

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

████████████████████

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 17-13

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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).

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.

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 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

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 [REDACTED] 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. [REDACTED] 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. [REDACTED] 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. [REDACTED] 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 [REDACTED], to release information periodically to his supervisor and to the County's Equal Employment Officer (EEO) concerning [REDACTED]'s progress in obtaining training/counseling in how to avoid engaging in acts of sexual harassment. [REDACTED] 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. [REDACTED] understands that should he breach any of the terms of this paragraph of the Agreement he will be subject to *dismissal*.

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); 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, [REDACTED] (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.

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'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. [REDACTED] (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 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:

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.

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.

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, [REDACTED] (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 [REDACTED] (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, [REDACTED] (RS), would provide testimony similar to that of SG if he were called. Tr. 193.

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

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

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;
- (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;

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 "██████████" and "██████████." Despite facing several elite opponents in those 57 professional fights, Appellant was never knocked out. AX 1.

- (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.

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).

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).

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



Charlotte Crutchfield
Chair