

Merit System Protection Board Annual Report FY2018

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Michael J. Kator, *Vice Chair*
Harriet Davidson, *Associate Member*

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**FY 2018
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD**

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (Board or MSPB) is composed of three members who are appointed by the County Council pursuant to Article 4, § 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. No member may hold political office or participate in any campaign for any political or public office during the member’s term of office. One member is appointed each calendar year to serve a term of three years. Members of the Board conduct work sessions and hearings during the work day and in the evenings, as required, and are compensated with a set annual salary as prescribed by law. The Board is supported by a part-time Executive Director and an Office Services Coordinator.

The Board members in Fiscal Year 2018 were:

| | |
|-----------------------|---|
| Angela Franco | Chair |
| Michael J. Kator | Vice Chair |
| Harriet Davidson | Associate Member (term began January 1, 2018) |
| Charlotte Crutchfield | Chair (term ended December 31, 2017) |

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

The duties of the Merit System Protection Board are contained in the Charter of Montgomery County, Maryland, Article 4, “Merit System and Conflicts of Interest,” § 404, *Duties of the Merit System Protection Board*; the Montgomery County Code, Article II, Merit System, Chapter 33; and the Montgomery County Personnel Regulations, § 35, Merit System Protection Board Appeals, Hearings, and Investigations. Below are excerpts from some of those provisions.

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 sets out the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the Board 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 Board granted herein must be exercised by the Board as needed to rectify personnel actions found to be improper. The Board must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, must establish its staffing requirements and define the duties of its staff.

* * *

(c) *Classification standards.* With respect to classification matters, the County Executive must provide by personnel regulation, adopted under Method (1), standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

- (1) The necessary components of class specifications;
- (2) Criteria for the establishment of new classes, modification or elimination of existing classes;
- (3) Criteria for the assignment of positions to classes;
- (4) Kinds of data required to substantiate allocation of positions;
- (5) Guidelines for comparing levels of job difficulty and complexity; and
- (6) Criteria for the establishment or abolishment of positions.

The Board must conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and must submit audit findings and recommendations to the County Executive and County Council.

* * *

(f) *Personnel regulation review.* The Merit System Protection Board must meet and confer with the Chief Administrative Officer and employees and their organizations from time to time to review the need to amend these regulations.

(g) *Adjudication.* The Board must 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.

(h) *Retirement.* The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

(i) *Personnel management oversight.* The Board must review and study the administration of the county classification and retirement plans and other aspects of the merit system and transmit to the Chief Administrative Officer, County Executive and County Council its findings and recommendations. The Board must conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations must cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this section.

(j) *Publication.* Consistent with the requirements of State law, confidentiality and other provisions of law, the Board must publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

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

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.

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, the employee must file in writing or by completing the Appeal Form on the Board's website. Montgomery County Personnel Regulations (MCPR), § 35-4. Under MCPR § 35-3, the employee must file the appeal within ten (10) working days after the employee has received a Notice of Disciplinary Action involving a demotion, suspension or removal. The appeal must include a copy of the Notice of Disciplinary Action. MCPR § 35-4(d)(1). Employees are encouraged to complete the on-line Appeal Form, which permits the uploading of documents and is available on the Board's website:
<http://www.montgomerycountymd.gov/MSPB/AppealForm.html>.

In accordance with § 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within thirty (30) days after receiving a final notice of disciplinary action, unless another law or regulation requires that an appeal be filed sooner.

After receipt of the Appeal Form, the Board sends a notice to the parties, requiring each side to file a prehearing submission, including a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which potential witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is set by the Board in consultation with the parties. The Board requires all parties to comply with its [Hearing Procedures](#). After the hearing, the Board prepares and issues a written decision.

During fiscal year 2018 the Board issued the following decisions on appeals concerning disciplinary actions.

DISMISSAL

CASE NO. 17-13

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the appeal of Appellant from the determination of Director AR of the Department of Transportation (DOT or Department) to dismiss Appellant from employment effective December 21, 2016. *See* Notice of Disciplinary Action (NODA), December 1, 2016, County Exhibit (CX) 1. The NODA charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) and the Collective Bargaining Agreement with the Municipal and County Government Employees Organization, United Food and Commercial Workers Local 1994, AFL-CIO (MCGEO), arising out of Appellant's inappropriate behavior, including sexual harassment, while on duty as a Montgomery County Bus Operator.¹

A hearing was held on June 12, 2017. Each party provided the Board with post-hearing submissions on August 7, 2017. *See* Post-Hearing Brief of Montgomery County, Maryland (County Brief); Appellant's Written Closing Argument, Proposed Findings of Fact, and Conclusions of Law (Appellant's Brief).

FINDINGS OF FACT

Appellant has been a County Ride On bus driver since December 4, 2001. CX 10; June 12, 2017, Hearing Transcript (Tr.) 147. Prior to the current charges, Appellant was disciplined for inappropriate behavior towards bus passengers on two occasions.

The first occasion was on January 24, 2012, when Appellant received a written reprimand for repeatedly giving his personal phone number to a female bus passenger. Appellant persisted in this behavior even though the passenger had told Appellant that she was not interested and asked him to stop. CX 12; Tr. 12, Tr. 133. At the time of the reprimand, Appellant admitted giving his phone number to female passengers, but contended that he was not engaged in sexual harassment. Appellant claimed that he handed out his card during the Christmas holiday season merely as a solicitation method for his personal business. CX 12.

The second disciplinary incident occurred on July 30, 2015, when Appellant was issued a Statement of Charges alleging that he had sexually harassed a 19-year-old female bus passenger (ES) on April 6, 2015. The charges were: (1) failure to perform duties in a competent manner; (2) negligence or carelessness in performing duties; (3) engaging in discriminatory, retaliatory, or harassing behavior; (4) engaging in a physical altercation or assault with another while on duty or

¹ The NODA (CX 1) and Statement of Charges (CX 2) charged Appellant with violations of the County Policy on Sexual Harassment (CX 18); Montgomery County Personnel Regulations (MCPR) on Equal Employment Opportunity (CX 19), § 5-1(d) and § 5-2(e); and the Disciplinary Regulations (CX 20), MCPR § 33-5(c) – (e), (g) – (h), (o), (w) – (x), and (aa). The NODA does not specify what provisions of the MCGEO agreement support the charges.

in a County vehicle; (5) an unwelcome sexual advance; and (6) written, verbal, or physical conduct of a sexual nature. CX 11. On December 28, 2015, Appellant signed a Last Chance Agreement with the County in which he agreed to resolve the charges by accepting a disciplinary suspension of fifteen (15) days. The Last Chance Agreement also mandated that Appellant participate in workplace and sexual harassment education. CX 11.²

The disciplinary action that is the basis for this Appeal arises out of an incident that occurred on July 27, 2016. The NODA (CX 1) and Statement of Charges (CX 2) charged Appellant with engaging in sexual harassment against a young female bus passenger in violation of the County Policy on Sexual Harassment, MCPR § 5-1(d) and § 5-2(e)(harassment), and MCPR § 33-5(q) (harassing behavior). CX 18, CX 19 and CX 20. The NODA further charged that the sexually harassing behavior breached the Last Chance Agreement, and thus violated an established policy or procedure under MCPR § 33-5(c).

The charges also allege that in the course of investigating the July 27 incident, several other complaints concerning Appellant's sexual harassment and inappropriate behavior toward other people came to light. The NODA thus alleges that these newly discovered incidents, and the prior discipline discussed above, demonstrate that Appellant engaged in a pattern of targeting minors and young adult passengers while operating a Ride On bus for the County. CX 1 at p. 9. The NODA also charged violations of the following regulations: MCPR § 33-5(d) (violates laws or regulations where there is a nexus with County employment); MCPR § 33-5(e) (fails to perform duties in a competent or acceptable manner); MCPR § 33-5(g) (false statement or report); MCPR § 33-5(h) (negligent or careless in performing duties); MCPR § 33-5(o) (takes, steals, misuses, or misappropriates the property of a client . . . citizen, or other person with whom the employee deals while on duty); MCPR § 33-5(w) (engages in a private business . . . during official working hours)

² The Last Chance Agreement provides, in relevant part:

1. The County agrees that it will reduce the disciplinary action of a Thirty (30) Day Suspension, as initiated by the Statement of Charges dated July 30, 2015, to a Fifteen (15) Day Suspension (time served), on the condition that [Appellant] attend and successfully complete a mandatory sexual harassment course of training/counseling with EAP, and that he also successfully complete individual Workplace Harassment training provided by the County EEO Office, and any follow-up training that the EAP recommends, as provided for in this agreement.
2. [Appellant] further agrees to immediately enter into and participate in whatever educational, training, and/or counseling program(s) that are recommended by the EAP. The employee may use sick, annual or compensatory leave to attend any recommended program.
3. [Appellant] also agrees to successfully complete one-on-one individual training for Workplace Harassment with the County EEO Office within ten (10) days of execution of this agreement.
4. [Appellant] agrees to successfully complete any such recommended program(s) of training within its prescribed time frame, and also agrees to authorize his EAP counselors, those providing training, education, and counseling to [Appellant], to release information periodically to his supervisor and to the County's Equal Employment Officer (EEO) concerning [Appellant]'s progress in obtaining training/counseling in how to avoid engaging in acts of sexual harassment. [Appellant] agrees to sign any and all appropriate releases allowing the EAP counselors, those providing him with sexual harassment training, education, and counseling to provide the **EEO Officer** with such information, including status reports on his training progress. [Appellant] understands that should he breach any of the terms of this paragraph of the Agreement he will be subject to *dismissal*.

CX 11, (emphasis in original).

MCPR § 33-5(x) (accepts, offers, gives, or promises to give money or a valuable thing); and MCPR § 33-5(aa) (fails to cooperate or provide information when the employee is the subject of an investigation).

On July 28, 2016, CA, a Ride On Bus Operator, notified DOT management that he had received a text message from a teenage female family member, identified as “Suzy,” expressing distress over Appellant’s behavior towards her. Tr. 19-20; CX 6 and CX 7.³ CA testified that according to Suzy, Appellant approached her as she was waiting at the Lakeforest Transit Center on July 27, 2016, and asked, “did you miss your bus?” Tr. 36; CX 6. Suzy ignored Appellant, and he asked the same question again. *Id.* When Suzy continued to ignore Appellant, he remained in her vicinity for a few minutes and then returned to his bus and drove off, honking the horn as he drove by Suzy. CX 6. Shortly after the incident, CA provided DOT with an email recounting his communications with Suzy concerning her contact with Appellant. CX 7. The County also introduced screen shots of the exchange of texts between CA and Suzy immediately after the incident. CX 6. In the text messages, Suzy told CA that: (a) the “creppy [*sic*] bus driver still bothering me”; (b) the driver parked at Lakeforest and walked over to her and asked if she had missed her bus; (c) asked her again when she failed to respond; (d) hovered around her for several minutes; and, (e) finally got back on the bus and honked the horn as he passed her. Tr. 34; CX 6.

Appellant’s post-hearing brief concedes the County’s account of the July 27 incident, specifically including the assertion that Appellant asked Suzy if she had missed her bus. Appellant’s Brief, p. 6 (Appellant “does not contest the Department’s account nor does he challenge the Department’s assertion that he asked [Suzy] if she has missed her bus.”). Appellant testified that asking patrons if they need directions is something he commonly does while on duty. Tr. 149, 151.

Regarding Suzy’s July 27 text message that she knew who Appellant was, and that he was “still bothering” her, Suzy’s text message referred to Appellant as “that same ome [*sic*] that’s been bothering me since that day I was at Rockville with you in the gas station the old black guy.” CX 6. CA testified that he knew Suzy was referring to Appellant because Suzy had previously complained of unwelcome contact made by Appellant. Tr. 24. CA stated that in 2014 Suzy had complained to him that Appellant had made unwelcome advances towards her. Tr. 21-22; CX 7. At the time, CA confronted Appellant and told him Suzy was only 15 and that Appellant should stay away from her. Tr. 21-22, Tr. 29-30; CX 7. AW, the County Equal Employment Opportunity (EEO) Officer, testified that when she was interviewed, Suzy confirmed that Appellant had approached her in a gas station convenience store while CA was in another part of the store. Tr. 87; CX 10, p. 4. According to Suzy, when CA told Appellant that she was only 15 Appellant responded, “My bad, I didn’t know” and apologized. CX 10, p. 4; Tr. 29-30. CA also testified that he confronted Appellant and instructed him not to have further contact with Suzy, and that

³The County identified the young woman by the alias “Suzy” to protect her identity. Tr. 20, Tr. 34. In the Hearing Transcript, the young woman’s alias is spelled as “Suzie,” while in various other documents and pleadings it is spelled “Suzy” or “Susie.” Some of the documents apparently reveal her real name, which was also mentioned during the June 12 hearing. CX 1, CX 10; Tr. 141, 143. To protect her identity, avoid confusion, and for the sake of consistency, throughout this decision we will refer to the young woman as “Suzy.”

Appellant understood and apologized. CX 7; Tr. 29 - 30.⁴ Appellant denied having a conversation with CA concerning the incident. Tr. 152.

Based on the date and location of the alleged incident involving Suzy, video from the bus driven by Appellant on July 27, 2016, was retrieved and reviewed by DOT and AW. Tr. 88, 107. County Exhibit 4 is a DVD with video from the multiple cameras on the bus and audio. The bus video of the July 27 incident was viewed in its entirety by the Board at the hearing, and specific parts were repeatedly viewed. CX 4; Tr. 105 and thereafter *passim*. The video confirms that Appellant parked his bus at Lakeforest Transit Center, got off, and walked over to and circled a young woman identified as Suzy by witness AW, the County EEO Officer, Tr. 109, Tr. 111; CX 4, at (timestamp)16:52:18-54. Testifying at the June 12, 2017, hearing in this matter concerning her investigation, AW said that when she interviewed Suzy and showed her the July 27 video, Suzy confirmed that she was the person in the video approached by Appellant. Tr. 121; CX 10, p. 4. The video and audio also confirm that as the bus drove off, Appellant honked the horn as it passed the location where Suzy was standing. CX 4, at 16:58:12.

On August 1, 2016, Suzy's mother called DOT to complain about Appellant's behavior towards her daughter on July 27. CX 9. At the request of the agency, she provided an August 10, 2016, email statement concerning Appellant's behavior. CX 8. That statement recounted what Suzy told her mother concerning the incident on July 27, as follows:

My Minor Child:

On Wednesday, July 27 at approximately 3:50 PM, my 17 year old daughter was standing at the Lake Forest transit. She saw a Ride On bus operator exit an out of service bus and walk in her direction. As the driver got closer to her, she recognized the driver as [Appellant]. She said that he stood next to her; he stood so close to her that she could hear him breathing. He asked her "Did you miss your bus"? She turned her head to ignore him and he asked her again "Did you miss your bus"? She asked him "Did you miss your bus"? Again, she turned her head in order to ignore him and he continued to stand beside her. After a few minutes, he returned to the out of service bus which turned into the 55 to Rockville, the bus that she was waiting for. Because she did not want to ride the bus with [Appellant] as the operator, she did not board the bus. Before he left the Lake Forest Transit, he blew the horn when he got in front of her.

When my daughter told me about this encounter she described him as the "creepy man" bothering her again. She is a young girl and there is nothing about my daughters' appearance that says that she is a grown woman. There were other times when she was out and he has said things to her. My nephew, [redacted], is a Ride On bus operator, works with [Appellant] and has personally told him that his cousin was only 15; back off! That was two years ago and he has, yet again, made an attempt to involve himself with my daughter; a minor child.

⁴ CA's testimony appeared to conflate two separate conversations with Appellant concerning Suzy. One conversation with Appellant apparently occurred on a bus, (CX 10; Tr. 21 – 22, Tr. 47), while the other occurred in the gas station convenience store. CX 10; Tr. 87.

CX 8. Suzy's mother was interviewed by AW, the County EEO Officer, as part of her investigation of the complaint of discrimination the mother filed against Appellant. CX 10; Tr. 82. AW also interviewed Suzy and CA. CX 10; Tr. 71. AW issued a September 27, 2016, report setting out the results of her investigation. CX 10. The mother's description of Suzy's story is, in all pertinent aspects, consistent with those recounted by CA and in Suzy's text messages.

In addition to her complaint about the treatment of her daughter, Suzy's mother complained about Appellant's behavior on July 22, 2016, when she was a passenger on his bus. CX 8. In response to her question concerning the amount of the bus fare, Appellant repeatedly made sexually suggestive gestures involving his middle finger. CX 8; Tr. 142. The statement also indicated that after Suzy's mother signaled that she had arrived at her stop and wished to disembark via the back door, Appellant unreasonably delayed opening door. According to the statement, on prior occasions Appellant has insisted that female passengers only exit through the front door. CX 8. The statement further asserted that on two previous occasions when she boarded the bus, Appellant handed her cards with his name and phone number, which she immediately returned. CX 8. When interviewed by AW about these interactions with Appellant, Suzy's mother provided information consistent with her August 1 written statement. CX 10; Tr. 71-72.

To support the charge that Appellant has engaged in a pattern of behavior and that there had been progressive discipline, the County introduced several exhibits concerning the April 6, 2015, incident that resulted in the 15-day suspension and the Last Chance Agreement of December 28, 2015. CX 11. The exhibits included: a written record of an April 21 telephone complaint by the mother of ES, (CX 14); an email from the mother indicating that Appellant had made inappropriate comments to ES and sent offensive texts to her mobile phone, (CX 15); and, a screen shot of the texts. CX 13. AW, the County EEO Officer, testified concerning her investigation into the April 6, 2015, incident. Tr. 72. AW testified that when interviewed, Appellant confirmed that it was his phone number. Tr. 116. At the hearing Appellant suggested that the time stamps at top and bottom of screen shot are inexplicably incongruent. Tr. 114. However, it is evident that the time indicated in the text messages themselves reflects the time the message was received or sent, while the time at the top (next to the battery indicator) is the time the screen shot was saved. CX 13. As Appellant acknowledged that it is his mobile phone number on the screen shot, there is no reason to doubt that Appellant sent these unusual texts. CX 13; Tr. 158-59. While some of the text messages are unintelligible or vaguely lewd, one is without question sexually suggestive. CX 13; Tr. 114. The April 6 incident formed the factual basis for the 2015 suspension.

AW testified about the EEO investigation report, which included her finding that Appellant had "sexually harassed male and female patrons of the Ride-On Bus." CX 10. AW found that there was sufficient evidence that Appellant had sexually harassed Suzy on July 27, 2016, at the Lakeforest Transit Center. CX 10. Suzy also told AW that the July 27 incident was not the only time Appellant interacted with Suzy in a manner that she considered unwelcome. Tr. 87. In one incident, Suzy was the only passenger on the bus and Appellant repeatedly asked her to sit up front with him. CX 10; Tr. 87-88, Tr. 140. On another occasion Appellant honked the bus horn while Suzy was waiting at the Clubhouse Road bus stop, and called to her by name, asking her to join him on an empty bus. CX 10; Tr. 88, 141.

AW further testified that Appellant successfully participated in the workplace and sexual harassment education required by the Last Chance Agreement. Tr. 80. Indeed, AW provided Appellant with personalized, one-on-one training on the County's workplace and sexual harassment policy, reviewing in detail what is considered inappropriate conduct. Tr. 79. The events precipitating the current charges, discussed above, occurred not long after Appellant completed the training required by the Last Chance Agreement.

MW, a Ride On Bus Operator, testified about yet another incident involving Appellant that occurred about three years ago. MW stated that her 19 year old nephew, QD, complained that Appellant was harassing him. Tr. 50-51. QD had provided Appellant with his cell phone number in order to purchase handbags from Appellant. Tr. 33-34, Tr. 54. Using QD's cell phone number, Appellant texted two nude photographs of himself to QD. Tr. 34. MW testified that QD showed her the nude pictures, and that in one picture she could clearly recognize Appellant's face. *Id.* MW testified that she confronted Appellant, asking him to stop harassing her nephew. Tr. 53. According to MW, she showed Appellant the pictures and he apologized:

I opened my phone up and I showed him the photograph. And he said, Oh. He said, I'm sorry. He said, I won't -- I won't say anything, I won't do anything.

Tr. 53. According to MW, Appellant did not deny sending the pictures to QD. Tr. 54.

MW testified that she also showed the pictures to other DOT employees. Tr. 54-55. MW testified that she lost the photographs when she switched cell phone providers and that she did not provide copies of the photographs to her supervisor, Appellant's supervisor, or DOT management. Tr. 61-64. Since MW did not provide the pictures to DOT and no longer has copies, the County was unable to produce them as evidence. Tr. 56.

In his testimony, EW, Deputy Director of DOT,⁵ described how the Department received, investigated, and processed the various complaints concerning Appellant. Tr. 131-35. EW testified that Appellant's dismissal was warranted due to the severity of the offenses, violation of the Last Chance Agreement, the fact that other discipline for similar behavior had already been imposed, and because Appellant had engaged in a "continued pattern of harassment, [and] inappropriate contact with patrons and other employees." Tr. 135; Tr. 143.

Appellant testified and denied knowing Suzy: "If I seen her walk through the door right now, I wouldn't know her. I wouldn't know her if she walked through this door right here today." Tr. 150. Appellant also denied having any conversation or confrontation with AC about Suzy. Tr. 152. Appellant further denied knowing or sending nude photographs to QD. Tr. 154.

Appellant called SC, a child care worker who rides the bus, as a character witness. Tr. 185-86. SG testified that she frequently rode the bus while Appellant was driving, and that he was always polite and friendly, and never behaved inappropriately. Tr. 187-88. Moreover, SG said she never saw Appellant behave inappropriately towards other passengers. Tr. 189-90. The parties stipulated that another Ride On Bus passenger, RS, would provide testimony similar to that of SG if he were called. Tr. 193.

⁵ At the time of the hearing, EW was serving as the Acting Director while the Director was on leave. Tr. 130-31.

The County introduced 20 exhibits, all of which were admitted into evidence. The County exhibits were as follows:

1. Notice of Disciplinary Action (NODA), December 1, 2016
2. Statement of Charges (SOC), November 16, 2016
3. Notice of Administrative Leave Pending Investigation, August 5, 2016
4. Bus Video, July 27, 2016
5. E-mail to EEO Officer, July 28, 2016
6. Texts between CA and Suzy, July 28, 2016
7. Statement of CA, August 1, 2016
8. E-mail statement from Suzy's mother, August 1, 2016
9. MC311 Complaint #1299272795, by Suzy's mother, August 1, 2016
10. EEO investigation report, September 27, 2016
11. Last Chance Agreement, 2015
12. Statement of Charges, 30-day suspension, July 30, 2015
13. Texts from Appellant to ES, April 6, 2015
14. MC311 Complaint #1261677062 by mother of ES, April 21, 2015
15. Sexual Harassment Complaint filed by mother of ES, April 27, 2015
16. MC311 Complaint #1238568267, November 21, 2014
17. MC311 Complaint #1146140287, May 29, 2013
18. Montgomery County Policy on Sexual Harassment
19. Montgomery County Personnel Regulations, Chapter 5
20. Montgomery County Personnel Regulations, Chapter 33

Appellant's sole exhibit was a copy of excerpts from the Wikipedia page concerning his professional heavyweight boxing career, which apparently lasted from 1989 until 2007. Appellant's Exhibit (AX) 1.⁶ Appellant's exhibit was admitted into evidence.

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 21, 2008 and June 30, 2015), § 5, *Equal Employment Opportunity*, which provides in relevant part:

§ 5-1. Definitions.

(d) **Harassment:** Inappropriate written, verbal, or physical conduct, including the dissemination or display of written or graphic material, based on one's race, color, religion, national origin, ancestry, sex, sexual orientation, marital status, age, disability, or genetic status, that unreasonably interferes with one's work performance or creates an intimidating, hostile, or offensive working environment. This includes sexual harassment, which may include:

- (1) an unwelcome sexual advance;

⁶ According to the Wikipedia profile, Appellant had a professional boxing career record of 12 wins, 4 draws, and 41 losses, and apparently fought under the nicknames "[redacted]" and "[redacted]." Despite facing several elite opponents in those 57 professional fights, Appellant was never knocked out. AX 1.

- (2) a request for physical conduct of a sexual nature; or
- (3) written, verbal, or physical conduct of a sexual nature or conduct based on one's gender, including gender stereotyping or animus, when:
 - (A) submission to the conduct is explicitly or implicitly a term or condition of an individual's employment;
 - (B) submission to or rejection of the conduct by an individual is a basis for employment decisions affecting the individual; or
 - (C) the conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

§ 5-2. Policy on equal employment opportunity.

(e) An employee must not:

- (1) discriminate against or harass another employee on the basis of race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status;
- (2) subject another employee, contractor, consultant, citizen, applicant, customer, or client to harassment on the basis of any of the causes listed in (1) above; or
- (3) retaliate against a complainant or other person who has testified, assisted, or participated in any manner in an investigation under this policy.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-2. Policy on disciplinary actions.

(a) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(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.
- (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.

(2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(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 factors.

§ 33-3. Types of disciplinary actions.

(h) ***Dismissal.*** Dismissal is the removal of an employee from County employment for cause.

§ 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 any established policy or procedure;

(d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment;

- (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; . . .
- (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; . . .
- (q) engages in discriminatory, retaliatory, or harassing behavior; . . .
- (w) engages in a private business, trade, or occupation during official working hours in violation of County statutes, regulations, or administrative procedures;
- (x) accepts, offers, gives, or promises to give money or a valuable thing, threatens to use force or to disclose another's personal affairs, or blackmails or extorts to influence a person in the performance of the person's official duties; . . .
- (aa) fails to cooperate or provide information when the employee is the subject of an investigation, unless the employee invokes the Fifth Amendment right against self-incrimination or refuses to give information that the employee is ethically or legally prohibited from revealing, such as attorney-client privileged material or mental health records; . . .

ISSUE

Was Appellant's dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) ("the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability").

County witnesses CA and AW testified that they were told by Suzy that on July 27, 2016, Appellant left his bus and approached her at the Lakeforest Transit Center. The County also introduced documents that include contemporaneous text messages from Suzy and a complaint from Suzy's mother. CX 6 and 8. When interviewed by the bus depot chief on August 5, 2016,

and by the EEO Officer at a later date, Appellant denied approaching any bus patrons on July 27 at the Lakeforest Transit Center. CX 1 and 2; CX 10. However, when he testified at the Board's June 12, 2017, hearing, Appellant did not dispute that on July 27 he parked his bus at the Lakeforest Transit Center and approached a young woman who was standing near the bus stop shelter. Indeed, he would be hard pressed to say otherwise because his actions were captured by the bus video recording. CX 4. Appellant does, however, deny knowing whether the young woman was Suzy or that the interaction was anything but an attempt to be helpful to a bus rider who may need assistance.

Appellant's testimony and that of the other witnesses diverge on other key points. While the County witnesses related various conversations and confrontations with Appellant concerning his inappropriate behavior towards Suzy and other passengers, he flatly denies that any of those conversations took place. Accordingly, the Board is obligated to consider and resolve the issue of credibility.

As the Board has discussed in previous decisions, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 13-03 (2013), *citing Haebe v. Department of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002). One way a trier of fact may assess credibility is by observing the demeanor of the witnesses.

The testimony of Appellant's coworkers CA and MW was that when they each confronted Appellant about harassing their young relatives he acknowledged doing so and said he would cease his inappropriate behavior. Both witnesses appeared sincere and neither displayed any indicia of deception or dishonesty. MW was firm and certain regarding her interaction with Appellant as well as her description of the offensive photographs. Her explanation for not maintaining copies of the photographs was also reasonable. CA was obviously nervous about his testimony, but such nervousness is not uncommon among those who testify infrequently. The Board thus finds no reason to doubt the veracity of Appellant's coworkers or the County EEO Officer when they testified concerning conversations they had with the young bus passengers, Suzy's mother, and Appellant. Nor is there reason to question the truthfulness of the various citizens complaining about their treatment by Appellant. The most reasonable explanation for the various complaints against Appellant, and the admissions he made to his coworkers, is that he indeed engaged in the offensive behavior alleged by the County. *See* MSPB Case Nos. 15-12 & 15-13 (2016).

In addition to Appellant's testimony being contradictory to his previously made statements to investigators and other witnesses, Appellant was defensive and defiant on the stand. The Board finds that Appellant's complete denial that he had any conversations with CA, MW, or Suzy, or even to know them, lacks credibility. *See* MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010).

Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. . . it is not infrequently that . . . a hostile witness . . . reveal[s] by his demeanor - his tone of voice, . . . or even his defiance - that his evidence is not to

be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness.

Gov't of Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967) (emphasis added).

We conclude that while the testimony of the County witnesses was plausible, consistent, and supported by contemporaneous documents, Appellant's denials were uncorroborated, self-serving, and ultimately not credible.⁷ See MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010). Accordingly, based on Appellant's demeanor, behavior, and inconsistent testimony, the Board concludes that Appellant was not a credible witness.

Appellant argues that the County failed to carry its burden of proof by not calling Suzy as a witness. Appellant argues that the County instead relied on the testimony of fellow bus driver CA and other hearsay testimony. Appellant's Brief, p. 3. Appellant may be attempting to invoke the "missing witness rule," *i.e.*, the argument that the failure to call Suzy creates an inference that her testimony would have been damaging to the County's case. Given the multiple witnesses who testified about their conversations with Suzy, and the document that contains text messages from Suzy consistent with CA's testimony (CX 6), we are not prepared to find that her testimony would have been favorable to Appellant or that it was necessary for the County to produce cumulative evidence to meet its burden. See, *Bereano v. State Ethics Comm'n*, 403 Md. 716, 750-51 (2008). Application of the "missing witness rule" must be based on some indication that the witness would have provided evidence unfavorable to the County, and that Suzy was "peculiarly" available to the County, but not to Appellant. 403 Md. at 741. Appellant has not suggested any reason to believe that Suzy would have provided testimony damaging to the County's case, or that Appellant was unable to subpoena Suzy to appear and testify. Appellant was provided with the County's exhibits and proposed witnesses well in advance of both the prehearing conference and the hearing on the merits. Despite knowing that the County did not intend to call Suzy as a witness, Appellant did not request a subpoena to compel her attendance and testimony. See *Travers v. Baltimore Police Dep't*, 115 Md.App. 395, 418-19 (1997) ("because appellant failed to exercise his right to subpoena [the victim] . . . we conclude that he has effectively waived his right to complain about a denial of the opportunity to cross-examine").

While it is true that the testimony of CA and AW concerning Suzy's statements is hearsay, reliable hearsay is admissible in an administrative proceeding. APA § 2A-8(e). So too are the unsworn written statements of Suzy's mother and CA. *Ford v. Office of Personnel Management*, 69 M.S.P.R. 73, 75 (1995) (unsworn allegations in a written statement may be less reliable than sworn allegations, but this goes to the weight, not the admissibility, of the statement). Similarly, the investigative report prepared by AW is admissible and may be relied upon by the Board. *Woodward v. Office of Personnel Management*, 74 M.S.P.R. 389, 394 (1997) (investigative reports composed largely of hearsay evidence properly admitted into evidence); *Marable v. Dep't of Army*, 52 M.S.P.R. 622, 626 (1992) (U.S. Air Force Office of Special Investigations report accepted into evidence even though report constitutes hearsay evidence).

⁷ The character witnesses put forth by Appellant show nothing more than that Appellant could behave courteously to some passengers on certain occasions. Their testimony was not probative of the behavior Appellant exhibited with respect to the specific charges against him in this case. See MSPB Case Nos. 15-12 & 15-13 (2016).

The County produced multiple witnesses, supporting documents, and video that support the reliability of Suzy's statements. Significantly, the testimony of CA and AW concerning their conversations with Suzy are consistent with CA's contemporaneous written statement (CX 7), the screen shots of text messages from Suzy (CX 6), the written statement of Suzy's mother (CX 8), and the record of Suzy's mother's complaint call to DOT shortly after the incident. (CX 9). Moreover, in an administrative hearing a party's case may rely entirely on hearsay. *Eger v. Stone*, 253 Md. 533, 542 (1969) ("not only is hearsay evidence admissible in administrative hearings in contested cases but . . . such evidence, if credible and of sufficient probative force, may indeed be the sole basis for the decision of the administrative body.").

With regard to the failure of the County to produce the offensive pictures of Appellant described by MW, we draw no negative inference from the failure of the County to produce the photographs themselves. The pictures were on MW's phone and in her possession at one time, but never within the County's control. MW testified that she lost the photographs when she switched cell phone providers and that she did not provide copies of the photographs to her supervisor, Appellant's supervisor, or upper level management. Tr. 61-64. We find that MW's testimony as to the existence and content of the pictures to be credible. Her demeanor was calm and straightforward, and no reason or motive for her to testify untruthfully was suggested by Appellant. Tr. 175.

In an administrative hearing, such evidence is admissible if found to be probative and reliable. In view of our finding that the County witness was credible, and that she provided convincing testimony concerning the lurid specifics of the photographs, the failure to locate the photographs and produce them as evidence is immaterial. *See, Gamble v. Dep't of Navy*, 54 M.S.P.R. 94, 97 (1992) (testimony of credible witness is sufficient where agency failed to keep physical evidence); *Jones v. Department of Agriculture*, 19 MSPR 133, 134 n.2 (1984) (where record contains sufficient corroborating evidence, failure to produce written document was immaterial).

The County Ride On bus service owes its passengers the highest standard of care to provide a safe means and method of transportation. *Todd v. Mass Transit Administration*, 373 Md. 149, 156 (2003). This public policy requiring the safe and secure transportation of the public includes protecting the public, especially the vulnerable or young, from ill-treatment by those responsible for and in charge of their transportation. *Cf., Henson v. Greyhound Lines, Inc.*, 257 S.W.3d 627, 629 (Mo. Ct. App. 2008) ("a carrier owes passengers protection against insults and indignities."). As this Board has previously found:

In determining whether the discipline of dismissal is consistent with law and regulation, and otherwise appropriate . . . it must be judged against the particular content of the Appellant's position, a bus driver. *This is a position where service to the user public is direct, and one in which a concern for the public's safety is paramount.*

MSPB Case No. 04-09 (2004) (emphasis added). Indeed, Appellant acknowledges that the allegations against him, "if true, would be indeed serious." Appellant's Brief, p. 2.

Appellant's on-duty behavior towards Suzy and her mother was entirely inappropriate, unwelcome, and unacceptable. The County need not tolerate a bus operator abusing his direct contact with passengers to engage in sexually harassing behavior. MCPR § 5-2(e) ("An employee must not: (2) subject another . . . citizen, . . . customer, or client to harassment. . ."); MCPR § 33-5 ("The following . . . may be cause for a disciplinary action . . . against an employee who: . . . (q) engages in . . . harassing behavior"). *See Geyer v. Department of Justice*, 70 M.S.P.R. 682, 687 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997) (inappropriate sexual remarks); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 324 *aff'd*, 975 F.2d 869 (Fed. Cir. 1992) (repeated unwelcome flirtatious conduct with a female customer); *Botkin v. Department of Interior*, 22 M.S.P.R. 90, 91 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985) (soliciting sex from a minor student while on duty).

Appellant argues that his July 27, 2016, behavior towards Suzy at the Lakeforest Transit Center was merely an innocent attempt to assist a bus patron. However, that incident cannot be viewed in isolation. There was ample evidence that Appellant had previously engaged in inappropriate behavior towards Suzy. Moreover, the County charged that he had engaged in a pattern of sexually harassing behavior targeted at minors and young adult passengers. CX 1 at p. 9. Appellant received a written reprimand on January 24, 2012, for repeatedly giving his phone number to a female passenger who told him she was not interested and had asked him to stop. CX 12; Tr. 12, Tr. 133. Appellant accepted a disciplinary suspension of 15 days for sexually harassing a young bus passenger. CX 11. Evidence was also presented concerning unwelcome and offensive photographs sent to QD, another young bus passenger.

We find that the County has demonstrated that Appellant engaged in a pattern of such unacceptable harassing behavior. It is within the Board's authority to consider Appellant's pattern of behavior, and to conclude that it warrants discipline. *See* MSPB Case No. 07-14 & 07-15 (2007); MSPB Case No. 96-12 (1996); MSPB Case No. 87-42 (1987); *Kaminski v. Department of Navy*, 56 MSPR 393, 397 (1993); *Scott v. Department of Justice*, 69 MSPR 211, 229-34 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996). *See also Carr v. SSA*, 185 F.3d 1318, 1327 (Fed. Cir. 1999) (termination based on a pattern of behavior). The County need not wait until misconduct of a sexual nature rises to a more serious level before imposing discipline. *Pope v. U.S. Postal Service*, 114 F.3d 1144 (Fed. Cir. 1997).

Appellant argues that there is no evidence that the texts and photographs to QD were sent while Appellant was on the job. Appellant appears to have first encountered QD while performing his duties as a bus operator. When, as here, the County seeks to discipline an employee on charges that include off-duty misconduct, the County bears the burden of proving that there is a nexus between the alleged misconduct and the employee's position with the County. The Board has sustained disciplinary action against County employees for off-the-job behavior that has a nexus with their County employment. *See, e.g.,* MSPB Case No. 14-19 (2014) (security officer engaged in domestic violence). While the offensive photographs Appellant sent to QD may have been taken and transmitted while Appellant was off duty, his contact with QD originated and was based upon his position as a bus operator. The off-duty sexual harassment of a bus passenger by a bus operator is sufficiently related to the job to create a nexus, especially when there is no other preexisting relationship between the two. Whether on or off duty, the charge involving QD provides evidence of a pattern of inexcusable behavior. Moreover, the Board finds that it is cumulative, and that

dismissal is the appropriate sanction based solely on Appellant's behavior towards Suzy and her mother.

We are, however, puzzled by the County's contention that Appellant's behavior in 2016 violated the 2015 Last Chance Agreement. Contrary to the County's assertions, the Last Chance Agreement does not contain an explicit warning that further violations of workplace harassment and sexual harassment policies would be grounds for dismissal. CX 11. Rather, paragraph 4 of the Last Chance Agreement states that Appellant's failure to successfully complete training, or sign appropriate releases allowing Employee Assistance Program counselors to share information with the County EEO Officer, would make him subject to dismissal. There is no indication that Appellant failed to complete the required training or comply with any other obligation under the Last Chance Agreement. Accordingly, while the 15-day suspension imposed in connection with the Last Chance Agreement does constitute an instance of progressive discipline, we cannot uphold the charge alleging a violation of the Last Chance Agreement itself.

Finally, although the NODA states that Appellant was charged with violating the County's Collective Bargaining Agreement with MCGEO, it does not specify what provisions of the MCGEO agreement support the charges. Nor did the County present any argument addressing the possible nature of Appellant's alleged violation of the Collective Bargaining Agreement in either its opening statement or post-hearing brief. Tr. 11-14; County Brief, pp. 7-13. Accordingly, we do not uphold the charges for dismissal to the extent they allege a violation of the Collective Bargaining Agreement with MCGEO.

The County has proven by a preponderance of the evidence that Appellant's behavior has been unacceptable, offensive, and in violation of County policies and regulations. There is no evidence in the record to support a contention that the County witnesses had any reasons to be untruthful, that Appellant has been unfairly targeted by management, or that he has been treated differently from other employees. The Board has considered his years of service, however, his refusal to accept responsibility for his outrageous conduct demonstrates that he lacks the potential for rehabilitation.

It is also significant that Appellant has previously been subject to discipline for similar behavior. The prior reprimand and suspension constitute progressive discipline under MCPR § 33-2(c) and suggest that Appellant is unlikely to alter his unacceptable behavior. Persistent misconduct despite being disciplined further justifies dismissal. MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case Nos. 07-14 & 07-15 (2007).

Therefore, the Board finds that dismissal is the appropriate sanction.

ORDER

For the foregoing reasons, the Board denies Appellant's appeal of his dismissal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order an appeal may be filed with the

Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 4, 2017

CASE NO. 17-15

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the appeal of Appellant from the determination of Director AR of the Department of Transportation (DOT or Department) to dismiss Appellant from employment effective January 20, 2017. *See* Notice of Disciplinary Action (NODA), January 5, 2017, County Exhibit (CX) 1. The NODA charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) arising out of Appellant's inappropriate behavior towards passengers while on duty as a Montgomery County Bus Operator on July 13, 2016.¹ This Appeal was filed on January 26, 2017.

On April 24, 2017, the parties appeared before the Board for a prehearing conference, where the Board reviewed the proposed witnesses and exhibits, sought to resolve any outstanding motions or issues, and set the date for the hearing. At the prehearing conference Appellant orally requested that the hearing be open to the public. Pursuant to MCPR §35-10(g), the Board asked Appellant to submit his request in writing by May 1, when he was required to file any proposed changes to his witness and exhibit lists *See* Summary of Prehearing Conference and Order. April 25, 2017.²

A hearing was held on June 20, 2017. The County indicated that it had no objection to the hearing being open to the public, and Appellant represented that he would not attempt to elicit testimony concerning confidential personnel information about other County employees. Hearing Transcript, June 20, 2017, (Tr.) 8. With those assurances, the Board granted Appellant's request that the hearing be open to the public. *Id.* Several people were in attendance in support of Appellant. Tr. 7.

The County provided the Board with its post-hearing submission on August 28, 2017. *See* Post-Hearing Brief of Montgomery County, Maryland (County Brief). Appellant submitted his Final Argument and Post-Hearing Brief on September 5, 2017. (Appellant's Post-Hearing Brief). On September 6, 2017, Appellant submitted an email supplementing and correcting an omission in his post-hearing submission. (Appellant's Supplemental Brief).

¹ The NODA (CX 1) and Statement of Charges (CX 2) charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) on Equal Employment Opportunity, § 5-1(d) and § 5-2(e)(2), (CX 15); and the Disciplinary Regulations, MCPR § 33-5(c), (e), and (h), (CX 16).

² MCPR §35-10(g) provides: "A hearing must not be open to the public unless the appellant requests it in writing at the time of the prehearing submissions."

FINDINGS OF FACT

Appellant has been a County Ride On bus driver since July, 2010. Tr. 29. Appellant testified that for the first 4 ½ years of his employment he had no incidents with bus passengers. Appellant Exhibit (AX) 2 at (timestamp) 28:49-53; Tr. 182 (“You know -- I shouldn’t say this -- but they didn’t have a problem out of me for about four years”). The County agrees that Appellant “was a good driver for many years.” Tr. 34. However, after an incident that he said involved a male passenger taking advantage of an older woman passenger, Appellant decided to alter his approach and insist that passengers always pay the correct fare and otherwise comply with his instructions. Tr. 182-83; AX 2 at 28:56-59.

After Appellant’s change in attitude and approach, and before July 13, 2016, he was disciplined on four occasions in less than a year for his inappropriate behavior towards bus passengers. Appellant received an oral admonishment on November 12, 2015, after bus passengers complained about the way he handled fare disputes. CX 6, p. 3; CX 10, p. 2. On November 18, 2015, Appellant received a written reprimand for his inappropriate and argumentative behavior towards bus passengers. CX 6, p. 3. On June 15, 2016, Appellant was disciplined by the forfeiture of eight-hours of his annual leave for disruptive, disrespectful, and unprofessional behavior towards bus passengers. CX 10. Finally, on June 20, 2016, Appellant received a five-day suspension for disruptive, unsafe, and unprofessional behavior towards passengers. CX 6.

The instant disciplinary action involves a July 13, 2016, incident in which three young passengers engaged in several verbal exchanges with Appellant. The County introduced a video that contains footage from several cameras on the bus and provides what appears to be a complete record of the July 13, 2016, incident between Appellant and the young passengers. CX 4.³ The Board reviewed the entire video during the hearing, and the parties directed the Board’s attention to various parts of the video for repeated viewing. The video contains audio from microphones on the bus.⁴

The incident began when two young women and a male child boarded Appellant’s bus. As one young woman was paying her fare Appellant gestured to the other young woman and said “Hold it, hold it, hold it. Who you got here? Didn’t you cuss me out a while back? . . . You’re not riding.” CX 4 at (timestamp) 16:49:44-54. The young passengers nevertheless went down the aisle and took seats. Appellant admits, and the video confirms, that the young passengers were not unruly. Tr. 134.

The bus remains parked at the curb while Appellant closes the door, initiates a call to the central dispatch unit, and waits for a response. CX 4 at 16:49:55-16:50:29. Upon receiving a call from the dispatch center Appellant begins explaining that he has “a young lady here with a little boy who cussed me out a while back. I turned in a report.” CX 4 at 16:50:32-39. One young woman returns to the front and stands by Appellant while he is on the phone. She tells Appellant, “We’re just going down the street,” and then adds, “we’re sitting down peacefully, drive us.” CX 4 at

³ CX 4 is composed of two electronic files.

⁴ Camera 1 records from above and behind the driver. Camera 2 records the interior, showing the passenger seats and the center aisle. Camera 4 is focused on the rear door and seating. Cameras 3, 5, and 6 are exterior views.

16:50:43-45, 56-57.⁵ Appellant then requests a police officer. CX 4 at 16:51:31. Appellant eventually hangs up the phone and, in response to her statement that “we’re just going down the hill,” he tells the young woman that she can either get off the bus or wait for the police to arrive. CX 4 at 16:52:20-22. The young woman then turns to the other two members of her party and says, “come on, we have to get off.” CX 4 at 16:52:24-27. A back and forth exchange ensues in which Appellant opens and closes the door several times and the young passengers discuss whether they have to get off the bus. Appellant repeatedly says that he cannot force them off the bus but that the police are coming and that they can take the young passengers off the bus.

The young women finally decide that they will stay on the bus even if the police are coming, and return to their seats. CX 4 at 16:55:07. During the entire time Appellant and the passengers are arguing, the older of the two young women has her cell phone in her hand, either talking on it or texting. Additionally, Appellant keeps the bus parked at the curb while several other passengers wait quietly in their seats. CX 4, camera 2. Appellant then calls central dispatch again and receives a call back a few seconds later. CX 4 at 16:55:34 – 44. He tells dispatch that he has not moved the bus and asks what they want him to do. CX 4 at 16:55:58 – 56:04. Appellant then hangs up and resumes driving. CX 4 at 16:56:31-36.

After the bus continued its route, picking up and discharging passengers for five to six minutes, it approached a bus stop and one of the young women stood up and approached the front of the bus to disembark with the male child. CX 4, camera 2, at 17:03:54-58. The other young woman passenger remained seated, apparently taking pictures of Appellant on her cell phone. CX 4, camera 2, at 17:04:05. The male child exits the bus first, followed by the young woman, who is holding up her cell phone. CX 4 at 17:04:08-09.

After carefully viewing the video and its audio, it is clear beyond any dispute that Appellant struck one of the young female passengers, knocking a cell phone out of her hands. CX 4 at 17:04:10. Indeed, Appellant readily admits that he did so. Tr. 181; CX 5. The video also reveals that prior to striking the young woman Appellant stopped the bus, opened the door, and threatened that “this time I’m bringing somebody,” presumably referring again to the police. CX 4 at 17:04:03-06; Tr. 152. Just after the young woman finishes saying, “we can get off right now,” Appellant strikes the phone out of her hand. CX 4 at 17:04:08-10; Tr. 152. After striking the passenger, Appellant unbuckled his seatbelt and stood up, moving towards the young women and loudly ordering “don’t take no pictures. You get off this bus.” CX 4 at 17:04:12-15; Tr. 147. After the young women are off the bus Appellant turns back towards the driver’s seat and makes a phone call, presumably to the central dispatch unit. CX 4 at 17:04:20-22. He then tells dispatch “Hey listen, I need a police officer and a road coordinator at this stop, they’re taking pictures of me and everything.” CX 4 at 17:04:21-27.

Appellant claims that he did not realize that the passenger was holding a cell phone, and that he felt threatened. Tr. 181. Appellant does not claim that he ever saw a threatening object, such as a weapon. Tr. 133. Appellant also admitted that after he knocked the cell phone out of the passenger’s hand he told her not to take pictures of him. Tr. 147. At one point during his testimony Appellant said that he only told her not to take pictures of him after he saw that she had been holding a cell phone. Tr. 147. However, Appellant later admitted, and it is clear on the video, that

⁵ It is not entirely clear whether the young woman said, “drive us” or “drive the bus.” The uncertainty is immaterial.

prior to knocking the cell phone out of the passenger's hand, he turned to the young woman, pointed at her, and said, "Listen, listen, listen. You're going to get the hell out of here with that camera." CX 4, at 17:03:58 – 04:00; Tr. 150; Tr. 153.

Shortly after the incident, the mother of the young woman Appellant struck called in a complaint concerning Appellant's behavior. CX 3 ("Driver physically hit 21 year old passenger after passenger try [*sic*] to take a picture of him. Mother would like to press charges. . ."). Not long after that complaint the County police interviewed the young woman, and then Appellant. Joint Exhibit (JX) 1. The police report states, in part:

At some point [Appellant] notified Central again because [the young woman] started taking pictures of him. He said that [the young woman] kept taking pictures of him and due to this he became uncomfortable so he pulled the bus over. [Appellant] then advised that [the young woman] started approaching him and that he "felt threatened when they approached me." [Appellant] said he thought she had a weapon so he slapped her hand and saw something fall to the floor. It was then that he saw it was a cell phone. Additionally, [Appellant] advised that the girls yelled at him saying, "that's why they hurt people like you, we're black we need to stick together." JX 1.

Appellant testified that one of the young women said to him "that's why we shoot bus drivers." Tr. 133; Tr. 173. Although Appellant testified that the remark was on the bus video and heard by GO, Appellant's Transit Operations Supervisor, and Appellant's witness, AC, Appellant was unable to locate the portion of the video allegedly containing that statement. Tr. 137-39. The Board has also reviewed the video many times and did not hear the remark. Appellant did not ask AC to testify about the remark on direct examination. Nor did Appellant ask GO about the remark during cross examination. Tr. 139.

Although Appellant told the police that the young woman had said "that's why they hurt people like you, we're black we need to stick together," JX 1, he did not tell the police or anyone in DOT that the passengers had made any comment about shooting bus drivers. Tr. 163-65. The day after the incident Appellant filed a signed Operator Incident report. CX 5.⁶ In the report, Appellant says, in part: "the young lady approached me and I thought she had a weapon and I knocked it out of her hand. Once it hit the floor I saw it was a cell phone." Appellant's incident report makes no mention of any verbal threat. CX 5.

DF, a Transit Operations Supervisor, testified that it is County policy that bus drivers lack the authority to physically touch anybody or to evict a passenger from a bus. Tr. 101. DF further testified that there is no County policy prohibiting bus passengers from using cell phones. Tr. 102.

GO testified that all Ride On busses, including Appellant's, have a "panic button" by the driver's left hand which permits a driver to discretely summon assistance in an emergency or if he or she feels unsafe. Tr. 69; Tr. 95. Engaging the panic button automatically opens the microphones on the bus, allowing the DOT Transit Division's central dispatch or operations center and the Montgomery County police to hear what is being said and other sounds on the bus. Tr. 70.

⁶ The incident report is dated July 13, 2016, but was apparently filed by Appellant the next day. Tr. 50.

Engaging the panic button results in immediate attention to the situation on the bus and may result in Transit Division supervisors and police responding to the vehicle. Tr. 70. Drivers are encouraged to engage the panic button rather than engage in physical or verbal altercations with passengers, and suffer no adverse consequences for choosing to call for assistance that way. Tr. 70.

Although Appellant made several calls to central dispatch during the incident on July 13, 2016, he admitted that he did not at any time engage the panic button. Tr. 70; Tr. 95; Tr. 180. Appellant questioned whether the panic buttons always worked properly. Tr. 179. Appellant initially stated that the one time he engaged the panic button it did not work, but then admitted that he really was not sure and that assistance arrived. Tr. 180 (“I don't -- I can't really tell you if the panic button worked or not. What I saw was police officers . . .”). County witness DF testified that the panic button systems are periodically tested and that he was unaware of any instance of malfunction when a bus driver has intentionally pressed the button. Tr. 103.

On March 22, 2017, subsequent to the filing of the Appeal in this matter, an administrative hearing was conducted by telephone before a Hearing Examiner of the Maryland Department of Labor, Licensing, and Regulation (DLLR) Unemployment Insurance (UI) Lower Appeals division. On April 6, 2017, a decision was issued concluding that there was insufficient evidence to support a finding that Appellant was discharged for misconduct under the UI law. AX 1.

The parties submitted a Montgomery County Police Department incident report, dated July 13, 2016, as Joint Exhibit 1.⁷ The County submitted 23 exhibits, as follows:

1. Notice of Disciplinary Action (NODA) – Dismissal, January 5, 2017
2. Statement of Charges (SOC) – Dismissal, November 16, 2016
3. MC311 Complaint #1298099133
4. Bus Video (disk), July 13, 2016
5. Incident Report, July 13, 2016
6. NODA – 5-Day Suspension, June 20, 2016
7. SOC – 10-Day Suspension, April 19, 2016
8. MC311 Complaint #1285806079
9. MC311 Complaint #1285815637
10. NODA - 8 Hour Forfeiture of Annual Leave, June 15, 2016
11. SOC - One Day Suspension, March 2, 2016
12. MC311 Complaint #1282134429
13. MC311 Complaint #1282573668
14. MC311 Complaint #1283648732
15. MCPR Chapter 5
16. MCPR Chapter 33
17. OP0007 Division of Transit Services Standard Operating Procedure
18. Article 10 of MCGEO CBA
19. Employee Acknowledgement for Participation in ADR Process, May 5, 2016
20. Employee Acknowledgement for Participation in the ADR Process, June 15, 2016
21. MC Time Card Correction
22. MC Time Correction Request, 1/31/17

⁷ JX 1 is an unredacted version of the redacted police report admitted as Appellant Exhibit 3.

23. MC Time Card Audit Edit

The Board admitted into evidence County Exhibits 1, 3-6, 10, 15-16, and 21-23.

Appellant introduced the following exhibits, which were all admitted into evidence:

1. Unemployment Insurance Appeals Decision, April 6, 2017
2. DLLR teleconference audio tape
3. MCPD incident report, July 13, 2016
4. ADR acknowledgement, December 21, 2016.

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 21, 2008 and June 30, 2015), § 5, *Equal Employment Opportunity*, which provides in relevant part:

§ 5-1. Definitions.

(d) **Harassment:** Inappropriate written, verbal, or physical conduct, including the dissemination or display of written or graphic material, based on one's race, color, religion, national origin, ancestry, sex, sexual orientation, marital status, age, disability, or genetic status, that unreasonably interferes with one's work performance or creates an intimidating, hostile, or offensive working environment. . . .

§ 5-2. Policy on equal employment opportunity.

(e) An employee must not:

- (1) discriminate against or harass another employee on the basis of race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status;
- (2) subject another employee, contractor, consultant, citizen, applicant, customer, or client to harassment on the basis of any of the causes listed in (1) above; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-1. Definition.

Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;

- (d) within-grade salary reduction;
- (e) suspension;
- (f) demotion; or
- (g) dismissal.

§ 33-2. Policy on disciplinary actions.

(a) *Purpose of disciplinary actions.* A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(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.
- (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.
- (2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(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 factors.

§ 33-3. Types of disciplinary actions.

(a) **Oral admonishment.** An oral admonishment is:

- (1) the least severe disciplinary action;
- (2) a spoken warning or indication of disapproval about a specific act of misconduct or violation of a policy or procedure; and
- (3) usually given by the immediate supervisor.

(b) **Written reprimand.** A written reprimand is:

- (1) the second least severe disciplinary action;
- (2) a written statement about a specific act of misconduct or violation of a policy or procedure; and
- (3) included in the employee's official personnel record.

(c) **Forfeiture of annual leave or compensatory time.**

- (1) A forfeiture of annual leave or compensatory time:
 - (A) is the removal of a specified number of hours from the annual leave or compensatory time balance of an employee;
 - (B) must be at least one day but not more than 10 days.
- (2) The FLSA prohibits a department director from taking compensatory time from a non-exempt employee for disciplinary purposes.

* * *

(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.
- (2) A department director may not:

- (A) suspend an employee for more than 10 days without the approval of the CAO; or
- (B) suspend an employee for more than 30 days, unless:
 - (i) a longer suspension is imposed by a court or quasi-judicial body; or
 - (ii) the employee agrees to the longer suspension as part of a settlement agreement.

* * *

(h) *Dismissal*. Dismissal is the removal of an employee from County employment for cause.

§ 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 any established policy or procedure; . . .
- (e) fails to perform duties in a competent or acceptable manner; . . .
- (h) is negligent or careless in performing duties; . . .

ISSUE

Was Appellant’s dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt’s Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) (“the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability”).

Collateral Estoppel

A threshold legal issue to be addressed is the doctrine of collateral estoppel. Appellant has pointed to the State Department of Labor, Licensing, and Regulation administrative decision regarding his application for Unemployment Insurance benefits and argues that under the doctrine of collateral estoppel the Board must honor the DLLR factual findings for purposes of this appeal. AX 1; Appellant’s Post-Hearing Brief, pp. 1-2; Appellant’s Brief, May 31, 2017, pp. 1-3; Appellant’s Addendum, May 1, 2017, pp. 7-10.

After conducting a hearing by telephone, a DLLR Hearing Examiner found that the County had not proven that Appellant was discharged for misconduct: “The claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer’s premises.” AX 1. As a result, Appellant did not receive a disqualification from receipt of full UI benefits.

Garrity v. Maryland State Bd. of Plumbing, 447 Md. 359 (2016), holds that when an issue is litigated and decided by an administrative agency, and the determination was essential to that decision, the determination may be conclusive in a subsequent administrative action between the parties, whether on the same or a different claim. *Garrity* holds that if the answers to the following four questions are in the affirmative, collateral estoppel may be applied:

1. Was the issue decided in the prior adjudication identical with the one presented in the current case?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

447 Md. at 369. The Board must therefore conduct an analysis of the answers to these questions.

1. Are the issues identical?

The County argues that the unemployment insurance issues before DLLR were different from the issues now before the MSPB, in part because the purposes of the UI law are different. County Response, May 31, 2017, p. 2. However, it is not necessary that the purposes of the UI law be identical to those of the Montgomery County Merit System law, only that the issue to be decided be the same. *Cosby v. Department of Human Resources*, 425 Md. 629, 642 (2012), quoting *Montgomery County Dep’t of Health & Human Services v. Tamara A.*, 178 Md. App. 686, 701, rev’d on other grounds, 407 Md. 180 (2009) (“Collateral estoppel does not require that the prior and present proceedings have the same purpose, nor does it mandate that the statutes upon which the proceedings are based have the same goals. The relevant question is whether the fact or issue was actually litigated and decided in a prior proceeding, regardless of the cause of action or claim.”). The factual issue in the UI benefits appeal was whether Appellant’s actions while driving a bus on July 13, 2016, constituted misconduct for which he could be terminated and denied unemployment benefits. Labor and Employment Article (LE), §§ 8-1002 and 8-1003 (defining gross misconduct and misconduct as grounds for disqualifying an applicant from receiving unemployment benefits).⁸ The factual issue in this MSPB proceeding is whether Appellant’s

⁸ Those provisions of the Labor and Employment Article provide:

§8-1002.

(a) In this section, “gross misconduct”:

- (1) means conduct of an employee that is:

actions provided cause justifying his dismissal from County employment for misconduct. MCPR § 33-2(c) (“misconduct”); § 33-3(h) (“for cause”); § 33-5 (lists the various causes for disciplinary action). Indeed, it appears that the County removed Appellant from duty and placed him on administrative leave pending charges pursuant to MCPR § 33-7. That personnel regulation permits such action when it is determined that an employee should be relieved from duty for “serious misconduct or if the presence of the employee will cause or continue a disruption in the workplace.”

We conclude that both the UI law and the merit system law address discipline based on “misconduct.”

2. Was there a final judgment on the merits?

The County concedes that the decision of the Hearing Examiner was a “final judgment” on the issue of unemployment insurance benefits. County Response, p. 3. The County did not appeal the UI decision to the DLLR Board of Appeals or seek judicial review. Accordingly, the decision of the DLLR Hearing Examiner is a final administrative decision on the merits. *Montgomery County v. Lake*, 68 Md. App. 269, 279 (1986) (“decisions of the [Workers Compensation] Commission when unappealed and unreviewed are final.”).

3. Are the parties the same or in privity?

The County concedes that the parties to this proceeding are the same as those in the DLLR UI proceeding. County Response, p. 3.

-
- (i) deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit; or
 - (ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee’s obligations; and
- (2) does not include:
- (i) aggravated misconduct, as defined under § 8–1002.1 of this subtitle; or
 - (ii) other misconduct, as defined under § 8–1003 of this subtitle.
- (b) An individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is gross misconduct in connection with employment.
- (c) A disqualification under this section shall:
- (1) begin with the first week for which unemployment is caused by discharge or suspension for gross misconduct as determined under this section; and
 - (2) continue until the individual is reemployed and has earned wages in covered employment that equal at least 25 times the weekly benefit amount of the individual.

§8–1003.

- (a) An individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
- (1) aggravated misconduct, under § 8–1002.1 of this subtitle; or
 - (2) gross misconduct under § 8–1002 of this subtitle.
- (b) A disqualification under this section shall:
- (1) begin with the first week for which unemployment is caused by discharge or suspension for misconduct; and
 - (2) continue for a total of at least 10 but not more than 15 weeks, as determined by the Secretary, based on the seriousness of the misconduct.

4. Was the party against whom collateral estoppel is asserted given a fair opportunity to be heard on the issue?

The County asserts that it was not given a full and fair opportunity to be heard on the issue of whether Appellant violated the MCPR, and whether the level of discipline was appropriate. County Response, p. 3. The County argues that a Lower Appeals division UI telephone conference hearing is “not akin to full adjudicatory hearings on the merits,” and that the “DLLR proceedings only satisfy the minimum requirements of procedural due process due in part to the informal and expedited nature of the proceedings. . .”. *Id.*

Although DLLR UI hearings are not required to be heard by the State Office of Administrative Hearings, State Government Article (SG) § 9-1601(a)(11), the DLLR hearing procedures do provide an administrative adjudicatory process. The DLLR Lower Appeals Division has adopted procedural regulations that are consistent with the contested case procedures of the State Administrative Procedure Act (APA). LE § 8-504.⁹ Hearing Examiners are specifically granted the ability to administer oaths, and to subpoena witnesses and documents or other records, LE § 8-505, and must admit and evaluate evidence in accordance with the standards of the State APA. LE § 8-506(a)(2). A record of the hearing is maintained, and parties are entitled to have counsel present. LE § 8-506(d) and § 8-507.

The procedural regulations for UI Lower Appeal cases are set forth in Code of Maryland Regulations (COMAR) Title 9, Subtitle 32, Chapter 11. Witnesses testify under oath, COMAR 09.32.11.02.I(1), and the rules of evidence are to apply in accordance with SG § 10–213 of the State APA. However, as opposed to the MSPB administrative process, the UI Lower Appeals procedural regulations do not allow prehearing discovery.¹⁰

While the UI procedural regulations allow the introduction and use of electronic records such as the video of the July 13, 2016, incident, it is significant that unlike MSPB hearings, in order for the video to have been introduced and utilized the County would have had to “produce at the hearing the equipment necessary to allow review of the contents of the records.” COMAR 09.32.11.02.I(2). This requirement creates a significant burden on litigants, a burden that is not present in litigation before this Board.

The County suggests that telephone conference hearings do not provide adequate administrative due process. Although the State APA specifically provides that contested case hearings may be conducted “by telephone, video conferencing, or other electronic means,” SG § 10–211, proceedings before this Board are in-person. While the County did have the right “to appear at the hearing and present evidence in person,” COMAR 09.32.11.02.S(2), it apparently could not have compelled Appellant to appear in person so that the Hearing Examiner could evaluate his demeanor and credibility.

⁹ The State APA does not apply to unemployment insurance hearings “except as specifically provided” by the Labor and Employment Article. SG § 10-203(a)(5).

¹⁰ The procedures do permit a party to obtain a subpoena for the production of documentary evidence at the hearing. COMAR 09.32.11.02.J.

We find most persuasive the County's argument that it did not have an incentive to defend the UI case vigorously because the stakes were so low. We agree that the consequences of an adverse Unemployment Insurance decision are substantially less significant to the County than the outcome of an MSPB dismissal hearing. While the stakes in a UI hearing may be significant to a terminated employee, and the potential saving or expenditure of thousands of taxpayer dollars is not inconsequential to the County, the primary interest of the County is in the safe and efficient operation of its workforce in delivering public services. In the context of this case, an important way to effectuate that interest is to ensure through the personnel disciplinary process that only responsible and reliable bus drivers are permitted to operate County busses and interact with the public. The gravity of a decision by the MSPB on the issue of whether it is necessary and appropriate to dismiss a bus driver who assaults passengers overwhelmingly outweighs the importance of a determination by a UI Hearing Examiner whether the County will be liable for some additional UI benefit payments.

We are aware that in an unreported decision the Court of Special Appeals concluded that the collateral estoppel doctrine precluded a State employee from relitigating facts established in a UI hearing. *Greene v. Dep't of Labor, Licensing, & Regulation*, 2017 WL 394516 (Md. Ct. Spec. App.), *cert. denied*, 453 Md. 365 (2017). As an initial matter, Maryland Rule 1-104 provides that an unreported opinion of the Court of Special Appeals may not be considered as authority:

(a) Not Authority. An unreported opinion of the . . . Court of Special Appeals is neither precedent within the rule of *stare decisis* nor persuasive authority.

Thus, we are not bound by the decision in *Greene*, and do not consider it as precedent or persuasive authority.

Moreover, we find that decision readily distinguishable from this case. In *Greene*, because the employee worked for the DLLR UI division, the benefits determination hearing was delegated to the State Office of Administrative Hearings (OAH). *Id.*, at footnote 1. Not only are the hearing procedures at the OAH more extensive than those normally provided at UI hearings, the exact same OAH procedural rules were used when the OAH also conducted the State employee termination hearing. *See* COMAR 28.02.01. The UI hearing in this case was instead conducted under the more limited procedures of COMAR 09.32.11. These are critical procedural differences that distinguish *Greene* from the circumstances of this case.

Furthermore, what is at stake for the terminated employee is considerably different from that of the employer. The *Greene* court found that the terminated employee had every incentive to vigorously defend herself at the UI hearing because a finding of misconduct would disqualify her from receiving benefits for a period of time. That loss of income is unquestionably critical to an out-of-work individual. The same cannot be said for the impact of a few thousand dollars of UI benefits payments on the incentive of a County with a \$5.5 Billion budget, and nearly 13,000 employees, to vigorously defend itself in every UI hearing.

We conclude that the expedited, informal, and limited procedures afforded at the UI Lower Appeals division hearing did not provide the County with a fair opportunity to present its case, and that due to the small stakes involved, the County lacked a sufficient incentive to vigorously defend itself. *See Rue v. K-Mart Corp.*, 552 Pa. 13, 713 A.2d 82 (1998); Restatement (Second) of

Judgments, § 28. Application of the doctrine of collateral estoppel might be appropriate when a fact or issue is determined by an adjudication that provides procedural protections equal or superior to those provided by this Board. *See e.g. Graybill v. United States Postal Service*, 782 F.2d 1567, 1573 (Fed Cir. 1986) (employee collaterally estopped from asserting innocence in administrative proceeding after a guilty plea). That is not the case here. Accordingly, we find that the doctrine of collateral estoppel does not apply and that the decision of the DLLR UI Hearing Examiner therefore carries no preclusive effect.

Appellant's testimony was not credible and his behavior was unacceptable

Appellant does not, as he cannot, deny that he struck a passenger and knocked her cell phone out of her hand. Rather, he claims that he was justified in striking the passenger as he feared for his safety and was acting to defend himself.

We conclude that Appellant's claims that he was verbally and physically threatened are contrary to the visual and audio evidence, uncorroborated, self-serving, and ultimately not credible. *See* MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010). Based on Appellant's demeanor, behavior, and inconsistent testimony, the Board concludes that Appellant was not a credible witness.

The video, Appellant's own testimony, and his failure to use the "panic button" all suggest that his claim of fear for his safety is not worthy of belief. At no time during any of the calls to central dispatch does Appellant claim that the passengers have threatened to shoot him, that he felt threatened in any way, or that he had struck one of them. Tr. 162. Indeed, his behavior throughout the bus video is argumentative, hostile, and aggressive towards the young bus passengers. The audio from the bus video and Appellant's testimony make clear that Appellant was upset that the young female passengers were recording him with their cell phones. While Appellant may have found that behavior offensive or uncomfortable, it did not constitute a physical threat.

Appellant's assertion that he felt physically threatened by a young woman holding a cell phone in plain view is simply not worthy of credence. It is more probable that he constructed his implausible "self defense" claim after the young woman's mother filed a complaint and the police were called to investigate. Appellant was simply trying to avoid administrative and possibly criminal sanctions by blaming the victim.

The County takes the reasonable position that bus drivers should not assault bus passengers. We agree. The County Ride On bus service owes its passengers the highest standard of care to provide a safe means and method of transportation. *Todd v. Mass Transit Administration*, 373 Md. 149, 156 (2003). This public policy requiring the safe and secure transportation of the public includes protecting the public, especially the vulnerable or young, from ill-treatment by those responsible for and in charge of their transportation. *Cf., Henson v. Greyhound Lines, Inc.*, 257 S.W.3d 627, 629 (Mo. Ct. App. 2008) ("a carrier owes passengers protection against insults and indignities."). As this Board has previously found:

In determining whether the discipline of dismissal is consistent with law and regulation, and otherwise appropriate . . . it must be judged against the particular content of the Appellant's position, a bus driver. *This is a position where service to*

the user public is direct, and one in which a concern for the public's safety is paramount.

MSPB Case No. 04-09 (2004) (emphasis added). *See* MSPB Case No. 84-80 (1984). *Cf.*, MSPB Case No. 15-03 (2014) (because of public safety concerns, County need not risk hiring a bus operator with a history of assault).

The County has proven by a preponderance of the evidence that Appellant's behavior has been unacceptable, offensive, and in violation of County policies and regulations. The County need not tolerate a bus operator abusing his direct contact with passengers to engage in assaultive and harassing behavior. MCPR § 5-2(e) ("An employee must not: (2) subject another . . . citizen, . . . customer, or client to harassment. . .").¹¹

We are aware that for over four years Appellant was apparently an exemplary employee. However, Appellant's conscious decision to become more assertive with passengers, including those who might not have the correct fare, was unwise and has had dire consequences. Appellant has engaged in a pattern of unacceptable behavior towards bus passengers. Appellant has previously received an oral admonishment, a written reprimand, the forfeiture of leave, and a five-day suspension for his rude, confrontational, and unprofessional behavior. CX 6; CX 10; Tr. 44, 54. It is within the Board's authority to consider Appellant's pattern of behavior, and to conclude that it warrants discipline. *See* MSPB Case No. 07-14 & 07-15 (2007); MSPB Case No. 96-12 (1996); MSPB Case No. 87-42 (1987).

Appellant's previous discipline constitutes progressive discipline under MCPR § 33-2(c), and suggests that Appellant is unlikely to alter his unacceptable behavior. Persistent misconduct despite being disciplined justifies his dismissal. MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case Nos. 07-14 & 07-15 (2007).

ORDER

For the foregoing reasons, the Board denies Appellant's appeal of his dismissal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order an appeal may be filed with the

¹¹ Inexplicably, the NODA did not cite to MCPR § 33-5(t) ("The following, while not all-inclusive, may be cause for a disciplinary action . . . against an employee who: . . . (t) engages in a physical altercation or assaults another while on duty, on County government property, or in a County vehicle. . ."). Nevertheless, the NODA and the Statement of Charges provide detail concerning the factual and legal basis for the charges and do explicitly use the term "assault." CX 1 & 2. The proper standard to assess the adequacy of charges is whether the County has given adequate notice so as to enable the employee to make an informed response. MSPB Case No. 17-12 (2017); MSPB Case No. 07-10 (2007), MSPB Case No. 07-13 (2007), and MSPB Case No. 08-09 (2008). Whether one considers the NODA to be inartfully drafted, there was sufficient specificity and clarity concerning the nature of the charges to enable Appellant to mount an adequate defense to the charge of assault on a passenger. We thus conclude that the SOC and NODA gave detail sufficient to provide Appellant with adequate notice under MCPR §33-6. *See Regan v. Board of Chiropractic Examiners*, 120 Md. App. 494, 519-20 (1998), *aff'd* 355 Md. 397 (1999).

Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 18, 2017

CASE NO. 18-02

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the appeal of Liquor Store Assistant Manager, Appellant, from the decision of the Director of the Department of Liquor Control (DLC), to dismiss Appellant from employment effective August 14, 2017. *See* Amended Notice of Disciplinary Action (NODA), July 24, 2017, County Exhibit (CX) 2. The NODA charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) § 33-5(c), (e), (h), and (k), arising out of allegations that Appellant consumed alcohol on the job, allowed employees to remove alcoholic beverages from the store without paying, and approved falsified timesheets. The Appeal was filed on August 14, 2017. A hearing was held on November 15, 2017, and continued on December 7, 2017.

The disciplinary action that is the basis for this Appeal arose out of the investigation of a whistleblower's complaint concerning TA, a store clerk supervised by Appellant. Hearing Transcript, December 7, 2017 (Tr. (Dec. 7)) 12. The County investigation revealed several possible improprieties by TA and Appellant. The County alleged that TA received permission from Appellant to take an alcoholic beverage from the County liquor store without paying. Appellant was charged with contravening MCPR § 33-5(h) (negligent or careless in performing duties) and MCPR § 33-5(c) (violated an established policy or procedure). CX 2.

Appellant was also charged with allowing TA to leave the store before the end of her shift on December 29, 2016, and January 5, 2017, without signing out and then approving her timecard for the full shift. CX 2. Appellant was also charged with approving TA's timecard with an inaccurate arrival time on December 17, 2016. CX 2. The County charged these timekeeping and attendance offenses as being contrary to established policy or procedure and a failure to perform duties in a competent or acceptable manner, in violation of MCPR § 33-5(c) and § 33-5(e).

Another charge alleging a violation of MCPR § 33-5(c) was that on multiple weekends neither Appellant nor the store manager were there to close the store, in violation of established policy and procedure which requires that there always be a manager or assistant manager on duty.

Finally, the NODA also alleges that Appellant would drink beer while on duty at the County store. CX 2. Appellant was charged with violating MCPR § 33-5(k), being impaired or under the influence of alcohol while at work.

FINDINGS OF FACT

Appellant has been employed by DLC for over 20 years, and has been a Liquor Store Assistant Manager for 15 years at various DLC stores. Tr. (Dec. 7) 35. Appellant has been the Assistant Manager at Clarksburg for the last three years. *Id.* Appellant has not previously been subject to disciplinary action. Tr. (Dec. 7) 34. It was the testimony of JF, the Clarksburg Liquor Store Manager and a 40-year DLC employee, that Appellant was reliable, punctual, and a “great employee.” Hearing Transcript, November 15, 2017 (Tr. (Nov. 15)) 150-51. JF further stated that he had no concerns about Appellant’s performance, and that he considered Appellant to be the best liquor store employee with whom he had ever worked. Tr. (Nov. 15) 151.

Although employees may purchase alcohol at a DLC store, they are required to pay for the product before removing it from the store. Tr. (Dec. 7) 17. County witness JU, the Chief of Administration for DLC, testified that he was present when Appellant was interviewed by a member of the County Attorney’s staff on April 3, 2017. Tr. (Dec. 7) 12. According to JU, Appellant admitted that he often bought alcoholic beverages as gifts for employees and that on December 31, 2016, he told TA to take a bottle and that he would pay for it later. Tr. (Dec. 7) 15. JS, a DLC human resources employee, was also present and stated that Appellant admitted to allowing TA to take a bottle from the store on December 31, 2016. Tr. (Nov. 15) 62. JS also testified that when questioned, TA said Appellant said it was okay to take the bottle of champagne before it was purchased. Tr. (Nov. 15) 26.

Appellant testified that on December 31, 2016, he told employee TA that he would buy her a bottle of champagne as a holiday gift. Tr. (Dec. 7) 57. However, TA was apparently unsure what type of champagne she wanted. Rather than wait for her to decide, Appellant admitted that he told her that she could remove the champagne from the DLC store without paying. Tr. (Dec. 7) 27, 48, 57; AX 3. Appellant paid for the champagne on January 3, 2017, his next work day. Tr. (Dec. 7) 28; AX 4. Appellant acknowledged that this transgression was a lapse in judgment, and it is undisputed that paying for product before it is removed from the store is the correct procedure. Tr. (Dec. 7) 48, 123. Appellant claimed that when giving employees a gift he pays for the alcohol before it is removed from the DLC store “99.9 percent of the time.” Tr. (Dec. 7) 48.

During his testimony Appellant acknowledged that, except for County sponsored controlled tastings of samples, it is a violation of County policy for an employee to consume alcohol while on duty and on County property. Tr. (Dec. 7) 39, 41, 44. JS also testified that during the investigatory interview Appellant acknowledged that he knew employees were not supposed to drink alcohol at the store. Tr. (Nov. 15) 38.

The County presented a January 6, 2017, video which appears to show Appellant drinking beer out of a red solo cup between 8:16 and 8:34 p.m. in the back of the store while performing job functions such as counting money. CX 6. JU and JS testified that Appellant admitted to investigators that he would often have a beer in the evening before his shift ended at 9:00 p.m. Tr. (Dec. 7) 15-16; Tr. (Nov. 15) 43, 46, 66-67. Appellant testified that while he had consumed alcohol on the job during his over 20 years with the County, he has not done so “recently.” Tr. (Dec. 7) 41. Appellant specifically denied that the liquid he was consuming on the January 6, 2017, video

(CX 6) was beer, instead claiming that it was orange juice. Tr. (Dec. 7) 41. Appellant also denied consuming alcohol as part of his written response to the Statement of Charges. AX 3.

Appellant called DW, Acting Chief, DLC Retail Operations as a witness. DW testified that when DLC employees are suspected of drinking or being under the influence of alcohol while on the job she and other DLC staff will immediately visit the store and confront the employee. Tr. (Dec. 7) 81, 99. They will then take the employee to the Office of Medical Services for a blood alcohol content (BAC) test. Tr. (Dec. 7) 81-82. In most cases the employees have tested positive with a BAC of .08 or higher and are not allowed to return to work in that condition, but employees with lower BAC levels are also removed from duty. Tr. (Dec. 7) 82, 97. In those circumstances, DLC typically agrees to enter into a Last Chance Agreement with the employee under which the employee agrees to random testing without the need for probable cause and Employee Assistance Program counseling. Tr. (Dec. 7) 83-84. The agreement also provides that the employee is subject to immediate dismissal if he or she fails an alcohol test or otherwise violates the Last Chance Agreement. Tr. (Dec. 7) 101. DW also stated that a first offense of drinking on County property does not typically subject an employee to dismissal. Tr. (Dec. 7) 101-02.

Both parties agreed to stipulate as to the authenticity and admissibility of the other party's exhibits. Accordingly, the Board admitted into evidence County Exhibits 1-6:

1. Appellant's August 14, 2017, MSPB Appeal Form and Letter
2. August 9, 2017, Amended Notice of Disciplinary Action
3. July 24, 2017, Notice of Disciplinary Action
4. June 26, 2017, Statement of Charges
5. Timecards
6. January 6, 2017, video (CD-ROM)

Appellant Exhibits 1-6 were also admitted:

1. Appellant's August 14, 2017, MSPB Appeal Form Letter
2. DLC's June 26, 2017, Statement of Charges
3. Appellant's June 27, 2017, Written Response to Statement of Charges
4. Appellant's Sales Receipt, January 3, 2017
5. DLC's July 24, 2017, Notice of Dismissal
6. DLC's August 9, 2017, Amended Notice of Dismissal

In addition, a one page exhibit containing two screen shots from the Liquor Store video (County Exhibit 6), was admitted as Board Exhibit 1.

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-2. Policy on disciplinary actions.

(a) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(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.

(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.

(2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(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 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 any established policy or procedure; . . .
- (e) fails to perform duties in a competent or acceptable manner; . . .
- (h) is negligent or careless in performing duties; . . .
- (k) is impaired or under the influence of alcohol or an unprescribed controlled substance while at work or when reporting to work;

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-14. Hearing authority of board, which states in applicable part,

(c) Decisions. . . The board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following: . . .

- (2) Order change in position status, grade, work schedule, work conditions and work benefits; . . .
- (6) Grant employee participation in an employee benefit previously denied (training, educational program or assistance, preferential or limited work assignments and schedules, overtime pay or compensatory leave); . . .
- (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale; . . .
- (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

Montgomery County Personnel Regulations (MCPR), 2001, Section 32, Employee Drug and Alcohol Use and Drug and Alcohol Testing, (as amended July 12, 2005, October 21, 2008, July 12, 2011, July 24, 2012, and June 30, 2015), provides, in pertinent part:

§ 32-2. Definitions

(tt) *Under the influence or impaired:* A state or condition less than intoxication where consumption of alcohol or drugs has affected an individual's normal coordination, judgment, or discretion.

§ 32-3. Prevention of Prohibited Drug Use and Alcohol Misuse by County Employees under County Regulations.

(a) *Drug and alcohol prohibitions that apply to job applicants and County employees.*

. . .

(2) A County employee . . . must not: . . .

(D) consume alcohol while at work or on duty;

(E) be impaired by, or under the influence of, alcohol while at work, on County property, or on duty. . .

Montgomery County Personnel Regulations (MCPR), 2001, Section 10, Employee Compensation, (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015), provides, in part:

§ 10-5. Salary-setting policies.

(d) *Salary on demotion.*

(3) *Disciplinary demotion or demotion resulting from unsatisfactory performance.* If an employee is demoted for cause or for unsatisfactory performance, the department director must reduce the employee's salary by:

(A) no more than 20 percent of base salary; or

(B) more than 20 percent, if necessary to bring the employee's salary to the maximum salary of the new pay grade or pay band.

ISSUE

Was Appellant's dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

Standard of Review

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See,*

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) (“the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability”).

The County Has Proven by a Preponderance of the Evidence That Appellant Allowed an Employee to Take an Unpurchased Bottle of Alcohol from the County Liquor Store

The first charge against Appellant was that he improperly gave TA permission to take a bottle of champagne out of the store inventory without paying. CX 2. The facts are not in dispute. Appellant acknowledged using poor judgment in allowing TA to take a bottle of champagne from the County liquor store before it had been purchased. Tr. (Dec. 7) 48.

Appellant suggests that his misstep was an isolated lapse in judgment, and that his intent was to pay for the champagne immediately upon his return to work. Appellant produced a receipt to show that he did indeed pay for the item. However, the County showed, and Appellant admits, that it is the clear and eminently reasonable policy of DLC to require payment for product before it is taken from the store by an employee obtaining the product for personal use.

The County has thus proven by a preponderance of the evidence that Appellant’s lapse in judgment regarding his holiday gift to TA was in contravention of MCPR § 33-5(h) (negligent or careless in performing duties) and MCPR § 33-5(c) (violated an established policy or procedure).

The County Failed to Prove That Appellant Violated Timecard and Attendance Policies

The County introduced evidence concerning the timecards and attendance of TA. CX 5. The testimony and documentary evidence was, however, ambiguous and unclear. Key information on the exhibits is simply illegible. *See, e.g.*, Tr. (Nov. 15) 32-33. While County witnesses mentioned videos of TA leaving the store without clocking out, those videos were not available to the Board. Tr. (Nov. 15) 28-29, 60, 69, 74; Tr. (Dec. 7) 16. The evidence and testimony simply do not clearly link Appellant to the alleged misbehavior by TA.

We conclude that the County failed to prove by a preponderance of the evidence that Appellant violated timecard and attendance policies with regard to TA.

The County Failed to Prove That Appellant Violated DLC Policies on Management Scheduling

The County made no real attempt to present evidence on the charge that on multiple weekends neither Appellant nor the store manager was there to close the store, in violation of established policy and procedure. The only evidence the County provided concerning Appellant’s work habits came from JF, the store manager, who testified that Appellant tended to come in to work early and was dependable.

We thus find that the County failed to prove that Appellant violated policies on management scheduling.

The County Has Proven by a Preponderance of the Evidence That Appellant was Drinking on the Job at the County Liquor Store

The County alleged that Appellant would drink beer while on duty at the County store, and the NODA charged him with violating MCPR § 33-5(k), being impaired or under the influence of alcohol while at work. MCPR § 32-2(tt) defines under the influence or impaired as a “state or condition less than intoxication where consumption of alcohol or drugs has affected an individual’s normal coordination, judgment, or discretion.” While the County introduced evidence suggesting that Appellant would have a beer at the end of his shift, it made no attempt to demonstrate that he was “under the influence or impaired.” The video evidence provided no visual indication of impairment, CX 6; Tr. (Nov. 15) 65-66, and no County witness could adequately explain how the consumption of a single beer would necessarily result in impairment. Moreover, it does not appear that the County ever subjected Appellant to blood alcohol testing, even though DW testified that it was standard procedure for DLC employees suspected of being under the influence or impaired. Accordingly, we cannot uphold the charge that Appellant violated MCPR § 33-5(k).

The NODA did not also cite to MCPR § 33-5(c) (“violates any established policy or procedure”) and MCPR § 32-3(a)(2)(D) (County employees must not “consume alcohol while at work or on duty”) under this charge. Nevertheless, the NODA and the Statement of Charges provide detail concerning the factual and legal basis for the charges, and explicitly address the impropriety of drinking on the job and on County property. The proper standard to assess the adequacy of charges is whether the County has given adequate notice so as to enable the employee to make an informed response. *See* MSPB Case No. 17-15 (2017); MSPB Case No. 17-12 (2017); MSPB Case No. 08-09 (2008); MSPB Case No. 07-10 (2007); and MSPB Case No. 07-13 (2007). Although the omission makes the NODA less precise, there was sufficient specificity and clarity concerning the nature of the charges to enable Appellant to mount an adequate defense to the charge of consuming alcohol while at work and on duty. We thus conclude that the NODA gave detail sufficient to provide Appellant with adequate notice under MCPR §33-6. *See Regan v. Board of Chiropractic Examiners*, 120 Md. App. 494, 519-20 (1998), *aff’d* 355 Md. 397 (1999).¹

It is undisputed that County policy prohibits employees from consuming alcohol while on duty and on County property. Tr. 68; AX 3, p. 2; MCPR § 32-3(a)(2)(D) (County employees must not “consume alcohol while at work or on duty”). The County produced two credible witnesses, JS and JU, who testified that Appellant admitted during an April 3, 2017, interview that at the end of his work day he would drink a beer in the store. While Appellant did not admit to this at the hearing or in his written response to the Statement of Charges (AX 3), we found the two witnesses who testified that Appellant admitted having a beer at closing time to be credible.

¹ Because of the County’s failure to reference MCPR § 33-5(c) (“violates any established policy or procedure”) and MCPR § 32-3(a)(2)(D) (may not “consume alcohol while at work or on duty”), it is arguable that this charge could be limited to what was specifically pled, *i.e.*, being impaired or under the influence of alcohol while at work. However, the NODA states that the charge relates to “drinking on the premises and before your shift was up,” CX 2, and Appellant clearly understood this charge to encompass drinking on the job while on duty when responding to the SOC. AX 3, p. 2; Tr. (Nov. 15) 68. While the Board finds that the charge of drinking at the store and on duty has been adequately pled in this case, we again caution the County that failure to specifically label each of its charges in a NODA and SOC, provide a narrative in support of each charge, and include all relevant citations to MCPR or other law or policy, risks dismissal of the charges in another case.

While it is true that the testimony of JS and JU concerning the county's investigation into the allegations against Appellant, including the statements of TA, may contain hearsay, reliable hearsay is admissible in an administrative proceeding. APA § 2A-8(e). MSPB Case No. 17-13 (2017). *See Woodward v. Office of Personnel Management*, 74 M.S.P.R. 389, 394 (1997) (investigative reports composed largely of hearsay evidence properly admitted into evidence). Moreover, in an administrative hearing a party's case may rely entirely on hearsay. *Eger v. Stone*, 253 Md. 533, 542 (1969) ("not only is hearsay evidence admissible in administrative hearings in contested cases but . . . such evidence, if credible and of sufficient probative force, may indeed be the sole basis for the decision of the administrative body."). In any case, Appellant's admissions are admissible as exceptions to the hearsay rule. Md. Rule 5-803(a).

As the Board has discussed in previous decisions, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 13-03 (2013), *citing Haebe v. Department of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002). One way a trier of fact may assess credibility is by observing the demeanor of the witnesses.

Appellant's denial that he drank on the job, was the least persuasive aspect of his testimony. Appellant's testimony was contradictory to his previously made statements to investigators. His testimony was also inconsistent. Appellant said that he had consumed alcohol on the job in the past, but not "recently," yet also testified that while having a beer at the end of a shift was "technically" a violation of County policy "it's really the culture of the store." Tr. (Dec. 7) 41, 44.

The January 6, 2017, video shows behavior which appears more consistent with Appellant's earlier admission to investigators than his subsequent denials. Appellant admitted keeping a substantial personal supply of Schlitz beer at the store, and the video shows Appellant filling the red solo cup in a location not completely visible from the video camera. CX 6; Tr. (Dec. 7) 28, 53-54. The video does not show Appellant filling the red solo cup from an orange juice container. Moreover, the liquid in Appellant's red solo cup on store video does appear more likely to be beer than, as Appellant claimed, orange juice. CX 6; Board Exhibit 1. So too, his actions recorded on the video tapes are more consistent with one savoring a beer than, as Appellant testified, one taking medication. CX 6; Tr. (Dec. 7) 41, 55, 59. We conclude that the visual evidence provided by the video provides more support for the charge of drinking a beer on the job than not.

We find that the testimony of the County witnesses was plausible, consistent, and supported by the visual evidence supplied by the store video. On the other hand, Appellant's denials on this point were self-serving, implausible, and ultimately not credible. *See* MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010). Accordingly, based on Appellant's demeanor, and the self-serving implausible, and inconsistent nature of his testimony, the Board concludes that Appellant was not a credible witness with regard to whether he was drinking beer at the end of his workday on January 6, 2017.

Accordingly, we uphold the charge that Appellant violated County policy by consuming alcohol while on duty in the DLC store.

Degree of Discipline

The County argues that Appellant's behavior was inexcusable for an experienced manager and supervisor holding a position of trust and responsibility. They further assert that despite Appellant's clean record, under the County's Personnel Regulations progressive discipline may be bypassed in situations involving egregious misconduct or a serious violation of policy. MCPR § 33-2(c)(2).

As discussed above, Appellant acknowledged using poor judgment in allowing TA to take a bottle of champagne from the County liquor store even though it had not been purchased. He also testified that he bought gifts of alcoholic beverages from the DLC store for female employees, but never for male employees. Tr. (Dec. 7) 58.

Despite Appellant's misconduct, there are mitigating factors that must be considered in determining the appropriate level of discipline. The Board notes that in over 20 years of County service Appellant has no record of any prior formal complaint or discipline, and his supervisor considered him to be an exemplary employee. While it is true that MCPR § 33-2(c)(2) does not require that the County apply discipline in a particular order or begin with the least severe penalty when an employee has engaged in serious misconduct or a serious violation of policy or procedure, under the circumstances of this case, where there is evidence that other employees engaging in similar behavior have been permitted to enter into Last Chance Agreements, more consideration for the principles of progressive discipline is warranted.

On the other hand, when there are proven allegations of misconduct "[t]he County is allowed to hold a supervisor to a higher standard as a supervisor holds a position of trust and responsibility and should be a role model for his subordinates." MSPB Case No. 05-07 (2005) (demotion from management appropriate discipline for serious misconduct by a supervisor). See *Fischer Department of Treasury*, 69 M.S.P.R. 614, 619 (1996) (removal mitigated to a demotion to a non-supervisory position); *Lampack v. U.S. Postal Service*, 27 M.S.P.R. 468, 470 (1985) (removal mitigated to a demotion to a non-supervisory position); *Dobroski v. U.S. Marshals Service*, 12 M.S.P.R. 499, 502 (1982) (dismissal of supervisor mitigated to a demotion to a nonsupervisory position following an incident of shoplifting a bottle of liquor when appellant had a long and unblemished record).

The County has every right to expect a liquor store manager to maintain strict adherence to DLC and County policies regarding inventory control and drinking on the job. Appellant's cavalier attitude about these rules, and the message that sends to subordinates, is unacceptable for one charged with responsibility to manage and supervise a DLC liquor store.

Where, as here, the Board has not sustained all of the County's charges, the Board may mitigate the discipline to the maximum reasonable penalty. MSPB Case No. 13-02 (2013). See *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). Accordingly, weighing the nature of Appellant's misconduct together with the foregoing mitigating factors, the Board has determined that consistent with the concept of progressive discipline, the maximum appropriate penalty for Appellant's misconduct is a demotion to a non-managerial position with the minimum possible grade and salary reduction.

ORDER

Based upon the foregoing analysis the Board hereby **ORDERS**

1. That the dismissal of Appellant from County employment be rescinded;
2. That Appellant be reinstated to County service and demoted to Liquor Store Clerk II, effective August 14, 2017, with back pay;
3. That Appellant's rate of pay be at the maximum of the applicable pay grade for a Liquor Store Clerk II, in accordance with MCPR § 10-5(d)(3); and
4. That within forty-five (45) days of this Order the County shall complete the actions ordered by the Board and provide written certification of full compliance to the Board.

The penalty imposed on Appellant having been significantly mitigated, the County must pay reasonable attorney fees and costs. Appellant shall submit a detailed request for attorney fees to the Board, with a copy to the Office of the County Attorney, within ten (10) working days from the date of this Final Decision. The County Attorney will have ten (10) working days from receipt to respond. Fees will be determined in accordance with Montgomery County Code, § 33-14(c)(9).

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 26, 2017

CASE NO. 18-02

SUPPLEMENTAL ORDER

On December 26, 2017, the Merit System Protection Board (MSPB or Board) issued a Final Decision and Order in the above-entitled matter. The Order provided, in part:

1. That the dismissal of Appellant from County employment be rescinded;
2. That Appellant be reinstated to County service and demoted to Liquor Store Clerk II, effective August 14, 2017, with back pay;
3. That Appellant's rate of pay be at the maximum of the applicable pay grade for a Liquor Store Clerk II, in accordance with MCPR § 10-5(d)(3). . . .

On January 2, 2018, following the issuance of the Final Decision and Order, Appellant's attorney raised questions concerning interpretation of the remedies ordered. The specific questions were:

Has [Appellant] been reinstated to work back at his Clarksburg location? Also, can you clarify the Board's meaning/intention regarding [Appellant]'s back pay? Is he entitled to back pay from when he was initially placed on Administrative Leave without pay on June 26, 2017 (County Exhibit #4), but that the rate of his backpay transitions to Liquor Store Clerk II on August 14, 2017, or will his back pay be calculated beginning August 14, 2017?

Electronic mail from KR to MSPB Executive Director, January 2, 2018.

The Board treated Mr. R's request as a motion and requested that the County respond within five (5) calendar days. The County provided its response on January 5, 2018. Electronic mail from Associate County Attorney to MSPB Executive Director, January 5, 2018. The Board has reviewed and considered the questions raised by Appellant.

The June 26, 2017, Statement of Charges referenced in Mr. R's email removed Appellant from duty, stating: "Due to your behavior and the disruption your presence in the workforce would cause, you are also hereby immediately relieved from duty without pay under MCPR 23 -6(a)(1) and 23-6(a)(2) and 33-7(a)."

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR) § 23-6. Placing an employee on LWOP.

(a) *LWOP associated with a disciplinary action.* Under Section 33 of these Regulations, the department director may place an employee on LWOP:

- (1) during an investigation, as described in Section 33-3(f), that may lead to disciplinary action against the employee;
- (2) after disciplinary action is proposed against the employee; or
- (3) before and during the employee's trial for offenses related to the employee's County employment.

MCPR § 33-3. Types of disciplinary actions.

(f) *Suspension pending investigation of charges or trial.*

(1) *Purpose of suspension pending investigation of charges or trial.* A department director may place an employee in LWOP status for an indefinite period while the employee is:

- (A) being investigated by the County or a law enforcement agency for an offense that has a nexus with (is reasonably related to) County employment;
- or
- (B) waiting to be tried for an offense that is job-related or has a nexus with County employment.

(2) *Employee's return to work after suspension.*

(A) The CAO must allow the employee to return to work unless the County dismisses or terminates the employee or the employee is convicted by a court.

(B) The CAO must give the employee back pay and benefits, subject to subparagraph (C) below, except as provided in a separate disciplinary action imposed by the County.

(C) The CAO's approval of back pay is subject to the following:

(i) the employee must provide documentation of other earnings or income during the period of suspension and must obey all County regulations on secondary employment; and

(ii) back pay must equal the amount the employee would have earned during all or part of the period of suspension less the amount the employee earned in other employment during the period.

MCPR § 33-7. Immediate removal of an employee from duty.

(a) An immediate or higher level supervisor may immediately relieve an employee from duty for serious misconduct or if the presence of the employee will cause or continue a disruption in the workplace.

(b) The supervisor who took the action must submit a recommendation for appropriate disciplinary action to the department director by the end of the workday following the day the employee is relieved from duty.

(c) A supervisor must ensure that an employee removed from duty is either on administrative leave or on another appropriate type of leave until the department director takes disciplinary action against the employee or allows the employee to return to work. An employee who is ill or otherwise medically unfit for duty during the period of time before a disciplinary action is taken may be required to use sick or annual leave or LWOP.

Montgomery County Code, § 33-14(c):

The board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

(4) Order reinstatement with or without back pay, although the chief administrative officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility. . .

ANALYSIS

Has [Appellant] been reinstated to work back at his Clarksburg location?

The Board's December 26, 2017, Order did not purport to require the County to assign Appellant to a particular position, job assignment, or duty location. This is consistent with Montgomery County Code, § 33-14(c)(4), which provides that the Board may "Order

reinstatement with or without back pay, although the chief administrative officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility.”

The Board has previously recognized that even in cases where the Board has completely rescinded discipline and reinstated the Appellant, the Code “unequivocally grants the County the unilateral discretion to reinstate the Appellant to a position other than” the specific position from which the Appellant was dismissed. *See Supplemental Decision on Remedial Issues*, MSPB Case No. 01-08 (November 7, 2002). In this case, where Appellant’s dismissal has been rescinded and he has been reinstated to County service, but demoted to Liquor Store Clerk II, the limitations of § 33-14(c)(4) appear equally applicable. Moreover, the Board is unaware of any provision in the County personnel regulations which would entitle Appellant to be assigned to a specific work location upon reinstatement.

If upon his reinstatement and assignment Appellant believes that the County’s action is inconsistent with the Board’s order or otherwise improper he may seek enforcement of the Board’s order or file a grievance. The Board does not and cannot express any opinion as to the merits of any potential action the County or Appellant may take, or whether procedural or jurisdictional requirements have been satisfied.

Is he entitled to back pay from when he was initially placed on Administrative Leave without pay on June 26, 2017?

The Board advises the parties that Appellant is entitled to reimbursement for back pay and benefits for the period of Appellant’s suspension pending dismissal. *See* MCPR § 33-3(f); MSPB Case No. 05-07 (2005). Under the authority granted by Montgomery County Code, § 33-14(c)(4), the Board has the discretion to decide whether interim earnings should be deducted from back pay. *Supplemental Decision on Remedial Issues*, MSPB Case No. 01-08 (November 7, 2002).

Although the County argues that back pay should be offset by any compensation received from secondary employment, the record suggests that there are no outside interim earnings. Hearing Transcript, December 7, 2017 at p. 34. Nevertheless, Appellant shall cooperate in good faith with the County’s efforts to compute the correct amount of back pay due, and promptly provide all information that may be necessary to verify the absence or existence of any interim earnings. In the absence of any proof of outside interim earnings, no offset shall be required.

As the Board has rescinded the dismissal and reinstated Appellant, the County shall restore any benefits lost by Appellant, including leave benefits. To avoid double compensation, the amounts of any paid leave actually received by Appellant may be deducted from back pay.

[Will] the rate of his backpay transitions to Liquor Store Clerk II on August 14, 2017, or will his back pay be calculated beginning August 14, 2017?

Since the Board’s Order specifies that the disciplinary action (demotion) is effective August 14, 2017, Appellant’s back pay during the suspension pending prior to that date should be at Appellant’s rate of pay prior to August 14. The County concedes that Appellant’s compensation

during that time should be at the rate associated with his status as a Liquor Store Assistant Manager. Back pay for the period after August 14, 2017, shall be as a Liquor Store Clerk II, at a rate in compliance with the Board's Order.

ORDER

For the reasons discussed above, it is **ORDERED** that the Board's Final Decision and Order of December 26, 2017, be clarified as follows:

1. That the Board's Order that Appellant be reinstated to County service and demoted to Liquor Store Clerk II, effective August 14, 2017, does not require placement in a particular position or work location;
2. That Appellant's back pay for the period from June 26, 2017, to August 14, 2017, be calculated at the pay rate associated with his status as a Liquor Store Assistant Manager;
3. That Appellant's rate of pay effective August 14, 2017, be at the maximum of the applicable pay grade for a Liquor Store Clerk II, in accordance with MCPR § 10-5(d)(3), and that back pay for the period on and after that date be calculated accordingly;
4. That Appellant and the County shall cooperate in good faith with regard to the County's efforts to calculate the appropriate amount of back pay due, and Appellant shall promptly provide all information necessary to verify the absence or existence of any interim earnings;
5. That the County shall restore any benefits lost by Appellant, including leave benefits, provided that Appellant's back pay may be offset by any paid leave received; and
6. That within forty-five (45) days of this Order the County shall complete the actions ordered by the Board and provide written certification of full compliance to the Board.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
January 9, 2018

APPEALS PROCESS DENIAL OF EMPLOYMENT

Montgomery County Code, § 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 § 6-14 of the Montgomery County Personnel Regulations (MCPR), 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 an employee or applicant has ten (10) working days after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position to file an appeal with the Board. The appeal must be filed in writing or by completing the Appeal Form on the Board's website, available at: <http://www.montgomerycountymd.gov/MSPB/AppealForm.html>. The appeal must include a copy of the notification of nonselection or nonpromotion. MCPR § 35-4(d)(3). Copies of such documents may be uploaded with the online Appeal Form.

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. MCPR § 35-8. 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 additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

During fiscal year 2018, the Board issued the following decisions on appeals concerning the denial of employment.

EMPLOYMENT DECISIONS

CASE NO. 18-13

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of Montgomery County's Office of Human Resources (OHR) Director to rescind a conditional offer of employment. The Appeal was officially filed October 30, 2017, and the County filed its response to the appeal (County Response) on December 11, 2017.¹ The Appellant did not exercise his right to make final comments in reply to the County's submission. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a position as a HVAC Mechanic I and was given a conditional offer of employment with the Montgomery County Department of General Services (DGS). The offer of employment was contingent upon Appellant's successful completion of a pre-employment medical evaluation, including drug and alcohol screening through urinalysis. County Response, p. 1. On September 29, 2017, Appellant went to the Occupational Medical Services (OMS) offices for the required physical examination and urine drug screening. County Response, Exhibit 1.

Appellant and the County provided similar accounts of what happened at the OMS offices when Appellant was asked to provide a urine specimen, although there is slight variation in some of the details. According to Appellant:

When I tried to submit the specimen, I accidentally voided loose stool all over the cup and myself. The collector came in and was upset and asked me to come out of the bathroom, and advised we would collect the urine specimen later. I was covered with feces, but was taken to complete the X-ray which I did. Feces was all over the office where I had been and I was very embarrassed and ashamed. A staff member then provided me with a red biohazard bag and a pair of shorts and asked me to change my clothes until the exam was over. I explained to him that I was not comfortable walking around partially unclothed and wearing someone else's shorts. I became tearful. The physician came in and asked me if I had ever provided a urine for a job, and whether or not this had happened before. I told him no. He told me he had never experienced this kind of event either, and informed me I may get a refusal letter.

Appeal, p.2. A doctor of OMS described the events as follows:

¹The appeal was filed online October 26, 2017, at 4:58:46 p.m., after Merit System Protection Board office hours. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

On 9/29/17, [Appellant] came to OMS for a physical examination and urine drug screen for the position of HVAC mechanic. Before coming back into the clinic with the nurse, he filled out all paper work, including the authorization for the release of information related to the urine drug screen. The nurse explained the UDS process, and gave [Appellant] the cup and escorted him to the bathroom, which he entered without incident. The nurse noted that the applicant took a long time in the bathroom and came out with an empty cup, saying to the nurse, "I can't do this." He was very loud and animated, and I came down the hallway to see what was happening. [Appellant] was in the hallway, kicking around his legs and stating that he had stooled all over himself and, "I can't do this, I can't do this." In fact there was stool on his jeans which he was kicking around to the floor. We offered him some clean clothes, and to come to the men's locker room to change and then complete the drug screen. I went with him into the men's locker room. He put the clean clothes on the floor and said, "I'm leaving," I explained to him that if he left without giving the specimen and completing the process, that would be considered a refusal to test, which equates to a positive drug screen. He responded that he didn't care what I said, he was leaving, and he went straight down the hall out of the clinic.

County Response, Exhibit 1.

The differences in the specific details of the unfortunate events of September 29, 2017, are immaterial. It is undisputed that Appellant (1) began the testing process; (2) did not provide a urine specimen; (3) was warned that refusing to provide a urine specimen during that visit to OMS may result in a withdrawal of the conditional offer of employment; and, (4) left the OMS offices without providing a urine specimen. Appeal, p. 2; County Response, Exhibit 1.

By letter dated October 13, 2017, Appellant was notified by the OHR Director that the conditional offer of employment as a HVAC Mechanic was withdrawn due to his failure to pass the medical examination. Appeal, Attachment 1. Appellant was informed that the Medical Examiner had determined that he was "medically not acceptable to perform the duties of a HVAC Mechanic. *Id.*

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Merit System Law, 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 discrimination prohibited by chapter 27, "Human Relations and Civil Liberties," of this Code, may be filed in the manner prescribed therein. 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. Appeals filed with the merit system protection

board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

§ 6-14. Appeals by applicants. 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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015), Section 8, Medical Examinations and Reasonable Accommodation, which states in applicable part:

§ 8-1. Definitions.

(b) *Conditional offer*: An offer of County employment that the OHR Director may withdraw if the applicant fails to meet the medical requirements for the position.

§ 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.

(2) An applicant who receives a conditional offer of employment in a County position must:

...

(B) undergo other medical examinations or tests as required by the medical exam protocol that the EME has determined is appropriate for the County position.

§ 8-11. Appeals by applicants and grievance rights of employees.

- (a) A non-employee applicant or employee applicant who is disqualified from consideration for a position or rated as medically unfit for appointment to a position may file an appeal directly with the MSPB under Section 35 of these Regulations.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended July 12, 2005, October 21, 2008, July 12, 2011, July 24, 2012, and June 30, 2015), Section 32, *Employee Drug and Alcohol Use and Drug and Alcohol Testing*, which provides, in pertinent part:

§ 32-1. Purpose. This section of the Personnel Regulations is intended to: . . .

- (c) establish the conditions under which applicants and employees may be tested for alcohol or drug use. . . .

§ 32-3. Prevention of Prohibited Drug Use and Alcohol Misuse by County Employees under County Regulations.

(h) Drug and alcohol testing of job applicants and employees.

(18) Refusal to take a drug or alcohol test.

(A) Any of the following on the part of an employee is considered a refusal to submit to drug or alcohol testing and is considered to be the same as a verified positive drug test result or an alcohol test with an alcohol concentration of 0.02 or higher:

- (ii) failing to remain at the testing site until the testing process is complete, but this does not apply to an applicant who leaves the testing site for a pre-employment drug test before the testing process begins . . .

(B) A department director must not select an applicant for a position that requires a pre-employment drug test if the applicant refuses to be tested for drugs.

(20) Rights of job applicants and employees subject to drug or alcohol testing.

(B) If the applicant or employee refuses to be tested, OMS must tell the applicant or employee of the consequences for refusing.

(21) Appeal rights of job applicants and employees subject to drug or alcohol testing.

(A) A job applicant may appeal to the MSPB under Section 35 of these Regulations if the applicant was denied employment or assignment to the position sought

because of a verified drug test result, alcohol test result, or refusal to take a drug test.

ISSUE

Was the County's decision to rescind the conditional offer of employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factor?

ANALYSIS AND CONCLUSIONS

Appellant has the burden of proving that the County's decision to rescind its conditional offer of employment was arbitrary, capricious, or based on other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 15-01 (2015). The County argues that Appellant cannot meet his burden of proof under the Personnel Regulations and County Code to show that the County's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors. The Board agrees and concludes that Appellant has failed to meet this burden.

Although Appellant's embarrassing accident while attempting to provide a urine specimen may have been unintended and unfortunate, his decision to leave the OMS testing site without providing a testable specimen, despite being warned as to the consequences, constituted a refusal under the Personnel Regulations. MCPR § 32-3(h)(18) & (20). *Cf.* MSPB Case No. 15-01 (2015) (Failure to provide complete and accurate information during the application process constitutes a sufficient basis to rescind an offer of employment). The County acted appropriately and in conformance with the Personnel Regulations when it warned Appellant that his refusal to remain at the test site until he could provide a urine sample would likely result in a withdrawal of the conditional offer of employment.

Appellant nevertheless requests that he be given another opportunity to complete the testing process. Appeal, p. 2. The County correctly argues that the Personnel Regulations contain no obligation that the County allow Appellant to try again. County Response, p. 2. Indeed, MCPR § 32-3(h)(18)(A)(ii) specifically provides that after the pre-employment drug testing process begins, an applicant who fails "to remain at the testing site until the testing process is complete" shall be considered to have refused to have submitted to the test.

The Board finds that the County was reasonable in rescinding the conditional offer of employment to Appellant based on his failure to provide a urine specimen and his refusal to remain at the test site until he could provide a sample. Accordingly, the OHR Director's decision was not arbitrary, capricious, or otherwise unlawful.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of HVAC Mechanic.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to

Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
February 12, 2018

CASE NO. 18-20

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of Montgomery County's Office of Human Resources (OHR) Director to rescind a conditional offer of employment. The Appeal was officially filed February 5, 2018.¹ Because the appeal did not include a copy of the notification of non-selection, the Board stayed the processing of the appeal until Appellant provided the necessary document. Appellant subsequently provided a copy of notification of non-selection dated January 19, 2018, (Appellant Exhibit (AX) 1). The County filed its response to the appeal (County Response) on April 2, 2018, which included one exhibit (County Exhibit (CX) 1). The Appellant did not exercise his right to make final comments in reply to the County's submission. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a position as a Community Services Aide III with the Department of Health and Human Services (DHHS or Department) and was given a conditional offer of employment. The offer of employment was contingent upon Appellant's successful completion of a pre-employment medical evaluation, including drug and alcohol screening through urinalysis. County Response, p. 2. On December 26, 2017, Appellant went to the Occupational Medical Services (OMS) offices for the required physical examination and urine drug screening. County Response, p. 2; CX 1.

According to Appellant:

I was unaware that I had to take a hearing and vision test before to *[sic]* medical exam. I thought it was just a urine exam. I informed the staff when I arrived I had to go to work later that day. I was in the office for over two hours. If I had known I would had *[sic]* planned accordingly.

¹The appeal was filed online on Friday, February 2, 2018, at 5:59 p.m., after normal business hours on a day that the Merit System Protection Board office is closed. Accordingly, the appeal is considered to have been officially received the next Board business day. See MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015). On February 6, 2018, the Board also received a letter expressing Appellant's desire to appeal.

Appeal, p. 2. As relief Appellant requests that he be allowed to retake the medical examination. *Id.*

The County maintains that Appellant began the testing process, but when he turned in a cold urine specimen he was told that he would have to provide a urine specimen while he was being observed. County Response, p. 2; CX 1. According to the progress notes of the Registered Nurse, Appellant's "behavior changed" and he said he could not stay because of child care issues. *Id.* Appellant was warned that by leaving before an acceptable specimen was provided he would be considered to have refused to test. *Id.* Appellant nevertheless left the OMS offices without providing an acceptable specimen. *Id.*

By letter dated January 19, 2018, Appellant was notified by the OHR Division Manager that the conditional offer of employment as a Community Services Aide III with the Department of Health and Human Services was withdrawn due to his failure to pass the medical examination. AX 1; County Response, p.2.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Merit System Law, 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 discrimination prohibited by chapter 27, "Human Relations and Civil Liberties," of this Code, may be filed in the manner prescribed therein. 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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

§ 6-14. Appeals by applicants. 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.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015), Section 8, Medical Examinations and Reasonable Accommodation, which states in applicable part:

§ 8-1. Definitions.

(b) *Conditional offer*: An offer of County employment that the OHR Director may withdraw if the applicant fails to meet the medical requirements for the position.

§ 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.

(2) An applicant who receives a conditional offer of employment in a County position must:

. . .

(B) undergo other medical examinations or tests as required by the medical exam protocol that the EME has determined is appropriate for the County position.

§ 8-11. Appeals by applicants and grievance rights of employees.

(a) A non-employee applicant or employee applicant who is disqualified from consideration for a position or rated as medically unfit for appointment to a position may file an appeal directly with the MSPB under Section 35 of these Regulations.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended July 12, 2005, October 21, 2008, July 12, 2011, July 24, 2012, and June 30, 2015), Section 32, *Employee Drug and Alcohol Use and Drug and Alcohol Testing*, which provides, in pertinent part:

§ 32-1. Purpose. This section of the Personnel Regulations is intended to: . . .

(c) establish the conditions under which applicants and employees may be tested for alcohol or drug use. . . .

§ 32-3. Prevention of Prohibited Drug Use and Alcohol Misuse by County Employees under County Regulations.

(h) **Drug and alcohol testing of job applicants and employees.**

(18) *Refusal to take a drug or alcohol test.*

(A) Any of the following on the part of an employee is considered a refusal to submit to drug or alcohol testing and is considered to be the same as a verified positive drug test result or an alcohol test with an alcohol concentration of 0.02 or higher:

(ii) failing to remain at the testing site until the testing process is complete, but this does not apply to an applicant who leaves the testing site for a pre-employment drug test before the testing process begins . . .

(iii) failing to provide a urine specimen for a drug test . . .;

(iv) in the case of a directly observed or monitored specimen collection for a drug test, failing to permit the observation or monitoring of the collection of a specimen; . . .

(vi) failing or refusing to take an additional drug test the employer or collector has directed the employee to take;

(viii) failing to cooperate with any part of the testing process, such as refusing to empty pockets when so directed by the collector, behaving in a confrontational way that disrupts the collection process, or engaging in conduct that obstructs the drug or alcohol testing process or makes the test impossible; . . .

(B) A department director must not select an applicant for a position that requires a pre-employment drug test if the applicant refuses to be tested for drugs.

(20) *Rights of job applicants and employees subject to drug or alcohol testing.*

(B) If the applicant or employee refuses to be tested, OMS must tell the applicant or employee of the consequences for refusing.

(21) *Appeal rights of job applicants and employees subject to drug or alcohol testing.*

(A) A job applicant may appeal to the MSPB under Section 35 of these Regulations if the applicant was denied employment or assignment to the position sought because of a verified drug test result, alcohol test result, or refusal to take a drug test.

ISSUE

Was the County's decision to rescind the conditional offer of employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factor?

ANALYSIS AND CONCLUSIONS

The County initially asserts that the appeal was untimely filed, arguing that the Appeal of the January 19, 2018, nonselection decision was due on February 2, 2018. County Response, p.2. It is the Board's view, however, that Fridays, when the Board's offices are closed, do not count as "working days" for purposes of MCPR § 35-3, and that the deadline for submission of the appeal was therefore February 6, 2018. *See* Montgomery County Code, § 1-301(c)(3). The County's motion to dismiss is thus denied.

Appellant has the burden of proving that the County's decision to rescind its conditional offer of employment was arbitrary, capricious, or based on other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). The County argues that Appellant cannot meet his burden of proof under the Personnel Regulations and County Code to show that the County's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors. It is notable that despite expressly being given the opportunity, Appellant did not dispute the County's assertions or, indeed, provide any reply to the County's submission.

The County OMS was acting in conformance with its authority when it asked Appellant to take an additional urine specimen under observation. MCPR § 32-3(h)(18)(A)(iv) and (vi). Appellant's decision to leave the OMS testing site without providing an acceptable, testable specimen, despite being warned as to the consequences, constituted a refusal under the Personnel Regulations. MCPR § 32-3(h)(18) & (20); MSPB Case No. 18-13 (2018) (Failure to provide testable urine sample constitutes a sufficient basis to rescind a conditional offer of employment). The County acted appropriately and in conformance with the Personnel Regulations when it warned Appellant that his refusal to remain at the test site until he could provide an acceptable urine sample would likely result in a withdrawal of the conditional offer of employment.

Appellant nevertheless requests that he be given another opportunity to complete the testing process. Appeal, p. 2. The County correctly argues that the Personnel Regulations contain no obligation that the County allow Appellant to try again. County Response, p. 2. Moreover, MCPR § 32-3(h)(18)(A)(ii) specifically provides that after the pre-employment drug testing process begins, an applicant who fails "to remain at the testing site until the testing process is complete" shall be considered to have refused to have submitted to the test.

The Board finds that the County was reasonable in rescinding the conditional offer of employment to Appellant based on his failure to provide a urine specimen and his refusal to remain at the test site until he could provide a sample and that Appellant has failed to meet his burden. Accordingly, the OHR Director's decision was not arbitrary, capricious, or otherwise unlawful.

ORDER

The County's motion to dismiss the Appeal as untimely is **DENIED**.

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Community Services Aide III with the Department of Health and Human Services.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 7, 2018

CASE NO. 18-22

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the February 14, 2018, appeal of Appellant challenging a determination by the Office of Human Resources (OHR) Director to rescind a conditional offer of employment. Appellant's Appeal included a copy of a December 18, 2017, conditional offer of employment letter from OHR (Appellant Exhibit (AX) 1). On March 16, 2018, the County filed its response to the appeal (County's Response), which included four attachments.¹ Appellant replied to the County's Response on April 9, 2018 (Appellant's Reply) and included one exhibit.² On April 9, 2018, the Board asked the parties to provide a copy of the job announcement for the position. Later that day the County provided a copy of job announcement IRC26519. CX 5. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for the position of Transit Bus Operator with the Department of Transportation (DOT or Department) and was given a conditional offer of employment by email on November 13, 2017, which was updated by letter dated December 18, 2017, addressing Commercial Driver's License requirements. County's Response at 2; CX 1; Appeal, p. 1; AX 1. The offer of employment was contingent upon Appellant's successful clearance of a background

¹ The County's attachments were: County Exhibit (CX) 1 - Email containing a November 13, 2017, conditional offer of employment; CX 2 - January 24, 2018, letter and January 26 email enclosing a copy of Appellant's background investigation report; CX 3 - OHR's January 31, 2018, letter to Appellant withdrawing the contingent job offer; and, CX 4 - multiple pages of print outs from the U.S. Equal Employment Opportunity Commission website.

² AX 2 - Email of January 2, 2018, from OHR enclosing an offer of employment letter

investigation. *See* CX 1 (offer contingent upon “successful background check”) and CX 5 (position requires “criminal background clearance”).

On January 2, 2018, DOT sent Appellant an email containing a formal offer of employment with a proposed start date of January 8, 2018. Appellant Reply; AX 2. However, Appellant admits that an hour after the January 2 email containing the offer was sent he received a telephone call from the DOT Administrative Specialist who had sent the email “informing me not to accept the formal offer because my background investigation had not yet been received by her office.” Appeal, p.1. Appellant does not allege that he accepted the January 2 offer before or after the telephone call.

The background check revealed that Appellant had a felony manslaughter conviction in 2008. The crime was apparently committed in July 2007, while Appellant was serving a prison term for a previous first degree murder conviction. Appellant was given a copy of the background check results on January 26, 2018, and an opportunity to review and contest or comment on background investigation report. CX 2.

By letter dated January 31, 2018, the OHR Director notified Appellant that the conditional job offer was being withdrawn because he did not pass the background investigation. CX 3.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Merit System Law, 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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which states in applicable part:

§ 6-4. Reference and background investigation requirement; Review of application.

(a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.

(2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.

(3) All applicants and employees must comply with established reference and investigation requirements.

(b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if: . . .

(5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

§ 6-14. Appeals by applicants. Under Section 33-9 of the County Code, a non-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.

ISSUE

Was the County's decision to deny Appellant employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

ANALYSIS AND CONCLUSIONS

The County has the right to establish appropriate job-related qualifications for a position and conduct background investigations before finalizing the selection of an applicant for a position. MCPR § 6-4(a)(1). In this case, the vacancy announcement clearly stated that the Bus Operator position required "criminal background clearance," and Appellant received a conditional offer of employment for the position that was expressly contingent on successful clearance of a background investigation. CX 1; CX 5; AX 1.

It is undisputed that Appellant's background investigation found that he was convicted of felony manslaughter in 2008 while serving a sentence for first degree murder, received a ten-year sentence, and was released from prison on January 11, 2017. County Response, p. 2; CX 2. Appellant concedes the accuracy of the background report, but claims that the County cannot consider criminal convictions that occurred more than seven years ago. Appellant Reply, p.1.³ Moreover, Appellant asserts that he has been rehabilitated and deserves the opportunity to obtain employment with Montgomery County. *Id.*

³ Appellant's Reply states: "The background report was correct. My manslaughter conviction was disposed of in 2008; however, the conviction started in 2007. Therefore, the 2007 date is the date that should have been used in your time elapsed consideration."

The County is authorized under MCPR § 6.4(b)(5) to withdraw an offer of employment “at any time in the hiring process” if “there is evidence of a job-related factor that would hinder or prohibit the applicant’s satisfactory performance of the duties and responsibilities of the position.” We have previously found that Bus Operator “is a position where service to the user public is direct, and one in which a concern for the public’s safety is paramount.” MSPB Case No. 04-09 (2004). Because of public safety concerns, the County need not risk hiring a bus operator with a criminal history. MSPB Case No. 15-03 (2014) (upholding nonselection for a Bus Operator based on misdemeanor assault and theft convictions). *See* MSPB Case No. 17-13 (2017) (Because bus operators have direct public contact public safety is a concern); MSPB Case No. 17-15 (2017) (same); MSPB Case No. 10-06 (2009) (County has a right to review background material before finalizing an offer of employment). We are unaware of any hard and fast rule or policy under federal, state, or County law limiting consideration of felony convictions to a certain time period, and Appellant has not identified any such limitation.

While the Board is sensitive to the concerns of former offenders who are seeking reentry into the workforce, and acknowledges that employment of a rehabilitated felon may be appropriate for some County jobs under certain circumstances, the County may legitimately decide that a Bus Operator position, with its requirement of regular and continuous contact with the public, is not one of those positions. Indeed, a compelling argument could be made that hiring Appellant to drive a County Ride-On bus, notwithstanding his serious criminal convictions, would be negligent.

We need not address the question of what standard of analysis we should apply had Appellant accepted the January 2 formal offer of employment before it was withdrawn. Appellant does not claim that he accepted the erroneous offer of employment before it was withdrawn by telephone an hour later. Nor does he assert that he attempted to accept the offer at any time prior to the formal letter of January 31, 2018, withdrawing the conditional job offer. Withdrawal of the employment offer prior to Appellant accepting the offer resulted in a denial of the appointment and the non-selection of Appellant for the position. *See Sapla v. Department of Navy*, 118 M.S.P.R. 551 (2012).

The Board finds the County was reasonable in its actions when it rescinded the conditional offer of employment based on the results of the background investigation. Given Appellant’s felony conviction, coupled with the fact that the position in question requires direct interaction with the public, the County must be allowed to make employment decisions that are in the best interest of public safety. *See* MSPB Case No. 15-03 (2014). Appellant has not carried his burden of showing that the County’s decision to deny him employment in a public contact position as a Transit Bus Operator was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

Based on the foregoing, the Board hereby denies Appellant's appeal from OHR's determination to rescind Appellant's conditional offer of employment as a Transit Bus Operator.⁴

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 7, 2018

⁴ The Board strongly urges the County to adopt clearer, written job-related policies concerning background checks and criminal convictions. Further, the almost careless administrative process evident in this case, and the poor wording of the conditional offer letters, deserves the close attention of OHR management. Even though the County properly withdrew the conditional job offer after discovering Appellant's criminal history, no job applicant should be subjected to mixed messages and apparently unauthorized correspondence that cruelly raises false hopes.

APPEALS PROCESS GRIEVANCES

In accordance with § 34-10(a) and § 33-9(b) of the Montgomery County Personnel Regulations (MCPR), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. The appeal must be filed in writing or by completing the [Appeal Form](#) on the Board's website. The appeal must include a copy of the CAO's decision. MCPR § 35-4(d)(2).

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee with a copy of all information provided to the Board. After receipt of the County's response, the employee 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 additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

During fiscal year 2018, the Board issued the following grievance appeal decisions.

CASE NO. 17-21

FINAL DECISION AND ORDER

On March 20, 2017, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a March 16, 2017, decision by the County Chief Administrative Officer (CAO) denying his grievance. With his Appeal, Appellant filed a copy of the CAO's response, a December 2016 email exchange, an undated statement apparently written by Appellant, and a copy of Appellant's grievance of December 20, 2016. We will refer to those attachments as Appellant Exhibits (AX) 1 through 4. The County filed a response on May 4, 2017, (County Response) with twelve exhibits designated as A through C and C-1 through C-9. (County Exhibits or CX). Appellant filed a response on May 17, 2017, (Appellant Response), with 18 pages of attachments consisting of a 12-page internet article entitled "8 Ways Working Night Shifts is Putting Your Health at Risk," a three-page article from the Journal of Headache & Pain Management entitled "Shift Work and Neurological Disease," and a three-page email from the County Live Well wellness program with the subject line "Wellness Wednesday" and the addressing the topic "Sleep Awareness Week." We will refer to those three attachments as Appellant Exhibits 5 through 7.

For the reasons stated herein, the Board denies Appellant's appeal and upholds the CAO's decision.

FINDINGS OF FACT

Appellant is one of two Inspection and Enforcement Field Supervisors with the Animal Services Division of the Montgomery County Police Department (MCPD). Appeal, p. 1, AX 2; County Response, p. 1; CX C-1, ¶ 2. On December 20, 2016, Appellant filed a grievance alleging that, based on his seniority, a new rotating scheduling system that applies to both Field Supervisors should not be applied to him. AX 4; CX A.¹

Appellant's supervisor, the Director of the Animal Services Division, provided an affidavit detailing the process and considerations that went into development of the rotating schedule at issue. CX C-1. As a result of numerous complaints from line staff that supervisors were not sufficiently responsive or overseeing operations, CXs C-1, ¶¶ 3-4, C-5, C-7, a primary goal of the new schedule was to address the continuing shortcomings in evening and night shift coverage. CX

¹ Appellant's grievance, AX 4, stated:

Grievance Statement- I am grieving the new schedule that is assigned to me beginning January 8, 2017. It will require me to rotated [*sic*] different days and hours. I have provided a schedule that covers the evening hours that the Director wants and also half of the weekends. If the Director insists on a compressed schedule as a senior supervisor I should be granted first choice. See enclosed emails.

Relief Requested - To stay on my current shift 0600-1600 rotating between Sunday thru Wednesday or Wednesday thru Saturday or if the compresses [*sic*] schedule is implemented take the 0600-1500 Monday thru Friday shift with alternate Fridays off.

C-1, ¶ 12. As part of his effort to design an appropriate schedule, the Director solicited the input of and engaged in discussions with Appellant and the other supervisor over how best to structure the schedule. CX C-1, ¶¶ 5-10. After deciding that he was unable to reach a consensus with both Field Supervisors, the Director established a 9-hour rotating schedule, with weekday coverage from 6:00 a.m. to 10:00 p.m. The Director determined that the schedule best addressed concerns about night shift coverage and call responsiveness, and sought to be equitable to both Field Supervisors by alternating night shift coverage. CX C-1, ¶¶ 11-13. The Director gave Appellant first choice of the rotating schedule, which provides both supervisors with a 3-day weekend every pay period. As Appellant's preference was for a day shift he was placed on the initial day shift and the other Field Supervisor was placed on the night shift. CX C-1, ¶ 13.

Appellant acknowledges the need for an evening supervisor. Appellant Response, p. 1.² Appellant asserts that as the more senior Field Supervisor he should have the option to choose either the day or night shift. Appeal, p. 2. Permanently assigning Appellant to the day shift would necessarily mean that the only other Field Supervisor would permanently be assigned to the night shift.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, which states in applicable part:

§ 33-9. Equal employment opportunity and affirmative action.

- (c) *Appeals by applicants.* . . . 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. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides in relevant part:

§ 1-31. Grievance: A formal complaint of a merit system employee arising from a misunderstanding or disagreement between the employee and supervisor over a term or condition of employment.

² Appellant's Response, p.1, states: "I understand the need for an evening supervisor. I don't see the advantage of rotating shifts for the Animal Control Supervisors."

Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, and June 30, 2015), Section 15, Work Schedules, Attendance, Hours of Work:

§ 15-2. Work schedules.

- (c) **Authority to change work schedule.** A supervisor may change the work schedule of an employee who reports to the supervisor. However, an employee must request a compressed work schedule, flextime, or job sharing arrangement under Section 15-4(b) or (c), as appropriate, and only the department director may approve an agreement to change to one of these types of alternate work schedules.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, provides in pertinent part:

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

- (a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy;
- (b) improper or unfair act by a supervisor or other employee, which may include coercion, restraint, retaliation, harassment, or intimidation;
- (c) improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, RIF, promotional action that was arbitrary and capricious or in violation of established procedures, or denial of an opportunity for training . . .

§ 34-9. Grievance procedure.

- (d) **Burden of proof . . .** (2) The grievant has the burden of proof in a grievance on any other issue.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

- (a) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer

the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

Montgomery County Police Department Attendance Policy, FC No. 315 (November 24, 2014), provides, in relevant part:

§I.A.

First-line supervisors and unit/district commanders will be responsible for scheduling, reviewing, and approving employee attendance. . . .

ISSUE

Did the County properly establish and implement the work schedule for Animal Services Division Inspection and Enforcement Field Supervisors?

ANALYSIS AND CONCLUSIONS

Appellant is grieving the implementation of a new rotating shift for Animal Services Division Inspection and Enforcement Field Supervisors. Appellant does not dispute his supervisor's authority to decide when Field Supervisors must be on the job. Appeal, p. 2 ("I agree management has a right to determine what hours and days of the week are to be covered."). The authority to establish employee schedules is vested in supervisors under the County's personnel regulations and the policies of the Police Department. MCPR § 15-2(c) ("A supervisor may change the work schedule of an employee who reports to the supervisor."); MCPD Attendance Policy, FC 315, § I.A ("First-line supervisors and unit/district commanders will be responsible for scheduling, reviewing, and approving employee attendance. . .").

Appellant specifically acknowledges the necessity for an evening supervisor. Appellant Response, p. 1. Nevertheless, Appellant believes that because of his seniority he should not have to serve as the evening supervisor. Appeal, p. 2; AX 4. Appellant asserts that while there has been a past practice in the agency of code enforcement officers and supervisors having their workdays subject to change, the hours of their shifts remained unchanged. Appeal, p. 1. According to Appellant, "Officers and employees would pick their shift by seniority." *Id.* However, Appellant has not provided any evidence of such practices being uniformly applied to supervisors, nor has he identified any regulation or policy that otherwise requires seniority be a factor in determining the work schedules of supervisors.

It appears that Appellant's impression concerning the role of seniority in shift assignments is based on a Memorandum of Agreement (MOA) between the County and the United Food & Commercial Workers, Local 1994, Municipal & County Government Employees Organization (MCGEO). CX C-3. However, the MOA expressly applies only to "shift assignments by bargaining unit members" in the Animal Services Division, and specifically lists only non-supervisory job classifications as covered. As a Field Supervisor, Appellant is not in the MCGEO

bargaining unit. Thus, by its express terms, the MOA's seniority-based provisions do not apply to Appellant.³

Permanently assigning Appellant to the day shift would unavoidably mean that the only other Field Supervisor would always be assigned to the night shift. There is nothing improper or inconsistent with any regulation or policy with the Director of the Animal Services Division considering the fairness of having both Field Supervisors alternating on the evening shift.

Appellant bears the burden of proof to show by a preponderance of the evidence that the schedule change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2). The County provided a detailed justification for its action, and that justification does not appear to be arbitrary, capricious, or discriminatory. As Appellant has not demonstrated how the County's implementation of the new rotating schedule for Animal Services Division Inspection and Enforcement Field Supervisors violates any applicable provision of law, regulation, or policy, the grievance appeal must be denied.

ORDER

Based on the foregoing, Appellant's grievance appeal is hereby **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
July 25, 2017

CASE NO. 18-04

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of Appellant challenging the decision of the Montgomery County Department of Transportation (DOT) to remove him from a temporary assignment as Acting Manager of the TRiPS Commuter Stores & Processing Center (Program Specialist II - Grade 21) and return him to his permanent position as Safety & Training Instructor (Grade 19). The County filed its response (County's Response) to the appeal on October 16, 2017. Appellant did not file a reply to the County's Response. The appeal was considered and decided by the Board.

³ We note that even for bargaining unit employees, seniority may be overridden by operational need. CX C-3, ¶ 13.

FINDINGS OF FACT

On February 9, 2017, DOT issued a memorandum soliciting applicants for a temporary Acting Program Specialist II position as the Acting Manager of TRiPS. County Response, at p. 2, County Exhibit (CX) 1.¹ The memorandum notified staff of an available temporary promotion, and stated that “[d]uration of the Acting assignment will be approximately two months but may extend longer.” Appellant was selected for the position and his temporary promotion became effective April 3, 2017. County Response, at p. 2; CX 2.

On May 19, 2017, Appellant’s wife, a bus operator with the Washington Metropolitan Area Transit Authority, engaged in a conversation with a temporary TRiPS store employee at the Silver Spring Transit Center. County Response, at p. 2; CX 3 & 4; Appeal, at p. 1. Appellant was present during that conversation. *Id.* The County asserts that Appellant’s wife spoke to the temporary employee in an “accusatory and possibly threatening manner.” CX 3. Appellant acknowledges that his wife did accuse the temporary employee of having an improper relationship with Appellant. CX 4, at p. 2 (“I do not know what lead to these accusatory questions made by my wife, but I can assure you that I do not have nor have I ever had a relationship of any kind with this employee other than work.”). *See* Chief Administrative Officer (CAO) Step 2 Grievance Decision, August 28, 2017, at p. 4 (“Both parties acknowledge that an incident occurred on May 19, 2017, between the Grievant’s wife and a temporary TRiPS store employee, where the Grievant’s wife confronted the TRiPS employee with accusations of infidelity concerning the Grievant.”). Appellant also expressed regret over his wife’s behavior. CX 4, at p. 2 (“My wife has since been very apologetic for her actions and has sought out counseling through WMATA’s EAP.”). Immediately after the encounter, the temporary employee left the transit center and told her supervisor that she would not return to work at Appellant’s TRiPS store location. CX 3 & 4.

Appellant admits that while he immediately contacted the temporary employee’s supervisors about the incident on the day it occurred, he did not inform his own supervisors until late afternoon on May 22, three days later. CX 3; CX 4, at p. 2; CAO Decision, at p. 4.

Due to his failure to inform his supervisor about the workplace incident in a timely manner Appellant received an oral admonishment and was removed from the temporary promotional assignment as Acting Manager of the TRiPS store and returned to his permanent position as a Safety and Training Instructor, effective May 30, 2017. County Response, at p. 3; CX 3.

APPLICABLE LAW AND REGULATIONS

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

¹ The County Response included six unmarked exhibits. The Board reminds the County that in the future its exhibits must be properly identified. The Board will identify the County exhibits as follows:

Exhibit 1 – W Memorandum, February 9, 2017

Exhibit 2 – B Memorandum, March 21, 2017

Exhibit 3 – B Memorandum, May 30, 2017

Exhibit 4 – Appellant Memorandum, June 2, 2017

Exhibit 5 – Appellant’s Grievance, June 2, 2017

Exhibit 6 – R Memorandum, June 22, 2017

(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 non-merit factors, may be filed directly with the Merit System Protection Board. . . Appeals filed with the Merit System Protection Board shall be considered pursuant to procedures adopted by the Board. The Board may order such relief as is provided by law or regulation.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides, in relevant part:

§ 1-17. Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;
- (d) within-grade salary reduction;
- (e) suspension;
- (f) demotion; or
- (g) dismissal.

§ 1-31. Grievance: A formal complaint of a merit system employee arising from a misunderstanding or disagreement between the employee and supervisor over a term or condition of employment.

§ 1-77. Temporary promotion: The short-term, non-permanent assignment of an employee to:

- (a) a vacant position with a higher grade;
- (b) a vacant position on a different salary schedule at a higher salary; or
- (c) a higher-level position while the employee in the position is absent on extended leave.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended June 30, 2015), Section 27. Promotion, provides in relevant part:

§ 27-1. Policy on promotion.

(a) A supervisor's assignment of higher-graded duties to an employee or an employee's assumption of higher-graded duties must not be considered a promotion or temporary promotion unless it has been formally designated as a promotion or temporary promotion.

§ 27-2. Types of promotion.

* * *

(c) *Noncompetitive temporary promotion.*

(4) When a temporary promotion ends, the department director must:

(A) return the employee to the position occupied immediately prior to the temporary promotion, unless the department director otherwise promotes, demotes, or transfers the employee to another position;

(d) *Competitive temporary promotion.*

(1) Prior to making the final selection for a competitive temporary promotion, the department director must provide for full and open competition and ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

(2) A competitive temporary promotion may extend beyond 12 consecutive calendar months without obtaining the approval of the MSPB.

§ 27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), Section 33, *Disciplinary Actions*, provides in pertinent part:

§ 33-9. Right of an employee to appeal a disciplinary action.

(a) *Grievance rights.*

(1) With the exception of an oral admonishment, an unrepresented (nonbargaining unit) employee may file a grievance under Section 34 of these Regulations over any disciplinary action and the penalty associated with the disciplinary action, such as the length of the suspension, the amount of leave or compensatory time

taken from the employee, or the salary reduction associated with a demotion or within-grade salary reduction.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. Grievances, provides in pertinent part:

§ 34-9. Grievance procedure.

(d)(2) The grievant has the burden of proof in a grievance on any other issue.

§ 34-10. Appeal of a grievance decision.

(a) An employee with merit system status may appeal a grievance decision issued by the CAO to the MSPB under Section 35 of these Regulations.

ISSUE

Was the County's decision on Appellant's temporary promotion arbitrary and capricious or in violation of established procedure?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems 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 the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Oral Admonishment is Not Subject to Appeal and the Termination of Appellant's Temporary Promotion Was Not Discipline

Although Appellant received an oral admonishment on May 30, 2017, for his failure to advise his supervisor about the workplace incident involving his wife, that form of discipline is not subject to grievance or appeal to the MSPB. MCPR § 33-9(a)(1). Accordingly, the Appeal must be dismissed for lack of jurisdiction over the oral admonishment.

Moreover, Appellant was not subject to any other disciplinary action, as termination of a temporary promotion is not a demotion or discipline. MSPB Case No. 90-36 (1990); *Compare* MCPR § 1-77 (temp promotion) to MCPR § 33-3(g) (demotion). Denial of a promotion or a job assignment may be the basis for a grievance, but such actions simply do not fit under the MCPR §

1-17 definition of disciplinary action. MSPB Case No. 17-28 (2017). For these reasons, to the extent that Appellant alleges that he was improperly subject to discipline, the Appeal must be denied.

Appellant Failed to Carry His Burden of Proof Regarding His Nonpromotion

In a nonpromotion case, an appellant has the burden of proving that the County's decision not to promote him was arbitrary, capricious or based on other non-merit factors. Montgomery County Code, § 33-9(c). Moreover, in a grievance over a promotional action an "employee must show that the action was arbitrary and capricious or in violation of established procedure." MCPR § 27-4. The Board concludes that Appellant has failed to meet this burden.

Appellant's grievance asserts that notwithstanding his failure to promptly advise his supervisor of the contentious workplace incident involving his wife and another employee he should have been allowed to continue in his temporary promotion. However, he fails to identify how the County's decision to end the temporary promotional assignment a few days before the expiration of the two-month duration in the February 9, 2017, posting was arbitrary and capricious or otherwise improper. A temporary promotion is the prerogative of management and not a right or entitlement of an employee. MSPB Case No. 89-50 (1990). It was also a prerogative of management to end the temporary promotion assignment and, while the Board may or may not have taken action in the same manner, the Board may not substitute its judgment when management is taking a discretionary action that is not arbitrary and capricious. *See* MSPB Case No. 16-07 (2016); MSPB Case No. 13-14 (2013); MSPB Case No. 84-70 (1984).

The Board finds that Appellant has failed to meet his burden of showing that the County's decision to rescind his temporary promotion and return him to his permanent position was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board denies Appellant's appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 14, 2017

CASE NO. 18-12

FINAL DECISION AND ORDER

On October 25, 2017, Appellant, a Correctional Shift Commander Lieutenant with the Montgomery County Department of Correction and Rehabilitation (DOCR or Department), filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a Step 2 Grievance decision of the Chief Administrative Officer (CAO) upholding a written reprimand Appellant had received as discipline.¹

The Board issued a scheduling letter ordering the County to submit its response to the Appeal by November 27, 2017. On November 30, 2017, the Chief, Division of Human Resources, for the Office of the County Attorney (OCA) filed an email request for an extension of the time within which the County may file its response. The email stated that the County's failure to file its response on time was "due to a miscommunication between [Office of Human Resources] and OCA regarding which Department would prepare the response." Appellant objected to the County's request and asked that the charges against him be dismissed. On December 4, 2017, the Board issued a Show Cause Order instructing the County to provide an explanation as to why it failed to file its response in a timely manner and should be granted an extension. The County's response was filed on December 6, 2017, and explained in greater detail the nature of the "miscommunication" between the Office of Human Resources and OCA. On January 17, 2018, the Board denied Appellant's motion to dismiss as it viewed the late filing as insufficient cause to justify sanctions under the Administrative Procedures Act, Montgomery County Code (APA), § 2A-8(j).

On January 24, 2018, the County filed its response to the Appeal. (County Response). On February 1, 2018, Appellant requested that the written reprimand be rescinded based on the failure of the County to file a timely response to the Appeal or to provide him with a copy of its response. The Board's Executive Director replied to Appellant's email and provided an electronic copy of the County Response. The Executive Director's email noted that the certificate of service indicated that it had been mailed to Appellant on January 25, 2018, and stated that he assumed the date was a typographical error. On February 3, 2018, Appellant again emailed the Board's Executive Director stating that he received the County Response on February 2, 2018, that the postmark on the envelope was dated January 25, 2018, and reiterated his motion to dismiss. On February 7, 2018, the County opposed the motion to dismiss and submitted an affidavit explaining that the County Response had been given to the County Department of General Services Mail Services Division on January 24, and that the January 25 date on the certificate of service was a

¹ The Appeal states:

I was unfairly treated in regards to the timeliness of the discipline given to me comparative to other employees for more heinous acts, in which multiple examples have been provided. I have never been informed of a date of the alleged incident, which does not allow me to appropriately defend the accusations. The alleged "subordinate employee" cited [*sic*] in the accusations against me was never identified, nor interviewed by the department. The investigation was flawed factually in the misrepresentation of statements I made, by a bias and untrained investigator. I was not privy to pre and post conference discussions between the department and the OHR representative at the Step 2 Grievance, which led to my unfair treatment.

typographical error. The January 25 postmark was due to the fact that mail submitted after 3:00 p.m. is not postmarked and processed until the next business day.

Notwithstanding his motion to dismiss, Appellant submitted his reply to the County Response on February 20, 2018. (Appellant Reply).

FINDINGS OF FACT

According to the CAO's decision and the County's Response, on February 9, 2017, Correctional Supervisor Sgt. M contacted DOCR to make a complaint about Appellant for making inappropriate and derogatory comments about her to a superior officer. The Department interviewed Appellant on February 22, 2017, and then consulted with the County Equal Employment Opportunity (EEO) Office regarding the matter on February 27, 2017. The EEO Office then suggested that DOCR conduct an investigation and provide its findings to the EEO Office. DOCR completed its investigation on March 23, 2017. After review, on April 11, 2017, the EEO Office apparently recommended that Appellant be disciplined. DOCR submitted a final report to the EEO Office on April 25, 2017. Upon receipt of a report from the EEO Office, a Statement of Charges (SOC) was issued to Appellant on May 2, 2017. A Notice of Disciplinary Action (NODA) was apparently issued on June 12, 2017. Appellant Reply, p.2; CAO Decision, p. 2.

It is undisputed that Appellant used some harsh words to describe Sgt. M when speaking to a superior officer. County Response, p. 2, and Affidavit of Captain W, ¶6. Appellant admits that he referred to Sgt. M as "cancerous," but denies calling her "poison." Appellant's Reply, p. 2. Appellant admits that he "spoke of [Sgt. M] being cancerous to the department, as she is known to gossip and pit people against each other in her former roll [*sic*] as a shop steward." Appellant disputes that his statements were derogatory, Appellant's Reply, p.1, but there can be no question that his description of Sgt. M was unflattering.

The CAO's decision suggested that it was "particularly egregious" for a supervisor such as Appellant "to make such derogatory statements to a subordinate employee regarding other employees. . . in a department where employees must place a strong reliance of [*sic*] other officers for mutual safety and collaborative work." It is unclear from the record, however, that Appellant made derogatory statements to Sgt. M as opposed to such statements being made about her to others. The CAO stated that he reviewed "an investigatory file which showed that the Grievant had called Sgt. [M] "poison" on February 22, 2017 when the Grievant was being interviewed by Captain W." *See* Affidavit of Captain W, ¶6.

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides, in relevant part:

§ 1-17. Disciplinary action: One of the following adverse personnel actions taken by a

supervisor against an employee: . . . (b) written reprimand. . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-1. Definition.

Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee: . . . (b) written reprimand. . .

§ 33-2. Policy on disciplinary actions.

(a) ***Purpose of disciplinary actions.*** A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace.

(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.
- (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.

§ 33-6. Disciplinary process.

(a) **Prior to taking disciplinary action.** A supervisor who is considering taking a disciplinary action should:

- (1) document the incident or employee's behavior that caused concern;
- (2) conduct an investigation, if appropriate and necessary; and
- (3) interview the employee and others who may have witnessed the conduct or have information about it.

(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:
 - (A) the disciplinary action proposed;
 - (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) that the employee may respond orally, in writing, or both;
 - (D) who to direct the response to;
 - (E) the deadline for submitting a response; and
 - (F) that the employee may be represented by another when responding to the statement of charges.
- (2) The department director must allow the employee at least 10 working days to respond to the statement of charges.
- (3) If the employee responds to the statement of charges, the department director must carefully consider the response and decide:
- (A) if the proposed disciplinary action should be taken;
 - (B) if no disciplinary action should be taken; or
 - (C) if a different disciplinary action should be taken.

(c) Notice of disciplinary action.

- (1) A notice of disciplinary action must contain the following information:
- (A) the type of disciplinary action that will be taken;
 - (B) the date on which the disciplinary action will take effect;
 - (C) the specific reasons for the disciplinary action including dates, times, places, and names of others involved, as appropriate;
 - (D) whether the employee responded to the statement of charges and if the response influenced the decision on the disciplinary action; and
 - (E) whether the employee may appeal the action by filing a grievance or an appeal to the MSPB; and
 - (F) the deadline for filing a grievance or an appeal.
- (2) A department director must issue a notice of disciplinary action at least 5 working days before the effective date of the proposed action.

§ 33-9. Right of an employee to appeal a disciplinary action.

(a) *Grievance rights.*

- (1) With the exception of an oral admonishment, an unrepresented (nonbargaining unit) employee may file a grievance under Section 34 of these Regulations over any disciplinary action and the penalty associated with the disciplinary action, such as the length of the suspension, the amount of leave or compensatory time taken from the employee, or the salary reduction associated with a demotion or within-grade salary reduction. . .

(b) *Right to appeal a disciplinary action to the MSPB.*

- (2) ***Right to appeal a grievance decision to the MSPB.*** An employee, other than a probationary employee or temporary employee, may appeal a decision on a grievance over a disciplinary action to the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. *Grievances*, provides in pertinent part:

§ 34-2. Eligibility to file a grievance.

(a) A merit system employee who has successfully completed the probationary period and has merit system status . . . may file a grievance on a matter described in Section 34-2.

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged: . . . (e) improper disciplinary action, which includes a written reprimand . . .

§ 34-9. Grievance procedure.

(d) Burden of proof.

(1) The County has the burden of proof in a grievance on: . . .

(G) a disciplinary action under Section 33.

ISSUE

Was Appellant’s written reprimand consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

The Montgomery County Charter and the Personnel Regulations provide that any merit system employee who is removed, demoted or suspended has the right to appeal the matter to the Board and have a hearing. Montgomery County Charter, Section 404; MCPR, § 33-9(b)(1). However, as Appellant received a written reprimand there is no right of direct appeal, and the Board finds that a hearing is unnecessary. The Personnel Regulations do provide that a non-bargaining unit employee may file a grievance over any disciplinary action. MCPR, § 33-9(a)(1). The Personnel Regulations also provide that a non-bargaining unit employee may appeal a decision on a grievance over a disciplinary action to the Board. MCPR, § 33-9(b)(2).

While Appellant has understandably expressed frustration with the County’s late filings and mailings, the Board is reluctant to rule based on minor technical irregularities. We deny Appellant’s February 1, 2018, motion to dismiss the charges. The County mailed a copy of its response to Appellant the day after it was filed with the Board. Appellant suffered no prejudice as the Board allowed him extra time within which to file his reply. In so holding we do not mean to suggest that we would never make a dispositive ruling based on a filing that is only one day late. Under the circumstances of this case, however, we decline to do so.

The County Failed to Carry Its Burden of Proof

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. APA, § 2A-10; MCPR, § 34-9(d)(1)(G). We have previously cautioned the County to specifically label each of its charges in a Notice of Disciplinary Action and Statement of Charges, provide a narrative in support of each charge, and include all relevant citations to MCPR or other law or policy, or risk dismissal of the charges. MSPB Case No. 18-02 (2018); MSPB Case No. 07-10 (2007); MSPB Case No. 07-13 (2007); and MSPB Case No. 08-09 (2008). We are unable to determine whether the SOC and NODA gave sufficient detail to provide Appellant with adequate notice of the charges, or if they contained other infirmities, because the County failed to provide the Board with those documents.

Moreover, the Board cannot assess the appropriateness of the written reprimand itself because the County did not produce a copy. Nor did the County submit the DOCR or EEO Office investigatory reports on which it apparently relied. Under these circumstances we are unable to confirm that the County was in compliance with MCPR, § 33-6, and otherwise acted appropriately in its disciplinary action. We are at a loss to understand how the County imagined that it could carry its burden of proof without presenting adequate factual support for its case.

As we must dismiss the charges against Appellant based on the County's failure to carry its burden of proof, we need not reach and decide the questions of the timeliness of the imposition of discipline or whether a written reprimand is an appropriate level of discipline in light of the discipline given to other employees in comparable positions for similar behavior. We do note, however, that the Board has long held that the untimely issuance of a written reprimand may result in dismissal of the discipline, *see* MSPB Case No. 88-21 (1988), and strongly urge the County to be attentive to the principles of prompt discipline.

ORDER

Accordingly, for the reasons stated above, the Board hereby **DENIES** Appellant's motion to dismiss and **ORDERS** that the written reprimand be rescinded and all documentation pertaining thereto immediately be removed from Appellant's personnel file.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
April 23, 2018

DISMISSAL OF APPEALS

Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if, among other reasons, the appeal is untimely, the appellant fails to prosecute the appeal or comply with appeal procedures, the Board lacks jurisdiction, the appeal is or becomes moot, the appellant failed to exhaust administrative remedies, there is no actual (*i.e.*, justiciable) controversy, or the appellant fails to comply with a Board order or rule. The County's Administrative Procedures Act (APA), Montgomery County Code § 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.

During fiscal year 2018, the Board issued the following dismissal decisions.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 17-28

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board or MSPB) on an appeal by Appellant, challenging the placement and retention of a sick leave restriction notice in his Department of Correction and Rehabilitation (DOCR) personnel file. Appellant filed his appeal on June 28, 2017. (Appeal).¹ The County filed a motion seeking to dismiss the appeal on July 31, 2017. (County's Motion to Dismiss). On August 10, 2017, Appellant filed a response captioned Motion to Not Dismiss. (Appellant's Response). The Board has reviewed and considered the submissions of the parties.

FINDINGS OF FACT

Appellant is employed by the Montgomery County Department of Correction and Rehabilitation as a Correctional Officer. Appellant alleges that the County DOCR improperly: (a) maintained a sick leave restriction notice in his DOCR personnel file; and, (b) used the sick leave restriction notice for purposes of determining job assignments and promotions.

Appellant was issued a sick leave restriction notice on August 18, 2015. Appeal, p. 3; Appellant Response, p. 2. As of April 25, 2017, the sick leave restriction notice was still in Appellant's file. Appeal, p. 7; Appellant Response, p. 2. Appellant claims that the retention of the sick leave restriction notice in his DOCR file was improper because "the notice has been and is continued to be used as a tool to deny promotions, and special assignments to employees." Appeal, p. 1. In Appellant's view, retention of the sick leave restriction notice in his file after the restriction itself had expired was disciplinary in nature. Appellant Response, pp. 2-3.

POSITIONS OF THE PARTIES

Appellant:

- The sick leave restriction notice "has been and is continued to be used as a tool to deny promotions, and special assignments to employees."
- Such use by DOCR is disciplinary and thus may be appealed directly to the MSPB.

County:

- Appellant may not file a direct appeal to the MSPB as his complaint is a grievance, and there is no right to a direct appeal of a grievance.
- Appellant has not filed a grievance, nor has he received an adverse final decision from the CAO which may be appealed to the MSPB.

¹ Appellant's Appeal and supporting exhibits total some 173 pages.

- The appeal is untimely since it involves a sick leave notice issued in 2015, and Appellant acknowledges that he knew it was in his DOCR operational file over two months before he filed his appeal.

APPLICABLE LAW AND REGULATION

Montgomery County Charter, Article 4, Merit System and Conflicts of Interest, which states in applicable part:

Section 404. Duties of the Merit System Protection 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
...

Montgomery County Code, Chapter 33, Merit System Law, Section 33-12. Appeals of disciplinary actions; grievance procedures, which states in applicable part,

- (a) *Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.
- (b) *Grievances.* A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. The determination of the board as to what constitutes a term or condition of employment shall be final. Grievances do not include the following: Classification allocations, except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process. A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the event of such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal. The county executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. In providing these procedures, the county executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution after a fact-finding inquiry authorized by the board.

Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides, in relevant part:

1-7. CAO: The Chief Administrative Officer or designee.

1-17. Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;
- (d) within-grade salary reduction;
- (e) suspension;
- (f) demotion; or
- (g) dismissal.

1-31. Grievance: A formal complaint of a merit system employee arising from a misunderstanding or disagreement between the employee and supervisor over a term or condition of employment.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, July 13, 2004, January 18, 2005, December 11, 2007, October 21, 2008, June 30, 2015, and February 14, 2017), Section 17, Sick Leave, states, in part:

17-1. Definitions.

(h) ***Sick leave restriction:*** A requirement that an employee provide a doctor's certificate to justify the employee's use of sick leave if a supervisor has reason to suspect the employee of misuse or abuse of sick leave.

17-9. Sick leave restriction.

(a) Before placing an employee on sick leave restriction, the supervisor must give the employee written notice and an opportunity to respond to the notice.

* * *

(c) An employee on sick leave restriction must provide medical certification from a licensed health care provider to support the use of sick leave, if the sick leave is not scheduled and approved in advance.

(d) The employee must give the medical certification to the employee's supervisor immediately after the employee returns from the use of unscheduled sick leave.

(e) If the employee fails to provide medical certification as required, the employee's supervisor may:

- (1) designate the absence as AWOL; and
- (2) take disciplinary action against the employee

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. *Grievances*, provides, in pertinent part:

34-2. Eligibility to file a grievance.

(c) A bargaining unit employee may not file a grievance under this section over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 35. *Merit System Protection Board Appeals, Hearings, and Investigations*, which states in applicable part:

35-2. Right of appeal to MSPB.

(a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the MSPB.

(b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

(c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment. . . .

(d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

* * *

35-3. Appeal period.

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

- (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal;
- (2) receives a notice of termination;
- (3) receives a written final decision on a grievance;
- (4) resigns involuntarily; or
- (5) knows or should have known of a personnel action

ISSUE

Does the Board have jurisdiction over Appellant's grievance?

ANALYSIS AND CONCLUSIONS

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute. *See, e.g.*, MSPB Case No. 10-09 (2009); MSPB Case No. 10-12 (2010); MSPB Case No. 10-16 (2010). *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems 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 the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Appeal Does Not Involve A Disciplinary Action

Appellant is alleging that DOCR is using sick leave restriction notices against employees when making promotional and job assignment decisions. Appellant alleges that the denial of a promotion or a job assignment is a disciplinary action. Appeal, p. 1. Appellant argues that a sick leave restriction is a disciplinary action since the notice is placed in an employee's DOCR operational file, and may be "viewed and used for disciplinary purposes." Appellant's Response, p. 2. Appellant concludes that he may thus appeal directly to the MSPB.

Appellant is incorrect as to what constitutes a disciplinary action, and does not allege that any of the disciplinary actions specified in MCPR § 1-17 have been taken against him. Denial of a promotion or a job assignment may be the basis for a grievance, but such actions simply do not fit under the MCPR § 1-17 definition of disciplinary action.

Accordingly, the Appeal must be dismissed because it contains no allegations of an adverse personnel action of a disciplinary nature (*i.e.*, demotion, suspension, termination, dismissal, or involuntary resignation) that would permit Appellant to file an appeal directly with the MSPB. MCPR § 35-2(a).

The Board Lacks Jurisdiction Over Direct Grievance Appeals

Appellant’s complaint that the sick leave restriction notice was improperly maintained in his DOCR operational file may be a grievable matter, however he does not allege that he ever filed a grievance, let alone received a Step 2 decision from the Chief Administrative Officer.

To the extent that Appellant is seeking to file a direct Board appeal of a grievance, he is doing so without exhausting his administrative remedies. Such direct appeals are not within the Board’s jurisdiction. The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 11-08 (2011). *See* MCPR § 35-2(b) (“An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO”).²

Accordingly, for the foregoing reason, the Board concludes that it lacks jurisdiction over Appellant’s appeal.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that the County’s Motion to Dismiss be **GRANTED** and that the appeal be, and hereby is, **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
October 31, 2017

CASE NO. 18-17

FINAL DECISION AND ORDER

Appellant, a part time, temporary Liquor Store Clerk I, filed this appeal with the Merit System Protection Board (MSPB or Board), challenging his January 15, 2018, non-disciplinary termination by the Montgomery County Department of Liquor Control (DLC).

On March 22, 2018, the Board wrote to the parties requesting “that the County provide clarification of Appellant’s merit system status as of the date he was provided with the notice of termination, and address the Board’s jurisdiction over this appeal if Appellant did not have merit

² The Appeal is also untimely because it was filed over two months after he saw a copy of the sick leave notice in his file. *See* MCPR § 34-9; § 35-3.

system status.” In response, on April 4, 2018, the County filed a Supplemental Submission and Motion to Dismiss Appeal (County Supplement) asserting that because Appellant did not have merit system status when he was terminated the Board was without jurisdiction over the appeal. On April 23, 2018, Appellant filed a reply (Appellant Reply) asserting that the County had failed to advise him that by voluntarily “stepping down” from his permanent Liquor Store Clerk position to a temporary Liquor Store Clerk position he would be relinquishing his merit system status.

By letter dated May 2, 2018, the Board then requested that the County provide a written response to Appellant’s claim that he was not informed that by transferring to a temporary position he was relinquishing his merit system status. The Board specifically asked that the County address federal MSPB cases such as *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349 (1994). The County provided the issue brief on May 10, 2018, (County Response), and Appellant replied on May 16, 2018 (Appellant Response).

FINDINGS OF FACT

Appellant was originally hired in February 2016 as a temporary seasonal, part time Liquor Store Clerk I. Appellant Exhibit (AX) 1. He was appointed to a part time merit system position December 22, 2016. AX 2; County Exhibit (CX) 1. In September 2017, Appellant asked about “moving back down to a temp position” because of the time demands of his job with the federal government. AX 4; CX 2. Appellant was advised that he could again apply for a temporary seasonal, part time Liquor Store Clerk I position, such as he had previously held. AX 4; CX 2.

Appellant voluntarily requested to “move back down” to a temporary position, applied for a temporary seasonal, part time position, and was selected. The process was completed when Appellant was formally transferred to a temporary seasonal, part time position, effective October 15, 2017. AX 3; CX 3.

The DLC human resources employee involved in Appellant’s application for and selection to the temporary position did not explicitly advise him that by taking the temporary position he would be losing his merit system status. Appellant was told that once he accepted a temporary position he would lose certain benefits and “be paid out for any annual leave that you have remaining.” AX 4; CX 2. Appellant acknowledges that when he was originally “promoted” from a temporary seasonal, part time position to a permanent position he was told that he had gained merit system status. Indeed, the job posting for the permanent position explicitly stated that it was merit system. The posting for the temporary seasonal position did not mention merit system status.

On January 15, 2018, DLC provided Appellant with a non-disciplinary termination notice pursuant to MCPR § 29-2(a)(3). CX 6. The notice advised Appellant that he served in a temporary status and that his “services are no longer required” by DLC. *Id.*

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Charter, Article 4, Merit System and Conflicts of Interest, which states in applicable part:

§ 401. Merit System.

The Council by law may exempt probationary employees, temporary employees, and term employees from some or all of the provisions of law governing the merit system. . .

§ 404. Duties of the Merit System Protection 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.

..

Montgomery County Code, Chapter 33, Personnel and Human Resources, which states in applicable part:

§ 33-6. Definitions.

In this article, the following words and phrases have the following meanings: . . .

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.

§ 33-7. County executive and merit system protection board responsibilities.

(g) *Adjudication.* The Board must 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 Personnel Regulations (MCPR), 2001 (As amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides in relevant part:

§ 1-8. Career position: A full-time, part-time, or term merit system position.

§ 1-38. Merit system employee: A person employed by the County in a full-time or part time career position. . .

§ 1-71. Seasonal position: A type of temporary position that: (a) does not involve year-round employment; and (b) may be used indefinitely to perform work usually associated with a particular season, such as removing snow or collecting fallen leaves.

§ 1-75. Temporary employee: An incumbent of a temporary position.

§ 1-76. Temporary position: A non-career position classified and filled under merit system principles.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended October 21, 2008), Section 1. Termination, provides in applicable part:

§ 29-1. Definition.

Termination: A nondisciplinary act by a department director to end an employee's County employment for a valid reason. Examples of valid reasons for termination include those stated in Section 29-2.

§ 29-2. Reasons for termination.

(a) A department director may terminate the employment of an employee: . . . (3) who is a temporary employee if: (A) the employee's job performance or attendance record does not warrant retention of the employee, or (B) the employee's services are no longer needed or wanted . . .

§ 29-7. Appeal of termination.

(c) A . . . temporary employee may not appeal a termination.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, provides in pertinent part:

§ 34-2. Eligibility to file a grievance

(b) A . . . temporary employee may file a grievance over a disciplinary action, except for an oral admonishment, but may not appeal a grievance decision by the CAO to the MSPB.

§ 34-10. Appeal of a grievance decision.

(b) A . . . temporary employee may not appeal a grievance decision by the CAO to the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

(b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. . .

§ 35-7. Dismissal of an appeal.

(c) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.

§ 35-10. Appellant’s right to review; right to hearing.

(a) (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.

ISSUE

Does the Board have jurisdiction to hear the appeal of a terminated temporary, part time, non-merit system employee?

ANALYSIS AND CONCLUSIONS

The Board’s Jurisdiction

As this Board has ruled in numerous cases, the Board’s jurisdiction is not plenary but is rather limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems 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 the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over the Termination Appeal of a Temporary Employee

As a result of the Board’s request for clarification regarding Appellant’s employment status, the County advised that he does not have merit system status. Appellant responded that he had not been warned by DLC that by accepting a temporary position he would be losing merit system status.¹

The Montgomery County Charter provides the County Council with the authority to exempt temporary employees from the provisions of law governing the merit system. Montgomery County Charter, § 401. The County Council has acted on that mandate, and has denied temporary employees the right to file and pursue appeals with the MSPB. More specifically, the personnel regulations expressly provide that a temporary employee may not challenge a termination before the Board by way of an appeal, grievance, or any other method. MCPR, § 29-7(c) (“A . . . temporary employee may not appeal a termination”).

Pursuant to § 404 of the Charter, only merit system employees have the right to appeal a removal action to the Board. The Code defines a merit system employee as a person who is employed in a permanent career position. County Code, § 33-6. The Code further provides that the Board only has the authority to hear and decide the disciplinary appeals of merit system employees

¹ Even though the County did not initially raise the issue of the Board’s jurisdiction over the termination of Appellant’s temporary appointment, the Board is always obligated to ensure that it has jurisdiction. MSPB Case No. 09-08 (2009), *citing Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

who have been removed, demoted or suspended. County Code, § 33-7(g). MSPB Case No. 13-08 (2013) (temporary employees lack merit system status and therefore lack appeal rights to the Board).

The County personnel regulations specifically provide that while temporary employees may file grievances over disciplinary actions, they may not appeal grievance decisions to the Board. MCPR § 34-2(b) (“A . . . temporary employee may file a grievance over a disciplinary action . . . but may not appeal a grievance decision by the CAO to the MSPB”); MCPR § 34-10(b) (“A . . . temporary employee may not appeal a grievance decision by the CAO to the MSPB”).

It is undisputed that at the time of his termination Appellant was not in a permanent career position but, rather, was a temporary employee. The Board lacks jurisdiction over the appeals of temporary employees since they do not have merit system status. MSPB Case No. 13-08 (2013) (no jurisdiction over suspension appeal because not a merit system employee); *see also* MSPB Case No. 16-19 (2016); MSPB Case No. 17-26 (2017); MSPB Case No. 16-04 (2015). By the nature of his current appointment, Appellant would therefore not be entitled to full merit system protections, including the right to appeal his removal. As noted above, an appeal to the MSPB over the termination of a temporary employee is specifically barred under the disciplinary regulations, grievance procedure, and the regulations governing temporary employment.

The Board requested that the parties brief the possible impact of federal MSPB cases such as *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349 (1994), on the question of jurisdiction. *Exum* held that when an agency fails to affirmatively inform an employee that a voluntary change in position within the same agency might lead to a loss of appeal rights, the employee is deemed not to have accepted the new appointment and to have retained the appeal rights of the former position. Since in this case Appellant applied for and accepted a different position with the same agency, and was not expressly informed that by transferring to a temporary position he was relinquishing his merit system status, the “*Exum* Rule” and line of cases appeared to be a closely analogous federal MSPB precedent.²

However, after the Board received the briefs of the parties, the “*Exum* Rule” was specifically rejected by the United States Court of Appeals for the Federal Circuit in *Williams v. Merit System Protection Board*, 892 F.3d 1156, 1162, 2018 WL 2769095, at *4-5 (Fed. Cir. June 11, 2018):

We reject . . . the *Exum* rule. As we held in *Carrow v. Merit Systems Protection Board*, [626 F.3d 1348 (2010)] an agency’s failure to advise federal employees on the terms of their appointment “does not create appeal rights for positions as to which Congress has not given the Board appellate jurisdiction.” 626 F.3d 1348, 1353 (Fed. Cir. 2010). . . we specifically disapprove the *Exum* rule, even for intra-

² *Exum* was based on *Covington v. DHHS*, 750 F.2d 937 (Fed.Cir. 1984), which involved a claim that a retiree did not make a knowing and voluntary choice between a RIF and a retirement due to coercion, or misinformation amounting to deception. It is notable that in *Exum* the agency knew that the employee’s request for part-time employment was limited (she requested the change “until further notice”) and the MSPB held “that the agency should have known that the appellant was acting under the erroneous impression that the only effects of her requested change would be to limit her working hours temporarily.” *Exum*, 62 MSPR at 349.

agency transfers, and hold that an agency's failure to inform an employee of the consequences of a voluntary transfer cannot confer appeal rights to an employee in a position which has no appeal rights by statute.

There is no allegation in this case that Appellant was in any way coerced or deceived. Appellant's argument is solely that he was not affirmatively advised that he would be sacrificing his merit system status by voluntarily transferring to a temporary position. In that regard, this case is identical to the factual circumstances faced by the Court in *Williams*:

Mr. Williams made no allegation that he was misled or coerced into taking the new CCA position. He voluntarily applied, and was selected, for the CCA position. Taking on a new position often leads to various changes in benefits. The agency has no obligation to advise its employees of all the potential changes associated with a new job. And certainly the agency's failure to advise its employee on the full range of consequences associated with a new position does not make the employee's decision to accept the position involuntary.

892 F.3d at 1163, 2018 WL 2769095, at *5. Under the reasoning of *Williams*, we find that Appellant voluntarily relinquished his merit system status when he chose to transfer back to a temporary position with DLC. *See Gaudette v. Department of Transportation*, 832 F.2d 1256, 1259 (Fed.Cir.1987) ("it defies logic to say that a voluntary action by an employee is somehow made involuntary because of an agency's failure to advise of appeal rights or to counsel the employee"); *Bergman v. United States*, 28 Fed. Cl. 580, 589 (1993); *Soler-Minardo v. Dep't of Defense*, 92 M.S.P.R. 100, 103-4 (2002) (An employee-initiated action is presumed to be voluntary, and the Board does not have jurisdiction over voluntary actions); *Heaphy v. United States*, 23 Cl. Ct. 697, 703 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) ("Plaintiff cannot be granted relief simply because he failed to more fully educate himself as to the law, and later wishes to revisit his voluntary choice").

Even under the *Exum* Rule there is sufficient evidence in the record for the Board to conclude that when Appellant initiated the change in his position he was primarily concerned with reducing his working hours due to the demands of his federal job, and knew that he was relinquishing his merit system status. Appellant previously held a temporary seasonal position, acknowledged that when he was "promoted" to a permanent position he was told that he had gained merit system status, and he characterized his request to transfer to a temporary position as a "move back down."³ The fact that Appellant did not anticipate the possible consequences of his decision (*i.e.*, that he could be terminated from his temporary position), does not convert the voluntary action he initiated into an involuntary act.

We find that because Appellant's decision to seek and accept a temporary position was entirely voluntary there is no basis to exempt Appellant from the rule that it lacks jurisdiction over appeals of temporary employees. *Williams v. Merit System Protection Board*, 892 F.3d 1156, 1163, 2018 WL 2769095, at *4-5 (Fed. Cir. June 11, 2018). *See Miller v. Bd. of Educ. of Baltimore Cty.*, 2016 WL 4591612, at *10 (Md. Ct. Spec. App.), *cert. denied*, 450 Md. 438 (2016) ("because Miller

³ Appellant was also told that upon transfer to the temporary position he would lose certain benefits and receive an annual leave pay out.

voluntarily relinquished his status as an employee, he no longer had a right to a hearing and appeal. *See Christie v. United States*, 518 F.2d 584, 588–89 (Ct.Cl.1975”).

The County Council has not delegated to the Board the authority to hear matters involving temporary, seasonal non-merit system employees. Under Maryland law, the Board cannot enlarge its own jurisdiction, and the parties cannot confer jurisdiction on the Board where it does not otherwise exist. *See John A. v. Board of Education for Howard County*, 400 Md. 363, 388 (2007); *Boyd v. Supervisor of Assessments*, 57 Md. App. 603, 608 (1984). *See* MSPB Case No. 16-07 (2016) (subject matter jurisdiction may not be conferred by estoppel). Given the reasoning in *Williams v. Merit System Protection Board*, the principles of State law, the facts of this case, and the statutory jurisdiction of the Board, Appellant’s voluntary decision to transfer to a temporary, seasonal, non-merit position deprives the Board of jurisdiction here.

ORDER

Based upon the foregoing analysis the Board hereby **ORDERS** that the Appeal be **DISMISSED** for lack of jurisdiction.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 28, 2018

CASE NO. 18-26

ORDER

On March 29, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board). An acknowledgement letter was sent to Appellant on March 30 advising her that the Board could not process her appeal until it receives a copy of a Notice of Disciplinary Action (NODA). On April 2, Appellant submitted a Statement of Charges (SOC). In response, another letter was sent to Appellant advising her that the Board lacks jurisdiction unless the County issues a NODA taking disciplinary action, and requesting that she provide the Board with a copy of a NODA.

On April 3 Appellant filed copies of three Statements of Charges.¹ Appellant was again advised, by letter dated April 4, that a NODA was necessary for the Board to proceed. Montgomery County Personnel Regulation § 35-4(d)(1) requires that an employee contesting a disciplinary

¹ Appellant provided: (1) Statement of Charges – Three-Day Suspension, dated March 26, 2018; (2) Statement of Charges – 3 Day Suspension, dated March 5, 2018; and, (3) Statement of Charges – Written Reprimand, dated February 23, 2018.

action provide a copy of a NODA to the MSPB. Thus, the three letters from the Board advised Appellant that if the Board did not receive a copy of a NODA her appeal would be dismissed. On April 4, Appellant submitted copies of her April 3 responses to the SOCs, but not a NODA.

After being given multiple opportunities to provide the Board with a copy of a NODA, and failing to do so, on May 30 the Board ordered Appellant to provide good cause as to why she has failed to provide a required NODA. The Show Cause Order required that Appellant's response be filed on or before June 12, 2018. When Appellant filed no response to the order the Board sent an email asking Appellant for an explanation. No response to the email was received by the Board.

The Show Cause Order also required the County to advise the Board whether a NODA had been issued effectuating discipline against Appellant in any of the three cases for which Appellant submitted a SOC to the Board. Having received no information from the County, in the same email sent to Appellant the Board also asked the County to explain its failure to meet the deadline. The County responded by advising the Board that a NODA for the written reprimand had been issued, but no NODAs had been issued that relate to the two SOCs involving suspensions.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The right of a merit employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal is granted by the Montgomery County Charter. Montgomery County Charter, § 404. The Montgomery County Code, § 33-12(a), provides that merit system employees who have been "notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board. . .". While it is true that under the Montgomery County Personnel Regulation (MCPR) § 35-2(a), an employee with merit system status has the right to appeal a suspension to the Board, the regulations provide a specific process by which the County must provide formal notification of a disciplinary action from which an employee may appeal to the Board. The personnel regulations make a clear distinction between a Statement of Charges, which notifies an employee of a *proposed* disciplinary action "[b]efore taking a disciplinary action," § 33-6(b)(1), and a Notice of Disciplinary Action, which provides notice of the actual imposition of discipline. § 33-6(c). *See* MSPB Case Nos. 17-17 and 17-06 (2017); MSPB Case No. 07-13 (2007). It is only after an employee receives a NODA that an appeal to the Board is permitted. MCPR § 35-3(a) ("An employee has 10 working days to file an appeal with the MSPB in writing *after* the employee: (1) receives a notice of disciplinary action. . .") (emphasis added). The Board has no jurisdiction to entertain an appeal of a Statement of Charges that has not been followed by a NODA. MSPB Case Nos. 17-17 and 17-06 (2017).

Furthermore, MCPR §35-4(d)(1) provides that an employee contesting a disciplinary action "must include the following documentation with the appeal: (1) If the employee is contesting a disciplinary action, a copy of the Notice of Disciplinary Action must be provided to

the Board.” After being given multiple opportunities, Appellant has not provided a copy of a NODA. Thus, because Appellant has not provided the copy of the NODA, presumably because no disciplinary action has yet been effectuated against her, the Board must dismiss this matter for failure to comply with established appeal procedures and because the Board lacks jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 17-17 (2017); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

Finally, there is no right of direct appeal to the Board with regard to a written reprimand. MSPB Case No. 15-10 (2015). A grievance is a prerequisite to the filing of an appeal to the Board under MCPR, § 33-9(b)(2); § 35-2(b) (a merit system employee may appeal to the Board “after receiving an adverse final decision on a grievance from the CAO.”). As we have no record of a grievance being filed over the written reprimand, or of any adverse final decision of the Chief Administrative Officer for the Board to review, the Board lacks jurisdiction to hear an appeal of the written reprimand due to a failure of Appellant to exhaust her administrative remedies.²

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 18-26 is dismissed. Should a NODA ultimately be issued suspending Appellant, or an adverse CAO decision be issued regarding the written reprimand, she may then timely file an appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 26, 2018

² Under the facts before us we need not address the possible distinction between the appeal rights of a bargaining unit employee and those of a non-bargaining unit employee in cases of a written reprimand. *See* MSPB Case No. 15-10 (2015); MCPR, § 33-9(a)(2).

DISMISSAL FOR MOOTNESS

CASE NO. 17-27

FINAL DECISION AND ORDER

On March 24, 2017, Appellant was sent a Notice of Intent to Terminate (NOIT) and, on April 27, 2017, a Notice of Termination. On May 8, 2017, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge her termination from employment with the County's Office of Human Resources. On June 15, 2017, by electronic mail, the County acknowledged that the original NOIT was procedurally deficient and notified Appellant and the Board that the NOIT and the Notice of Termination were being withdrawn. On June 19, 2017, the Board issued an order requiring Appellant to show good cause as to why the Board should not dismiss her appeal as moot.

The County provided certification that the termination was rescinded and that Appellant was placed on administrative leave, effective Monday, May 8, 2017. Affidavit of SS, July 5, 2017, ¶¶ 9-10. The County further certified that Appellant has been made whole for any loss of salary and benefits. *Id.* For these reasons, the County argues that this appeal, MSPB Case No. 17-27, should be dismissed. County's Response to Show Cause Order, July 18, 2017. Appellant's response to the Show Cause Order does not provide any persuasive explanation of why the County's actions rescinding the Notice of Termination and reinstating Appellant with full back pay and benefits do not moot this case.

Appellant has called to the Board's attention a prior MSPB case, MSPB Case No. 10-19 (2010), in which Appellant (under a different name) was terminated due to excessive medical absences after exhausting all paid leave. Appellant Response to Show Cause Order, July 10, 2017. In that case, after the MSPB found that the County agency involved had failed to give Appellant proper notice of her rights it ordered her reinstated with back pay. Appellant argues that in this appeal the Board should grant her motion to dismiss the notice of termination and rescind the termination. She further argues that the County should not be allowed a "do over." However, unlike MSPB Case No. 10-19, in this case the County recognized its failure to provide proper notice and reinstated Appellant with back pay without waiting to be ordered to do so by the Board. This appeal is moot because the action being appealed has been completely rescinded.¹

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where an agency completely rescinds the action appealed. *See, e.g.,*

¹ Appellant claims that she has not been made whole because at the time of the flawed notice of intent to terminate she still had 30 days left on a 90-day period in which she had disability priority rights to vacant County jobs. Appellant Response to Show Cause Order, p. 2. While it is correct that the notice was provided with 30 days remaining, Appellant ignores the fact that the notice clearly indicated, in bold lettering, that she had a month left to secure another position before the termination would take effect. Memorandum from SS to Appellant, March 24, 2017, ¶ 2. Moreover, the County submitted an affidavit certifying that Appellant had a 90-day period of priority rights. Affidavit of MD, July 18, 2017, ¶ 7.

MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014); MSPB Case No. 12-06 (2006); MSPB Case No. 10-12 (2010). The County has demonstrated to the Board that it has fully rescinded the action appealed and made Appellant whole.

ORDER

Based on the above, the Board hereby dismisses Appellant's appeal based on mootness.

For the Board
July 26, 2017

CASE NO. 18-08

ORDER OF DISMISSAL

On October 11, 2017, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) challenging the failure of the Department of Health and Human Services to hire her into a merit system position. On November 13, 2017, the County filed a Motion to Dismiss the appeal as moot. One basis for the County's motion was that Appellant was notified on November 7, 2017, that she had been selected for the merit system position she sought and was scheduled to start work November 13, 2017. In a December 5, 2017, email to the Board's Executive Director Appellant acknowledged that the "situation of not working has been resolved." Nevertheless, Appellant stated that she did not wish to withdraw her appeal. Nonetheless, Appellant did not provide a substantive response to the County's motion or present any argument why, having received all the relief she had sought in her Board appeal, her case should not be dismissed as moot.

Pursuant to Montgomery County Personnel Regulations, § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that when the County provides the relief sought by the Appellant, the appeal should be dismissed as moot. MSPB Case Nos. 16-14 & 16-16 (2016); MSPB Case No. 89-52 (1990); MSPB Case No. 89-15 (1989); MSPB 89-45 (1989).

Accordingly, the Board concludes that the appeal in Case No. 18-08 is moot, and hereby **ORDERS**, that it be **DISMISSED**, with prejudice.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 26, 2017

CASE NO. 18-15

ORDER OF DISMISSAL

Appellant filed an appeal from the Montgomery County Department of Police's decision to terminate him from the position of Traffic Enforcement Technician II, effective November 10, 2017. The Merit System Protection Board (Board or MSPB) received the appeal on November 6, 2016. That same day the Board acknowledged the Appeal, assigned the matter the above referenced case number, and advised Appellant that processing of his Appeal would be stayed until he provided the Board with a complete copy of the Notice of Termination. On November 13, the Board received the Notice of Termination and issued a scheduling letter. Appellant filed an email with the Board asking to withdraw his Appeal in the above-captioned case on November 16, 2017.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long held that the withdrawal of an appeal by an appellant renders that appeal moot. MSPB Case No. 17-11 (2017); MSPB Case No. 16-17 (2016); MSPB Case No. 88-15 (1990). *See* MCPR § 35-7(b) (Board may dismiss an appeal if the appellant fails to prosecute the appeal). Appellant's request to withdraw his Appeal in this matter renders the Appeal moot.

Accordingly, the Board hereby **ORDERS**, that the above-captioned appeal be **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
November 21, 2017

DISMISSAL FOR UNTIMELINESS

CASE NO. 18-16

FINAL DECISION AND ORDER

Appellant, a Correctional Shift Commander Lieutenant, filed a grievance with the Montgomery County Department of Correction and Rehabilitation (DOCR or Department) concerning the use of leave. On January 9, 2018, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging the February 3, 2017, Step 2 grievance decision by the County Chief Administrative Officer (CAO) denying his grievance. With his Appeal, Appellant filed a copy of the CAO's decision (Appellant Exhibit 1). Appellant has also requested a hearing. The County filed a response on February 8, 2018, with five unnumbered exhibits. (County Response).¹

On May 23, 2018, the Board wrote to the County requesting the following clarification of its response to the Appeal:

The Appeal Form filed with the Board on January 9, 2018, contains a February 16, 2017, date on page 4, and next to Appellant's signature is the notation "SUBMIT PLEASE." The County's response states that "there is no record that anyone in OHR . . . offered to file the appeal on Appellant's behalf." County Response, p. 2. It is unclear whether the same form that was filed with the Board on January 9, 2018, was also sent to the Office of Human Resources. Please provide an explanation and documentation . . . as to whether and when OHR received a copy of the appeal form, whether it was identical to the form filed with the Board, and any subsequent actions taken by OHR. What document was referenced in the January 3, 2018, email from OHR to Appellant, County Exhibit 1, p. 3, ("When you submitted your appeal to the Merit Board, did you send them a copy of what you sent me?"), and when it was received by OHR?

The County filed a Response to Request for Clarification (County Clarification) on June 5, 2018.²

¹ We will identify the unlabeled County Exhibits (CX) as follows:

- CX 9 - Emails to and from B, Office of Human Resources (OHR), and Appellant
- CX 10 - Email from B to Appellant attaching CAO decision
- CX 11 - Memorandum of Understanding between DOCR and UFCW Local 1994
- CX 12 - DOCR Policy 1100-05, January 27, 2017
- CX 13 - DOCR Policy 1100-7, December 30, 2016

The Board requests that in future filings the County provide exhibits that are properly identified and marked.

² The County Clarification contained the following exhibits:

- CX 1 – Affidavit of B, June 5, 2018
- CX 1A – Email from B, February 3, 2017
- CX 1B – CAO Step 2 Grievance Response, February 3, 2017
- CX 2A – Email from Appellant, February 16, 2017
- CX 2B – MSPB Appeal Form Attached to Appellant's February 16 email
- CX 3 – Email from B, January 8, 2018, with chain of earlier emails

Although by letter dated January 9, 2018, the Board specifically advised Appellant of his right to file a response to the County's submission, no response by Appellant has been filed to date.

FINDINGS OF FACT

Appellant filed a grievance with DOCR on October 27, 2016, alleging that DOCR twice denied his requests for Sunday leave use, that the leave requests for four other employees were approved, and that DOCR failed to notify him of the leave denial within five days of his request for leave, in violation of DOCR policy. Appellant also claims that DOCR has no written policy, and that the rules for bidding on leave were changed by DOCR in that his leave could not be carried over into the next calendar year.³

DOCR responds by asserting that the denial of Appellant's leave request was because the minimum staffing requirements at MCDC require that at least one lieutenant be on duty during every shift. County Response, p. 2; Appellant Exhibit 1. DOCR admits that it failed to respond to Appellant's leave request within the required five (5) days, but explains that it needed additional time to determine whether another officer was available to replace Appellant on the Sunday shift. County Response, p. 2.⁴ The County also asserts that the four other employees granted leave were not Correctional Shift Commander Lieutenants, and that Appellant has not demonstrated any harm as a result of the delayed notification. *Id.*

DOCR also notes that it has a written policy concerning minimum staffing requirements and written policies on leave and staffing. *Id.* Policy 1100-05, January 27, 2017, Section II.C, (CX 12), provides that at least one lieutenant must be on duty during every shift:

MCDC shall maintain a minimum of one Lieutenant at all times. When a Lieutenant is unable to report for his/her scheduled shift or there is not a minimum of one (1) Lieutenant scheduled to work that shift, overtime is authorized for Lieutenants. If there are no volunteers, a Lieutenant shall be drafted to meet the minimum shift requirement.

DOCR introduced "shift switch" agreements in 2011, under which employees are permitted to arrange a "shift switch" with another employee of the same rank when they apply for leave. CX 11. The County alleges that Appellant did not attempt to find another lieutenant to take his Sunday shift under the "shift switch" policy. County Response, p. 3.

The CAO's decision advised Appellant that he had the right to appeal to the Merit System Protection Board within ten (10) working days. Appellant was also advised in a February 3, 2017, email from OHR: "If you would like to pursue this grievance to next [*sic*] step please follow the

³ The Appeal Form, p. 2., states: "False statements and very misleading. The Department never give notice that leave would be denied if I bid to work in Rockville. No policy written. Plus I bid in November of 2015 the rules changed eight months later. July 2016. I wish to have a hearing. My leave "roll over" I wanted time off."

⁴ DOCR Policy 1100-7 on the Scheduling and Use of Leave, §VII.B, provides that an "employee's supervisor reviews the request as soon as possible and notifies the employee, in writing, within five (5) working days of receipt of the request as to the status of the leave request. . .". CX 13

outlined process in Section 34 of the Montgomery County Personnel Regulations.” Email from B to Appellant, January 3, 2018, CX 10, p. 1.

The record does not reflect any further activity by Appellant or the County regarding the grievance until almost a year later when, on December 27, 2017, Appellant sent an email to OHR inquiring into the status of his appeal. CX 1, ¶6. OHR responded by asking: “When you submitted your appeal to the Merit Board, did you send them a copy of what you sent me?” Email from B to Appellant, January 3, 2018, CX 9, p. 3. Appellant simply responded “Yes.” Email from Appellant to B, January 3, 2018, CX 9, p.3. Appellant was then informed by B that “MSPB handles their hearings independently” and provided the email address for the MSPB. CX 9, p. 3. Appellant then forwarded the email chain to the MSPB without explanation. In response, the Board’s Executive Director replied by advising Appellant that the Board had no record of an appeal. Appellant replied, “I was informed that the appeal was forward [sic] to the MSPB.” Appellant Email to MSPB, January 5, 2018, CX 9, p. 2. The County denies that Appellant was told that anyone in OHR offered to file the appeal on Appellant’s behalf. County Response, p. 2; CX 1, ¶¶8-10; CX 9, p. 1.

On Monday, January 8, 2018, the Executive Director emailed Appellant the following in response to Appellant’s email of Friday, January 5, 2018, email:

We have checked both our paper and electronic records and can find no indication that you have filed an appeal with the MSPB. . . .

Who informed you that your appeal had been forwarded to the MSPB? Do you have any documents reflecting that an appeal has been filed with the MSPB?

For your information, appeals may be filed on the MSPB website. Here is the link to the Appeals Form. The form allows you to attach supporting documents and upon submission should provide you with an automatically generated confirming email.

I have also attached a PDF of the Appeal Form that you may print, fill out, sign, and submit in hard copy. You may mail the completed form to our offices . . . You may also hand deliver the form to our offices during the MSPB’s regular business hours . . .

Email from MSPB Executive Director to Appellant, CX 9, pp. 1-2.

In a telephone call to the Board’s Executive Director the morning of January 9, 2018, Appellant claimed that he had electronically filed an appeal on the MSPB website in February, 2017, and that he sent a hand written “back up” copy to OHR by facsimile. Email from MSPB Executive Director to Appellant, January 9, 2018.⁵ Another thorough search of the Board’s

⁵ This explanation is seemingly inconsistent with Appellant’s initial response concerning whether his appeal had been timely filed in February 2017; Appellant’s initial response was that he had been “informed that the appeal was forward [sic] to the MSPB.” Appellant Email to MSPB, January 5, 2018, CX 9, p. 2.

electronic and paper files did not provide confirmation that Appellant had any contact with or filed an appeal with the MSPB at any time prior to January 9, 2018.

Later on the morning of January 9, 2018, Appellant filed this appeal challenging the CAO's February 3, 2017, Step 2 grievance decision denying his grievance. The appeal form filed with the MSPB contains a February 16, 2017, date, and next to Appellant's signature has the notation "SUBMIT PLEASE." The County acknowledges that on February 16, 2017, Appellant emailed OHR a copy of the appeal form containing the "SUBMIT PLEASE" notation. CX 1, ¶4. Ms. B states that she assumed Appellant was providing OHR with a copy of his MSPB appeal and took no further steps. *Id.*, ¶5. Appellant resent the appeal form to OHR on December 27, 2017. *Id.*, ¶6.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, which states in applicable part:

§ 33-12. Appeals of disciplinary actions; grievance procedures.

(b) *Grievances.* A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. . . Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

§ 33-13. Appeal procedures.

The county executive shall prescribe by personnel regulations . . . procedures covering appeals, including grievances which shall include the time limit for filing such appeal. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), Section 1, Definitions, provides in relevant part:

§ 1-31. Grievance: A formal complaint of a merit system employee arising from a misunderstanding or disagreement between the employee and supervisor over a term or condition of employment.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, provides in pertinent part:

§ 34-9. Grievance procedure.

* * *

(e) *Steps of the grievance procedure.* The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

| STEPS OF THE GRIEVANCE PROCEDURE | | |
|--|------------------------------------|---|
| Step | Individual | Responsibility of individual* |
| 1 | Employee | Present job-related problem informally to immediate supervisor. |
| | | If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor within 30 calendar days. |
| | | If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director. |
| | Department Director | Give the employee a written response within 15 working days after the written grievance is received. |
| 2 | Employee | If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department's response. |
| | CAO's Designee | Must meet with the employee, employee's representative, and department director's designee within 30 calendar days to attempt to resolve the grievance. |
| | Employee and Dept. Director | Present information, arguments, and documents to the CAO's designee to support their positions |
| | CAO's Designee | If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition. |
| | CAO | Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting. |
| 3 | Employee | If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received. |
| | MSPB | Must review the employee's appeal under Section 35 of these Regulations |
| * At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute. | | |

§ 34-10. Appeal of a grievance decision.

(c) A written grievance decision must include information about:

- (1) how the employee may appeal the decision to the next step of the grievance procedure or file an appeal with the MSPB, if applicable; and

(2) the time limits for appealing the grievance to the next step, or to the MSPB.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

(b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

§ 35-3. Appeal period.

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

(3) receives a written final decision on a grievance. . .

§ 35-4. Appeal filing requirements.

- (a) An employee or applicant must file an appeal with the MSPB in writing . . .
- (b) Alternatively, an employee or applicant may complete the MSPB Appeal Form (Appendix V) and provide the information requested on the Form.
- (c) An employee or applicant may instead choose to file an appeal electronically by completing the MSPB Appeal Form found on the MSPB County website.

§ 35-7. Dismissal of an appeal.

- (a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.
- (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.

§ 35-10. Appellant's right to review; right to hearing.

(a) (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing

officer from a demotion, suspension, dismissal, termination, or involuntary resignation.

(2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.

ISSUE

Was the grievance filed timely?

ANALYSIS AND CONCLUSIONS

Appellant has the responsibility to establish that the appeal was filed in a timely manner, *i.e.*, the burden of proof on the issues of timeliness and jurisdiction. MSPB Case No. 17-16 (2017). The personnel regulations expressly require an employee to “file an appeal with the MSPB in writing.” MCPR § 35-4(a). An appeal may also be filed “electronically by completing the MSPB Appeal Form found on the MSPB County website.” MCPR § 35-4(c).

The record shows that Appellant received the CAO’s decision on February 3, 2017. CX 1, ¶3, CX 1A and CX 1B; CX 10. Pursuant to MCPR § 34-10(c), the decision advised Appellant that he had the right to appeal to the Merit System Protection Board within ten (10) working days. *See* MCPR § 35-3(a)(3). Appellant was also advised in a February 3, 2017, email: “If you would like to pursue this grievance to next [*sic*] step please follow the outlined process in Section 34 of the Montgomery County Personnel Regulations.” Email from B to Appellant, January 3, 2018, CX 10, p. 1; CX 1, ¶3, CX 1A. Thus, the County advised Appellant of his appeal right to the Board, and the regulatory time limit within which to effect a timely appeal.⁶

Appellant filed his Appeal with the MSPB on January 9, 2018, eleven months after receiving the CAO’s decision. Although MCPR § 35-7(a) provides that the MSPB “may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3”, Appellant alleges⁷ that he filed timely an electronic appeal with the MSPB on February 16, 2017. The Board’s electronic filing system maintains a record of every appeal filed, and automatically sends a confirmation email. However, the Board has no record of any such filing and Appellant has provided no verification. Moreover, we have no reason to suspect that there has been a malfunction of any sort with the online filing system. While it is certainly possible that Appellant attempted to electronically file a timely appeal with the Board and that some unknown computer error prevented that filing from being received and acknowledged by the Board,

⁶ MCPR § 34-10(c)(1) requires that a CAO’s Step 2 decision state “how the employee may . . . file an appeal with the MSPB.” The Board strongly urges the County to explicitly provide more detailed information in such notices, including a link to the Board’s website, the mailing address for the Board’s office, and the Board’s telephone number.

⁷ Appellant made these assertions in a telephone conversation with the Board’s Executive Director, but he has never submitted any documentation to the Board to this effect, sworn or otherwise. For purposes of this decision, we will treat these assertions as having been properly raised and entered into the administrative record in this case. Telephone conversations with Board employees obviously are not, however, proper means of entering matters into the administrative record. We remind the County and others who appear before the Board that while the Executive Director is authorized to correspond with litigants on the Board’s behalf and to give technical, non-substantive directions, the Executive Director is not an alter ego of the Board and should never be construed to operate as such.

Appellant has not provided any evidence, beyond his mere assertion, that this in fact happened.⁸ Thus, we cannot conclude, on the record before us, that Appellant timely filed an electronic appeal with the Board.

Appellant also appears to contend that his late filing should be excused because he sent a “back up” copy of his appeal form to OHR instead of the MSPB. Email from MSPB Executive Director to Appellant, January 9, 2018. The appeal form submitted to the Board on January 9, 2018, is identical to the form that Appellant sent to OHR on February 16, 2017, eleven months earlier. CX 1, ¶4; CX 2A and CX 2B. Although the appeal form contains the notation “SUBMIT PLEASE” next to Appellant’s signature, and the February 16, 2017, email transmitting it to OHR has the subject line “Thanks,” the email contains no further message indicating that any action was being requested of OHR. CX 2A and CX 2B; CX 1, ¶4.

The County takes the position that it bears no responsibility to file a misdirected appeal with the MSPB on behalf of an employee. County Clarification, p. 2. The County further argues that “there is no record that anyone in OHR or any other department offered to file the appeal on Appellant’s behalf.” County Response, p. 2. Further, OHR employee B, the recipient of Appellant’s February 16, 2017, email, states in her affidavit that she assumed Appellant was merely providing her with a copy of his MSPB appeal and, accordingly, took no further action. CX 1, ¶5.

While Appellant’s blank email and the “PLEASE SUBMIT” notation on the appeal form may have led Ms. B to believe that she was not being asked to forward the appeal form to the MSPB, we are troubled by OHR’s failure to make any attempt to resolve the ambiguity by simply asking Appellant about his intent. We find that the appeal form submitted to OHR on February 16, 2017, should have been understood to have contained a request by Appellant that OHR submit the appeal with the Board. At the very least, OHR should have notified Appellant that he had filed his appeal in the wrong place.

There is no County regulation or MSPB precedent permitting an appeal submitted to OHR to be treated as a filing with the MSPB. *Cf., Massingale v. Merit Systems Protection Board*, 736 F.2d 1521, 1523 (Fed. Cir. 1984) (pursuit of a grievance elsewhere does not constitute good cause for delayed filing of an appeal to the Board). Moreover, the Board generally does not waive the 10-day filing limit. MSPB Case No. 17-22 (2017) (appeal filed seven weeks late untimely); MSPB Case No. 14-07 (2013) (appeal filed 10 weeks late untimely); MSPB Case No. 10-20 (2010) (appeal filed four working days late untimely).⁹ However, the Board may waive the filing time limits for good cause shown.

Under the specific authority of 5 C.F.R. § 1201.12, the federal MSPB may waive its regulations, including those relating to the timely filing of appeals, for “good cause.” The factors in determining whether good cause exists for waiving the time limits include: (1) the length of the delay; (2) whether the employee was notified of the time limit; (3) whether there were

⁸ The MSPB website analytics indicate that on February 16, 2017, there were three “page views” of the Board’s Appeal Form, but no “entries” or filings.

⁹ See also MSPB Case No. 17-07 (2017); MSPB Case No. 14-43 (2014); MSPB Case No. 14-08 (2013); MSPB Case No. 13-05 (2013).

circumstances beyond the employee's control affecting his or her ability to comply with the time limit; (4) the degree to which the employee was negligent; (5) whether any neglect was reasonably excusable; (6) whether there was unavoidable casualty or misfortune that could not reasonably have been prevented; and, (7) the extent and nature of prejudice to the agency that would result from a waiver of the time limit. *Alonzo v. Department of the Air Force*, 4 MSPR 180, 184, 186 (1980).¹⁰

The federal MSPB has also created an exception to the rules regarding timeliness when a *pro se* appellant has failed to follow filing instructions, directed the appeal to the Office of Personnel Management, clearly indicated intent to seek further review, but OPM failed to redirect an otherwise timely appeal to the MSPB. *Custodio v. Office of Personnel Management*, 113 MSPR 639, 643 (2010); *Tress v. Office of Personnel Management*, 109 MSPR 126, 128 (2008).

Under *Custodio* and *Alonzo*, Appellant has not demonstrated good cause. Appellant was notified of the time limit and his failure to exercise due diligence in filing and pursuing his appeal with the MSPB militates against a finding of good cause for the delay. *White v. Department of Navy*, 55 MSPR 376, 379 (1992) ("filing with OPM does not exhibit the necessary due diligence or ordinary prudence and therefore does not show good cause"). The only claim Appellant makes regarding circumstances beyond his control affecting his ability to comply with the time limit is that there must have been a malfunction on the MSPB electronic filing system. Even if we were to accept Appellant's assertion in this regard, it is undisputed that Appellant waited nearly a year before seeking to ascertain the status of his appeal.

After apparently misdirecting his appeal to OHR in February, 2017, Appellant waited until December 27, 2017, to first inquire with OHR as to the status of his appeal. The first time Appellant contacted the MSPB was by an email on January 3, 2018. The length of the delay is always a factor in assessing whether an untimely filing may be excused. Here the extremely long delay strongly militates against any finding of good cause. MSPB Case No. 13-03 (2013) (appeal filed 14 months late is untimely). We are unaware of any prior decision of the MSPB that waived the 10-day filing limit where the employee's filing with the Board was eleven months late. This is not a circumstance where a misdirected filing to OHR resulted in an appeal reaching the MSPB a few days or weeks late, nor is it one where OHR misinformed or deceived the employee. Here, almost a year passed before Appellant even inquired as to the status of his appeal. A delay of that length does not demonstrate due diligence and cannot be characterized as reasonable. MSPB Case No. 10-08 (2010) (appellant waiting nearly a year to appeal to the MSPB "was not diligent in attempting to discover and exercise her appeal rights in a timely manner").

Because an appeal of a grievance must be filed within 10 working days after receipt of the Step 2 CAO decision, MCPR § 35-3(a)(3), and Appellant has not demonstrated good cause to waive that time limit, we find that Appellant's appeal must be dismissed as untimely.

While we reaffirm that filing an appeal with OHR does not constitute a filing with the Board, it is unsatisfactory for OHR to do nothing when an employee provides information that may suggest confusion concerning the appeals process. The Board expects OHR to immediately

¹⁰ The agency is only required to submit evidence of prejudice if the appellant has met the burden of showing that there was good cause for the delay. *Booker v. U.S. Postal Service*, 5 MSPR 219, 221 (1981).

adopt and implement procedures for clarifying the process with unrepresented employees and for promptly redirecting appeals to the MSPB in cases where *pro se* appellants have erroneously directed appeals to OHR. The Board stands ready to work with OHR in crafting policies and regulations consistent with *Custodio* to implement needed improvements to the appeals process.

ORDER

Based on the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant's request for a hearing and grievance appeal are hereby **DENIED**.¹¹

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 28, 2018

¹¹ Unlike appeals of demotions, suspensions, and removals, there is no right to a hearing before the Board in the appeal of a grievance decision. Montgomery County Code, § 33-12(b); MCPR § 35-2(b); § 35-10(a)(2). The Board rarely holds hearings in grievance appeals, and only does so where it has concluded that a hearing is necessary to resolve material issues of fact. MSPB Case No. 03-08 (2002); MSPB Case No. 04-10 (2004). As the record submitted by the parties adequately provides the Board with the material facts concerning the appeal, the Board concludes that a hearing in this appeal is unnecessary.

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, § 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.

During fiscal year 2018, the Board issued the following decision on a Request for Reconsideration of a Preliminary Matter.

CASE NO. 17-27

DECISION ON APPELLANT'S REQUEST FOR RECONSIDERATION

On May 8, 2017, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), seeking to challenge her termination from employment with the County's Office of Human Resources. On June 15, 2017, the County acknowledged that the termination action was procedurally deficient and notified Appellant and the Board that the Notice of Termination was being withdrawn. Given that the termination being appealed was rescinded, on June 19, 2017, the Board issued an order requiring Appellant to show good cause as to why the Board should not dismiss her appeal as moot.

Appellant's July 10, 2017, response to the Show Cause Order did not provide any persuasive explanation of why the County's actions rescinding the Notice of Termination and reinstating Appellant with full back pay and benefits did not moot her appeal. Although not contesting that she had been reinstated with full back pay and benefits, Appellant claimed that she had not truly been made whole. That is because at the time of the flawed notice of intent to terminate Appellant still had 30 days left on a 90-day period in which she had disability priority rights to vacant County jobs. Appellant Response to Show Cause Order, p. 2. However, the Board's July 26, 2017, Final Decision and Order found that while the notice of intent to terminate was provided to Appellant with 30 days of the 90-day period remaining, the notice unambiguously indicated, in bold lettering, that Appellant still had a month left to secure another position before the termination would take effect. Memorandum from SS to Appellant, March 24, 2017, ¶ 2.¹

The County provided certification on July 5, 2017, and in its July 18, 2017, response to the Show Cause Order, that the termination was rescinded, that Appellant was retroactively placed on administrative leave, and that Appellant had been made whole for any loss of salary and benefits. Accordingly, the Board found that the appeal was moot because the action being appealed had been completely rescinded.

On August 7, 2017, Appellant filed a request for reconsideration alleging that she was not provided with the County's July 18, 2017, response to the Show Cause Order because it was mailed to an incorrect address.² This Board has previously held that the failure of a party to properly serve a copy of a pleading on the opposing party is insufficient, in and of itself, to justify reconsideration of a final decision. For example, in MSPB Case No. 13-12 (2013), the County sought reconsideration for a variety of reasons, including its complaint that it never received a copy of the appellant's reply. The County argued that Board staff should have noticed the absence of a certificate of service and informed the appellant to provide a copy to the County. Nevertheless, reconsideration was denied.

¹ Appellant argues that she should have an opportunity to respond to the July 18, 2017, Affidavit of MD. The Board's final decision cited the D affidavit as having certified that Appellant had a 90-day period of priority rights. Affidavit of D, July 18, 2017, ¶ 7. However, the Board did not rely solely on the D affidavit as it merely confirmed what was also stated in the March 24, 2017, S memorandum.

² The County's August 10, 2017, response to Appellant's request for reconsideration asserts that its July 18 response was mailed to the address Appellant provided to the County on April 27, 2017. Under the circumstances of this case, the Board need not resolve the question of what was the "correct" address for Appellant.

Appellant has had ample opportunity to present her reasons as to why the Board should not dismiss her appeal as moot. Appellant argues that although the Show Cause Order did not provide for additional responses and replies after the submissions of each party, MSPB Case No. 16-04 (2015), provides authority for the Board to permit the parties to file additional, supplemental pleadings. That case is inapposite to this matter since the filings in Case No. 16-04 occurred *prior* to the final decision. In this case, the issuance of the final decision means that any additional arguments Appellant wishes to make must meet the standard for reconsideration of a final decision. Appellant has failed to do so. Although Appellant received a copy of the County response from the Board on July 31, 2017, and was provided with the full text of Montgomery County Personnel Regulation (MCPR) §35-17, her request for reconsideration does not state any substantive objections to or arguments concerning the County's response, or allege any mistake or irregularity, other than the mailing of the County's response to what she now claims is the wrong address. Under the facts of this matter, the alleged misdirection of the County's response did not deprive Appellant of due process or the ability to fully state her case as to why the appeal should not be dismissed as moot.

The County has demonstrated by a preponderance of the evidence that it has fully rescinded the action appealed and made Appellant whole, while Appellant has provided no material evidence to the contrary. Appellant has not provided any valid reason to warrant the Board issuing a new decision different from the Board's initial decision. *See* MSPB Case No. 12-11 (2012). The Board will not alter its decision that the appeal must be dismissed as moot. *See, e.g.,* MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014); MSPB Case No. 12-06 (2006); MSPB Case No. 10-12 (2010).

ORDER

Based on the above, the Board hereby denies Appellant's request for reconsideration of the Board's decision to dismiss her appeal based on mootness.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this decision an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
August 15, 2017

MOTIONS

The County's Administrative Procedures Act (APA), Montgomery County Code, § 2A-7(c), 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 dismiss a party and substitute another, 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 ten (10) calendar days to respond. MCPR § 35-11(a)(4). The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning or end of the hearing, rule on the motion.

During fiscal year 2018 the Board issued the following decision on motions filed during the course of an appeal proceeding.

MOTION TO DISMISS

CASE NO. 18-06

ORDER DENYING MOTION TO DISMISS

On October 9, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging the decision of the Department of Correction and Rehabilitation to dismiss him from his position as a Correctional Supervisor - Sergeant. On January 2, 2018, Appellant filed a prehearing submission and exhibits pursuant to the Board's procedural rules. Included in Appellant's prehearing submission was a Motion to Dismiss the charges against him as untimely. Appellant Prehearing Submission, pp. 3-4.

The Board has carefully considered the motion to dismiss and the arguments of the parties and finds no basis for dismissing the charges against Appellant based on timeliness. Under Montgomery County Personnel Regulations (MCPR), § 33-2(b)(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." It is well settled that use of the term "should" or "may," rather than "shall" or "must," suggests that the 30-day requirement is not absolute. Moreover, MCPR § 33-2(b)(2), provides that "[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." Thus, the County Personnel Regulations are readily distinguishable from the mandatory State statute construed by the Court of Appeals in *Western Correctional Institution v. Geiger*, 371 Md. 125 (2002).

Appellant also references MSPB Case No. 11-02 (2011), where the Board found that the County had not taken prompt discipline when the department director waited over one year after he became aware of the alleged misconduct to issue a statement of charges. Here, according to Appellant, the statement of charges was issued 43 days after the addendum to the investigative report. We decline to hold that an alleged delay of less than two weeks violates the prompt discipline requirements of MCPR, § 33-2(b).

Accordingly, it is hereby **ORDERED** that Appellant's motion to dismiss is **DENIED**.

For the Board
February 27, 2018

CASE NO. 18-07

ORDER DENYING MOTION TO DISMISS AND/OR TO BIFURCATE

On October 10, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging the decision of the Department of Correction and Rehabilitation to dismiss him from his position as a Correctional Officer. On January 3, 2018, Appellant filed a Motion to Dismiss Charges and/or to Bifurcate Issue of Timeliness, asserting that the charges against him were untimely.

The Board has carefully considered the motion to dismiss and the arguments of the parties and finds no basis for dismissing the charges against Appellant based on timeliness. Under Montgomery County Personnel Regulations (MCPR), § 33-2(b)(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.” It is well settled that use of the term “should” or “may,” rather than “shall” or “must,” suggests that the 30-day requirement is not absolute. Moreover, MCPR § 33-2(b)(2), provides that “[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.” Thus, the County Personnel Regulations are readily distinguishable from the mandatory requirements in State Personnel and Pensions Article (SPP), § 11-106, the State statute construed by the Court of Appeals in *Western Correctional Institution v. Geiger*, 371 Md. 125 (2002). Appellant argues that the State statute’s protections apply to him, completely ignoring SPP § 11-102, which limits the application of the subtitle that includes § 11-106 “to all employees in the State Personnel Management System within the Executive Branch” of State government. Appellant is a County employee, not an employee of the State Division of Correction or anywhere else in the Executive Branch of State government.

In MSPB Case No. 11-02 (2011), the Board found that the County had not taken prompt discipline when the department director waited over one year after he became aware of alleged misconduct to issue a statement of charges. Here, according to Appellant, the statement of charges was issued less than two months after the investigative report. We decline to hold that an alleged delay of less than a month violates the prompt discipline requirements of MCPR, § 33-2(b).

Accordingly, it is hereby **ORDERED** that Appellant’s motion to dismiss or to bifurcate is **DENIED**.

For the Board
February 27, 2018

MOTION FOR APPROPRIATE RELIEF

CASE NO. 18-06

ORDER GRANTING DEPOSITION

On June 14, 2018, the County filed a Motion for Appropriate Relief seeking to address a scheduling conflict for a Lieutenant, a County witness approved by the Board at the March 6, 2018, pre-hearing conference. The County's motion states that the witness will be on pre-approved leave during the dates scheduled for the hearing on the merits.

The witness is the lead Defensive Tactics instructor for the County Department of Correction and Rehabilitation (DOCR) and is to testify regarding permissible defensive techniques, required training, and what is taught to employees during the training. The County proposes that the Board approve one of the following approaches to obtaining the witness's testimony:

1. Hold a *de bene esse* deposition prior to the currently scheduled hearing;
2. Conduct the hearing as scheduled and hold it open until the witness can testify "at a mutually convenient time for all parties";
3. Convene the Board prior to the full hearing to conduct live testimony of the witness;
4. Permit the witness to submit testimony by affidavit; or
5. Reschedule the hearing.

As it appears that the County witness is unavailable to testify, and the County has represented that Appellant has no objection, pursuant to Montgomery County Code, § 2A-8(h)(14), and Montgomery County Personnel Regulation, § 35-12(b), the Board hereby **ORDERS** that the County may hold a *de bene esse* deposition of the Lieutenant.

At the March 6, 2018, prehearing conference the Associate County Attorney agreed to notify employee witnesses and their supervisors of the hearing dates in this case so that leave would not be approved. That obligation was included in the March 14, 2018, Pre-hearing Order. The County's motion states that the witness "will be on pre-approved leave from July 15-28," but does not state when the leave was approved. As the Board is displeased that the witness is unavailable for the hearing despite the assurance it received from the County at the pre-hearing conference, the Associate County Attorney is hereby **ORDERED** to provide certification to the Board of when and in what manner the Associate County Attorney notified the witness and his supervisors of the hearing dates; when the leave was approved; and, what steps the County will take in the future to prevent a reoccurrence of this situation.

It is the Board's view that a party wishing to preserve its own witness's testimony through a deposition in these circumstances should bear the costs. Accordingly, the Board further **ORDERS** that the County bear all costs relating to the taking of the deposition,

including the costs of providing Appellants with copies of the transcript and video recording, if any.

For the Board
June 26, 2018

CASE NO. 18-07

ORDER GRANTING DEPOSITION

On June 14, 2018, the County filed a Motion for Appropriate Relief seeking to address a scheduling conflict for a Lieutenant, a County witness approved by the Board at the March 6, 2018, pre-hearing conference. The County's motion states that the witness will be on pre-approved leave during the dates scheduled for the hearing on the merits.

The witness is the lead Defensive Tactics instructor for the County Department of Correction and Rehabilitation (DOCR) and is to testify regarding permissible defensive techniques, required training, and what is taught to employees during the training. The County proposes that the Board approve one of the following approaches to obtaining the witness's testimony:

1. Hold a *de bene esse* deposition prior to the currently scheduled hearing;
2. Conduct the hearing as scheduled and hold it open until the witness can testify "at a mutually convenient time for all parties";
3. Convene the Board prior to the full hearing to conduct live testimony of the witness;
4. Permit the witness to submit testimony by affidavit; or
5. Reschedule the hearing.

The Appellant objects to obtaining the testimony by deposition or affidavit, incorrectly suggesting that it would be impermissible for the Board to accept such testimony in lieu of live testimony. *See* Montgomery County Administrative Procedures Act, Montgomery County Code, § 2A-8(e) and (h)(14); Montgomery County Personnel Regulation (MCPR), § 35-12(b). Appellant also raises concerns about the cost of a video deposition, although it does not appear that the County is suggesting that a deposition should only be by video or that Appellant would be required to share the costs.

As it appears that the County witness is unavailable to testify, and that a deposition will protect the rights of the parties and the interests of justice, pursuant to Montgomery County Code, § 2A-8(h), and MCPR, § 35-12(b), the Board hereby **ORDERS** that the County may hold a *de bene esse* deposition of the Lieutenant.

At the March 6, 2018, prehearing conference the Associate County Attorney agreed to notify employee witnesses and their supervisors of the hearing dates in this case so that leave would not be approved. That obligation was included in the March 14, 2018, Pre-hearing Order. The County's motion states that the witness "will be on pre-approved leave from July 15-28," but does not state when the leave was approved. As the Board is displeased that the

witness is unavailable for the hearing despite the assurance it received from the County at the pre-hearing conference, the Associate County Attorney is hereby **ORDERED** to provide certification to the Board of when and in what manner the Associate County Attorney notified the witness and his supervisors of the hearing dates; when the leave was approved; and, what steps the County will take in the future to prevent a reoccurrence of this situation.

It is the Board's view that a party wishing to preserve its own witness's testimony through a deposition in these circumstances should bear the costs. Accordingly, the Board further **ORDERS** that the County bear all costs relating to the taking of the deposition, including the costs of providing Appellants with copies of the transcript and video recording, if any.

For the Board
June 26, 2018

ENFORCEMENT OF BOARD DECISIONS AND ORDERS

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions. Montgomery County Personnel Regulations, § 35-15.

The Board may also be asked to enforce a final decision. The Board, where appropriate, may seek enforcement of its decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. Montgomery County Code, § 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly failed to comply with the Board decision to determine whether there is a basis for seeking enforcement.

During FY18, three agreements were entered into the record.

CASE NO. 17-09

ORDER ACCEPTING SETTLEMENT AGREEMENT

On November 21, 2016, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a five-day suspension imposed by the Montgomery County Office of Human Resources.

On October 16, 2017, the parties filed a settlement agreement with the Merit System Protection Board in the above-captioned case. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

As this case involves a disciplinary action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face. Moreover, both parties are represented by counsel and freely entered into the agreement. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records as a settled case;
2. That the appeal in this Case No. 17-09 be and is hereby **DISMISSED** as settled;
3. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
October 17, 2017

CASE NO. 17-24

ORDER ACCEPTING SETTLEMENT AGREEMENT

On April 10, 2017, Appellant, an employee of the Montgomery County Fire & Rescue Services, filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a grievance decision denying him acting capacity pay. On August 23, 2017, the parties filed a fully executed settlement agreement with the Board in the above-captioned case. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15. The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, and freely entered into by the parties. Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records as a settled case;
2. That the appeal in this Case No. 17-24 be and is hereby **DISMISSED** as settled;
3. That within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
August 24, 2017

CASE NO. 18-01

ORDER ACCEPTING SETTLEMENT AGREEMENT

On July 31, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a thirty (30) day suspension. On August 15, 2017, the parties filed a fully executed settlement agreement with the Board. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

As this case involves a disciplinary action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB

Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, and freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records as a settled case;
2. That the appeal in this Case No. 18-01 be and is hereby **DISMISSED** as settled;
3. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
August 23, 2017

SHOW CAUSE ORDERS

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to the grievance procedure, MCPR § 34-9(a)(3), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, § 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a Show Cause Order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the Personnel Regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a Show Cause Order to determine whether the appeal is in fact timely.

Finally, the Board may issue a Show Cause Order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

The following is an example of a Show Cause Order issued in fiscal year 2018.

CASE NO. 18-26

SHOW CAUSE ORDER

On March 29, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging “Back to Back” disciplinary statements of charges. An acknowledgement letter was sent to Appellant on March 30 advising her that the Board could not process her appeal until it receives a copy of a Notice of Disciplinary Action (NODA). On April 2, Appellant submitted a Statement of Charges (SOC). In response, another letter was sent to Appellant advising her that the Board lacks jurisdiction unless the County issues a NODA taking disciplinary action, and requesting that she provide the Board with a copy of a NODA.

On April 3 Appellant filed copies of three Statements of Charges.¹ Appellant was again advised by letter dated April 4 that a NODA was necessary for the Board to proceed. Montgomery County Personnel Regulation § 35-4(d)(1) requires that an employee contesting a disciplinary action provide a copy of the NODA to the MSPB. Thus, the three letters from the Board advised Appellant that if the Board did not receive a copy of a NODA her appeal would be dismissed. On April 4, Appellant submitted copies of her April 3 responses to the SOCs, but not a NODA.

After being given multiple opportunities, Appellant has not provided the Board with a copy of a NODA. Accordingly, the Board hereby **ORDERS** Appellant to provide a statement of such good cause as exists for why she has failed to provide a required NODA. The statement shall be filed on or before close of business June 12, 2018, with a copy served on the County. The County shall have the right to file any response on or before June 19, 2018. Appellant is hereby notified that, absent the filing of a NODA or a finding by the Board of good cause for her failure to file a NODA, the Board will dismiss her appeal for lack of jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

The Board further **ORDERS** the County to advise the Board by June 6, 2018, whether a NODA has been issued, based on any of the three SOCs submitted by Appellant, effectuating discipline against Appellant.

For the Board
May 30, 2018

¹ Appellant provided: (1) Statement of Charges – Three-Day Suspension, dated March 26, 2018; (2) Statement of Charges – 3 Day Suspension, dated March 5, 2018; and, (3) Statement of Charges – Written Reprimand, dated February 23, 2018.

ATTORNEYS FEE REQUESTS

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In *Montgomery County v. Jamsa*, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance to respond. The Board then issues a decision based on the written record.

During fiscal year 2018, the Board issued the following attorneys fee decisions.

CASE NO. 15-27

DECISION ON ATTORNEY'S FEE REQUEST

This is the Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's May 26, 2016, Request for Attorney's Fees (Appellant's Request).¹ Appellant's Request seeks \$14,750.00 in attorney's fees and costs. The appeal was considered and decided by the Board Chair, and Vice Chair. The Associate Member issued a separate concurring opinion.

Appellant is a Correctional Officer who was disciplined by being suspended for thirty (30) days and demoted in rank for excessive Internet usage while on duty. After a hearing, the Board issued a Final Decision and Order finding that the County had proven a violation of the County Internet usage policy by a preponderance of the evidence. Decision and Order, MSPB Case No. 15-27 (May 16, 2016). Taking into consideration the principles of progressive discipline and other mitigating factors, the Board upheld the 30-day suspension but rescinded the demotion. The Board found that because the penalty had been mitigated, the County was required to pay reasonable attorney's fees and costs. *Id.*, at 17.

The County objects to certain elements of Appellant's Request, arguing that because Appellant only prevailed with regard to part of the penalty against him, compensation for attorney's fees should be reduced to reflect that partial success. The County also argues that Appellant is not entitled to fees which predate the filing of the Appeal or were incurred after the Board's final decision, and further suggested that the hourly billing rate was excessive. *See* County Response, June 6, 2016.

On June 20, 2016, subsequent to the pleadings concerning attorney's fees, Appellant filed a petition for judicial review of the Board's final decision with the Circuit Court for Montgomery County. Because a decision by the Circuit Court might have had an impact on the Board's determination of appropriate attorney's fees, the Board issued an order staying consideration of the attorney's fee issue until resolution of the petition for judicial review. Order, MSPB Case No. 15-27 (July 28, 2016). The May 16, 2016, decision of the Board was ultimately affirmed by Judge Nelson W. Rupp, Jr. [*Appellant*] v. *Merit System Protection Board*, Circuit Court for Montgomery County, No. 422211-V, Docket Entry #22 (May 9, 2017) (Rupp, J.).

Consistent with its July 28, 2016, Order, the Board requested that by September 7, 2017, the parties provide: (1) verification that there had been a final disposition of the petition for judicial review; and (2) advise the Board whether there were any amendments to the fee request or the opposition thereto. *Letter to parties from MSPB Executive Director Martin*, August 24, 2017. The parties did not file any amendments.

¹ Appellant's Request was filed by Appellant's attorney before the MSPB, JL. Ms. L also represented Appellant on judicial review in the Circuit Court. Subsequently, the Appellant informed the Board that Ms. L was no longer his attorney and that he was proceeding without representation. *See* Emails from Appellant to MSPB, August 23 and September 06, 2017.

APPROPRIATE REIMBURSEMENT FORMULA

The Montgomery County Code, § 33-14(c), provides the Board with remedial authority to “[o]rder the County to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” See *Montgomery County v. Jamsa*, 153 Md. App. 346, 355 (2003). In determining what constitutes a reasonable fee, § 33-14(c)(9) of the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code, § 33-14(c)(9).

In *Manor Country Club v. Flaa*, 387 Md. 297 (2005), the Court of Appeals considered an attorney’s fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The provisions of §27-7(k)(1) then in effect were identical to § 33-14(c)(9), which is controlling on the Board. The *Flaa* Court noted that the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989), were “in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)” for determining an appropriate attorney’s fees award. 387 Md. at 313.²

In *Friolo v. Frankel*, 403 Md. 443, 460 (2008), the Court of Appeals cited both *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Flaa* for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney’s fees. See MSPB Case No. 00-13 (2000). In this case, the County does seek to reduce the award of attorney’s fees based on Appellants’ degree of success.

ANALYSIS AND CONCLUSIONS

Appropriate Hourly Rate

The Board has consistently looked to the United States District Court for the District of Maryland Local Rules for guidance in determining an appropriate hourly rate for attorney’s fees, as well as considering the nature and complexity of the case.³ See MSPB Case No. 14-33 (2016); MSPB Case No. 14-17 (2014); MSPB Case No. 13-07 (2013); MSPB Case No. 13-04 (2013);

² The Court of Appeals in *Flaa* noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). See 387 Md. at 313.

³ Appendix B of the United States District Court for the District of Maryland Local Rules (July 1, 2016), is available at: <http://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf>.

MSPB Case No. 13-02 (2013); MSPB Case No. 11-03 (2011); MSPB Case No. 11-04 (2011); MSPB Case No. 10-19 (2010); MSPB Case No. 07-17 (2008); MSPB Case No. 06-03 (2010). Those guidelines are “intended solely to provide practical guidance.” United States District Court for the District of Maryland Local Rules, Appendix B at 127.⁴ Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

Appellant’s attorney, a member of the Maryland Bar since 1997, billed at an hourly rate of \$250. She asserts that the submitted rate is reasonable and fair, and reflects the customary rates for local practitioners of comparable experience. Appellant’s Request at 2. The County acknowledges that the District Court guidelines provide a suggested hourly rate for lawyers with Appellant’s attorney’s experience of between \$275 and \$425, but suggests that a quasi-judicial administrative hearing before the Board is not the equivalent of a trial before the U.S. District Court. County Response at 3. The County further argues that Appellant’s attorney failed to provide a copy of a fee agreement. *Id.*

Appellant’s attorney attached copies of twelve invoices with Appellant’s Request, and stated that each was submitted to Appellant for payment. The total amount of attorney’s fees and costs was \$14,750. A review of the documentation reveals that Appellant’s attorney consistently billed at an hourly rate of \$250, and that as of May 25, 2016, Appellant had paid his attorney \$14,475.⁵

The hourly billing rate actually charged by an attorney is credible evidence that the rate is consistent with the local market rate, because the client freely agreed to pay that rate. MSPB Case No. 14-33 (2016). *See Willis v. U.S. Postal Service*, 245 F.3d 1333, 1340 (2001). Where an attorney and a client have agreed upon a specific fee for legal services in a Board case, we presume that the amount agreed upon represents a reasonable fee. MSPB Case No. 14-33 (2016). *See Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, 160-61 (2001); *Gensburg v. Department of Veterans Affairs*, 85 M.S.P.R. 198, 206 (2000). That presumption is, of course, rebuttable based upon the factors we are required to consider under Montgomery County Code, § 33-14(c)(9). Among those factors is the customary fee for such services and the experience, reputation, and ability of the attorney.

Appellant’s counsel is an experienced employment lawyer with 20 years of litigation experience. She was a partner with the reputable law firm of Lord & Whip and a Chief Solicitor with the Baltimore City Office of Law. As the Chief of the Office of Legal Affairs for the Baltimore Police Department, she represented the Police Department in employment matters. Her experience is impressive and pertinent to representation of the Appellant in this case. Appellant’s attorney’s resume indicates numerous honors and professional activities, including published articles and presentations, that suggest that she has a good reputation in the legal community. The Board had the opportunity to observe, and was favorably impressed by, the work product, preparation, and litigation ability of Appellant’s attorney. *See Johnson*, 488 F.2d at 718-19. It is unlikely that another attorney could have obtained a more positive result for Appellant. We thus conclude that the hourly rate of \$250 is reasonable and appropriate.

⁴ Under those guidelines, the suggested rate for lawyers admitted to the bar for fifteen to nineteen years is \$275 - \$425. United States District Court for the District of Maryland Local Rules, Appendix B at 127.

⁵ Appellant made five payments from May 12, 2015, to February 17, 2016. The balance due as of May 25, 2016, was \$275.

Number of Hours Billed

The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees. *Hensley v. Eckerhart*, 461 U.S. at 437; *Casali v. Department of the Treasury*, 81 M.S.P.R. 347 (1999). One factor the Board must consider in awarding attorney fees is the time and labor required – *i.e.*, the number of hours reasonably expended. Montgomery County Code, § 33-14(c)(9)(a). The County argues against the reasonableness of the hours sought in this matter. Appellant is seeking an award for a total of 58.9 hours of attorney time, which was billed by and paid to Appellant’s counsel.

Appellant believes that the amount of time charged is reasonable given the complexity of the case due to the necessary information technology analysis, the novelty of the issues, and the legal analysis concerning correctional officer standards of conduct. Appellant’s Request at 1-2. As discussed above, Appellant provided billing records in the form of detailed invoices to support the fee request.

The County argues that it “is impossible to know how much time was necessary on this case as it is impossible to tell what time Appellant’s counsel actually spent working on the case.” County Response at 2. We disagree. The invoices contain an adequate description of the nature of Appellant’s attorney’s activities, how much time was expended, and the dates on which the services occurred. The Board finds that the issues in this case were challenging and that the time spent was adequately documented and reasonably necessary to achieve the partially successful outcome.

The County objected to any fees related to services performed prior to the filing of the Appeal on March 6, 2015. County Response at 2-3. The Board does not agree that such fees are unrecoverable. The Board may award attorney fees for services rendered to the Appellant prior to issuance of the Notice of Disciplinary Action and the Appeal. It is to be expected that an employee served with a Statement of Charges would seek legal counsel and that counsel may attempt to forestall or mitigate any disciplinary action. If this were not so, the Board would lack the authority to appropriately compensate Appellant for all or part of his reasonable attorney fees incurred, as intended by § 33-14(c)(9) of the County Code. *See Mudrich v. Department of Agriculture*, 92 M.S.P.R. 413 (2002) (“Services rendered in connection with an agency action subject to the Board’s jurisdiction are compensable even though the services were provided prior to the filing of the appeal”); *Lizut v. Department of Army*, 27 M.S.P.R. 611, 614 (1985) (“an award may compensate for services rendered in connection with an agency action subject to the Board’s jurisdiction, even though the services were provided prior to the filing of the appeal in attempts to dissuade the agency from taking its proposed action”); *McBride v. Department of Agriculture*, 3 M.S.P.R. 495, 497 (1980) (“Board has jurisdiction to award attorney fees for services rendered to the appellant prior to issuance of the agency’s final decision”).

The County asserts that Appellant’s request should be reduced, as reimbursement is only allowed for hours directly related to the Appeal. County Response at 4. However, the County does not specify which and how many hours should be excluded under this principle. We must therefore assume that the County is referring to services provided prior to the Appeal. As discussed above, to the extent the County’s objection is to the time spent after the Statement of Charges, but prior

to the Appeal, we find that the County's position lacks merit.

The County further claims that fees charged from December 2, 2015, after Appellant's final pleading was filed, should not be compensable. Those hours appear on the May 25, 2016, invoice, the final invoice submitted by Appellant. A total of 1.1 hours of attorney time is reflected on that invoice. After reviewing the description of the services rendered we agree that there should be no compensation for the 0.9 hours of time reviewing and responding to emails from Appellant, as there is no explanation of how that effort is related to the Appeal. However, we believe it appropriate that compensation be provided for the 0.2 hours of time Appellant's attorney spent reviewing the Board's final decision. It should go without saying that it is appropriate for an attorney to read the Board's final decision as part of representing a client in an appeal. We presume the County would not object to the time an attorney spent reading the appeal in a case where, for example, doing so resulted in the attorney formulating and pursuing a successful motion for reconsideration.

Finally, the County argues that Appellant is not entitled to reimbursement for his attorney's travel time or parking expenses. County Response at 4. We find that under Board precedent compensation for mileage expenses and travel time is allowed. MSPB Case No. 13-04 (2013); MSPB Case No. 99-23 (2001). We agree, however, that Appellant's request for costs of \$25.00 to compensate for parking fees must be denied as neither the County Code nor the MSPB's regulations provide for parking reimbursement. MSPB Case No. 13-04 (2013).

The Degree of Success Achieved

The County argues that because Appellant did not completely prevail in his appeal the amount of attorney's fees should be reduced. County Response at 4. Under Maryland law and Board precedent, when an appellant partially prevails the Board will only award a portion of the fees sought. MSPB Case No. 13-02 (2013). *See Friolo v. Frankel*, 403 Md. 443 (2008) (degree of success is a crucial factoring determining a fee award); *Manor Club v. Flaa*, 387 Md. 297, 305 (2005). *See also, Hensley v. Eckerhart*, 461 U.S. at 436 (most critical factor in determining amount of attorney's fees is degree of success obtained).

The County proved violations of the County Internet usage policy by a preponderance of the evidence, and while the Board rescinded Appellant's demotion, it upheld the 30-day suspension. Decision and Order, MSPB Case No. 15-27 (May 16, 2016). The Board thus finds merit to the County's argument that Appellant only partially prevailed. However, while it is true that Appellant did not completely prevail in his appeal, he did achieve a degree of success. Under our precedent, if the degree of success is sufficiently high that it cannot reasonably be characterized as "partial" and the fees requested are modest, we will award the full amount of fees requested. For example, in MSPB Case No. 14-17 (2014), the Board rescinded an employee's dismissal and imposed a one grade demotion. The Board awarded full attorney's fees because the appellant had "achieved the overwhelming majority of the relief he has sought." The Board reasoned that the employee retaining his employment, albeit in a lesser position, was a sufficiently high degree of success that no reduction in the amount of fees sought was justified.

Where an appellant has a lesser degree of success than that achieved in MSPB Case No. 14-17 a reduction in the fees requested may be appropriate. In MSPB Case No. 13-02 the Board found that the County had proven a charge of Conduct Unbecoming. Although the Board refused to grant the County's request for a demotion and a twenty-day suspension, the Board did impose a ten-day suspension. The Board concluded that the ten-day suspension was a significant penalty, and clearly demonstrated that the Appellant did not completely prevail in his appeal. The Board concluded that reducing the number of hours billed by twenty-five percent (25%) was appropriate based upon degree of success.

The facts and ruling in MSPB Case No. 13-02 are indistinguishable from this case, and there is a significant difference between avoiding workplace "capital punishment" and a demotion. In both this case and MSPB Case No. 13-02 the County sought to demote and give substantial suspensions to the appellants. The Board in both cases found that the County had proven a violation of policy that warranted discipline, but rescinded the demotion and upheld a suspension. Under this precedent we conclude that based upon degree of success in this case the number of hours billed should be reduced by twenty-five percent.⁶ Accordingly, the 58 hours of allowable attorney's fees sought by Appellant will be reduced by 25%, resulting in 43.5 total compensable hours.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board finds that a total of 43.5 hours of attorney's fees shall be reimbursed at a rate of \$250 per hour. Accordingly, the County is hereby **ORDERED** to reimburse Appellant for attorney's fees in the total amount of **\$10,875.00**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 13, 2017

CASE NO. 15-27

CONCURRING OPINION **OF ASSOCIATE MEMBER KATOR**

I agree that our decision in this case is consistent with our prior decision in MSPB Case No. 13-02. In that case, we awarded only 75% of the fees sought in recognition that the appellant

⁶ The Board is generally obligated to consider our own precedent. In attorney's fee matters, the County Code specifically requires consideration of "awards in similar cases." Montgomery County Code, § 33-14(c)(9)(i).

did not obtain complete relief before the Board. As in this case, the Board in 13-02 found that discipline was warranted but only a suspension, and not a demotion, was the appropriate penalty.

Neither in 13-02 nor in this case, however, do we explain how it is that 25% is the appropriate discount. We start from the proposition that the appellant did not obtain full relief, but we do not say, for example, that he only obtained 75% of the relief he sought. We demand precise and detailed records from attorneys to justify their fee requests yet our analysis in cases such as this lacks any of that precision and justification. To be sure, the Board is not expected to be “green-eyeshaded accountants,” but instead only to provide “rough justice” in making fee awards. *Fox v. Vice*, 563 U.S. 826, 838 (2011). “Rough justice” must be justice nonetheless. I do not believe that taking a metaphorical meat cleaver to the fee request is necessarily consistent with that end.

There is no argument here that any of the fees requested can be directly attributed to appellant’s ultimately unsuccessful effort to challenge his suspension; that is, had the County sought only to demote the appellant and not suspend him, he would have incurred exactly the same amount of fees and we would have required the County to pay them in full. Given that appellant would have incurred exactly the same amount of fees irrespective of whether the Board sustained or reversed the suspension, it is difficult to find the justice in refusing to recompense Appellant for fees that were necessarily and reasonably incurred.

Our authority under Code § 33-14(c) is to “[o]rder the County to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” And we must consider the degree of success in fashioning an appropriate attorney fee award. *Manor Country Club v. Flaa*, 387 Md. 297 (2005). But to say we must consider degree of success is not to say that we must discount the fees sought in every case in which the appellant does not completely prevail on every aspect of his case. Rather, the County must persuade us that a particular reduction in the fee requested is appropriate in light of the unique facts of each case.

We have held that when an appellant obtains the “lion’s share” (but not all) of the relief he seeks then a reduction for lack of complete success is not appropriate. *See* MSPB Case No. 14-17 (2014) (awarding full fees when Board reversed removal and mitigated penalty to a one grade demotion). Certainly, it is conceivable that an appellant who succeeded in having the Board reverse his demotion but still suffered a suspension could be deemed to have obtained the lion’s share of the relief he sought. Compared to a demotion, for example, a 30-day suspension could have an almost indiscernible effect on an employee’s career earnings.

The County has offered no rationale to justify any particular reduction in the fee sought. Rather, it has merely cited our precedent for the apparent proposition that when an appellant obtains a reversal of a demotion but is left with a suspension in place then fees will automatically be reduced by 25%. I think that is a misreading of our precedent. While I agree that the modest reduction in the fees sought here is appropriate in light of the unique facts of this case, in future cases I would expect the County to present a cogent argument for any specific proposed fee reduction.

December 13, 2017

CASE NO. 18-02

DECISION ON ATTORNEY'S FEES

This is the Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's January 10, 2018, Attorney's Fees Petition (Appellant's Request), seeking \$9,000.00 in attorney's fees and costs of \$45.89. Appellant's Request was considered and decided by the Board.

Appellant, a Liquor Store Assistant Manager, appealed the decision of the Department of Liquor Control (DLC), to dismiss him from employment effective August 14, 2017. The dismissal was based on allegations that Appellant consumed alcohol on the job, allowed employees to remove alcoholic beverages from the store without paying, and approved falsified timesheets. After hearings conducted on November 15 and December 7, 2017, the Board held that the County failed to prove that Appellant violated timecard and attendance policies, or policies on scheduling, but did violate County policy by consuming alcohol while on duty at a DLC store. Decision and Order, MSPB Case No. 18-02 (December 26, 2017); Supplemental Order, MSPB Case No. 18-02 (January 9, 2018). In its decision, the Board rescinded Appellant's dismissal from County employment, reinstated him to County service, but demoted him to the non-supervisory position of Liquor Store Clerk II. The Board found that because the penalty had been "significantly mitigated" the County was required to pay reasonable attorney's fees and costs. Decision and Order, MSPB Case No. 18-02, at 11.

The County objects to Appellant's counsel receiving full payment of attorney's fees, asserting that the requested fees should be reduced by 50% because Appellant "gained little" by continuation of the litigation after rejecting a settlement offer by the County on December 5, 2017, prior to the second and final day of hearings. County Response to Appellant Attorney's Fees Petition and Motion to Disclose Confidential Settlement Negotiations, January 22, 2018 (County Response). The County urges the Board to permit disclosure of the terms of the settlement offer that Appellant rejected in order to determine the reasonableness of the attorney's fees petition. The County does not oppose the award of \$45.89 in costs.

APPROPRIATE REIMBURSEMENT FORMULA

The Montgomery County Code, § 33-14(c), provides the Board with remedial authority to "[o]rder the County to reimburse or pay all or part of the employee's reasonable attorney's fees." *See Montgomery County v. Jamsa*, 153 Md. App. 346, 355 (2003). In determining what constitutes a reasonable fee, § 33-14(c)(9) of the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;

- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

In *Manor Country Club v. Flaa*, 387 Md. 297 (2005), the Court of Appeals considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The provisions of §27-7(k)(1) then in effect were identical to § 33-14(c)(9), which is controlling on the Board. The *Flaa* Court noted that the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989), were "in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)" for determining an appropriate attorney's fees award. 387 Md. at 313. The Court of Appeals further noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Id.*

In *Friolo v. Frankel*, 403 Md. 443, 460 (2008), the Court of Appeals cited both *Hensley v. Eckerhart* and *Flaa* for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney's fees. *See* MSPB Case No. 15-27 (2017); MSPB Case No. 00-13 (2000). In this case, the County seeks to reduce the award of attorney's fees based on Appellants' degree of success after he rejected a settlement offer.

ANALYSIS AND CONCLUSIONS

Disclosure and Relevance of the Settlement Discussions

The County urges the Board to permit disclosure of the terms of the settlement offer that Appellant rejected because, it believes, the settlement discussions will demonstrate that Appellant unnecessarily prolonged this litigation and gained little by doing so. County Response at 2. The County relies on MSPB Case No. 13-07 (2013) as precedent for disclosure of the settlement discussions and reduction in the number of hours billed.

We believe that ordering the disclosure of information concerning settlement negotiations is unnecessary under the facts of this case and would risk chilling negotiations in future cases, contrary to the public policies reflected in Maryland and federal law. *See* Md. Rule 5-408; Fed. R. Evid. 408. While the terms of a settlement agreement might be appropriately discoverable in certain circumstances, disclosure of negotiations leading up to a settlement agreement is usually inappropriate. *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 469 (1998). Moreover, unlike MSPB Case No. 13-07, the Board did not consider (or even know) the terms of the proposed settlement agreement when fashioning its decision and remedy. We therefore deny the County's motion to disclose confidential settlement negotiations.

The timing of the settlement negotiations in the two cases are also much different. In MSPB Case No. 13-07, an employee filed an appeal with the Board upon receiving a Notice of Termination. However, the Notice of Termination was defective and the County advised the Board that it would be reissued. The Board then stayed the processing of the appeal until the County corrected and reissued the notice. Prior to reissuing a corrected notice, the County negotiated a settlement with the union, which the employee rejected. Approximately six weeks later, the

corrected notice was issued and the litigation resumed. The Board ultimately awarded a remedy that was the essentially the same as that proposed in the settlement that the employee had rejected. In considering the subsequent petition for attorney's fees, the Board found that the appellant gained little more through litigation than what was offered to him by the County, and thus reduced the total amount of hours billed by one-third.

Our decision in MSPB Case No. 13-07 is thus readily distinguishable from this matter and provides little support for the County's position. Unlike in that case, here the County does not contend that it offered Appellant the relief he ultimately obtained well before the litigation began, or even the start of the first day of hearings. Rejecting the County's settlement offer cannot be characterized as unreasonably delaying resolution of this case when agreeing to it would have resulted in Appellant losing his job.

After the hearing began and the Board had already heard from two witnesses, the parties engaged in further discussions. Tr. (Nov. 15) at 155-60. The parties represented that they were close to an agreement, but that the County needed time to obtain further information. The Board then granted the request of the parties to postpone the hearing until December 7, 2017. On December 5, 2017, the County advised the Board's Executive Director by email that the day before it had provided Appellant with information he needed to make a decision on the County's most recent settlement offer. The settlement offer was subsequently rejected by Appellant later that same day. County Response at 1.

We do not find that it was unreasonable for Appellant to reject a settlement offer late in the litigation, *i.e.*, two days before the second and final day of hearings. This is especially true when, due in part to the effectiveness of his counsel, Appellant may have reasonably believed that his prospects for complete success had significantly improved.

The County also cites federal court decisions that have considered settlement offers in determining appropriate fees. However, in those cases fees were reduced only when a plaintiff *unreasonably* rejected settlements that would have provided superior relief to what was ultimately obtained through continued litigation. Maryland law is much the same. *See Friolo v. Frankel*, 438 Md. 304, 325 (2014) ("a party should not be permitted to increase a fee award by prolonging the litigation as a result of making unreasonable settlement demands or rejecting reasonable settlement offers."¹).¹ However, given that the County's more generous offer did not come until after Appellant's counsel had prepared for and begun the hearing, Appellant cannot be accused of unreasonably prolonging the litigation. Appellant reasonably decided to take his chances and vigorously pursue his case to conclusion. The County "could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner." *City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11 (1986), *citing Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (*en banc*) ("The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response."). Accordingly, the fact that Appellant rejected a settlement offer only to receive essentially the same relief from the Board does not warrant, in this instance, any reduction to his attorney's fees.

¹Although, we note that there is no Maryland equivalent to an "offer of judgment" under Fed. R. Civ. P. 68. *See Friolo v. Frankel*, 438 Md. at 324 n.8.

Appropriate Hourly Rate

The Board has consistently looked to the United States District Court for the District of Maryland Local Rules for guidance in determining an appropriate hourly rate for attorney's fees, as well as considering the nature and complexity of the case.² See MSPB Case No. 15-27 (2017); MSPB Case No. 14-33 (2016); MSPB Case No. 14-17 (2014). Those guidelines are "intended solely to provide practical guidance." United States District Court for the District of Maryland Local Rules, Appendix B at 127.³ Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

Appellant's primary attorney in this case is an associate with The [redacted] Firm, LLC. He has been a member of the Virginia Bar since the summer of 2014, asserts that he normally bills at an hourly rate of \$300, and that Appellant agreed to a fee arrangement at that hourly rate.⁴ Appellant's Request at 6-7. In recognition that the District Court guidelines provide a suggested hourly rate of between \$150 and \$225 for lawyers with Appellant's attorney's level of experience, the requested rate is \$225. Appellant asserts that the submitted rate is reasonable and fair, and reflects the customary rates for local practitioners of comparable experience. Appellant's Request at 7; Exhibit 2 (Declaration of DS), ¶3. Despite performing some work on the case, the firm's principal did not submit a request for her hours. Appellant's Request at 7.

Appellant's attorney provided time records reflecting dates work was performed, the nature of the services, the amount of time worked, and the cost. Appellant's Request, Exhibit 1. The fee petition avers that the billing statement submitted as Exhibit 1 is accurate, was reviewed by the firm's principal, and reflects "all legal work performed from Appellant's initial consult through this fee petition." Appellant's Request at 3. According to Exhibit 1, the total number of hours billed was 38.5, which when multiplied by an hourly rate of \$225 results in total attorney's fees of \$8,662.50. Inexplicably, Appellant's Exhibit 2, ¶6, asserts that Appellant's attorney expended 40 hours of time on this case. The requested amount of \$9,000.00, would be the correct figure if 40 hours of attorney time were billed at the \$225 hourly rate. However, since there is no documentation or explanation provided for the inclusion of the additional 1.5 hours of attorney time in Appellant's calculations, any award of attorney's fees may only be based on the 38.5 hours that is documented.

As noted above, Appellant agreed to an hourly rate of \$300 for the services of Mr. R. The hourly billing rate actually charged by an attorney is credible evidence that the rate is consistent with the local market rate, because the client freely agreed to pay that rate. MSPB Case No. 14-33 (2016). See *Willis v. U.S. Postal Service*, 245 F.3d 1333, 1340 (2001). Where an attorney and a client have agreed upon a specific fee for legal services in a Board case, we presume that the amount agreed upon represents a reasonable fee. MSPB Case No. 14-33 (2016). See *Martinez v.*

²Appendix B of the Local Rules of the United States District Court for the District of Maryland, July 1, 2016, (March 2018 Supplement), is available online at: <http://www.mdd.uscourts.gov/sites/mdd/files/LocalRules-2016-ExpeditedLARAmendments.pdf>.

³Under those guidelines, the suggested rate for lawyers admitted to the bar for less than five years is \$150 - \$225. United States District Court for the District of Maryland Local Rules, Appendix B at 127.

⁴MD Code Ann., Business Occupations and Professions Article, §10-206(b)(5), provides that "an individual who is authorized by a county employee to represent the employee at any step of the county's grievance procedure" need not be a member of the Maryland Bar.

U.S. Postal Service, 89 M.S.P.R. 152, 160-61 (2001); *Gensburg v. Department of Veterans Affairs*, 85 M.S.P.R. 198, 206 (2000). That presumption is, of course, rebuttable based upon the factors we are required to consider under Montgomery County Code, § 33-14(c)(9). Among those factors is the customary fee for such services and the experience, reputation, and ability of the attorney. The County's response does not question whether the hourly rate requested is appropriate and reasonable for an attorney with Appellant's counsel's experience, reputation, and ability.

While Appellant's counsel does not have extensive experience as an employment lawyer, the Board had ample opportunity to observe his work product, preparation, and litigation ability. *See Johnson*, 488 F.2d at 718-19. We were sufficiently impressed and thus conclude that the hourly rate of \$225 is reasonable and appropriate.

Number of Hours Billed

The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees. *Hensley v. Eckerhart*, 461 U.S. at 437; *Casali v. Department of the Treasury*, 81 M.S.P.R. 347 (1999). One factor the Board must consider in awarding attorney fees is the time and labor required – *i.e.*, the number of hours reasonably expended. Montgomery County Code, § 33-14(c)(9)(a). Appellant is seeking an award of 38.5 hours of attorney time. The County has not objected to the reasonableness of the number of hours required to litigate this case, except as to the hours expended as a result of Appellant's rejection of the County's settlement offer. As discussed above, we do not find that it was unreasonable for Appellant to refuse to accept the County's last settlement offer.

We agree with Appellant that the amount of time charged is reasonable given the nature of the case. Appellant's Request at 3-5. While the case did not involve especially complex legal issues, a careful investigation and analysis of the facts was necessary. Hearings were held on two separate days, six witnesses testified, and a number of documents, including videos, had to be reviewed and analyzed. Appellant's counsel clearly spent the time necessary to become familiar with the relevant facts and used that knowledge to effectively examine and cross examine witnesses, and make persuasive arguments.

As discussed above, Appellant provided billing records to support the fee request. The records contain an adequate description of the nature of Appellant's attorney's activities, how much time was expended, and the dates on which the services occurred. Having reviewed the billing records submitted by Appellant's counsel, the Board concludes that the time was adequately documented and appears well spent on activities necessary to the litigation and to achieve a successful outcome.

The Degree of Success Achieved

Under our precedent, if the degree of success is sufficiently high that it cannot reasonably be characterized as "partial," and the fees requested are modest, we will award the full amount of fees requested. In MSPB Case No. 14-17 (2014), the Board rescinded an employee's dismissal and imposed a one grade demotion. The Board awarded full attorney's fees because the appellant had "achieved the overwhelming majority of the relief he has sought." The Board reasoned that the

employee retaining his employment, albeit in a lesser position, was a sufficiently high degree of success that no reduction in the amount of fees sought was justified.

The ruling in MSPB Case No. 14-17 is indistinguishable from this case, as both cases involve an employee receiving a demotion while avoiding workplace “capital punishment.” The Board is generally obligated to consider our own precedent, and in attorney’s fee matters, the County Code specifically requires consideration of “awards in similar cases.” Montgomery County Code, § 33-14(c)(9)(i). Accordingly, we find that although the relief awarded to Appellant was not complete, the degree of success achieved by Appellant’s counsel in this case does not justify any reduction in the amount of attorney’s fees sought.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** the County’s motion to disclose confidential settlement negotiations. The Board further finds that a total of 38.5 hours of attorney’s fees shall be reimbursed at a rate of \$225 per hour. In addition, Appellant is entitled to \$45.89 in costs. Accordingly, the County is hereby **ORDERED** to reimburse Appellant for attorney’s fees and costs in the total amount of **\$8,708.39**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
March 26, 2018

OVERSIGHT

Classification and Compensation Audit

Under § 404 of the Montgomery County Maryland Charter, the Merit System Protection Board is required to, “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 County Council appropriated funding in the Fiscal Year 2017 and 2018 budgets to allow the MSPB to hire a consultant to conduct an independent analysis of the County’s classification and compensation plan and procedures. *See* Montgomery County Personnel Regulation (MCPR) § 9-3(h)(2)(A) (“At least once every 5 years, the MSPB must have a consultant who is a specialist in the field and independent of the County government conduct an objective audit of the entire classification and compensation plan and procedures”).

Due primarily to fiscal constraints, funding for the most recent audit was delayed until Fiscal Year 2017.¹ In October 2016, Board entered into a contract with an independent consultant, Cooperative Personnel Services, a California Joint Powers Agency doing business as CPS HR Consulting, to design and conduct a comprehensive review and audit of the County’s classification and compensation program and procedures. The objectives of the audit were to: (1) ensure the accuracy, equity, validity, and integrity of the classification and compensation program and execution of its procedures; and, (2) determine the effectiveness of the current classification and compensation models and methodologies.

On June 7, 2018, the Board submitted its audit report on Montgomery County’s Classification and Compensation Plans and Procedures to the County Council, County Executive, and the Chief Administrative Officer. CPS HR’s comprehensive final report identified the current classification and compensation system’s strengths and opportunities for improvement, along with specific recommendations. CPS HR concluded that the County has “an effective classification and compensation program,” with “no significant compliance issues.” The Board provided the Council with comments on the audit recommendations, but offered no recommendations which would require the Council to alter the existing classification and compensation system.

Electronic versions of the final report and appendices, as well as the Board’s comments and recommendations, are posted to the [MSPB website](#).

Creation of New Classifications

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

¹ The previous audit was completed in 2001.

Based on § 33-11 of the Code, MCPR § 9-3(b)(3) provides that the Office of Human Resources Director shall 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 fiscal year 2018, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) Automotive Parts Technician I
- 2) Automotive Parts Technician II
- 3) Supervisory Supply Technician
- 4) Animal Services Officer (Series)
- 5) Capital Improvement Project Manager (Series)
- 6) Department of General Services Mechanics