

**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. 19-16**

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**DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of ██████████ (Appellant). On January 15, 2019, Appellant filed this appeal challenging his dismissal from a Firefighter/Rescuer II position with the Department of Fire and Rescue Services (DFRS, MCFRS, or Department).<sup>1</sup> County Exhibit (CX) 1.

**BACKGROUND**

The discipline in this matter relates to a March 25, 2018, incident involving Appellant's alleged assault on his domestic partner at their home in Northern Virginia, as well as allegations that Appellant subsequently violated a protective order and failed to fully cooperate with a DFRS investigation by providing false and misleading statements to investigators. CX 1. On December 31, 2018, DFRS issued a Notice of Disciplinary Action (NODA) dismissing Appellant, effective January 7, 2019. CX 1.

The NODA found that Appellant violated various provisions of the Montgomery County Personnel Regulations (MCPR) and the DFRS Code of Conduct arising out of Appellant's assault on his domestic partner, violation of a protective order, and failure to cooperate with the DFRS investigation by providing false and misleading statements to the investigators. Specifically, the NODA found that Appellant had exhibited conduct unbecoming when he assaulted his significant

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<sup>1</sup> The appeal was filed online Friday, January 11, 2019, a day that the MSPB offices are not open, and County offices were closed on Monday, January 14, 2019, due to inclement weather. Accordingly, the appeal was considered to have been officially received by the Board on January 15. *See* MSPB Case Nos. 17-14 and 17-16 (2017).

other and thus violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.0 and § 5.14 (conduct unbecoming). CX 1, CX 18, CX 19. The NODA also found that Appellant had violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.14 (conduct unbecoming) by calling his significant other from jail on two occasions in violation of an emergency protective court order. CX 1, CX 18, CX 19. Finally, the NODA found that by failing to provide honest and accurate information during an internal affairs investigation Appellant had violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(g) (knowingly making a false statement), MCPR § 33-5(aa) (failure to cooperate with an investigation), DFRS Regulation 22.00, Code of Ethics, § 4(c)(13) (false or misleading statement during an investigation), DFRS Policy 529, Internal Affairs, § 4.10 (truthfully answer questions). CX 1, CX 20, CX 21.<sup>2</sup>

A hearing on the merits was conducted on September 10 and 11, 2019. Subsequent to the hearing the parties submitted post-hearing briefs, including proposed findings of fact and conclusions of law. *See* Closing Brief of Montgomery County, October 21, 2019 (County's Brief); Appellant's Proposed Findings of Fact and Conclusions of Law, October 21, 2019; (Appellant's Brief).

After hearing the testimony and reviewing the exhibits and briefs of the parties, the appeal was considered and decided by the Board.

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<sup>2</sup> County Exhibits 1 through 26 and Appellant Exhibits (AX) 1 through 27 were admitted into the record. The County Exhibits are as follows:

- CX 1 - Notice of Disciplinary Action
- CX 2 - Protective Order
- CX 3 - 911 Audio
- CX 4 - Jail Call Number 1 Audio
- CX 5 - Jail Call Number 2 Audio
- CX 6 - KL Internal Affairs Interview Audio
- CX 7 - AL Internal Affairs Interview Audio
- CX 8 - [REDACTED] (KK) Internal Affairs Interview Audio
- CX 9 - 911 Transcript
- CX 10 - Jail Call Number Transcript
- CX 11 - Jail Call Number Transcript
- CX 12 - KJ Internal Affairs Interview Transcript
- CX 13 - AL Internal Affairs Interview Transcript
- CX 14 - KK Internal Affairs Interview Transcript
- CX 15 - Fairfax County Police Photographs of AL
- CX 16 - Internal Affairs Acknowledgement form Signed by KL
- CX 17 - Internal Affairs Investigative Report
- CX 18 - MCPR § 33-5
- CX 19 - MCFRS Code of Conduct
- CX 20 - MCFRS Executive Regulation 22-00
- CX 21 - MCFRS Policies and Procedures No. 529, Internal Affairs
- CX 22 - Fairfax County Police Report
- CX 23 - Arrest Report
- CX 24 - Fairfax County Police DV Screen and LAP Checklist
- CX 25 - 2006 MOU Re: Levels of Discipline
- CX 26 - Collective Bargaining Agreement, Article 30 – Discipline

### FINDINGS OF FACT

The Board heard testimony from six witnesses, including Appellant. The following witnesses testified and are identified by their initials, or as “Appellant,” elsewhere in this decision:

1. [REDACTED], Investigator/Background Screening Specialist, DFRS (AH)
2. [REDACTED], Assistant Fire Chief, DFRS (ES)
3. Captain [REDACTED], DFRS (RH)
4. [REDACTED], Fire Chief, DFRS (SG)
5. [REDACTED] (AL)
6. [REDACTED] (KJ or Appellant)

At the time of his dismissal, Appellant was employed as a Firefighter/Rescuer II with DFRS and had been a firefighter for less than six years. September 11, 2019, Hearing Transcript (Tr. (Day 2)) 196. Appellant had no prior disciplinary record. Tr. (Day 2) 198; Stipulations, ¶4, August 10, 2019.

The disciplinary action against Appellant arose out of an incident that occurred on March 25, 2018, at his home in Fairfax County, Virginia. Appellant and his significant other, AL, engaged in an altercation and AL called 911 at approximately 2:09 p.m. AL told the 911 operator three separate times that she had been choked or strangled by Appellant while at their home. Specifically, AL first told the 911 operator, “He hurt me. He strangled me.” CX 9 at 2:20. AL also said, “He just f[REDACTED]ing strangled me.” *Id.* at 4:16. Finally, AL told the operator, “He just - I was standing outside on the balcony. He just came out and just started grabbing and choking me.” *Id.* at 7:1-3. In the audio of the 911 call AL’s voice is unmistakably angry and emotional. CX 3.

The Fairfax County Police promptly responded to Appellant’s residence, interviewed AL, and prepared a report. The report indicates that AL told the responding officers the following:

VI [AL] stated her and the offender [Appellant] were arguing over a facebook picture. During the argument she opened the glass door and went outside on to the patio. At this time the offender then closed the sliding glass door and locked VI outside. VI then started knocking on the glass door to come back inside. The offender opened the door and in a violent manner grabbed VI’s right arm and throat and continuously pushed her backwards until she fell onto the patio furniture.

CX 22, p. 3.

AL also answered questions from the officers when they administered the FCPD Domestic Violence Lethality Screen for First Responders. CX 24. AL affirmed that Appellant had tried to choke her and initialed the form.

The police officers, AL and AL’s roommate took photographs of AL. The pictures of AL in CX 15 “were taken, on-scene, by members of the Fairfax County Police and/or by [AL] and/or by [KK] on March 25, 2018.” Stipulations, ¶11. Several of the photographs taken by AL or KK immediately after the incident clearly show red marks on AL’s neck and right arm. CX 15. The red marks are consistent with AL’s statements to the police, immediately after the incident, that she had been assaulted by Appellant and that he had grabbed her arm and choked her.

Although Appellant was still in the residence when AL called 911, he did not remain there for the entire call. He took his daughter to a birthday party before the police arrived.

Later that day, after Appellant was advised that the police wanted to speak with him, he turned himself in to the police and was arrested. Appellant was charged with felony strangulation under Va. Code Ann. § 18.2-51.6. AL was contacted by someone with the Fairfax County prosecutor's office and asked if she intended to press charges against Appellant. AL replied "no." Tr. (Day 2) 138-40. Prosecutors in Fairfax County ultimately entered a *nolle prosequi* on that charge. Stipulations, ¶12.

A protective order pursuant to Va. Code Ann. § 16.1-253.4 was issued at 4:17 pm on March 25, 2018, and Appellant was served with it shortly after his arrest. CX 2. The court specifically ordered that Appellant "shall have no contact of any kind with [AL]."

Appellant was held in jail the night of March 25, 2018. Notwithstanding the protective order, Appellant called AL from jail twice that evening. Both calls were recorded. CX 4, 5, 10, and 11.

The first call was made by Appellant just after 8:00 pm. CX 4, CX 10, p. 2. Appellant told AL that he had not been released on bond because the charge against him was "like up there with like murder and all that so there's no bond." CX 10, p. 4. AL, who had expressed surprise that Appellant had not been released, responded by saying "Oh, my god." *Id.*

Later in the call, after Appellant expresses his love for her, AL voiced remorse for calling the police:

[Appellant]: I love you so much.

[AL]: Love you too. I'm so sorry.

[Appellant]: It's not your fault, babe.

[AL]: It is. I shouldn't have called. I didn't think. I didn't think they were going to do that. I didn't say you strangled me or anything. . .

CX 10, p. 9.

Appellant then tells AL that he has researched the charge against him and explains what the State will need to prove to obtain a conviction:

[Appellant]: Just in court you got to say, you know, the truth because

[AL]: What?

[Appellant]: I looked it up and they're only supposed to charge you if you're like applying pressure and not allowing air to the victim or whatever, but (inaudible) .

[AL]: I mean I told her it happened for 2.5 seconds.

[Appellant]: Yeah.

[AL]: So I mean if worse comes to worse when I testify I'll just say it just happened and like -- I mean, the pictures, they just show red.

[Appellant]: Yeah.

[AL]: Like you know what I mean? Like I don't know. Maybe I can say I'm just --

[Appellant]: We'll talk about it.

[AL]: -- (inaudible). It only happened for two seconds. Like it wasn't -- I mean, it's not right for them to charge you for that. . .

After strategizing about Appellant's defense and AL's potential testimony, the first call ends with Appellant telling AL, "I'll call you in a little bit, okay?" and AL saying "Okay. Call me." CX 10, p. 10.

Appellant makes the second call at 10:05 pm that same evening. CX 11, p. 2. This time the call was made to KK, the housemate of AL and Appellant. The first thing KK says to Appellant is, "She's on the phone with her lawyer." *Id.* This suggests that, as promised at the conclusion of the first call, Appellant is trying to reach AL. Indeed, Appellant interrupts KK to say, "Well, I told her I'd call her back." CX 11, p. 3.

When AL is finished speaking with the lawyer she gets on the phone with Appellant. AL then tells Appellant that the lawyer was knowledgeable, explained what proof the State would need, and suggested that it would be difficult for the State to convict Appellant. CX 11, p. 8. AL then advised Appellant that the lawyer suggested how she should testify if she wanted Appellant to avoid a conviction: "He was saying that like I could say that like I didn't remember or (inaudible) or I'm on a lot of medication." CX 11, p. 10. She then indicated that the lawyer reassured her that if she just said she does not remember that would be enough to end the matter. *Id.*, pp. 10-11. Towards the end of the conversation, Appellant told AL that they needed to discuss their relationship.

After DFRS learned of Appellant's arrest an investigation was initiated. DFRS Internal Affairs Investigator AH interviewed AL on April 9, 2018. AL told Investigator AH that Appellant only gave her a "bear hug" to calm her down. CX 13, p. 6. AL also said she was "loopy" from a lot of medication at the time of the incident. *Id.*, pp. 5-6.

AL told Investigator AH that the police were "pushing" her to say certain things, but that "I never said he strangled me. I never said that he touched my throat or tried. I never said that." CX 13, p. 7. During the interview she repeatedly denied that Appellant had strangled her. CX 13, pp. 11, 21. With regard to the marks on her arm and neck that AL had documented and shared with the police, she told Investigator AH that they were "just red marks that I could simply get from just running outside, I would think." CX 13, p.12.

Investigator AH testified that after the interview he obtained and listened to the audios of AL's 911 call and the two calls Appellant made to her from the jail. AH heard that contrary to what she had told him, AL did say that Appellant had strangled her. Tr. (Day 1) 64.

Appellant was interviewed by Investigator AH on June 11, 2018 and signed an Investigation Acknowledgement Form that was also an order signed by the Fire Chief on June 7. CX 16. The order required Appellant "to answer all questions truthfully" and warned that failure to do so "could lead to disciplinary action up to and including dismissal."

During the interview, however, Appellant denied having contact with AL while he was in jail. CX 12, p. 30. After Investigator AH confronted Appellant with the audio of the first call Appellant admitted making the call. When Investigator AH asked if Appellant had any other contact with AL while subject to the protective order Appellant indicated that he did not recall any, and when asked about the second call denied any recollection. CX 12, p. 50.

Notwithstanding Appellant's acknowledgement of the Fire Chief's order "to answer all questions truthfully," Appellant admitted during his hearing testimony that he was not truthful with the Internal Affairs investigator when asked if he had contacted AL while the protective order was in effect. Tr. (Day 2) 219. Appellant explained that he lied to the Internal Affairs investigators because he was concerned that he would lose his job if he told the truth:

I was terrified I was going to lose my job, and I thought that if I told them that I'd never talked to [AL] during the protective order that it would let me keep my job. And I truly regret doing that. . . I wish I could go back and change that, but I made a mistake, and I regret it.

Tr. (Day 2) 219.

In Appellant's November 14, 2018, response to the Statement of Charges Appellant admitted that "As to the charge that I violated an emergency protective order on the night that it was served on me, it is true that I initiated two calls that evening and spoke to [AL] each time." AX 1.<sup>3</sup> Appellant also acknowledged during his hearing testimony that he violated the protective order by speaking to AL from jail on March 25, 2018. Tr. (Day 2) 235, 237-38.

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<sup>3</sup> Appellant's Exhibits are as follows:

- AX 1 - November 14, 2018 Response from Appellant to Chief SG
- AX 2 - November 13, 2018 Letter from Captain [REDACTED] (RH) to Chief SG
- AX 3 - DFRS Domestic Violence Spreadsheet
- AX 4 - Disciplinary Action Documents, Firefighter A
- AX 5 - Disciplinary Action Documents, Firefighter B
- AX 6 - Disciplinary Action Documents, Firefighter C
- AX 7 - Disciplinary Action Documents, Firefighter D
- AX 8 - Disciplinary Action Documents, Firefighter E
- AX 9 - Disciplinary Action Documents, Firefighter F
- AX 10 - Disciplinary Action Documents, Firefighter G
- AX 11 - Disciplinary Action Documents, Firefighter H
- AX 12 - Disciplinary Action Documents, Firefighter I
- AX 13 - Disciplinary Action Documents, Firefighter J
- AX 14 - Disciplinary Action Documents, Firefighter K
- AX 15 - Disciplinary Action Documents, Firefighter L
- AX 16 - Disciplinary Action Documents, Firefighter M
- AX 17 - Disciplinary Action Documents, Firefighter N
- AX 18 - Disciplinary Action Documents, Firefighter O
- AX 19 - Disciplinary Action Documents, Firefighter P
- AX 20 - Disciplinary Action Documents, Firefighter Q
- AX 21 - Disciplinary Action Documents, Firefighter R
- AX 22 - Disciplinary Action Documents, Firefighter S
- AX 23 - Disciplinary Action Documents, Firefighter T
- AX 24 - Disciplinary Action Documents, Firefighter U
- AX 25 - Disciplinary Action Documents, Firefighter V

Appellant downplayed his role in the altercation with AL, telling Investigator AH that all he did was to give AL a bear hug. CX 12, p. 35. Appellant also testified at the hearing that all he did was give AL a bear hug. Tr. (Day 2 ) 228. He denied grabbing AL by the neck and pushing her into the furniture on the porch. Tr. (Day 2) 228-29. Appellant conceded that AL's arm and neck area are the only places in the photographs with redness. Tr. (Day 2) 229.

During her testimony at the hearing AL admitted that her alleged lack of memory was part of a strategy she discussed with the lawyer she obtained to defend Appellant. Tr. (Day 2) 185. She also testified that during the incident she was angry and out of control, and that when she lunged at Appellant he was calm and tried to get her under control with a bear hug. Tr. (Day 2) 128. AL admitted that she told the police that Appellant had caused the marks on her neck. Tr. (Day 2) 167. AL suggested that the red marks in the photographs were actually due to "Asian flush," a result of drinking alcohol. Tr. (Day 2) 192. AL's Asian flush theory was not raised to the police, during the telephone call from jail where AL and Appellant discussed how to explain the red marks (CX 10, p. 10), or at the investigatory interview with AH.

Investigator AH testified that Appellant demonstrated the bear hug as being face to face. Tr. (Day 1) 80. Investigator AH further testified that the redness on AL's arm and neck were inconsistent with the bear hug maneuver as demonstrated by Appellant during the interview. Tr. (Day 1) 81.

#### APPLICABLE LAW

**Montgomery County Personnel Regulations, 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. . .

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

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, Code of Conduct, Code of Personal Conduct, No. 502, May 6, 1996, which states in applicable part:**

- 5.0 Employees will, at all times, conduct themselves in such a manner as to reflect favorably on the DFRS and Fire-Rescue-EMS Service in general. . .
- 5.14 No employee will commit any act which constitutes conduct unbecoming a merit system employee. "Unbecoming" conduct includes, but is not limited to, any criminal, dishonest or improper conduct.

**Montgomery County Department of Fire and Rescue Services, Policies and Procedures, Internal Affairs, No. 529, September 9, 1997, which provides, in pertinent part:**



- 4.10 Employees are required to truthfully and promptly answer questions concerning performance of duty, adherence to Department procedures, or suspected misconduct.

**Montgomery County Department of Fire and Rescue Services, Executive Regulation, Code of Ethics and On-Duty Personal Conduct**, No. 22-00 AM, July 9, 2002, which provides, in applicable part:

**Sec. 4. Policy.** It is the policy of the Fire and Rescue Commission to ensure that all **on-duty personnel** maintain an exemplary standard of personal integrity and ethical conduct in their relationships with each other and with the public at all times. **On-duty personnel** must conduct themselves in a professional manner that is beyond reproach. . .

- c. Personal Conduct. **On-duty personnel** must behave in a professional manner that reflects favorably on the **Montgomery County Fire and Rescue Service** at all times. They must not commit any act that constitutes **conduct unbecoming** a member of the fire and rescue service. . .
13. **MCFRS personnel** must not make any false or misleading statements during the course of an investigation, or in order to initiate an investigation.

#### Issue

The following issue will be heard and decided by the Board:

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

### **ANALYSIS AND CONCLUSIONS**

#### ***Burden of Proof***

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 Testimony of Appellant and AL Lacked Credibility***

Appellant testified that the domestic altercation with AL, his significant other, consisted of him applying a defensive "bear hug" to AL. This is inconsistent with the telephone call recordings and transcripts, the testimony of Investigator AH, and AL's contemporaneous statements to the police. Accordingly, the Board is obligated to consider and resolve the issue of credibility for Appellant. As the Board has previously explained, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013).

Investigator AH credibly testified that Appellant's reenactment of the face-to-face bear hug he claimed to have used on AL demonstrated that from the placement of his hands it could not have resulted in the red marks on AL's neck as reflected in the photographs. Given AL's statements to the police and the 911 operator and the photographic evidence, we find Appellant's defensive bear hug explanation to be self-serving and implausible. As Appellant conceded that he knowingly lied to DFRS Internal Affairs Investigator AH about contacting AL in violation of the protective order, we conclude that Appellant's hearing testimony is not worthy of credence.

The hearing testimony of AL was significantly different from the statements she made to the 911 operator and police in the immediate aftermath of the domestic altercation. Further, her behavior in taking photographs of herself immediately after the assault is at odds with the bear hug account. Accordingly, the Board is also obligated to consider and resolve the issue of credibility for AL.

AL's hearing testimony contradicted her previous statements to the police and was inconsistent with the recordings and transcripts of her telephone calls with the 911 operator and Appellant. AL's new version of what occurred on March 25, 2018, differed markedly from her report to the 911 dispatcher and the police officers that responded to her call. She repeatedly told the 911 operator that Appellant tried to strangle or choke her. She told the police officers the same thing. She even took the initiative to photograph the marks Appellant left on her to preserve the evidence of his assault.

Only after Appellant telephoned her from jail, in violation of the protective order, did she change her story. In the audio and transcripts of the calls from jail AL expresses regret that reporting the assault had resulted in a serious felony charge against Appellant. She discusses the need to explain away the red marks on her neck and her statements to the police that she had been strangled by Appellant. After speaking to the criminal defense attorney AL tells Appellant that she was advised to say she was using drugs and had a limited recall of the incident.<sup>4</sup> At some point after the calls she and Appellant apparently came up with the "bear hug" explanation for the obvious red marks on her neck and arm following the altercation. At the hearing AL presented yet another explanation, that of the "Asian flush."

We conclude that it is far more likely that AL was a domestic violence victim and told the truth to the police and the 911 operator when she said that Appellant choked or strangled her. Those statements were made in the immediate aftermath of the assault and we consider them more reliable than AL's testimony at the hearing.<sup>5</sup> AL's testimony during the hearing that she fabricated her accusations that Appellant strangled her on March 25, 2018, are not credible.<sup>6</sup>

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<sup>4</sup>A witness feigning a lack of memory is not uncommon. *Nance v. State*, 331 Md. 549, 572 (1993) ("The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized. 2 *McCormick on Evidence, supra*, § 251, at 121.").

<sup>5</sup> Hearsay is admissible in an administrative hearing. APA § 2A-8(e); *Eger v. Stone*, 253 Md. 533, 542 (1969).

<sup>6</sup> We note that for various reasons it is not unusual for victims of domestic violence to recant statements made to the police and try to reconcile with their abusers. Abusers may utilize emotional and other forms of manipulation of their victims to accomplish that goal. See MSPB Case No. 14-19 (2014) (Victim's testimony recanting allegations she made to police was disregarded as not credible); *Cody v. Commonwealth*, 68 Va. App. 638, 812 S.E.2d 466 (2018). Cf., *State v. Smullen*, 380 Md. 233, 253-54 (2004).

***Conduct Unbecoming – Assault on a Domestic Partner***

The County charged Appellant with conduct unbecoming for assaulting AL, violating the protective order, and for being untruthful when questioned by the Internal Affairs investigator. Under the DFRS Code of Conduct, § 5.0 and § 5.14, Appellant was required to conduct himself “in a manner as to reflect favorably on the DFRS” and not to “commit any act which constitutes conduct unbecoming a merit system employee.” Section 5.14 specifically provides that conduct unbecoming “includes, but is not limited to, any criminal, dishonest or improper conduct.”

Appellant knowingly contacted AL after having been served with a protective order prohibiting that conduct. Appellant admits to having been dishonest to investigators when he denied violating the protective order by having contact with AL. By these actions he violated Virginia law, an order of the Fire Chief, and DFRS policy.

Furthermore, the County proved by preponderant evidence that Appellant did assault and strangle AL on March 25, 2018. The audio and transcript of the 911 call, the statements to the police, the photographs of AL’s neck and arm, and the audio and transcript of the jailhouse calls from Appellant to AL provide ample support for a finding that Appellant violently assaulted his domestic partner.<sup>7</sup>

When, as here, the County seeks to discipline an employee on charges that involve 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. Thus, for example, the Board has sustained disciplinary action against a firefighter who assaulted a prostitute, MSPB Case No. 16-08 (2016); a correctional officer involved with illegal narcotics, MSPB Case No. 14-17 (2014); as well as a security officer engaged in domestic violence. MSPB Case No. 14-19 (2014).

We find that the County has met its burden. Strangulation of one’s significant other is violent and potentially life-threatening. Such a serious assault may provide sufficient nexus and warrant removal, especially where Appellant’s job involves responding to the homes of County citizens. *Hayes v. Department of Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984) (for purposes of nexus agency properly concerned about off duty domestic abuser’s access to residential housing in connection with work as a mechanical planner-estimator).

Further, a loss of trust and confidence in job performance is sufficient to establish nexus. *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509 (2010) (nexus requirement met with proof that misconduct adversely affected the agency’s trust and confidence in appellant’s job performance); *Raco v. Social Security Administration*, 117 M.S.P.R. 1 (2011); *Adams v. Department of Labor*, 112 M.S.P.R. 288 (2009).

In MSPB Case No. 16-08, upholding the dismissal of a Master Firefighter for off duty conduct, we held that:

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<sup>7</sup> While Appellant’s arrest for assaulting AL does not alone supply the nexus or evidence of misconduct to support removal, the charge is not based on his having been arrested. Rather, the specification alleging that he physically assaulted his significant other was based on the underlying facts that led to the Appellant’s arrest, and not merely that he was arrested.

Nexus may be demonstrated simply by showing that an employee engaged in off-duty misconduct that is inconsistent with the agency's mission and undermines confidence in the employee.

As was the case with the appellant firefighter in Case No. 16-08, Appellant's position as a firefighter with DFRS is dedicated to the protection and preservation of life, health, and safety. Appellant's violent domestic assault was inconsistent with the mission of DFRS and a job in which Appellant would be entrusted with the health and safety of the citizens of Montgomery County. *Cf.*, MSPB Case No. 14-19 (2014) (Domestic violence is incompatible with the responsibilities of a security officer to protect the safety of County employees). *See Social Security Administration v. Long*, 2010 M.S.P.B. 19, 113 M.S.P.R. 190 (2010), *aff'd*, 635 F.3d 526 (Fed. Cir. 2011) (ALJ dismissed for domestic violence; victim recanted, criminal charges dropped); *Kinslow v. Department of the Treasury*, 315 F. App'x 286, 289 (Fed. Cir. 2009) (removal of an IRS agent who assaulted his wife); ); *Carlton v. Department of Justice*, 95 M.S.P.R. 633 (Deputy U.S. Marshal dismissed for choking, throwing vase, and pointing gun at wife; "misconduct was serious and raises serious concerns about his lack of judgment and impulse control and his ability to perform the duties of his position."), *review dismissed*, 115 F. App'x 430 (Fed. Cir. 2004). *Banks v. Dep't of Veterans Affairs*, 25 F. App'x 897, 900 (Fed. Cir. 2001) (VA hospital food service worker's domestic violence assault provides nexus).

We therefore find that Appellant's egregious behavior violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.0 and § 5.14 (conduct unbecoming). CX 1, CX 18, CX 19.

### ***Knowing Violation of the Protective Order***

The second charge against Appellant was that by calling his significant other from jail he knowingly violated an emergency protective court order.

The emergency protective order issued against Appellant specifically required that Appellant have no contact of any kind with AL. Appellant's telephone calls from jail to the victim (AL) the same day as the assault were clear violations of the no contact provision of the protective order under Virginia law. *Cody v. Commonwealth*, 68 Va. App. 638, 812 S.E.2d 466 (2018). *See Elliott v. Commonwealth*, 277 Va. 457, 675 S.E.2d 178 (2009) (telephone call constitutes "contact" for purposes of a protective order). Appellant's telephone calls constituted two separate violations of the protective order.

Appellant's contact violations of the protective order were conscious and intentional. Moreover, the violations involved some risk to Appellant given that violation of the provisions of a protective order is a crime under Virginia law. Va. Code Ann., § 16.1-253.2. Appellant was apparently willing to take the risk in order to engage in emotionally manipulative behavior designed to generate AL's sympathy and convince her not to testify against him in criminal court. Appellant seems to have achieved his objective, and the criminal charges were dismissed. In an effort to save his job, it is likely that Appellant used a similar approach to cause AL to change her initial story and describe Appellant's actions as a defensive bear hug rather than an assault involving strangulation or choking.

In our view, violation of the protective order provides a nexus to Appellant's job. The intentional violation of a court order designed to protect a domestic violence victim from undue

threat or pressure on at least two occasions demonstrates that Appellant is untrustworthy and willing to violate the law in order to achieve what is in his best interest. This does not equate with running a red light or making a late payment of one's taxes. If Appellant takes an order of a court so lightly then how can his superiors trust him to carry out supervisory directions in emergency situations that affect public safety. Likewise, if Appellant finds it so easy to put his own interests above compliance with a lawful court order, he can exhibit this behavior in a situation in which his supervisors and co-workers must count on him to follow direction and department protocol.

Moreover, Appellant's efforts to hide the violation from investigators demonstrates that he was well aware of the serious nature of his transgression and willing to engage in a cover up. Only when confronted with irrefutable proof did he admit what he had done and express regret.

Fire Chief SG and Assistant Chief ES testified that in a public safety organization where employees must follow orders and instructions DFRS leadership cannot tolerate serious doubts concerning the integrity and character of their emergency first responders. An ability to follow orders is of paramount importance to the mission of the department. Appellant's violation of a court order raised serious concerns for the Fire Chief about Appellant's ability to follow orders. Tr. (Day 1) 147-49; 269. It is legitimate for DFRS to demand that firefighters obey all lawful orders, not just those with which they agree or which serve their interests at the time.

Appellant's failure to comply with the protective order seriously undermined the Chief's confidence that Appellant would, without hesitation, follow lawful orders from his superiors even when he might have personal doubts or disagree with those orders or when faced with an emergency situation. There is nothing in the record to call into question the Chief's sincerely held beliefs about the need for all of his subordinates to follow orders and his lack of confidence in Appellant's ability to do so.

It is also significant that Appellant's own behavior suggests an acknowledgement that there is a nexus between his violation of the protective order and his job. Appellant explained that he was untruthful to investigators *because* he was aware that his improper and illegal contact with the victim jeopardized his employment. *Cf., Pekrul v. DOJ*, 2006 MSPB LEXIS 4224 (M.S.P.B. August 1, 2006) ("appellant has not rebutted the presumption of nexus between his misconduct and his position. . . his remarks in the background of the 911 dispatcher's call . . . show he is aware his actions jeopardized his employment.").

We therefore find that the County has demonstrated nexus and proven by a preponderance of the evidence that Appellant violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.14 (conduct unbecoming), by calling AL from jail in violation of an emergency protective court order. CX 1, CX 18, CX 19.

#### ***False or Misleading Statements to Investigators***

The third charge against Appellant is that he failed to provide honest and accurate information during the Internal Affairs investigation. At the beginning of the interview with Investigator AH Appellant signed an Investigation Acknowledgement Form that was also an order signed by the Fire Chief on June 7. CX 16. The order required Appellant "to answer all questions truthfully" and warned that failure to do so "could lead to disciplinary action up to and including dismissal."

Nevertheless, Appellant admitted he was not truthful with the Internal Affairs investigator when asked if he had contacted AL while the protective order was in effect. Appellant testified that he “was terrified” that he would lose his job if he told the truth. Tr. (Day 2) 219. Appellant also acknowledged during his hearing testimony that he violated the protective order by speaking to AL from jail on March 25, 2018. Tr. (Day 2) 235, 237-38.

Accordingly, there can be no dispute that the County has shown that Appellant was untruthful to investigators. Indeed, Appellant admits that he was knowingly deceitful in an effort to avoid dismissal. Although Appellant admitted in his November 14, 2018, response to the Statement of Charges that “it is true that I initiated two calls that evening and spoke to [AL] each time,” AX 1, Appellant attempts to justify part of his deception by arguing that the second call from jail to AL was not a call to her but instead to their housemate KK. Tr. (Day 2) 213-14, 238-39; Appellant’s Brief, p. 11.

We have reviewed the audio and transcripts of both telephone calls from the jail and find Appellant’s denial that he intended to call AL the second time not worthy of belief. Appellant ended the first call by telling AL he would call her again. Appellant then called KK’s phone to reach AL, consistent with his promise of two hours earlier. Indeed, he told KK that he had promised to call AL and, at the conclusion of the second call, Appellant indicated that he would likely attempt to make a third call, if possible. Clearly Appellant had no qualms about repeatedly calling AL in violation of the protective order.

Appellant’s denials concerning the second call are disingenuous and a further indication of Appellant’s character failings when it comes to matters of integrity. We find that the County has proven by a preponderance of the evidence that Appellant twice violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(g) (knowingly making a false statement), MCPR § 33-5(aa) (failure to cooperate with an investigation), DFRS Regulation 22.00, Code of Ethics, § 4(c)(13) (false or misleading statement during an investigation), DFRS Policy 529, Internal Affairs, § 4.10 (truthfully answer questions). CX 1, CX 20, CX 21.

### ***Level of Discipline***

Appellant has admitted providing false information to Internal Affairs investigators and to violating the protective order. As a consequence, Appellant acknowledges that he deserves significant discipline. Appellant’s Brief, p. 26. His argument is that the level of discipline is too severe and that he should instead receive a 5% reduction in pay for 10 pay periods. *Id.*

Fire Chief SG testified that since January 2018, DFRS has made a conscious decision to be stricter and more consistent with respect to off-duty domestic violence conduct. Tr. (Day 1) 257-61. We have previously found that the County may legitimately contend that penalties in previous cases may have been too lenient, and it need not continue to make the same mistakes in subsequent cases. MSPB Case No. 18-06 (2019); MSPB Case No. 18-07 (2019), *citing Davis v. U.S. Postal Service*, 120 MSPR at 457, 465 (2013); *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, 651 (2012). Moreover, to the extent some of the discipline in the comparison cases was the result of settlement, DFRS need not explain the difference in treatment. MSPB Case No. 18-07 (2019), *citing Davis v. U.S. Postal Service*, 120 MSPR at 463-64; *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325, *aff’d*, 975 F.2d 869 (Fed. Cir.1992).

This is not to say that the discipline in prior cases was always more lenient than now. As discussed above, in MSPB Case No. 16-08 this Board upheld the dismissal of a firefighter for off-duty behavior that could be characterized as domestic abuse.

Appellant's attorney cross-examined Fire Chief SG concerning previous cases that had similarities to this one but did not result in dismissal. While the Fire Chief testified that he would now impose a higher level of discipline, including dismissal, *e.g.*, Tr. (Day 2) 45, none of those cases were identical to this one and thus not appropriate as comparators. Tr. (Day 2) 102-03. The Fire Chief testified that the three charges against Appellant (domestic violence, violation of a protective order, and failure to be truthful to an investigator) would have justified his dismissal even before the DFRS effort to be more consistent and stricter with domestic violence matters. Tr. (Day 2) 103-05.

The Fire Chief also testified that since January 2018 five firefighters, including Appellant, have been disciplined for off-duty conduct that included domestic violence and three were given NODAs for dismissal. Tr. (Day 2) 18. One of the two not dismissed received a 5% percent pay reduction for six pay periods for an incident where he poked his former mother-in-law in the forehead with his finger at a child's soccer game. Tr. (Day 2) 80, 111. The other involved an employee whose penalty was reduced after meeting with the Fire Chief because the employee was not aware that there was a prohibition on secondary employment while on administrative leave. Tr. (Day 2) 64-66.

Appellant has not shown that he and the comparison employees engaged in similar misconduct without differentiating or mitigating circumstances. MSPB Case No. 10-04 (2010). Thus, we believe that the Fire Chief provided an adequate explanation for his determination that Appellant's serious misbehavior and lack of trustworthiness justified the highest level of discipline.

Montgomery County Code, § 33-14(c), grants the Board substantial latitude to decide the appropriate level of penalty. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986). The Board will normally uphold an agency determined penalty unless we find some aspect of the personnel action to have been improper. In this case, the facts support a finding that Appellant committed the acts for which he was charged, and the law supports a conclusion that he violated the provisions of law under which he was charged. By his own admission Appellant's behavior merits significant discipline. Moreover, Appellant has continued to demonstrate his untrustworthiness by testifying in a manner that was simply not credible. His continued failure to be completely honest indicates that he is unable to be fully rehabilitated. We see no improper agency action in the Fire Chief's decision to dismiss Appellant, and we do not find sufficient mitigating circumstances to justify reducing the penalty.

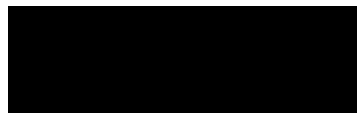
Accordingly, we conclude that the discipline of dismissal was appropriate and consistent with law.

**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 30, 2019



Harriet E. Davidson  
Vice-Chair