

**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. 20-01**

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**FINAL DECISION AND ORDER**

This is the final decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of ██████████ (Appellant). On July 1, 2019, Appellant filed this appeal challenging his dismissal from a Federal Transit Administration (FTA) Safety Sensitive Mechanic II position with the Department of General Services (DGS or Department) due to a positive drug test result.<sup>1</sup>

**BACKGROUND**

On June 20, 2019, DGS issued a Notice of Disciplinary Action (NODA) dismissing Appellant, effective July 6, 2019. County Exhibit (CX) 4. The NODA stated that on April 3, 2019, the Department was notified by the County Occupational Medical Services (OMS) that a random drug test conducted on March 19, 2019, was determined to be positive. As a consequence, the County found that Appellant had violated Montgomery County Personnel Regulations (MCPR) § 33-5(c) (violates any established policy or procedure), MCPR § 32-5(i)(1) (immediate removal from Safety Sensitive duties), and § 32-5(i)(2)(A) (Safety Sensitive employee with positive drug test must be dismissed). CX 4.

On October 23, 2019, the parties appeared before the Board for a prehearing conference. As reflected in the Board’s Prehearing Order of November 14, 2019, the Board requested that the

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<sup>1</sup> The appeal was filed on Friday, June 28, 2019, at 7:57 p.m., a date and time when the Merit System Protection Board (MSPB) office was not open. Accordingly, the appeal was officially received by the MSPB the next business day.

County file a motion addressing certain issues raised at the prehearing conference. Specifically, the County was asked to explain its legal position that Appellant's dismissal was mandatory and that the Board lacked the authority to impose a different level of discipline and to address recent law on the inadvertent ingestion of cannabis products. Moreover, as Appellant had raised the issue of unequal punishment, the County was instructed to provide Appellant and the Board with any relevant reports, papers, and documents concerning similarly situated employees who failed drug tests yet were not dismissed. The Board reiterated the requirement that the County provide this comparator information in orders of December 4, 2019, and January 6, 2020.

The County produced records concerning the comparator employees on January 27, 2020. Those records included a redacted spreadsheet listing the 45 comparators as well as documents for each individual employee. The comparator employees are identified by number. Appellant is No. 39 and the only employee identified by name. We admit the comparator records into evidence as Joint Exhibit (1).<sup>2</sup>

On February 25, 2020, the parties filed a pleading titled "Joint Supplemental Stipulations, Request to Hold Hearing in Abeyance in Lieu of Cross-Motions for Summary Decision, and Proposed Briefing Schedule." The pleading asserted the view of both parties that the material facts in the appeal were not in dispute and that the case could appropriately be resolved by summary decision. The parties jointly suggested that the merits hearing scheduled for March 30 and 31, 2020, be held in abeyance while they submit, and the Board consider, cross-motions for summary decision. On February 27, 2020, the Board so ordered. The parties filed cross-motions for summary decision on March 16, 2020, followed by oppositions, and then replies.

After reviewing the motions and briefs of the parties and the exhibits in the record the appeal was considered and decided by the Board.

### **FINDINGS OF FACT**

Appellant is a Mechanic Technician II and has worked for the Department of General Services since 2014. Because he works on and test drives County Ride-On busses, Appellant has a Commercial Drivers License (CDL) and is an FTA Safety Sensitive employee.

On March 19, 2019 Appellant tested positive for Tetrahydrocannabinol (THC) on a random drug test. Appellant does not dispute the validity of the drug test but alleges that he tested positive for THC because he took the drug test shortly after he had used Cannabidiol (CBD) oil and that some of the comparator employees who also tested positive were not dismissed.

The parties agreed to the following stipulations of fact on February 4 and 25, 2020, which we have combined and lightly edited:

1. Appellant took and passed a pre-employment drug test.
2. Appellant was hired as a Mechanic I and has been employed with DGS since 2014.
3. Appellant became a Mechanic II in 2016.
4. Appellant has worked at three different DGS depots, including Kensington and most recently Silver Spring (Brookeville Maintenance Facility).

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<sup>2</sup> The pages of Joint Exhibit 1 are Bates stamped from page 001 to page 267.

5. March 19, 2019 was the first time during Appellant's County employment that he was drug tested.
6. The March 19, 2019 drug test was positive for THC.
7. Appellant's position as a Mechanic II at the time of the drug test was an FTA Safety-Sensitive Position.
8. The comparator records produced by the County in response to the Board's earlier orders are authentic business records of the County.
9. The February 18, 2020, United States Department of Transportation Notice concerning CBD products and drug testing (County Exhibit 16) is authentic.

Appellant's motion for summary decision calls our attention to the following comparator employees who were not dismissed.

After a positive test for an unprescribed controlled substance, Comparator No. 19 received a statement of charges on December 4, 2009. JX 1, p. 100. No. 19 agreed to a "Last Chance Settlement Agreement" on 5/12/10. JX 1, 094 - 99. The terms of the settlement agreement included reduction of the proposed dismissal to a 3-day suspension, required No. 19 to complete a course of substance abuse treatment, and provided for two years of regular drug and alcohol screening. Subsequently, No. 19 tested positive on a drug test, JX 1, 086, and received a statement of charges for dismissal dated February 12, 2014. JX 1, 091 - 92. The employee agreed to have the matter referred to Alternative Dispute Resolution (ADR). JX 1, 088, 090. As a result of the ADR process the County and No. 19 agreed to a settlement on March 6, 2014. JX 1, 088 - 89. Under the settlement agreement No. 19 was permitted to exhaust all personal, annual, and sick leave and then go on leave without pay until June 6, 2014. JX 1, 089. During the time before June 6 No. 19 was permitted "to explore medical priority placement." Under the terms of the settlement agreement, if no placement was found No. 19 would resign effective June 6, 2014. No. 19 apparently was unable to obtain a medical priority placement and resigned effective June 6, 2014. JX 1, 087.

Comparator employee No. 44 was a safety sensitive transit employee who reported to work inebriated and failed an alcohol test on December 18, 1998. JX 1, 243. Subsequently, on March 22, 1999, a Notice of Disciplinary Action - Dismissal was issued. JX 1, 242 - 46. Pursuant to a Last Chance Settlement Agreement dated January 10, 2000, employee No. 44 was reinstated. JX 1, 235 - 40. In 2009, employee No. 44 had an alcohol breath test result of .034, below the .04 level that would mandate dismissal under MCPR § 32-5(i)(2)(A)(ii). On July 15, 2009, pursuant to a Last Chance Settlement Agreement, employee No. 44 received a ten-day suspension. JX 1, 252 - 59.

Employee No. 44 is the only comparator not separated from County employment. Twenty-three of the comparator employees resigned, thirteen were terminated, and eight were dismissed.

#### **APPLICABLE LAW**

**Montgomery County Personnel Regulations, Employee Drug and Alcohol Use and Drug and Alcohol Testing, Section 32**, (As amended October 21, 2008, July 12, 2011, July 24, 2012, June 30, 2015 and September 27, 2017).

**§ 32-5. Prevention of Prohibited Drug Use and Alcohol Misuse by FTA Safety-Sensitive Employees Under Federal Transit Administration Regulations**

(a) *Application of section.* This Section applies to any employee assigned to an FTA Safety-Sensitive position on a full-time, part-time, temporary, or intermittent basis. . . .

(c) *FTA Safety-Sensitive positions.* The following are FTA Safety-Sensitive positions if the employee must have a CDL or operates, dispatches, controls, or maintains Montgomery County transit vehicles and operations: . . .

(7) Mechanic; . . .

(e) *Drug and alcohol prohibitions.*

(1) *Prohibitions for FTA Safety-Sensitive employees.* In addition to the prohibitions of Section 32-3, an FTA Safety-Sensitive employee must not:

(A) use a prohibited drug;

(B) report for duty, remain on duty, or perform a safety-sensitive function after testing positive for a prohibited drug;. . .

(f) *Drug and alcohol testing.* . . .

(2) *Prohibited drugs.* When administering a drug test under FTA regulations, the County must ensure that employees are tested for the following drugs:

(A) marijuana; . . .

(i) *Consequences for an employee of prohibited drug use, alcohol misuse, or refusal to take a drug or alcohol test.*

(1) *Consequences under FTA regulations.* Under FTA regulations, the following are the required consequences for an employee who has a verified positive drug test result, violates the alcohol misuse prohibitions, or who refuses to be tested:

(A) immediate removal from safety-sensitive duties; and

(B) referral to a Substance Abuse Professional for evaluation.

(2) *Consequences under County authority.*

(A) Under County authority not derived from the FTA regulations, a department director must dismiss an FTA Safety-Sensitive employee with merit system status . . . who:

(i) has a confirmed positive drug test result;

(ii) has a confirmatory alcohol test with an alcohol concentration of 0.04 or greater; or

(iii) refuses to take a drug or alcohol test. . .

**Alcohol Testing Programs, Subpart G -- Medical Review Officers and the Verification Process.**

**§ 40.151 What are MROs prohibited from doing as part of the verification process?**

As an MRO, you are prohibited from doing the following as part of the verification process:

\* \* \*

**(d)** It is not your function to consider explanations of confirmed positive, adulterated, or substituted test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that someone slipped amphetamines into her drink at a party, that she unknowingly ingested a marijuana brownie, or that she traveled in a closed car with several people smoking crack. MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.

**(e)** You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted).

**(f)** You must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative. . .

**ISSUE**

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

**ANALYSIS AND CONCLUSIONS**

***Appellant Had a Confirmed Positive Drug Test Result***

Although Appellant alleged in his Appeal, p. 2, that he falsely tested positive for THC because he took the drug test shortly after he used CBD oil, Appellant no longer appears to dispute the validity of the drug test and has never contested that he was an FTA Safety Sensitive employee. Appellant's central argument is that the County has imposed lesser discipline in similar cases and should also reduce Appellant's discipline.

In any event, under Federal Department of Transportation regulations Appellant's explanation concerning the use of CBD oil is unavailing. The Federal regulations, 49 CFR § 40.151(d), provide that in verifying the test result a medical review officer (MRO), such as the County Occupational Medical Services, may not

consider explanations of confirmed positive. . . test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that . . . she unknowingly ingested a marijuana brownie. . . MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation.

Consequently, you must not declare a test as negative based on an explanation of this kind.

Moreover, § 40.151(e) states that an MRO “must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the “medical marijuana” laws that some states have adopted).” Further, § 40.151(f) requires that an MRO “must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative.”

We conclude that Appellant was an FTA Safety Sensitive employee with a confirmed positive drug test result and is subject to discipline under the County Personnel Regulations. Thus, the County has met its burden of proof that discipline is warranted. The question now is what penalty is proper.

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

The County contends that because Appellant was an FTA Safety Sensitive employee, the County Personnel Regulations mandate that he must be dismissed, and that neither the Department nor the MSPB have discretion to impose a lesser sanction.

We reject the County’s argument that the MSPB lacks the authority to reduce Appellant’s penalty if we find that the County acted improperly. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986) (“the Board . . . must be able to grant appropriate relief. . . ‘the remedial and enforcement powers of the board shall be fully exercised by the board as needed to rectify personnel actions found to be improper....’”) (*quoting* County Code § 33-7(a)).

The controlling County regulation, MCPR § 32-5(i)(2)(A), states that “a department director must dismiss an FTA Safety-Sensitive employee . . . who: (i) has a confirmed positive drug test result.” It is well settled that use of the term “must” is mandatory. MSPB Case No. 17-20 (2018). *See Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 512 (1990) (use of the word “must” is mandatory, and not a mere “nudge”).

Notwithstanding the straightforward and mandatory language of the regulation Appellant argues that his offense was relatively minor, he is of good character, and that dismissal is an unjustifiably harsh sanction considering the lesser sanctions given to two of the comparator employees. Appellant suggests that since the County has not consistently dismissed those who test positive, Appellant should be treated like comparator employees No. 19 and 44, *i.e.*, the County “should terminate him technically, [and] reinstate him immediately, as he has shown that he is not a safety threat with a last clear chance agreement.” Appellant’s Opposition to the County’s Motion for Summary Judgment, p. 6. *See* Appellant’s Motion for Summary Judgment, p. 3, (“Appellant should get no more than the discipline allotted to employees #19 and #44.”).

The County argues that those two cases were from years ago, may have been “mistakes,” and involved settlements.

On June 30, 2015, § 32-5(i)(2)(A) was amended to clarify the requirement for dismissal of FTA safety sensitive employees who test positive:

Under County authority not derived from the FTA regulations, a [department director may take disciplinary action, up to and including dismissal, against an employee who uses prohibited drugs, misuses alcohol, or refuses to take a required drug or alcohol test. A] department director must dismiss [a] an FTA Safety-Sensitive [Transit] employee with merit system status or terminate [a] an FTA Safety-Sensitive [Transit] probationary employee who:

Executive Regulation 16-13AMII, Resolution No. 18-199 (effective June 30, 2015) (brackets indicate language deleted by the amendment). Moreover, the regulation was also amended to delete the following language in § 32-5(i)(1), the subsection concerning the consequences under FTA regulations for an employee who tested positive: “(C) if the employee is not terminated, return-to-duty testing and follow-up testing as directed by a Substance Abuse Professional.” *Id.*

Nevertheless, we have no evidence that there was a mistake or misinterpretation, and it is not possible to ascertain the reasoning behind the County’s decisions to settle with comparator employees No. 19 and 44. This is unsurprising since settlement negotiations are typically confidential and settlement agreements frequently omit any detailed or specific discussion of the underlying motivations and justifications of the parties. More importantly, under our precedent the County is not obligated to explain differences in disciplinary treatment resulting from settlements.

This Board has held that the County is not strictly bound in perpetuity by disciplinary precedent, and that employees whose cases resulted in settlements may not be used as comparators for level of discipline determinations.

An agency may legitimately contend that a penalty in a previous case was too lenient and that . . . it need not make the same mistake again. *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).

Second, the level of discipline was the result of a settlement. In that circumstance, DOCR need not even explain the difference in treatment. *Davis v. U.S. Postal Service*, 120 MSPR at 463-64 (“The Board has held that if another employee receives a lesser penalty, despite apparent similarities in circumstances, as the result of a settlement agreement, the agency is not required to explain the difference in treatment. *See 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 (agency not required to explain lesser penalties imposed against other employees whose charges were resolved by settlement), *aff’d*, 975 F.2d 869 (Fed. Cir.1992).

MSPB Case No. 18-06 (2019). *See also* MSPB Case No. 18-07 (2019). Thus, we do not take into account the settlements involving comparator employees No. 19 and 44 in determining whether “the discipline given to other employees in comparable positions in the department for similar behavior” was the same as that given to Appellant. MCPR § 33-2(d)(3).

In 96% of the comparator cases (43 of 45) the employees resigned, were dismissed or were terminated.<sup>3</sup> Appellant's final reply argues that in a number of the comparator dismissals the County did not specifically cite to the regulatory provision mandating dismissal. Appellant's argument is inapposite as in many of those cases employees chose to resign prior to formal charges or as part of a settlement, and others involved the termination of probationary employees who had an employment status distinct from that of an employee with merit system status like Appellant. That the citation of a specific regulation may have been absent is immaterial to the question of whether "the discipline given to other employees in comparable positions in the department for similar behavior" was the same as that given to Appellant. What is important is that with the exception of two settlements the County has consistently separated from County employment individuals who were similarly situated to Appellant, whether by dismissal, termination, or resignation in lieu of dismissal or termination.<sup>4</sup>

Appellant also argues that comparator employees disciplined after Appellant should not be considered by the Board. Appellant's Motion for Summary Judgment, p. 3. We disagree. Those cases simply reinforce our conclusion that in non-settlement cases the County has consistently dismissed employees who were similarly situated to Appellant.<sup>5</sup>

Appellant has failed to show unequal application of discipline since the only two comparable situations that did not result in dismissal were the result of settlements. As discussed above, because settlements may be entered into for various unknown reasons, such as the strength or weakness of the facts in the case, a desire to quickly resolve the matter, or a desire to avoid costly litigation, the Board will not consider them for level of discipline comparison purposes.

Finally, we decline to follow Appellant's suggestion that the County "should terminate him technically, [and] reinstate him immediately." Appellant's Opposition to the County's Motion for Summary Judgment, p. 6. In making that request Appellant again relies on the two settlements, which we have already found to be inappropriate to consider in determining whether discipline has been consistently applied. Moreover, a remedy involving the adjustment of the penalty is not appropriate in this case because the County correctly interpreted the relevant regulation and we have determined that the County acted properly and within its authority regarding Appellant's drug test and discipline.<sup>6</sup>

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.

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<sup>3</sup> The County may wish to consider whether evolving societal standards regarding the use of CBD products warrants the amendment of County regulations to permit disciplinary action other than dismissal.

<sup>4</sup> Although the terms "termination" and "dismissal" are frequently and inaccurately used interchangeably, both still result in separation from County employment. *See* MCPR § 29-1, § 33-3(h).

<sup>5</sup> We also would have taken those subsequent cases into consideration had the employees been treated more favorably than Appellant.

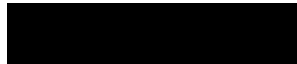
<sup>6</sup> The comparator records indicate in a comment section that Appellant "is not eligible for re-hire in all safety-sensitive positions with DGS." JX 1, 203. Although we note that in some circumstances MCPR § 32-3(g) permits the hiring of applicants for safety-sensitive positions two years after a positive drug test, we express no opinion on Appellant's eligibility for rehire by the County in a safety-sensitive position at some date in the future.



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

May 11, 2020



Harriet E. Davidson  
Chair