975).

Forbearance to make use of a legal remedy, such as appealing to the Board, is sufficient consideration for a return promise, such as a reduction in the penalty of a disciplinary action. Rivas v. United States Postal Service, 72 M.S.P.R. 383 (1996); see also Chernick, 327 Md. at 480, 610 A.2d at 774. The Board notes that Appellant was represented by the Union during the ADR process. The Union, as a signatory to the CBA, knew that by accepting the reduction in penalty, Appellant was foregoing Appellant's right to appeal the

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<sup>9</sup> The Board expects the County to ensure, henceforth, that all employees, **prior** to participating in the Settlement Conference, sign a specific acknowledgement that they are waiving their rights to appeal to the Board by participating in the Settlement Conference. Failure of the County to ensure a knowing waiver by the employee will result in the Board accepting any subsequent appeal by the employee of their disciplinary action.

reduced discipline to the Board. Accordingly, the Board finds that by accepting the reduction in Appellant's penalty, Appellant waived Appellant's right to appeal Appellant's discipline to the Board.

C. The Board Finds That Appellant Was Aware Prior To Entering Into ADR That The Department Director Lacked The Authority To Issue More Than A 5-Day Suspension Action; Because Appellant Chose To Accept A 30-Day Suspension In Lieu Of Dismissal, Appellant Waived Appellant's Right To Challenge The Director's Authority To Issue Such A Suspension Without CAO Approval.

Appellant has appeared before the Board before. Specifically, in MSPB Case No. 07-05, Appellant appealed a fifteen-day suspension that Appellant received from DOCR. In that case, Appellant successfully challenged the Department Director's authority to issue Appellant more than a five-day suspension without the approval of the CAO.<sup>10</sup> The Board overturned Appellant's fifteen-day suspension and substituted a five-day suspension based on its finding that the Department Director lacked the authority to impose a greater suspension.

Thus, Appellant was aware at the time Appellant entered ADR that the Department Director lacked the authority to unilaterally impose greater than a five-day suspension. However, the Board finds that by agreeing to accept the thirty-day suspension, Appellant implicitly waived Appellant's right to contest the Department Director's lack of authority.

Accordingly, the Board concludes based on all of the evidence submitted to it that it lacks jurisdiction over the instant appeal as Appellant accepted a thirty-day suspension during the ADR Settlement Conference and effectively waived Appellant's right to appeal the suspension to the Board.

**ORDER**

On the basis of the above, the Board hereby dismisses Appellant's appeal based on lack of jurisdiction.

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<sup>10</sup> The Board notes that in MSPB Case No. 07-05, the County argued unsuccessfully that the very same Delegation submitted by the County in the instant case gave the Department Director the authority to impose a fifteen-day suspension. For the reasons relied upon in MSPB Case No. 07-05, the Board again rejects the County's argument that the 1992 Delegation is still viable.

# **RECONSIDERATION**

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code Section 2A-7(c) of the Administrative Procedures Act (APA). There is no specific time limit for filing such a motion under the APA or the Board's current procedures. Rather, the APA indicates that motions should be filed promptly.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days from a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within ten (10) days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

In FY 2009, during the course of proceedings in several cases, the Board issued two decisions on requests for reconsideration of a preliminary matter.

# **RECONSIDERATION DECISIONS**

## **Case. No. 08-12**

### **DECISION ON APPELLANT'S MOTION FOR RECONSIDERATION**

On June 24, 2008, Appellant filed a Motion for Reconsideration of the Merit System Protection Board's (Board's) Decision on the County's Motion in Limine, seeking to have the Board reconsider its determination to exclude the testimony of Appellant's proposed witness, Witness A. On July 8, 2008, the County filed an Opposition to Appellant's Motion. Because the County's Opposition is late, the Board has determined not to consider it in ruling on Appellant's Motion for Reconsideration.<sup>1</sup>

This appeal involves a fifteen-day suspension based on two charges: 1) Appellant's failing to perform duties in a competent or acceptable manner based on Appellant's failure to report to local law enforcement or HHS the attempted assault of one of Appellant's clients as required of a mandated reporter; and 2) Appellant's violation of an established policy when Appellant failed to do a safety assessment for every child-group or residential placement (SAFE-C GRP) based on the attempted assault of Appellant's client. Both the Statement of Charges and the Notice of Disciplinary Action, effecting the fifteen-day suspension, were signed by Director, Department of Health and Human Services.

On May 15, 2008, the County filed a Motion in Limine, seeking to have the Board exclude, inter alia, Appellant's proposed witness, Witness A, a Social Worker with HHS, on the basis that Witness A's testimony was not relevant. The County noted in its Motion in Limine that Appellant's Prehearing Submission simply indicated that Witness A would testify about "employee expectations." County Motion in Limine at 4. Appellant's Opposition to the County's Motion in Limine indicated that Witness A is a peer of Appellant and also works under Appellant's supervisor. Accordingly, Appellant asserted that Witness A could testify to specific incidents that demonstrate that Appellant's supervisor is subjecting Appellant to disparate treatment.

In its Decision on County's Motion in Limine, the Board determined that Appellant had not demonstrated the relevancy of the testimony of Witness A, who was not alleged to have first-hand knowledge any of the events forming the basis for the disciplinary action in this matter. Accordingly, the Board excluded Witness A as a witness.

In Appellant's Motion for Reconsideration, Appellant cites to Montgomery County Personnel Regulations (MCPR), 2001, Section 33-2(d)(3), which requires that a department

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<sup>1</sup> Under the Board's Hearing Procedures, a party has five days from receipt of a motion to file an opposition. The County was well aware of this requirement, as Appellant had to seek leave in this case to file Appellant's Opposition to the County's Motion in Limine as Appellant exceeded the Board's five calendar day time frame.

director should consider the discipline given to other employees in comparable positions in the department for similar behavior when deciding if discipline is appropriate or how severe the disciplinary action should be. Appellant asserts that Witness A will testify to three very specific incidents where Witness A was not disciplined by Appellant's supervisor.

According to Appellant's Motion for Reconsideration, Witness A will testify as to an incident involving a teenager, who was a group home resident, wherein the teenager fought with another resident and received bruises and scratches. Appellant alleges that Witness A was not instructed by Appellant's supervisor to report this incident to the screening unit nor was Appellant disciplined for failure to report it. In a second incident, involving the same teenager, the teenager was punched while lying in bed and Witness A reported this occurrence to Appellant's supervisor but Appellant's supervisor did not instruct Witness A to report it to the screening unit. Again, Witness A was not disciplined for this failure to report. Finally, Appellant alleges that Witness A will testify regarding a third incident, involving another teenager, who was in a pushing match with the teenager's roommate, during which the teenage hit the teenager's head on a table and required staples to the head. When Witness A sought guidance from Appellant's supervisor as to how to deal with this incident, Witness A was purportedly instructed to inform the teen's parents and attorney but was told not to report it to the screening unit. Moreover, Witness A was not disciplined for not reporting the matter.

Appellant's Motion for Reconsideration notes that MCPR Section 35-12(a)(1)(B) indicates that the Board will hear testimony indirectly related to the charges, provided a relevant relationship has been established. Appellant asserts as MCPR Section 33-2(d)(3) requires the department director consider discipline given to other employees in comparable positions in the department for similar behavior, it follows that discipline given to other employees in comparable positions to Appellant would be indirectly related to the charges and thus appropriate testimony under MCPR Section 35-12(a)(1)(B).

### **APPLICABLE LAW AND REGULATIONS**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings**, which states in applicable part,

- (e) **Evidence.** The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request. The hearing authority may take official notice of commonly cognizable facts, facts within its particular realm of administrative expertise and documents or matters of public record. Parties shall be notified of matter and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.



**Montgomery County Personnel Regulations (MCPR), 2001, Section 33, Disciplinary Actions**, which states in applicable part:

**33-2. Policy on disciplinary actions.**

- (d) *Consideration of other factors* A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

...

- (3) the discipline given to other employees in comparable positions in the department for similar behavior; . . .

**Montgomery County Personnel Regulations (MCPR), 2001, Section 35, Merit System Protection Board Appeals, Hearings, and Investigations**, which states in applicable part:

**35-12. Testimony of witnesses at hearings; interrogatories and depositions.**

(a) *Testimony of witnesses at hearing.*

- (1) All witnesses must testify under oath and only witnesses having direct knowledge of the facts on which the charges are based will be heard. The MSPB or hearing officer will hear testimony:
- (A) directly related to the charges;
  - (B) indirectly related to the charges, provided a relevant relationship has been established; and
  - (C) of past work record, but only for the purpose of determining degree of penalty, if any.

**ANALYSIS AND CONCLUSIONS**

Under Section 2A-8(e) of the Administrative Procedures Act, the Board may exclude evidence if it is not relevant. The Board will admit evidence if it is relevant to the issues in the case and tends to establish or disprove them. *Cook v. State*, 118 Md. App. 404, 416, 702 A.2d 971, 976 (1997), *cert. denied*, 349 Md. 234, 707 A.2d 1328 (1998) (citing to Md. Rules 5-401 to 402; *Dorsey v. State*, 276 Md. 638, 643 (1976)); *Parker v. State*, 156 Md. App. 252, 268, 846 A.2d 485, 498, *cert. denied*, 382 Md. 347, 855 A.2d 350 (2004) (same). As previously noted, the instant appeal involves Appellant's fifteen-day suspension for failing to report the attempted assault of one of Appellant's clients. Therefore, what is relevant is evidence concerning the events surrounding the reporting to Appellant of the attempted assault of the 14-year old child

who was one of Appellant's clients and Appellant's actions thereafter.

The Board has reviewed the proffered testimony of Witness A and notes that there are striking dissimilarities between the events described in the proffer and the events surrounding the discipline of Appellant. First, Appellant asserts that Appellant's supervisor did not discipline Witness A for similar behavior as Appellant. Yet the Board notes that Appellant's supervisor did not discipline Appellant; Appellant was disciplined by the Department Director.

Secondly, based on Appellant's proffer, Witness A reported each of the three incidents to Appellant's supervisor and sought guidance as to how to proceed. No where in any filing by Appellant does Appellant allege that Appellant similarly reported the incident at issue to Appellant's supervisor and sought guidance as to how to proceed. Rather, Appellant's supervisor learned of the incident in question when the child's psychologist reported it to the Appellant's supervisor.

Third, the Board notes that none of the incidents involving Witness A concerned a failure to report the same type of purported assault of a teenager, which is the basis for Appellant's discipline. MCPR Section 33-2(d)(3) requires a department director to consider discipline given to other employees in comparable positions in the department for similar behavior.

While it is true that MCPR Section 35-12(a)(1)(B) provides for the Board hearing testimony indirectly related to the charges, it requires that a relevant relationship be established. Based on the foregoing analysis, the Board finds that there is no relevant relationship between the incidents Witness A would testify to and the incident at issue in this case.

### **ORDER**

Based on the foregoing, the Board hereby denies Appellant's Motion for Reconsideration.

## **Case No. 08-12**

### **DECISION ON COUNTY'S MOTION FOR RECONSIDERATION**

On July 7, 2008, the Merit System Protection Board (Board) received the County's Motion for Reconsideration, seeking to have the Board reconsider its determination to exclude Manager F as the Department representative in this matter. The Board made this determination during its Prehearing Conference in this matter on May 29, 2008, and incorporated said determination in its Scheduling Order, issued on June 5, 2008. Pursuant to the Board's Hearing Procedures, all motions for reconsideration are due five calendar days from the date of the Board's ruling is received. Thus, the County's Motion for Reconsideration was due on June 3, 2008.<sup>1</sup> Nevertheless, the Board has determined to address the merits of the County's Motion.

This appeal involves a fifteen-day suspension based on two charges: 1) Appellant's failing to perform duties in a competent or acceptable manner based on Appellant's failure to report to local law enforcement or Health and Human Services (HHS) the attempted assault of one of Appellant's clients as required of a mandated reporter; and 2) Appellant's violation of an established policy when Appellant failed to do a safety assessment for every child-group or residential placement (SAFE-C GRP) based on the attempted assault of Appellant's client. The attempted assault was reported to Appellant in October 2007 but Appellant failed to report this matter. On December 28, 2007, the psychologist for the client reported the matter to HHS.

Appellant received a Statement of Charges (SOC), dated January 24, 2008. The Statement of Charges discusses an investigative examination which occurred on January 8, 2008. According to the SOC, Appellant, Appellant's Union Representative, Manager F, Appellant's supervisor, Supervisor E, and Manager J attended the investigative examination. Appellant received a Notice of Disciplinary Action (NODA), dated March 3, 2008. The NODA, like the SOC, also discussed the investigative examination and noted that Manager F attended the examination.

On May 6, 2008, Appellant filed Appellant's Prehearing Submission in this matter. In the Prehearing Submission, Appellant identified Manager F as a potential witness and indicated that Manager F would testify to the allegations against Appellant and the investigative meeting. The County subsequently filed a Motion in Limine, seeking to have the Board exclude various witnesses and documents. In a cover letter

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<sup>1</sup> Even, assuming arguendo, the time for filing a Motion for Reconsideration began to run from the date of receipt of the Board's Scheduling Order, which incorporated the ruling the Board made on May 29, 2008, it is evident that the County's Motion is late. The County references in its Motion June 9, 2008 as the date of the Board's Scheduling Order; the Board assumes this is the date when the County received the Order. Thus, the County has filed its Motion for Reconsideration almost a month after receipt of the Scheduling Order.

transmitting its Motion in Limine, the County noted that Manager F was the department representative in this case. The County stated that whether Manager F was called as a witness by Appellant, it was the County's expectation that Manager F would remain in the hearing room throughout to assist counsel. The County indicated if the Board disagreed, the matter needed to be addressed at the Prehearing Conference on May 29, 2008.

The Board raised the matter during its Prehearing Conference, noting that its decision on a similar matter in MSPB Case No. 07-17 controlled. In MSPB Case No. 07-17, the Board excluded as a departmental representative an individual who was identified as a potential witness by the County. Nevertheless, the Board then gave both parties the opportunity to present arguments on the matter. After hearing from the parties, the Board reaffirmed its determination to exclude Manager F as a representative of HHS so long as Manager F remained a potential witness for Appellant.<sup>2</sup>

### APPLICABLE LAW

**Montgomery County Code, Chapter 2A, Administrative Procedures Act,** which states in applicable part,

#### **Section 2A-2. Applicability.**

This Chapter governs the following administrative appeals and proceedings and applies equally when a hearing is conducted by a hearing examiner or another designated official.

...

- (c) Appeals, grievances and complaints filed pursuant to Chapter 33, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Merit System Protection Board.

#### **Section 2A-8. Hearings.**

...

- (g) **Right to counsel.** In any case governed by the procedures established in this chapter, the parties have the right to be represented by themselves or by legal counsel of their choice. The appearance of counsel shall be entered and the hearing authority shall be notified in

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<sup>2</sup> The Board did suggest a compromise. It stated that it would permit Manager F to remain as the departmental representative if Manger F was the first witness, subject to direct examination by both parties, and was not called as a rebuttal witness by either party. However, Appellant's counsel, who is not required to put on Appellant's case first, objected, indicating that Appellant's counsel would not agree at that time to such a solution.

writing expeditiously following counsel's retention. All parties of record shall be notified simultaneously with the hearing authority.

- (h) **Powers of the hearing authority.** In addition to any other power granted by this article, a hearing authority is empowered:

...

- (10) To take any other action authorized by this article or necessary to a fair disposition of the case.

...

- (13) Upon its own motion and at the request of an affected party to order that witnesses other than a party be excluded from the hearing room until called to testify.

### **ANALYSIS AND CONCLUSIONS**

As the Board has previously informed the County, see MSPB Case No. 07-17, the Montgomery County APA governs this case, not the Maryland APA or arbitration procedures.<sup>3</sup> The Montgomery County APA provides the parties with the right to represent themselves **or** the right to be represented by counsel. No where in the Montgomery County APA does it provide that the County has the right to have a Department representative as well as County counsel. While the Board has previously permitted the County to have a Department representative at an appeal, as the County was previously informed, this was a matter of courtesy, not a right.<sup>4</sup>

The County once again has cited to Jacocks v. Montgomery County, 58 Md. App. 95, 472 A.2d 485 (1984), to support its request for reconsideration. Jacocks held that it was not an abuse of discretion when, during an administrative hearing, a witness was allowed to remain in the room as the County's representative. Jacocks involved an administrative hearing before the Law Enforcement Officer Bill of Rights Hearing Board (hearing board) regarding a disciplinary action of a police officer. At the beginning of the hearing, the appellant requested that the witnesses be sequestered. One witness, who testified first, was allowed by the hearing board to remain in the hearing room as the County's representative.

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<sup>3</sup> Likewise, the Maryland Rules to which the County cites are inapplicable. The Maryland Rules make clear that they apply to all actions in courts in the State. See Maryland Rule 1-101(e). As the case of Safeway Stores, Inc. v. Watson, 317 Md. 178, 562 A.2d 1242 (1988), which is cited by the County to support its reconsideration request, deals with the interpretation of a Maryland Rule, it too is inapposite to this proceeding.

<sup>4</sup> Indeed, the Board notes that the County has not articulated a reason as to why it is necessary to have anyone assist the County's counsel in the presentation of the County's case.

The appellant subsequently appealed, arguing, *inter alia*, that the decision to permit the witness to remain in the hearing room was prejudicial. In support of this proposition, the appellant cited the exclusion rule, Maryland Rule 755, which requires that if the exclusion of a witness is requested in a criminal trial then the court must comply with the request.

In Jacocks, the Court of Special Appeals reviewed the applicability of the exclusion rule to administrative hearings. The Court explained that “[t]he purpose of the exclusion rule is to prevent witnesses from being taught or prompted by another’s testimony.” 58 Md. App. at 109, 472 A.2d at 492 (quoting Gwaltney v. Morris, 237 Md. 173, 176-77, 205 A.2d 266 (1964)). The Court held that the exclusion rule applies to courts of the state but not to quasi-judicial proceedings by state administrative agencies. Significantly, the Court went on the hold that “the decision whether to sequester witnesses in an administrative adjudicatory hearing is a matter resting in the sound discretion of the presiding officer(s).” 58 Md. App. at 110, 472 A.2d at 492.

The Board exercised its sound discretion in this quasi-judicial proceeding by excluding Manager F as a Department representative, so long as Manager F remains a potential witness for Appellant. The Board finds the County has failed to show any good cause for the Board to change its determination.

### **ORDER**

Based on the foregoing, the Board hereby denies the County’s Motion for Reconsideration.

# **MOTIONS**

The County's Administrative Procedures Act (APA), Montgomery County Code Section 2A-7(b), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to quash subpoenas, motions in limine (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions may be filed at any time during a proceeding. The opposing party is given five (5) calendar days to respond. The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning of the hearing, rule on the motion.

During FY 2009, the Board issued the following two decisions: one concerning the parties' request for additional witnesses and/or additional exhibits; and the other concerning the County seeking to limit what exhibits could be introduced at hearing and which witnesses could be called.

# **REQUEST FOR ADDITIONAL WITNESSES AND ADDITIONAL EXHIBITS**

## **Case No. 08-12**

### **DECISION ON APPELLANT'S REQUEST FOR ADDITIONAL WITNESSES AND APPELLEE'S REQUEST FOR ADDITIONAL EXHIBITS**

This appeal involves the dismissal of Appellant from the Fire Department (FD or Appellee). Appellant, as an employee of FD, is subject to the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR). Section 21-16 of the Montgomery County Code provides the services of the Montgomery County Merit System Protection Board (MSPB or Board) to the local fire and rescue departments, including FD. MCFRCPR Section 30-2 provides that a merit system employee of a local fire and rescue department has the right to appeal a dismissal to the Board. Accordingly, pursuant to the Board's practice, it held a Prehearing Conference with the parties on April 22, 2009, and subsequently scheduled a hearing in this appeal for June 1, 2009. Less than a week prior to the hearing, the Board received a request to call additional witnesses from Appellant's counsel, to which FD's counsel objects. Also, less than one week before the hearing, the Board received from FD's counsel twelve additional exhibits, to which Appellant's counsel objects.<sup>1</sup>

### **PROCEDURAL HISTORY**

#### **The Prehearing Conference**

As previously noted, on April 22, 2009, the Board held a Prehearing Conference<sup>2</sup> with the parties on the above-captioned case. During the Prehearing Conference, the parties discussed the witnesses they would be calling and the witnesses' proposed testimony, as well as the documents they would be submitting. The Board indicated during the Prehearing Conference that it was concerned about the number of witnesses each party wanted to call<sup>3</sup> as it appeared that much of the proposed testimony by the

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<sup>1</sup> Appellant's counsel does note that Appellant would not object to the additional exhibits if Appellant is permitted to have Appellant's final list of witnesses. See Letter to Executive Director from Appellant's counsel, dated 05/24/09, subject: Appellant/Fire Department, Inc., MSPB 09-10.

<sup>2</sup> Prior to the Prehearing Conference, both parties received copies of the Board's Hearing Procedures, including the requirements for their Prehearing Submissions.

<sup>3</sup> Appellant's Prehearing Submission indicated Appellant intended to call twenty-two witnesses, including Appellant; FD's Prehearing Submission indicated it intended to call thirty witnesses, including Appellant.



various witnesses would be repetitive. Accordingly, the Board asked the parties if it was possible to eliminate some of the witnesses designated in their respective Prehearing Submissions. Appellant, through counsel, agreed to limit Appellant's witnesses to a total of seven including Appellant.<sup>4</sup> Likewise, Appellee, through counsel, agreed to limit the number of witnesses it was calling to a total of nine.

The Board also discussed the numerous exhibits submitted by the parties – i.e., forty-eight from Appellant and eighteen from Appellee. The Board urged the parties to attempt to limit the number of exhibits they would be submitting at hearing.

#### Appellee's Submission of Additional Exhibits

On May 18, 2009, the Board received from Appellee a substitute for its Exhibit 7. The original Exhibit 7 submitted in Appellee's Prehearing Submission was a report marked "draft". Appellee indicated it was substituting the final report which it had previously advised the Board it would do.

On May 26, 2009, the Board received a letter from Appellee's counsel, dated May 21, 2009, transmitting twelve additional exhibits. Appellee's counsel indicated the exhibits were inadvertently omitted from Appellee's original Prehearing Submission.

#### Appellant's Request for Additional Witnesses

During the Prehearing Conference, the parties were instructed by the Board's Executive Director to notify the Executive Director at least two weeks before the hearing which of the approved witnesses they would need subpoenas for and verify the names and addresses of each witness to be subpoenaed.

When the Executive Director did not hear from the parties regarding their need for subpoenas, the Executive Director emailed the parties on May 19, 2009, reminding them that the Executive Director needed the information previously requested in order to issue subpoenas to the parties to serve on their respective witnesses. FD's counsel responded to the email that morning, indicating the names and addresses of the nine witnesses FD would be calling. The Board's Executive Director issued nine subpoenas to FD's counsel on May 19, 2009.

Appellant's counsel responded to the Executive Director by email on the evening of May 19, 2009, indicating that Appellant's counsel had emailed FD's counsel the names of Appellant's witnesses and FD's counsel had called Appellant's counsel but they had missed each other. Appellant's counsel indicated that Appellant's counsel hoped to provide the information by the following afternoon. When the Board's Executive Director still had not

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<sup>4</sup> The witnesses for Appellant approved by the Board were: Mr. W; Mr. X (also known by a different first name according to Appellant's counsel); Chief S; Chief I; Ms. K; and Mr. T.

heard from Appellant's counsel on May 21, 2009, the Executive Director emailed Appellant's counsel reminding Appellant's counsel that the Board's office was closed on Friday<sup>5</sup> and that once the necessary information was received from Appellant's counsel, subpoenas would be issued on May 27, 2009.

On May 26, 2009, after the Board's office was closed for the day, Appellant's counsel sent a series of emails to the Board's Executive Director. The first email, sent at 5:24 p.m., indicated that a letter had been sent by courier to the Board that day. However, the email indicated the final list of witnesses for Appellant were: Captain (Capt.) U; Chief V; Capt. Y; Ms. K; Chief I; Mr. R; and Mr. P.<sup>6</sup> Addresses for all of the witnesses except Mr. R were provided. A second email, sent at 5:30 p.m., listed the same witnesses for Appellant as provided in the first email and provided addresses for all the witnesses listed. At 6:12 p.m., Appellant's counsel sent a third email to the Executive Director, changing the address for Mr. R and requesting two additional witnesses: Mr. X and Mr. L.<sup>7</sup> On May 27, 2009, upon arriving in the office, the Executive Director found a letter from Appellant's counsel which had been put in the Board's mail slot. The letter, dated May 24, 2009, indicated the following list of witnesses besides Appellant: Mr. R, Mr. P, Capt. Y, Chief V, Mr. T and Ms. K.<sup>8</sup>

On May 27, 2009, the Board's Executive Director sent Appellant's counsel an email, with a copy to Appellee's counsel, indicating that the list of witnesses in Appellant's counsel's emails did not correspond to the witnesses approved by the Board during the Prehearing Conference and that the lists in the various emails differed in some respects from the list contained in Appellant's counsel's letter of May 24. See Email from Executive Director to Appellant's counsel, dated 05/27/09, subject: RE: Subpoenas – MSPB Case No. 09-10. The Executive Director informed Appellant's counsel that based on what the Board had previously approved, the Executive Director would issue subpoenas for Chief I and Ms. K. Id. The Executive Director also indicated Executive Director would issue a subpoena for Mr. T once Appellant's counsel provided an address. Id. In addition, the Executive Director indicated that the Executive Director needed clarification as to whether Mr. X, who was

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<sup>5</sup> Both parties had previously been informed in correspondence from the Board that its hours of operation are 9:30 a.m. to 3:00 p.m., Monday through Thursday.

<sup>6</sup> Of the seven witnesses designated, only four had been included in Appellant's Prehearing Submission: Ms. K; Chief I; Mr. R; and Mr. P. However, as previously noted, Appellant's counsel agreed to eliminate some witnesses at the Prehearing Conference, including Mr. R and Mr. P.

<sup>7</sup> A Mr. X had appeared in Appellant's Prehearing Submission as did Mr. L. However, as previously noted, Appellant's counsel at the Prehearing Conference agreed to eliminate Mr. L as a witness.

<sup>8</sup> Of the six witnesses listed in Appellant's counsel's May 24, 2009 letter, four had appeared in Appellant's Prehearing Submission: Mr. R, Mr. P, Mr. T and Ms. K. As previously noted, Appellant's counsel agreed to eliminate Mr. R and Mr. P as witnesses.

listed as a witness in Appellant's counsel's third email of May 26, was the same person as the Mr. X (different first name), who had previously been approved as a witness by the Board.<sup>9</sup> Id. The Executive Director informed Appellant's counsel that the Executive Director would forward all of Appellant's correspondence regarding additional witnesses<sup>10</sup> to the Board for its determination. Id. However, prior to doing so, the Executive Director informed Appellant's counsel that counsel needed to provide the Board with a summary of the additional testimony to be provided by each witness. Id. Also, the Executive Director noted that Appellee would be given an opportunity to file an objection to Appellant's additional witnesses. Id.

Appellant's counsel responded to the Executive Director's email by telephone call and was informed by the Executive Director to follow up in an email, with a copy to Appellee's counsel, which Appellant's counsel did. In the email, Appellant's counsel acknowledged that Mr. (first name) X and Mr. (different first name) X are the same person. See Email from Appellant's counsel to Executive Director, dated 05/27/09, subject: RE: Subpoenas – MSPB Case No. 09-10. Based on this assertion, the Executive Director issued three subpoenas to Appellant's counsel that day for the following witnesses: Chief I; Ms. K; and Mr. X.<sup>11</sup> Appellant's counsel noted that Mr. T had to fly to California for at least a week because his father had to have emergency heart surgery. Id. Accordingly, Appellant's counsel asked that Appellant's counsel be permitted to submit an affidavit from Mr. T in lieu of testimony. Id. Appellant's counsel also provided a summary of the testimony expected from each of the proposed witnesses. Id.

By email dated May 28, 2009, Appellee's counsel filed an Objection to Appellant's Inclusion of Additional Witnesses. In the Objection, Appellee argued that Appellee has been preparing for hearing based on the witnesses identified by Appellant at the Prehearing Conference which were approved by the Board.<sup>12</sup> Appellee asserted that allowing Appellant to

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<sup>9</sup> This issue had also arisen with regard to one of FD's witnesses who had been listed in FD's Prehearing Submission as Mr. (first name) Z but identified as Mr. (different first name) Z in FD's counsel's email concerning the issuance of subpoenas.

<sup>10</sup> The Executive Director listed the following as the additional witnesses sought by Appellant: Capt. U; Chief V; Capt. Y; Mr. R; Mr. P; and Mr. L.

<sup>11</sup> Due to the fact that the hearing in this matter is scheduled for Monday, June 1, 2009, the Executive Director hand-delivered the subpoenas to Appellant's counsel's office after the Board's office closed for the day on May 27, 2009.

<sup>12</sup> In its Objection, Appellee asserts that the Board only approved four additional witnesses other than Appellant – Mr. W; Mr. X; Chief S; and Chief I. See Fire Department's Objection to Appellant's Inclusion of Additional Witnesses at 1. The Board has carefully reviewed its notes from the Prehearing Conference and has determined that in addition to the four approved witnesses listed by Appellee in its Objection, the Board also approved Mr. T and Ms. K as witnesses for Appellant during the Prehearing Conference. The Board agrees

supplement Appellant's witness list on the eve of trial would be severely prejudicial to Appellee.

The Executive Director forwarded all of Appellant's correspondence to the Board for its determination regarding the matter of the additional witnesses, as well as Appellee's objection. In addition, the Executive Director forwarded a copy of Appellee's twelve additional exhibits to the Board members. The Board has carefully reviewed the material provided to it and provides the following determinations.

### ANALYSIS

The Board's Hearing Procedures indicate that any request to call witnesses or submit documents not contained in a party's Prehearing Submission will only be granted for good cause shown. Likewise, it is the Board's practice that once a party agrees at a Prehearing Conference to eliminate some witnesses, it must show good cause before the Board will permit the party to call a witness that has been eliminated.

In support of Appellant's late request for additional witnesses besides those previously approved by the Board, Appellant's counsel asserts that Appellant's counsel had tried to work out with opposing counsel the final list of Appellant's witnesses but was unsuccessful. See Letter to Executive Director from Appellant's counsel, dated 05/24/09, subject: Appellant/Fire Department, Inc., MSPB 09-10. Appellant's counsel also argues that Appellee is attempting to introduce twelve additional exhibits not in its Prehearing Submission. Id. Appellant's counsel additionally notes that Appellant is calling three fewer witnesses than Appellee. Finally, Appellant's counsel submits that Appellant's delayed sending the witness list to the Board, as requested, because Appellant's counsel only had received the complete list from Appellant's counsel's client the previous Tuesday<sup>13</sup> and Appellant's counsel and FD's counsel had been discussing the list, as well as possible resolution of the case. Id.

Notwithstanding the fact that the May 24, 2009 letter allegedly contained the final list of witnesses, Appellant's counsel sent an email at 5:24 p.m. on May 26, to the Board's Executive Director with a "final" list of witnesses which omitted one witness designated in the May 24 letter and added one additional witness.<sup>14</sup> At 5:30 p.m. on May 26, 2009, Appellant's counsel again sent an email to the Board's Executive Director with the same final list and complete addresses for all witnesses. Shortly thereafter at 6:12 p.m. on May 26, 2009, Appellant's counsel requested two additional witnesses besides those on the lists emailed previously. In responding to the Executive Director's request for clarification and

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with Appellee's list of additional witnesses sought by Appellant that have not been approved by the Board. Id.

<sup>13</sup> Based on this statement, it would appear to the Board that Appellant's counsel had the "complete" list contained in the May 24 letter on May 19, 2009.

<sup>14</sup> Specifically, the email omitted Mr. T as a witness and added Capt. U as a witness.

additional information, Appellant's counsel noted that Appellant had had serious surgery within the last few weeks and was only able to renew Appellant's work on this matter within the last week or so. See Email from Appellant's counsel to Executive Director, dated 05/27/09, subject: RE: Subpoenas – MSPB Case No. 09-10.

The Board has carefully considered the various arguments raised by Appellant to support Appellant's request for additional witnesses besides those previously approved by the Board, as well as those raised by Appellee opposing the additional witnesses. The Board has determined that Appellant's arguments lack merit. The Board notes in particular that Appellant was aware prior to the Prehearing Conference of Appellant's impending surgery and, in fact, the Board agreed to work around the surgery to schedule Appellant's hearing in this matter. The Board agrees with Appellee that to allow the additional witnesses at this late date would be prejudicial to Appellee. Accordingly, the Board has determined Appellant has failed to show good cause as to why the Board should allow any additional witnesses. Therefore, the Board will not permit Appellant to call any additional witnesses besides those previously approved by the Board at the Prehearing Conference. As the Board did approve Mr. T at the Prehearing Conference and Appellant has shown good cause why he cannot appear at the hearing on June 1, 2009, it will permit Appellant to submit an affidavit from him in lieu of testimony.<sup>15</sup>

With regard to Appellee's substitute exhibit, the Board notes that it was put on notice at the Prehearing Conference that a final report would be substituted for the draft report. As Appellant never objected to the substitution at that time, the Board has determined to accept the final report and substitute it for the draft report. With regard to the remaining additional exhibits submitted by Appellee, the Board notes that Appellee indicates that the "exhibits were inadvertently omitted from the Appellee's original submission." The Board finds that this argument fails to establish good cause as to why the Board should permit these documents to be made part of the record.

### **ORDER**

On the basis of the above, the Board hereby denies Appellant's request to call any additional witnesses beyond those approved by the Board at the Prehearing Conference. Likewise, the Board denies Appellee's request to submit any additional exhibits, although it will allow the substitution of a final report in lieu of the draft report submitted by Appellee in its Prehearing Submission.

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<sup>15</sup> On May 28, 2009, the Board authorized the Executive Director to notify Appellant's counsel that it would accept an affidavit from Mr. T provided it was submitted to the Board by the date of the hearing.

# **MOTION IN LIMINE**

## **CASE 08-12**

### **DECISION ON COUNTY'S MOTION IN LIMINE**

On May 15, 2008, the County filed a Motion in Limine, seeking to have the Merit System Protection Board (Board) exclude: 1) emails (delineated in Appellant's Prehearing Submission as Appellant 13-24); 2) a February 28, 2008 memorandum from Ms. X (delineated in Appellant's Prehearing Submission as Appellant 25); 3) Appellant's proposed witness, Ms. A; 4) Appellant's proposed witness, Mr. Y; 5) Appellant's proposed witness, Ms. B; and 6) Appellant's proposed witness, Ms. Z, on the basis that they are not relevant. Appellant responded to the County's Motion,<sup>1</sup> asserting that the exhibits and witnesses at issue are probative to Appellant's affirmative defense that the fifteen-day suspension was imposed for reasons other than the merit of the charges against Appellant. In addition, Appellant asserts that the County's motion was premature, as discovery has not yet begun.

### **BACKGROUND**

This appeal involves a fifteen-day suspension based on two charges: 1) Appellant's failing to perform duties in a competent or acceptable manner based on Appellant's failure to report to local law enforcement or Health and Human Services the attempted assault of one of Appellant's clients as required of a mandated reporter; and 2) Appellant's violation of an established policy when Appellant failed to do a safety assessment for every child-group or residential placement (SAFE-C GRP) based on the attempted assault of Appellant's client.

In Appellant's Prehearing Submission, a total of nine exhibits were submitted and the total number of pages marked as Appellant 1-28.<sup>2</sup> The County seeks to exclude Exhibits 5 and 6. Exhibit 5 is a series of emails between Appellant, Appellant's supervisor, Supervisor E,

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<sup>1</sup> Under the Board's Hearing Procedures, Appellant's Opposition was due to be filed by May 20, 2008. See Appellant's Motion for Leave to File Opposition to Employer's Motion in Limine Nunc Pro Tunc at 1. However, Appellant did not file an Opposition until May 29, 2008. Appellant acknowledged the late filing and filed a Motion for Leave to File Opposition to Employer's Motion in Limine Nunc Pro Tunc, indicating that Appellant's counsel erroneously believed Appellant's counsel had fifteen days to respond instead of five days. The Board has determined to grant Appellant's Motion for Leave to File Opposition.

<sup>2</sup> To facilitate the identity of Appellant's exhibits, the Board's staff numbered Appellant's exhibits (Exs.) as follows: Appellant's Ex. 1 – Worksheet; Appellant's Ex. 2 – Child Abuse – Report Disposition; Appellant's Ex. 3 – Response to Statement of Charges by Appellant; Appellant's Ex. 4 – Safety Assessment for Every Child; Appellant's Ex. 5 – Emails between Supervisor E and Appellant and Supervisor E and Mr. V; Appellant's Ex. 6 – Letter by Ms. X, dated February 28, 2008; Appellant's Ex. 7 – Clinical Social Work

and emails between Supervisor E and a Mr. V. According to the County, these emails relate to another incident involving Appellant and a different client of Appellant's, which is separate from the incident at issue in this case. In support of this contention, the County submitted a Notice of Disciplinary Action – Twenty (20) day Suspension, dated 05/16/08, signed by the Director of the Department of Health and Human Services (HHS).<sup>3</sup> See County Motion in Limine, Ex. 1. Appellant's Opposition does not address the relevance of the emails.

Appellant's Exhibit 6, which the County also seeks to exclude, is a letter from Ms. X, addressed "To Whom It May Concern" indicating that Appellant was a "devoted, concerned and thorough advocate for the youth in Appellant's case." According to the County, this memorandum relates to the other incident involving Appellant for which the twenty-day suspension is being proposed. Again, Appellant's Opposition does not address the relevance of the memorandum.

The County also seeks to bar four of Appellant's proposed witnesses: Ms. X, Mr. Y, Ms. B, and Ms. Z. With regard to witness Ms. X, the County asserts that Ms. X is an employee of a facility unrelated to where the incident at issue in the fifteen-day suspension took place. According to the County, Ms. X is not in any way involved in the matter on appeal. Appellant's Opposition indicates that Ms. X was involved in investigating another incident, which is the subject for the proposed 20-day suspension. Appellant asserts that Ms. X issued a report finding that Appellant was innocent in the subsequent incident. Appellant notes that despite this fact Supervisor E chose to charge Appellant with misconduct and that this reveals serious deficiencies in Supervisor E's application of disciplinary policy to Appellant.

Appellant's Prehearing Submission indicates that Mr. Y is being called to testify about the therapeutic history of the alleged victim in the incident which forms the basis for Appellant's fifteen-day suspension. The County seeks to exclude Mr. Y on the basis that the victim's therapeutic history is irrelevant as there is no discretion in reporting suspected child abuse. Appellant's Opposition asserts that Mr. Y is the therapist who worked with the child at issue in this case and that he saw no need to personally report the incident to State authorities.

The County seeks also to exclude as a witness Ms. B. The County notes that in Appellant's Prehearing Submission, Appellant only identified Ms. B as a Director and did not indicate what Ms. B directs or what Ms. B will testify about, as required by the Board's

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Practice Update, Volume III, No. 2 (June 2003); Appellant's Ex. 8 – NASW Child Welfare Guidelines; and Appellant's Ex. 9 – NASW Code of Ethics.

<sup>3</sup> Although signed by the Director, HHS, the notice does not contain the effective date of the 20-day suspension, nor does it have the receipt acknowledgement portion signed by Appellant, indicating Appellant has in fact received it. The Board noted during its Prehearing Conference on May 29, 2008, that no appeal had been received from Appellant concerning a 20-day suspension and, therefore, the 20-day suspension is not before it.

procedures.<sup>4</sup> However, the County notes that it understands that Ms. B is the Director of the group home where the alleged child abuse occurred. Appellant's Opposition indicates that Ms. B is the individual who notified Appellant about the incident involving the child which is at issue in this case.

Finally, the County seeks to exclude Ms. Z, a Social Worker with HHS. The County notes that Appellant's Prehearing Submission simply indicates that Ms. Z will testify about "employee expectations." County Motion in Limine at 4. Appellant's Opposition indicates that Ms. Z is a peer of Appellant's and also works under Supervisor E's supervision and can testify to specific incidents that demonstrate that Supervisor E is subjecting Appellant to disparate treatment.

### **APPLICABLE LAW**

**Montgomery County Code, Chapter 2A, Administrative Procedures Act,  
Section 2A-8. Hearings,** which states in applicable part,

- (e) **Evidence.** The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request. The hearing authority may take official notice of commonly cognizable facts, facts within its particular realm of administrative expertise and documents or matters of public record. Parties shall be notified of matter and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.

### **ANALYSIS AND CONCLUSIONS**

Under Section 2A-8(e) of the Administrative Procedures Act, the Board may exclude evidence if it is not relevant. The Board will admit evidence if it is relevant to the issues in the case and tends to establish or disprove them. Cook v. State, 118 Md. App. 404, 416, 702 A.2d 971, 976 (1997), cert. denied, 349 Md. 234, 707 A.2d 1328 (1998) (citing to Md. Rules 5-401 to 402; Dorsey v. State, 276 Md. 638, 643 (1976)); Parker v. State, 156 Md. App. 252, 268, 846 A.2d 485, 498, cert. denied, 382 Md. 347, 855 A.2d 350 (2004) (same). As previously noted, the instant appeal involves Appellant's fifteen-day suspension for failing to report the attempted assault of one of Appellant's clients. Therefore, what is relevant is

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<sup>4</sup> The Board notes that the County is correct that Appellant is required as part of the Prehearing Submission to not only identify proposed witnesses but also indicate a summary of their anticipated testimony. A copy of the Board's procedures was provided to Appellant prior to the Prehearing Conference. Appellant's counsel, who has not previously practiced before the Board, was notified of this at the Prehearing Conference held with the parties on May 29, 2008.



evidence concerning the events surrounding the reporting to Appellant of the attempted assault of the child who was one of Appellant's clients and Appellant's actions thereafter. Accordingly, the Board agrees with the County that Appellant's Exhibit 5, dealing with an incident involving a different client, is not relevant to the matter at hand and, therefore, will exclude it. Likewise, the testimony of Ms. X, which would address another incident rather than the one at issue in this case, is not relevant. However, the Board will allow Appellant's Exhibit 6, solely for the purpose of considering Appellant's work record, and will give it the weight it deems appropriate.

The Board also agrees with the County that the alleged victim's therapeutic history is not relevant to the instant proceedings. The issue before the Board is what actions Appellant was or was not required to take when an incident of attempted assault was reported to Appellant. Accordingly, the Board will grant the County's motion to exclude Mr. Y's testimony.

However, the Board disagrees with the County's assertion that Ms. B's testimony is not relevant. As she was the individual who reported the attempted assault to Appellant, Ms. B has first-hand knowledge of certain of the events that form the basis for the disciplinary action taken against Appellant. Accordingly, the Board will deny the County's motion to exclude Ms. B's testimony.

Appellant has not demonstrated the relevancy of the testimony of Ms. Z, who is not alleged to have first-hand knowledge any of the events forming the basis for the disciplinary action in this matter. Accordingly, the Board will also exclude Ms. Z as a witness.

### **ORDER**

Based on the foregoing, the County's Motion in Limine is granted in part and denied in part. Specifically, Appellant's Exhibit 5 is excluded from evidence. Likewise, Ms. X, Mr. Y and Ms. Z are excluded as witnesses. Appellant shall be allowed to call Ms. B as a witness and is permitted to introduce Exhibit 6 at the hearing.

## **STAYS**

Pursuant to Section 35-6(b) of the Montgomery County Personnel Regulations, the Board is empowered on its own motion or pursuant to a request by an appellant to issue a stay if it finds the reasons for said stay are proper and just.

During FY 2009, the Board issued the following decisions concerning the requests for stays of dismissals.

# **STAY DECISIONS**

## **CASE NO. 09-10**

### **DECISION ON APPELLANT'S STAY REQUEST AND ORDER**

On February 12, 2009, the Montgomery County Merit System Protection Board (MSPB or Board) received an appeal of the decision of Mr. A, President, Fire Department (FD), to dismiss Appellant on February 16, 2009. As part of the appeal, Appellant requested that Appellant's termination be stayed.

On March 16, 2009,<sup>1</sup> Fire Department's counsel responded to Appellant's stay request. In the response, counsel alleged that FD had legitimate and urgent grounds for Appellant's termination. Counsel asserted that Appellant, inter alia, was insubordinate, failed to return two FD credit cards in Appellant's possession and failed to transfer important records from a laptop to a desk computer. Moreover, after an audit, counsel stated that it was discovered that FD's checking account was significantly overdrawn; and that many checks, invoices, supporting documents and bank statements were missing.

In Appellant's response, Appellant asserted that in April 2008 Appellant received a performance evaluation that was a tenth of a percent below excellent. It was only after Appellant complained about Director C's<sup>2</sup> inappropriate behavior that Appellant received a poor evaluation. Appellant subsequently filed an EEO claim with the County and, shortly before Thanksgiving, Appellant was suspended and placed on administrative leave. Because the EEO investigation is pending, and Appellant only received a week's notice prior to termination, Appellant asked for the stay pending an appeal hearing. Appellant asserted that Appellant needs the stay so that Appellant can apply for positions in the County available to County employees only<sup>3</sup> and Appellant needs to work to support Appellant's family.

Pursuant to MCFRCPR, Section 30-7, the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 05-07 (2005) and 08-12

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<sup>1</sup> The Board originally noted the appeal and sent it to the County for response. The County filed a Motion to Dismiss, indicating that Appellant was an employee of the Fire Department (FD), and as such was not a Montgomery County merit system employee. The County noted in its Motion to Dismiss that Appellant, as an employee of FD, is subject to the Montgomery County Fire and Rescue Corporation Personnel Regulations (MCFRCPR). Subsequently, FD, through its General Counsel responded to the stay request. The General Counsel also advised the Board that FD had retained Ms. U as counsel in this case.

<sup>2</sup> In Appellant's appeal, Appellant stated that Director C is a FD Board member.

<sup>3</sup> Appellant noted that because of the County's hiring freeze many positions are only open to current County employees.

(2008). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)). The Board has carefully reviewed all of the material submitted by the parties. The Board is of the opinion that any harm to Appellant by Appellant's termination, can adequately be addressed by the Board should Appellant prevail on the merits of Appellant's appeal after a hearing on the matter.

### **ORDER**

Accordingly, the Board denies Appellant's request for a stay.

## **CASE NO. 09-11**

### **DECISION ON APPELLANT'S STAY REQUEST AND ORDER**

On March 26, 2009, the Montgomery County Merit System Protection Board (MSPB or Board) received an appeal of the decision of the Interim Fire Chief, Montgomery County Fire and Rescue Service (MCFRS), to dismiss Appellant, effective March 31, 2009. As part of Appellant's appeal, Appellant requested that Appellant's dismissal be stayed. Appellant noted that absent a stay by the Board, Appellant would be required to execute retirement papers on March 31, 2009 to ensure no break in service.

On March 30, 2009, the County responded to Appellant's stay request. In the response, the County stated that it seeks to dismiss Appellant because Appellant drove a MCFRS vehicle while impaired, resulting in a collision with three other vehicles causing thousands of dollars in property and alleged personal injuries. The County noted that Appellant stated that absent a stay on Appellant dismissal date, Appellant will be forced to retire on March 31, 2009 to avoid a break in service. The County stated that if Appellant does retire, Appellant will suffer no irreparable harm as Appellant will receive a full retirement and maintain Appellant's benefits while Appellant pursues Appellant's appeal.

Pursuant to Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, and October 21, 2008), Section 35-6(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 05-07 (2005), 08-12 (2008), 09-10 (2009). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)). The Board has carefully reviewed all of the material submitted by the parties. The Board is of the opinion that any harm to Appellant by Appellant's dismissal, can adequately be addressed by the Board should Appellant prevail on the merits of Appellant's appeal after a hearing on the matter.

### **ORDER**

Accordingly, the Board denies Appellant's request for a stay.

# **OVERSIGHT**

Pursuant to statute, the Board performs certain oversight functions. Section 33-11 of the Montgomery County Code provides, in applicable part that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service . . . .

Based on the above-referenced provision of the Code, Section 9-3(b)(3) of the Montgomery County Personnel Regulations, 2001 (as amended October 22, 2002, April 27, 2004, July 12, 2005, June 27, 2006, December 11, 2007, and October 21, 2008) provides that the Office of Human Resources Director notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class.

In fulfilling this mandate during FY 09, the Board reviewed and where appropriate provided comments on the following new class creations:

- 1) Summer Youth Intern, S-2;
- 2) Gain Sharing Coordinator, Grade 26;
- 3) Urban District Public Service and Maintenance Team Supervisor, Grade 17;
- 4) Public Safety 911 Call-Taker I, Grade 15; and
- 5) Public Safety 911 Call-Taker II, Grade 16.