

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

**IN THE MATTER OF**

**[REDACTED]**

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**CASE NO. 18-12**

=====

**FINAL DECISION AND ORDER**

On October 25, 2017, [REDACTED] (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.<sup>1</sup>

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

---

<sup>1</sup> 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" sited [*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.

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 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 Sergeant [REDACTED] (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 [REDACTED] (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. [REDACTED] “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.

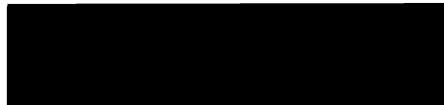
As we must dismiss the charges against Appellant based on the County's failure to carry its burden of proof, we need not reach and decide the questions of the timeliness of the imposition of discipline or whether a written reprimand is an appropriate level of discipline in light of the discipline given 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



Angela Franco  
Chair