

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

IN THE MATTER OF

[REDACTED],

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 19-20

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FINAL DECISION AND ORDER

On March 4, 2019, [REDACTED] (Appellant) filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the decision of the Department of Corrections and Rehabilitation (DOCR) to suspend him for fifteen (15) days.

FINDINGS OF FACT

The discipline in this matter relates to an incident involving Appellant’s use of force against an inmate at the Montgomery County Correctional Facility (MCCF). On November 6, 2019, a hearing on the merits was held before the Board.

The following witnesses testified and are identified by their initials, or as “Appellant,” elsewhere in this decision. The County called two witnesses: [REDACTED] (AT), the Director of DOCR, and Acting Deputy Warden [REDACTED] (MW). At the time of the incident and subsequent investigation MW was a Captain and the Professional Standards and Compliance Manger of DOCR. Appellant testified on his own behalf and called the following witnesses to testify: Lieutenant [REDACTED] (CM); Sergeant [REDACTED] (GS); and Case Manager [REDACTED] (DC).

Appellant has been employed by the County as a Correctional Officer since January 28, 2013. County Exhibit (CX) 2. On November 4, 2018, he was assigned to work the MCCF West One Pod Five (W-1-5) housing unit on the “3 Shift” (2:30 - 11:00 p.m.). CX 2. The W-1-5 pod is one of MCCF’s four medium and maximum security housing units for inmates classified as requiring a higher level category of security. Hearing Transcript (Tr.) 30. The pod is composed of various cells

on a ground and upper level tier. In addition to cells on the ground tier there is a day area with seating areas, tables, and televisions. There is also a desk for the officer on duty located on the ground tier. The desk was Appellant's post and he was responsible for the immediate supervision, custody, safety, and control of inmates in the pod.

At approximately 5:15 p.m., inmate ██████████ (MJ) approached Appellant as he was standing by the officer's desk to complain about the quality of the chicken on his dinner tray. CX 7 & 8; Tr. 37. Appellant and inmate MJ then walked to the other end of the day room area, and shortly thereafter Appellant returned to the desk and telephoned the cluster sergeant for guidance as to how to remedy the inmate's complaint. CX 7; Tr. 31, 37, 47, 147. While Appellant was on the telephone with the cluster Sergeant the inmate returned to the desk, gestured in an agitated manner at his dinner tray, then walked away from the desk and threw or slammed the contents of his dinner tray into a trash receptacle, tossed the tray into the location set aside for dirty trays, and washed his hands. CX 7; Tr. 31, 37-38, 148, 212-13. According to Captain MW, who investigated the incident, inmate MJ threw the tray in a "[v]ery agitated, aggressive in a threatening manner." Tr. 38.¹

Appellant called CM² as a witness. Sergeant CM testified that he was on the telephone with Appellant discussing inmate MJ's complaint about his chicken when he heard the inmate yelling. Tr. 212. Sergeant CM testified that Appellant told him "never mind" because inmate MJ had taken his dinner tray and dumped it into the trash. *Id.* Sergeant CM then related that he verified with Appellant that he did not wish to order another dinner for inmate MJ. Tr. 212-13, 220.

The inmate then went across the day room and walked up the stairs to his assigned cell on the upper tier. A verbal exchange between inmate MJ and Appellant ensued. Sergeant CM testified that he was watching events unfold on a monitor at his location and was unconcerned about the "banter" between Appellant and inmate MJ because the inmate had gone up the stairs to the upper tier towards his cell. Tr. 213. Sergeant CM testified that when inmate MJ went up the stairs and Appellant said "don't worry about ordering the tray because he threw his food away" he assumed inmate MJ was locking himself in his cell. Tr. 215, 220-21. Sergeant CM then turned his attention towards other pods that were also his responsibility. Tr. 213-14.

Appellant left the desk and walked towards the back of the day room, looking up at the upper tier while gesturing and speaking to the inmate. Sergeant CM testified that when he heard the yelling he looked back at the monitors for W-1-5 and saw Appellant come out from behind the desk, go out into the day room looking up towards the cell area in the upper tier. Tr. 213-14. Sergeant CM could not hear what was being said.

Appellant admitted that he used profanity in addressing inmate MJ, calling him "a f████ing baby." Tr. 55. As Appellant was returning to the desk the inmate descended the stairs and approached him in the center of the room. Sergeant CM testified that when he saw inmate MJ coming back down the stairs, he got up from the cluster desk and started responding to West 1-5. Tr. 214.

Appellant went into a boxer's stance and punched inmate MJ once in the face with a closed fist. At all times there were at least a dozen other inmates present in the day room, and several of them

¹ The Board is puzzled by the County's failure to introduce a copy of the investigatory report. Providing such reports in disciplinary appeals would avoid speculation concerning the actual contents of the report.

² CM, who is now a Lieutenant, was the cluster sergeant at the time of the incident.

exhibited excitement at the altercation. CX 7. Corporal ██████ (K) saw the incident, called for assistance, and quickly entered the W-1-5 pod. Tr. 214, 221. Sergeant CM was among the officers responding to W-1-5 and handcuffed inmate MJ and escorted him to the Medical Section for evaluation and treatment. CX 7 & 8; Tr. 45, 50-51, 214-15.

As part of Captain MW's investigation of the incident security camera video was pulled and reviewed. Tr. 29. The Board reviewed the video during the hearing and was able to clearly see the entire incident from two different angles. CX7.

Captain MW testified that DOCR requires correctional officers to follow a six step use of force continuum so that the least amount of force necessary is used in order to reduce the risk of injury to both staff and inmates, and to avoid the excessive use of force. Tr. 20-23. In ascending order the six levels in the use of force continuum are: (1) officer presence; (2) verbal command; (3) show of force, (*i.e.*, increase the number of correctional officers present); (4) "soft" empty hand control, (*e.g.*, handcuffs, joint locks, pressure points) and "hard" empty hand control, (*e.g.*, use of tools such as pepper spray); (5) less lethal control devices, (*e.g.*, Taser, baton); and (6) deadly force. Tr. 20-24, 33-34; CX 5.

On July 20, 2017, Appellant was given a copy of the use of force policy and counseled on the use of force. CX 5 & 9; Tr. 28. Appellant was specifically told that he should not take it upon himself to take action when the use of force was not necessary or safe, and that "[w]hen possible call your cluster [sergeant], use your radio, and wait for help." CX 9; Tr. 28, 171-72.

During his testimony Appellant admitted that he had used poor judgment in handling the November 4, 2018, incident with inmate MJ and that he had allowed the situation to unnecessarily escalate. Tr. 172.

On February 12, 2019, DOCR issued a Notice of Disciplinary Action (NODA) suspending Appellant for fifteen (15) days. CX 2.³ The NODA found that Appellant violated the following provisions of the Montgomery County Personnel Regulations (MCPR): § 33-5(c) (violates any established policy or procedure); § 33-5(e) (fails to perform duties in a competent or acceptable manner); § 33-5(h) (negligent or careless in performing duties). The County alleged that during an interaction with an inmate that Appellant perceived as a threat Appellant failed to call for assistance,

³ County Exhibits 1 through 13 and were admitted into the record. The County Exhibits are as follows:

- CX 1 - MSPB Appeal Form, March 4, 2019
- CX 2 - Notice of Disciplinary Action (NODA), February 12, 2019
- CX 3 - Amended Statement of Charges, January 11, 2019
- CX 4 - Statement of Charges, January 3, 2019
- CX 5 - DOCR Policy and Procedure 1300-10
- CX 6 - DOCR Policy and Procedure 3000-7
- CX 7 - CD-ROM Containing Video
- CX 8 - Adjustment Report drafted by Appellant
- CX 9 - Email between Captain ██████ (MM) and Warden ██████ (SM), August 9, 2017
- CX 10 - Redacted NODA, August 24, 2017
- CX 11 - Redacted NODA, August 24, 2017
- CX 12 - Redacted NODA, October 3, 2017
- CX 13 - Redacted NODA, March 18, 2019

did not lock the inmate in his cell, verbally incited the inmate, urging him to return for a potential physical altercation, and ultimately punching the inmate.

In addition, Appellant was found to have violated multiple DOCR policies, as follows. DOCR Policy Number 1300-10: § III(B) (“When force is used, the least amount of force reasonably necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved”); § V(A) (“Whenever an officer believes that the use of physical force may be necessary, he/she must immediately contact the Shift Administrator/Shift Manager/Assistant Unit Manager”); § V(C) (“Physical force is used only after all other means to handle the situation have been exhausted. When at all possible, inmates should be persuaded to carry out instructions. Often the show of sufficient manpower is enough to persuade an individual to comply with given orders and instructions. Inmates not involved in the incident should be removed from the immediate area and secured in their cells or some other area”), CX 5.

Appellant was also charged with violations of DOCR Policy Number 3000-7: § V(C) (“Only such force as is necessary should be used to control an unruly visitor/ defendant/ inmate/ resident/ participant.”); § V(D) (“Personnel shall not strike or lay hands on a visitor/ defendant/ inmate/ resident/ participant except to defend themselves, to prevent an escape, to prevent serious injury, or damage to person or property, to quell a disturbance, to search a visitor/ defendant/ inmate/ resident/ participant or to move an unruly or uncooperative inmate/ resident/ visitor”); § V(E) (“Personnel should treat visitors/ defendants/ inmates/ residents/ participants with respect, courtesy, and fairness. Profane, demeaning, insulting, and threatening language directed toward an inmate/resident/participant shall not be tolerated. Personnel should never engage in an argument or shouting match with an inmate/ resident/ participant”); § VII(E)(3) (“Employees shall use force only in accordance with the law and departmental policy and procedures and shall not use more force than is necessary to control the situation or protect themselves and/or other from harm”); § VII(E)(9) (conduct unbecoming) (“No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming includes, but not limited to any breach of the peace, neglect of duty, misconduct or any other conduct on the part of any employee of the department. . .”); § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance) (“Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention. . .”), CX 6.

Appellant filed an Appeal with the Board on March 4, 2019 and represented himself at the hearing.⁴

⁴ Appellant Exhibits (AX) 1 through 15 were admitted into the record. Appellant’s exhibits are as follows:

- AX 1 - Appeal of 15-day suspension
- AX 2 - Adjustment report involving the stabbing of an officer, May 7, 2018
- AX 3 - Adjustment report involving an assault on an officer, July 6, 2018
- AX 4 - Adjustment report involving a use of force on a violent inmate, December 5, 2018
- AX 5 - Statement of Charges against Cpl. ██████████ (CT), December 15, 2017
- AX 6 - Adjustment report involving Cpl. CT and inmate ██████████, 8/14/2017

APPLICABLE LAW AND 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:

§ 33-1. Definition.

Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee: . . . (e) suspension;

§ 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:

AX 7 - Article from *The Baltimore Sun* that mentions inmate MJ

AX 8 - Adjustment report involving inmate MJ, 10/1/2018

AX 9 - Adjustment report involving inmate MJ and DCA 36s from Sgt. CM, Cpl. K, Cpl. [REDACTED] and Cpl. [REDACTED], 11/4/2018

AX 10 - DCA 36 incident report involving inmate MJ, 4/10/2018

AX 11 - DCA 36 incident report involving inmate MJ, 4/6/2019

AX 12 - Adjustment report involving inmate MJ, 3/14/2019

AX 13 - DCA 36 incident report involving inmate MJ, 2/21/2019

AX 14 - DCA 36 incident report involving inmate MJ, 11/12/2018

AX 15 - DCA 36 incident report involving inmate MJ, 3/6/2019

- (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.

(e) Suspension.

- (1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct.

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

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

Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct/Code of Ethics, effective December 30, 2016, (replacing policy of November 5, 2012), which states in applicable part:

V. RELATIONSHIP OF DEPARTMENTAL PERSONNEL WITH VISITORS/DEFENDANTS/INMATES/RESIDENTS/PARTICIPANTS:

C. Only such force as is necessary should be used to control an unruly visitor/ defendant/ inmate/ resident/ participant. (See Policy and Procedures on Use of Force.)

D. Personnel shall not strike or lay hands on a visitor/ defendant/ inmate/ resident/ participant except to defend themselves, to prevent an escape, to prevent serious injury or damage to person or property, to quell a disturbance, to search a visitor/ defendant/ inmate/ resident/ participant or to move an unruly or uncooperative inmate/ resident/ visitor.

E. Personnel should treat visitors/ defendants/ inmates/ residents/ participants with respect, courtesy, and fairness. Profane, demeaning, insulting and threatening language directed toward an inmate/ resident/ participant shall not be tolerated. Personnel should never engage in an argument or shouting match with an inmate/

resident/ participant.

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

3. Use of Force:

Employees shall use force only in accordance with the law and departmental policy and procedures and shall not use more force than is necessary to control the situation or protect themselves and/or others from harm. No employee shall use force in a discriminatory manner. . .

9. Conduct Unbecoming:

- a. No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming includes, but is not limited to any breach of the peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or stated in other Departmental policies, shall be considered conduct unbecoming an employee of this Department, and will subject the employee to disciplinary action by the Department.
- b. Examples of conduct unbecoming include but are not limited to falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, retaliation, misuse of a county owned radio, and the failure to cooperate with an internal investigation.

10. Neglect of Duty/Unsatisfactory Performance:

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

Montgomery County Department of Correction and Rehabilitation, Policy Number: 1300-10, Use of Force, Chemical Agents & Restraints, effective March 23, 2018, (replacing policy of April 15, 2015), which provides, in relevant part:

II. DEFINITIONS

C. Force

Any action within the force continuum by a staff member intended to compel an uncooperative or aggressive inmate to act or to cease acting.

D. Force Continuum

A sequential order of force beginning with the least amount of force and progressing through the degrees of non-deadly and deadly force.

Note: These represent different levels of the **MCDOCR** use of force continuum that can be adopted by staff. While they can represent individual levels that are gone through a step at a time, it is important to realize that staff may skip levels and enter confrontations at different levels. Staff should use the minimal amount of force necessary to handle each situation.

DOCR Use of Force Continuum:

1. Officer Presence - Identification of Authority.
2. Verbal Direction - Commands of Direction.
3. Show of Force - At least one additional Officer called to the scene. Additional commands or directions and a larger officer presence.
4. Empty Hand Control, and/or use of Oleoresin Capsicum (OC) aerosol.

a. *Soft* Empty Hand Control -

Techniques that have minimal probability of injury. (Examples handcuffing, escort, pressure points (joint locks), takedowns, other pain compliance strikes).

b. Hard Empty Hand Control, or **OC Pepper use - Techniques that have a moderate to high probability** of injury, to include the use of physically touching an individual. (Examples: takedowns, other pain compliance strikes). These techniques and or the use of OC aerosol should be determined by the user, depending upon specific circumstances and instances.

5. Less Lethal Control Devices:

The use of equipment that may have a higher probability of injury. (Example: Use of the approved X26PTaser in Taser Mode and/or Drive Stun Mode, baton, impact shield and impact weapon strikes, or PepperBall gun).

6. Deadly Force: Only in situations intended to prevent serious bodily injury or death.

(Examples: Firearms, other emergency equipment, or unarmed selfdefense techniques. Note: (refer to Firearms Policy and Procedure 1300-10-01).

III. POLICY

It is the policy of the MCDOCR that: . . .

- B. When force is used, the least amount of force reasonably necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved.

V. USE OF PHYSICAL FORCE - GUIDELINES

The following guidelines must be strictly followed whenever it becomes necessary to use physical force on an inmate: . . .

- A. Except in cases of extreme emergency, ONLY the Shift Administrator/ Shift Manager/ Assistant Unit Manager shall authorize the use of physical force to either move or restrain an unruly or uncooperative inmate. Whenever an officer believes that the use of physical force may be necessary, he/she must immediately contact the Shift Administrator/ Shift Manager/ Assistant Unit Manager. . . .
- C. Physical force is used only after all other means to handle the situation have been exhausted. When at all possible, inmates should be persuaded to carry out instructions. Often the show of sufficient manpower is enough to persuade an individual to comply with given orders and instructions. Inmates not involved in the incident should be removed from the immediate area and secured in their cells or some other area.

ISSUE

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

ANALYSIS AND CONCLUSIONS

The material facts in this appeal are unambiguous and for the most part undisputed. The best evidence presented was a video compilation of security camera footage from two vantage points. CX 7. Significantly, Appellant admitted that he used poor judgment in handling the November 4, 2018, incident with inmate MJ, and that he allowed the situation to unnecessarily escalate. Tr. 172, 254; AX 1. Appellant suggests that he acted with the best of intentions, but also concedes that discipline is warranted. Tr. 255.

The video evidence was clear, complete and compelling. On November 4, 2018, at 5:15 p.m. Appellant was on duty in the West 1-5 pod of MCCF when inmate MJ became upset about the condition of the chicken he had been served for dinner. Apparently unsatisfied with Appellant's attempt to address the issues with his meal, the inmate walked away from Appellant's post and slammed the contents of his food tray into a trash can. He then put the tray in the proper place, washed his hands, and walked past the officer's desk and up the stairs to his cell on the upper tier.

When inmate MJ reached the upper tier, he found that the cell door was closed, so inmate MJ could not enter without Appellant pushing a button to unlock it. Appellant did not unlock the cell. Tr. 42.

Appellant left the desk and walked through the day room of the pod looking up at inmate MJ, gesturing, and talking. CX 7. There were a dozen of other inmates in the vicinity, most of them still eating dinner and watching the interaction between Appellant and inmate MJ.

Inmate MJ then walked back along the tier and down the stairs. Inmate MJ approached Appellant and stopped at least an arm's length away. Appellant took a boxing stance with his fists up. Inmate MJ leaned forward from the waist and pointed his finger at Appellant. It is clear from the video that inmate MJ posed no imminent threat to Appellant's safety. It is also clear from the video that Appellant was the aggressor when he then punched inmate MJ once in the face with his closed fist. Inmate MJ turned to the door, outside of which were other correctional officers, and gestured at them. Other inmates in the pod reacted with varying levels of excitement. The other officers quickly entered the pod to take control and deescalate the situation.

Captain MW testified that after the inmate behaved in an agitated and aggressive manner Appellant should have, consistent with the continuum of force policy, requested that the cluster sergeant or other correctional officers report to the West 1-5 pod. Tr. 38. Even though Appellant was on the phone with the cluster sergeant during inmate MJ's outburst he did not request assistance. Instead he hung up the phone and proceeded to have an animated verbal exchange with inmate MJ. Appellant's behavior and language were unprofessional and inciteful, provoking inmate MJ to descend from the upper tier. Appellant was certainly not being threatened by inmate MJ once the inmate had gone to the upper tier. The use of force could have been avoided entirely had Appellant's emotions not gotten the best of him. Tr. 150-51. Because of Appellant's failure to deescalate the situation by calling for assistance or allowing inmate MJ to enter his cell, a face-to-face confrontation between two angry men occurred. Although inmate MJ stopped in front of Appellant and merely pointed his finger, this avoidable confrontation ultimately culminated in Appellant punching inmate MJ in the face.

Appellant alleged that he struck inmate MJ in self-defense. Appellant presented a witness, Sgt. [REDACTED], who testified that Appellant's behavior was reasonable. We find this testimony to be unpersuasive and contrary to what we could see on the video. Appellant unnecessarily provoked inmate MJ instead of calling for assistance from other officers or simply opening inmate MJ's cell (by pressing a button on his desk) and letting him go in to the cell to lock in and calm down. Unable to enter his cell, and with Appellant still striding across the floor and verbally provoking him from the day room, inmate MJ came back down the stairs.

Appellant immediately went into a boxer's stance. Rather than move aggressively towards Appellant or adopt his own fighting stance, inmate MJ stood flat footed, bent from the waist, and merely pointed a finger at Appellant. Nevertheless, Appellant chose to strike inmate MJ in the face with his fist.

DOCR's regulation on the Use of Force makes clear that physical force is only to be used after all other means to handle the situation have been exhausted. Appellant had options to avoid a one-on-one confrontation and, even when the confrontation occurred, had no valid reason for using physical force on inmate MJ. Therefore, the Board concludes that the County proved by a preponderance of the evidence that Appellant failed to perform his duties in a competent and acceptable manner when he used force on the inmate.

Level of Discipline

Having determined that the County proved by a preponderance of the evidence that Appellant violated established policy or procedure and failed to perform his duties in a competent or acceptable manner and engaged in an unnecessary physical altercation with an inmate while on duty, the Board will address whether the penalty of a 15-day suspension is appropriate.

As a threshold matter, we note that the County did not call any witnesses who had actually participated in drafting or deciding to issue either the statement of charges or the notice of disciplinary action. This could be problematic on a number of levels, not the least of which being that it might open the County to a Due Process challenge. Specifically, an employee is entitled, as a matter of constitutional due process, to notice of both the charges leveled against him and the factors that were considered in imposing the particular level of discipline. *See Ward v. USPS*, 634 F.3d 1274, 1280 (Fed. Cir. 2011) (due process requires predeprivation disclosure of all facts "material to the merits of the underlying charge or material to the penalty to be imposed."). Where, as here, there is scant evidence as to what factors were considered in selecting the penalty, and no witness to bolster the record, an employee could assert that he did not have notice of or an opportunity to respond to the specific factors that led to the selection of the penalty in his case. Because Appellant did not raise any Due Process challenge to his discipline, however, we express no view as to whether such a Due Process issue is present here.

Moreover, MCPR § 33-2(d) states that in addition to progressive discipline the County "should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be," listing such considerations as "(1) the relationship of the misconduct to the employee's assigned duties and responsibilities; (2) the employee's work record; [and] (3) the discipline given to other employees in comparable positions . . . for similar behavior. . .". We also understand "[i]t is well settled that use of the term "should" or "may," rather than "shall" or "must," means that the . . . requirement is precatory, not mandatory." MSPB Case No. 17-20 (2018). *See* MSPB Case Nos. 18-06 & 18-07 (2019). This Board has not formally adopted the factors in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), *see* MSPB Case No. 17-20 (2018) and MSPB Case No. 00-22 (2000), and need not do so at this time. Nor do we hold here that the County "must" consider the factors MCPR § 33-2(d) says it "should" consider. Nonetheless, while the Board is not bound by the County's choice of penalty, and does not defer to that choice in any significant way, it is much more likely to sustain a County-imposed penalty

if it is clear on the record that these factors have been considered and the individuals who in fact made those considerations are called to testify.

Turning to the specific discipline imposed in this case, the unjustified use of force against an inmate is a serious infraction and it is appropriate for DOCR to hold officers engaged in such behavior strictly accountable. In a number of prior cases we found that dismissal was appropriate punishment for an unnecessary confrontation and use of force on an inmate. *See, e.g.*, MSPB Case Nos. 18-06 & 18-07 (2019); Case No. 07-10 (2007). *See also* CX 10-13. Moreover, Appellant's offense is aggravated by the fact that he had previously been specifically counseled to try to avoid the use of force and "[w]hen possible call your cluster [sergeant], use your radio, and wait for help." CX 9; Tr. 28, 171-72. Appellant could easily have requested assistance in dealing with inmate MJ while he was on the phone with his cluster sergeant. Doing what his counseling urged would have obviated the need for force and complied with the use of force continuum.

Appellant has acknowledged that he used poor judgment in handling the November 4, 2018, incident, that he allowed the situation to unnecessarily escalate. Tr. 172, 254; AX 1. Although he disputes the level of discipline Appellant concedes that discipline is warranted. Tr. 255. There was testimony that Appellant was usually able to appropriately resolve situations by talking. Tr. 199, 202. This suggests to us that Appellant is capable of rehabilitation, that he is likely to be an improved correctional officer as a result of this discipline, and that dismissal would be excessive.

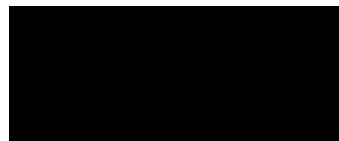
We find that while Appellant's behavior on November 4, 2018, may have been out of character, it was nevertheless an egregious display of poor judgment. Because of Appellant's good work record and potential for rehabilitation, we agree with the County that rather than dismissal a 15-day suspension is appropriate and justified.

ORDER

For the foregoing reasons, the Board **DENIES** Appellant's appeal of his suspension.

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



Michael J. Kator
Chair