

**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. 21-01

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FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of ██████████ (Appellant).

BACKGROUND

The discipline in this matter relates to a February 13, 2020, incident involving the alleged use of force against an inmate at the Montgomery County Detention Center (MCDC). The Department of Correction and Rehabilitation (DOCR or Department) issued a Statement of Charges for Dismissal dated July 22, 2020, and served on Appellant on July 27, 2020. County Exhibit (CX) 1. On September 24, 2020, DOCR issued an amended Notice of Disciplinary Action - Dismissal to Appellant, which was served on Appellant on September 25, 2020. CX 4. 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(g) (knowingly making a false statement or report); and §33-5(h) (negligent or careless in performing duties), CX 5.

In addition, Appellant was found to have violated multiple DOCR policies, as follows: DOCR Policy Number 1300-10: §III(D) (force is not authorized as a means of punishment); §VI(E) (in controlled situations only shift commander may authorize chemical agent use), CX 8. Appellant was also charged with the following violations of DOCR Policy Number 3000-7: §VII(E)(3) (employee shall not use more force than necessary to control the situation or protect themselves or others from harm; employees shall not use force in a discriminatory manner);

§VII(E)(9)(a) & (b) (conduct unbecoming, false report); §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance); §VII(E)(14) (untruthful statements), CX 7.

On August 3, 2020, Appellant filed this appeal challenging the decision of the Department to dismiss him from his position as a Correctional Officer III.

A hearing on the merits of the appeal was held on March 2, 2021. The County was represented at the hearing by Associate County Attorney [REDACTED], while Appellant was represented by attorney [REDACTED]. The hearing was conducted before Board Chair Harriet E. Davidson and Vice Chair Sonya Chiles, and they considered and decided the Appeal.¹

After hearing testimony and reviewing the exhibits and stipulations of the parties, the Board made the following factual findings.

FINDINGS OF FACT

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

1. Private First Class [REDACTED] (AS)
2. Lieutenant [REDACTED] (JM)
3. Director [REDACTED] (Director or AT)
4. Corporal [REDACTED] (Appellant or MS)
5. Corporal [REDACTED] (AI)

Appellant Exhibits² (AX) 1 through 4 and County Exhibits³ (CX) 1 through 21 were admitted into the record.

¹ Former Board Member C. Scott Maravilla, who was appointed by the County Council effective February 9, 2021, and resigned March 16, 2021, and current Board Member Barbara S. Fredericks, who was appointed April 20, 2021, did not participate in the consideration of this decision.

² Appellant’s exhibits are as follows:

- AX 1 - Adjustment Report completed by Appellant dated February 13, 2020.
- AX 2 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics, effective December 30, 2016.
- AX 3 - DOCR Department Policy and Procedure 1300-10, Use of Force, Chemical Agents & Restraints, effective March 23, 2018.
- AX 4 - Video Surveillance, MCDL-MAIN-2 – Medical Hallway, February 13, 2020.

³ The County Exhibits are as follows:

- CX 1 - Statement of Charges - Dismissal, July 22, 2020.
- CX 2 - Notice of Administrative Leave with Pay, May 19, 2020.
- CX 3 - Notice of Disciplinary Action - Dismissal, September 21, 2020.
- CX 4 - Amended Notice of Disciplinary Action - Dismissal, September 24, 2020.
- CX 5 - Montgomery County Personnel Regulation, § 33.
- CX 6 - MCGEO Collective Bargaining Agreement, Article 28 - Disciplinary Actions.
- CX 7 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics.
- CX 8 - DOCR Department Policy and Procedure 1300-10, Use of Force, Chemical Agents & Restraints.
- CX 9 - Shift Administrator’s Investigative Report, April 23, 2020.
- CX 10 - Video Surveillance of Medical Unit, February 13, 2020.

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The parties filed joint stipulations on February 17, 2021, which are set out in their entirety in a footnote.⁴ The Board accepted the stipulations into the record. Hearing Transcript (Tr.) 9.

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- CX 11 - Use of Force Checklist, February 13, 2020.
 - CX 12 - Incident Report, Written Statement of PFC [AS], February 13, 2020.
 - CX 13 - Incident Report, Written Statement of Sgt [MT], February 13, 2020.
 - CX 14 - Written Statement of Cpl [MS], February 13, 2020.
 - CX 15 - Employee Training Schedule Report for Appellant.
 - CX 16 - Last Chance Agreement, finalized January 8, 2019.
 - CX 17 - Statement of Charges - Ten (10) Day Suspension, January 5, 2018, Amended Notice of Disciplinary Action - Five (5) Day Suspension taken as Forfeiture of Leave and Last Chance Agreement, February 4, 2019, and Order Accepting Settlement Agreement, January 28, 2019.
 - CX 18 - Notice of Disciplinary Action - Five (5) Day Suspension, July 20, 2016, Alternative Dispute Resolution Settlement Conference Intake Form, and work status change documents, Statement of Charges June 14, 2016.
 - CX 19 - Statement of Charges - Dismissal dated August 12, 2020, Notice of Disciplinary Action dated September 21, 2020 and Amended Notice of Disciplinary Action September 24, 2020 (Pending matter).
 - CX 20 - Comparable Discipline, June 11, 2019.
 - CX 21 - Comparable Discipline, February 23, 2015.

⁴ The parties agreed to the following stipulations of fact:

Director [REDACTED] (background information only)

- Director [REDACTED] has been with DOCR for 28.5 years.
- Current Position: Director. Dir. [REDACTED] has been in this role since August 2019, she was Acting Director from May 2019 to August 2019.
- Prior positions held in DOCR: Division Chief Community Corrections (PRC and Pre-Trial Divisions), Division Chief Pre-Trial Services, Unit Manager Pre-Release and Reentry Services, Work Release Coordinator (PRRS), Case Manager (PRRS) and Resident Supervisor (PRRS).
- As Director, she has complete oversight and decision-making authority for the Department of Correction and Rehabilitation and its complement of 541 employees.
- Disciplinary process:
 - The Warden usually assigns a Lieutenant or Captain to investigate a matter, though sometimes the Director may do so.
 - Once the investigation is complete, the investigative report is turned into the Deputy Warden (“DW”) for review and recommendation for disciplinary action. The DW will then forward it to the Warden for review with recommendations from the DW. The Warden can ask additional questions. The Warden either agrees or disagrees with DW’s recommendation then forwards the investigation and recommendations to the Director for review. The Director can then ask the investigator to conduct additional investigation. The Director either agrees with or disagrees with Warden’s and DW’s recommendations for disciplinary action.
 - The Director is the final decision maker on the level of discipline to be issued.
 - Once the level of discipline is determined, a Statement of Charges (“SOC”) is written and served on the employee.
 - If the employee does not request Alternative Dispute Resolution (“ADR”) and the employee does not provide a response within ten days that justifies a reduction in the discipline imposed, a Notice of Disciplinary Action (“NODA”) is issued and served upon the employee.
 - These steps were followed in this matter.
- When determining the level of discipline, the Director takes the following factors into consideration:
 - Nature and gravity of the offense
 - Relationship of the misconduct to the employee's assigned duties and responsibilities

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- The employee's work record
 - Comparable discipline
 - Whether the employee should have been aware of the rules/procedures
 - Other relevant factors

Deputy Warden [REDACTED] (background information only)

- Current title: Deputy Warden of Custody and Security for MCDC. DW [MW] has been in this position for the past 5 months and was the Acting Deputy Warden for one year prior to that.
- Has been with DOCR for over 27 years.
- Prior Positions held:
 - Captain/Professional Standards and Compliance Manager (included being DOCR's Internal Affairs Investigator) - 2 years;
 - Admin. Captain for MCDC - 2 years;
 - Shift Manager (Captain) for MCCF's #1 Shift - 1 year;
 - Shift Commander (Lieutenant) assigned to both MCCF and MCDC from 2009 - 2015;
 - Honor Guard Commander (additional position during my tenure as Lieutenant and Captain).
 - Correctional Officer
- DW [MW]'s duties include being responsible for the day-to-day management, leadership, and coordination of all criminal justice agencies and programs at the MCDC. MCDC is primarily responsible for the intake and processing of adult male and female offenders arrested within the County and has a facility capacity to accommodate approximately 200 inmates. Major program elements at the MCDC include the Central Processing Unit (processing over 15,000 offenders per year), Intake, Booking and Release, Pre-Trial Assessment, Records Management, Behavioral Health Screening and Assessment, Correctional Health Screening, Public Defender Interviews, interfacing with numerous law enforcement agencies, and critical daily support of all District Court Commissioner operations. This position leads in both on-the-floor management of line operation and public policy planning and development at every level of correctional operations in Montgomery County, MD.
- Responsibilities include:
 - Basic budget development and management;
 - Staff mentoring and supervision;
 - Security operations;
 - Managing program elements critical for the constitutional practice of correctional operation in the county/local correctional setting; and
 - Participating in the disciplinary process of employees assigned to MCDC.
- Training and Education: HS Diploma, United States Marine Corps ('88-'92), AA Degree from Frederick Community College (General Studies), Correctional Entrance-Level Training Program (State Academy) - 1993, Accelerated Police Academy with MCP - 1997 (trained in law, criminal investigation, crime scene preservation, evidence collection, criminal charging offenders, etc.), First Line Supervisor Training - 2006, First Line Administrator's Training-2015, Internal Affairs Investigation Training-2018. In addition, DW [MW] received countless correctional officer training hours during his tenure as a correctional officer.
- Responsibilities in the Disciplinary Process: DW [MW]'s role in the disciplinary process is to review all reports of the incident, to include incident reports (DCA-36), adjustment reports (DCA-71), Use of Force Check Lists, Shift Administrator's Investigative Reports (SAIR), and Security Rounds reports. He will also review all evidence related to the incident, to include photographs, video surveillance footage, and physical evidence (*i.e.* clothing, weapons, etc.). Once he has reviewed all components of the incident, and all appear complete, he will write a recommendation as to the findings and forward his recommendations to the Warden for review.
- The Chain of Command between DW [MW] and Cpl. [MS]: Cpl. [MS] reports to his Lieutenant who reports to the Administrative Captain, who reports to Deputy Warden [MW]. There are Sergeants on Cpl. [MS]'s shift, but he does not directly report to them.

Capt. [REDACTED]
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Appellant has been employed as Correctional Officer with DOCR since October 15, 2007. At the time of his dismissal he was serving as a Correctional Officer III, Corporal. On February 13, 2020, Appellant was assigned to the Run Desk post on the Third Shift at MCDC. Tr. 22, 55, 135.

On February 13, 2020, during the Third Shift at MCDC Correctional Officer AS was assigned to the Medical Post. Tr. 22. AS was the officer in charge of the post since he was the only Correctional Officer assigned to the post. Tr. 26-27. A medical unit cell for male inmates is in front and to the right of the medical post desk. Tr. 23. The male inmate cell has a door, and to the left of the door there is a window with bars and no glass through which one can extend an arm into or out of the cell. Tr. 23, 37. When an inmate is in the medical unit cell the door is locked. Tr. 25.

Inmate W was occupying the medical unit cell on February 13 during the Third Shift while he was waiting for his initial medical assessment. Tr. 24. According to AS, inmate W was “talking to everyone” and “was loud and disruptive but he was not combative or anything, he was just loud.” Tr. 26.

The County introduced video of the hallway where the medical unit cell and Medical Post are located and where the February 13, 2020, incident occurred. CX 10. At the beginning of the video Inmate W’s hands are visible resting between the bars and outside of the cell while engaged in a conversation with a correctional officer. During the conversation Inmate W extended his hand and the officer engaged in a handshake with the inmate. CX 10, 19:42:31-36.⁵ They shook hands again as the officer prepared to leave the area. 19:43:32-35.

Less than two minutes later Appellant entered the vicinity of the Medical Post desk and inmate cell. 19:45:13. As Appellant passed in front of the cell Inmate W and Appellant began

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- Captain [BW] is the Custodian of Records for the video surveillance system at MCDC and if called to testify, he would verify to the authenticity of the video surveillance footage found on CE 10.

Sgt. [REDACTED]

- [MT] is a Sergeant at MCDC. He has been with DOCR since 2008 and has been a Sergeant for two years. If called at a hearing, Sgt. [MT] would testify to the following:
 - He was Cpl. [MS]’s Sergeant at the time of the incident at issue
 - He was called to the scene by Lt. [JM].

Nurse [REDACTED]

- [LB] is a Nurse with DOCR assigned to MCDC. If called at a hearing, Nurse [LB] would testify to the following:
 - She conducted the new inmate intake assessment on inmate [W] after he had been sprayed with OC spray by Cpl. [MS].
 - She did not have to treat him for the OC spray.
 - She was in the medical office off the medical hall when the incident occurred.

Other Factual Stipulations

- Cpl. [MS] was served in this matter with a Statement of Charges for Dismissal (CE 1), dated July 22, 2020 on July 27, 2020.
- Cpl. [MS] was served in this matter with an Amended Notice of Disciplinary Action for Dismissal (CE 4), dated September 24, 2020 on September 25, 2020.
- Cpl. [MS] has been employed with DOCR since October 15, 2007. He was most recently assigned to the Third Shift at MCDC.

⁵ The video reflects both the military time of day and the elapsed time of the recording. We reference the time of day in this decision.

talking. 19:45:23. The inmate reached his arm and open hand out of the cell and towards Appellant as if to shake his hand or reach a cup Appellant was holding, and Appellant responded by suddenly raising his right arm in a swift swatting motion without making contact with the inmate. 19:45:26-27. Inmate W again reached out with his open hand towards Appellant, this time towards but not touching Appellant's face. 19:45:28. Appellant backed off out of reach, put down the cup he was holding on to the Medical Post desk and reached to his belt for his Oleoresin Capsicum (OC spray or pepper spray). 19:45:28-34. Appellant then held the OC spray up to the cell opening, pointing it into the cell. 19:45:35-36. Appellant then stepped back and lowered his arm while continuing to talk to Inmate W. 19:45:39-42. As Appellant's interactions with Inmate W began to escalate Officer AS asked Appellant to leave, but Appellant did not do so. Tr. 27, 229; CX 12.

Appellant then turned to the desk and started to reholster the OC spray. 19:45:44. Based on Appellant's testimony and the video, it appears that Inmate W then spat on Appellant. 19:45:48; Tr. 143. Appellant again reached for his OC spray, went to the cell door, and pulled on the handle. 19:45:50-53. When the locked cell door did not open Appellant went to the opening to the left of the door and, while holding the OC spray, put his arm into the cell slightly past elbow depth. 19:45:54-57.

As soon as Appellant reached into the cell with the OC spray officer AS reached for the telephone on the desk and made a call. 19:45:56 – 46:01. AS testified that he was calling Lieutenant JM. Tr. 29-30. While officer AS was on the phone with Lieutenant JM Appellant remained in front of the cell gesturing and talking to officer AS. 19:46:02-04. Appellant then suddenly turned and returned to the cell opening, reached his arm inside, and sprayed Inmate W a second time. Tr. 32-33, 45, 57-58; 19:46:02-7. On this point we find the testimony of Officer AS credible and supported by what we can see on the video. Inmate W told Lieutenant JM that Appellant had sprayed him twice. Tr. 57-58. The Adjustment Report (DCA 71) Appellant wrote on Inmate W stated that he "pulled out the OC spray and disburse a second burst of OC at inmate [W]." CX 14.

It is undisputed that Appellant discharged OC spray into Inmate W's cell. Tr. 28, 145. Appellant claims that he used the term "second burst" in the Adjustment Report as a term of art under DOCR policy for a one second burst. Tr. 148 ("So I only sprayed him once, but when I spoke to the investigator I said I sprayed a second burst, not twice, but in the policy and procedure if you look at it, and OC spray it say you say a second burst of OC spray."). Appellant did not cite to or provide the Board with a copy of any DOCR policy referencing the term "second burst," and DOCR Policy Number 1300-10 on Use of Force, Chemical Agents & Restraints contains no such terminology. CX 8. Considering the contrary credible evidence, Appellant's behavior on the video, and Appellant's demeanor at the hearing, we find Appellant's clarification of his written statement and denial that he used OC spray on Inmate W a second time inconsistent, implausible, and unworthy of credence.

While still on the phone with Lieutenant JM, officer AS stood up. 19:46:08. Appellant finally left the unit and headed back the way he had originally come from. 19:46:42. Shortly thereafter Lieutenant JM and Sergeant MT responded to the scene. 19:46:55. Lieutenant JM testified that he could immediately tell that OC spray had been deployed and that it caused him to cough. Tr. 57-58. Lieutenant JM's coughing is visible on the video. CX 10. Lieutenant JM, Sergeant MT, and officer AS then took Inmate W out of the cell for decontamination. 19:47:40-45.

Lieutenant JM was the shift commander for the Third Shift at MCDC on February 13. Tr. 61. Appellant did not call Lieutenant JM prior to using OC pepper spray on Inmate W. Appellant did not ask officer AS to call Lieutenant JM. Tr. 29-30. Appellant testified that that there was “no way” he was going to call Lieutenant JM before he used the OC spray on Inmate W, and that he observed and overheard officer AS calling Lieutenant JM “immediately, after I deployed the OC spray.” Tr. 161, 166-67.

Inmate W was locked alone in the medical unit cell and not presenting an immediate danger to others. Tr. 24, 26. There is no evidence in the record that he was a danger to himself, that he was destroying property, or that he trying to escape. Tr. 28-30, 232. Inmate W’s only misbehavior was spitting at Appellant, and Appellant could have avoided the risk of being spat on by walking away. Tr. 30, 51, 61-62, 103-04, 116. There was no emergency that warranted deploying OC spray without notifying the shift commander. Tr. 46. The situation was not uncontrolled, requiring an unplanned use of force. Tr. 30, 61-62.

Appellant’s testimony that he could not simply leave the area because the hallway was too narrow, and the desk blocked a safe exit, is contradicted by the video evidence. CX 10. Appellant had sufficient room and opportunity to simply walk away from Inmate W’s cell.

Appellant’s testimony that he was not angry at Inmate W was also inconsistent with the video evidence. Tr. 230; CX 10. Appellant’s testimony is rebutted by the surveillance video evidence, which shows that Appellant was acting in a visibly excited manner, with his body language indicating that he was agitated and upset.

Pursuant to a Last Chance Settlement Agreement, in February 2019, Appellant was given a five-day disciplinary suspension for a November 2017 incident involving Appellant’s aggressive and inappropriate behavior towards a DOCR nurse. Tr. 83; CX 16, CX 17.⁶

In July 2016, Appellant received a five-day disciplinary suspension for using excessive force against a teenager by pushing him in the back and out the front door of MCDC. Tr. 82-82; CX 18.

In a memorandum dated July 22, 2020, the Warden issued to Appellant a Statement of Charges (SOC) in support of a dismissal. On September 24, 2020, the Director of DOCR issued an amended Notice of Disciplinary Action (NODA) dismissing Appellant. CX 4.

APPLICABLE LAWS AND POLICIES

⁶ Because Appellant raised and wished to discuss allegations that he was misled about the contents of the agreement, including his accusation that he was orally told that the agreement only had a one-year duration, the Board admitted into evidence as Board Exhibit 1 a copy of the Order Accepting Settlement Agreement in MSPB Case No. 18-18. Both the agreement and the Order explicitly provide that the Last Chance Settlement Agreement had a three-year duration, and the Order details the efforts undertaken by the Board to verify that Appellant’s understanding of the terms of the agreement was the same as the County’s and that his agreement was knowing and voluntary.

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: . . . (g) dismissal . . .

§ 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.

Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

(d) *Consideration of other factors.* A department director should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be:

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

§ 33-3. Types of disciplinary actions.

(h) *Dismissal.* Dismissal is the removal of an employee from County employment for cause.

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

- (c) violates any established policy or procedure; . . .
- (e) fails to perform duties in a competent or acceptable manner;
- (g) knowingly makes a false statement or report in the course of employment;
- (h) is negligent or careless in performing duties; . . .

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:

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. . . .

14. Untruthful Statements: Employees shall not make untruthful statements, either verbal or written.

Montgomery County Department of Correction and Rehabilitation, Policy Number: 1300-10, Use of Force, Chemical Agents & Restraints, effective December 30, 2016, (replacing policy of April 15, 2015), which provides, in relevant part:

III. POLICY

It is the policy of the MCDOCR that:

- A. Use of force against an inmate is authorized when the acting staff member reasonably believes such force is necessary to accomplish any of the following objectives:
 - 1. protection of self or others;
 - 2. protection of property from damage or destruction;
 - 3. prevention of an escape;
 - 4. recapture of an escapee;
 - 5. prevention of a criminal act;
 - 6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or
 - 7. the prevention of the individual from self-inflicted harm.
- 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.

- C. Use of force shall be applied in accordance with the force continuum, as defined in Section II of this policy, unless the acting staff member reasonably believes the situation requires immediate escalation to a greater degree of force to accomplish any of the objectives identified in this policy.
- D. Force is not authorized as a means of punishment. . . .

VI. CHEMICAL AGENTS - GUIDELINES

- A. MCDOCR is authorized to use Oleoresin Capsicum (O.C.) pepper spray and pepper ball gun (see Policy - 1300-27).

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- E. Each officer is authorized to carry on his/her person one (1) can of department issued Oleoresin Capsicum on duty. In uncontrolled emergency situations (time not permitting), staff are authorized to use O.C. against an inmate. In controlled situations only, the Shift Administrator/Shift Manager/Assistant Unit Manager or higher authority may authorize the use of a chemical agent against an inmate(s). . . .

VII. USE OF CHEMICAL AGENTS – PROCEDURES

- A. Officers limit the use of force against any inmate to that necessary to ensure security and control. All officers who have been trained and certified in the use of chemical agents are issued pepper spray, expected to carry it, and are authorized to use it to control or break-up assaultive actions by inmates.
- B. A chemical agent is used when in the judgment of the officer; its use is in the best interest of the inmates and Correctional Staff (i.e. minimizing the necessity for physical force). Oleoresin Capsicum (pepper spray) can be sprayed directly into the person's face, recommended distance is at least three feet away. The inmate is given the opportunity to wash the spray off as soon as he/she is under control. Officers who are trained and qualified to use pepper spray must do so in accordance with the established guidelines on the Use of Force listed in Section VI, of this Policy and Procedure. Pepper spray has been issued to all officers who have been trained in its use, primarily for self-defense or the defense of others.

ISSUE

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. 18-07 (2019); 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”).

Appellant's Testimony Lacked Credibility

Appellant's testimony and that of other witnesses differ on certain key points, most notably the issue of whether Appellant twice used OC pepper spray on Inmate W. Accordingly, the Board is obligated to consider and resolve the issue of credibility. As the Board has discussed in previous decisions, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 18-07 (2019); MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013), *citing Haebe v. Department of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002).

Appellant testified that he did not pull out and brandish the OC pepper spray until Inmate W spat on him, and that he only sprayed the inmate once, after he was spat upon a second time:

I didn't threaten him with the OC spray. Before I pulled out my OC spray, ma'am, he spat on me already for the first time. So I don't – not because of what he said that I pulled out my OC spray. He spat on me first before I brandished the OC spray.

Tr. 207. But video evidence belies that claim. CX 10, 19:45:28-34. It is clear on the video that before the spitting incident Appellant pulled out the OC spray in reaction to the inmate's hand reaching towards his face. 19:45:28-34. Indeed, the video clearly shows Appellant removing the OC pepper spray from his belt and brandishing it at Inmate W at least three times. Considering the clear video evidence, we cannot accept Appellant's version of events. *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (where reliable video evidence is available, an interpretation promoted a party that is not supported, or is contradicted, by the video should not be adopted).

Appellant then contradicted himself, acknowledging that he actually did first display the OC spray in response to the inmate reaching towards his face:

The second time he swat his hand towards my face. That is the second time. When he did that, that was the first time I showed him the OC spray; if you do that again, I'm going to spray you.

Tr. 210. Appellant's inconsistent testimony calls into question his credibility and reliability as a witness.

Immediately after Appellant threatened Inmate W with the pepper spray the first time the video strongly suggests that Inmate W then spat on Appellant. 19:45:48. Appellant then reached for his OC spray a second time. Appellant testified that he was spat on but that he only displayed the OC spray in response.

The first spit he spat on me landed on my hand. So I put the drink back down, pulled out my OC spray. I pointed the OC spray towards him, that if you ever did that again I'm going to spray him.

Tr. 143. On the video, Appellant can be seen looking at the OC spray dispenser before extending his arm into the cell, appearing to make sure that the nozzle was pointing in the correct direction, *i.e.*, away from Appellant and towards the inmate. 19:45:55-56. That effort would, of course, be unnecessary if Appellant intended to show, as opposed to disburse, the OC spray. Furthermore, the credible testimony of a disinterested witness, officer AS, conflicts with Appellant's denial. Tr. 28. Appellant's denial that he disbursed the OC spray in response to the inmate's provocation is thus contradicted by the video evidence and the testimony of officer AS.⁷

Furthermore, immediately after the incident Inmate W told Lieutenant JM that he had been pepper sprayed by Appellant twice. Tr. 57-58. Inmate W was "screaming in excruciating pain." Tr. 28, 57. While the testimony of Lieutenant JM concerning the statements of Inmate W is hearsay, reliable hearsay is admissible in an administrative proceeding. APA § 2A-8(e); MSPB Case No. 18-02 (2017); MSPB Case No. 17-13 (2017). The reliability of Inmate W's statements that he was sprayed twice is enhanced by the testimony of officer AS, the video evidence, and because under the circumstances, Inmate W's exclamations constitute excited utterances. Excited utterances are an exception to the hearsay rule that Maryland has long endorsed due to their reliability and trustworthy nature. *Cooper v. State*, 434 Md. 209, 242 (2013); Md. Rule 5-803(b)(2) ("Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). Inmate W's statement falls within the excited utterance exception as he was clearly still in the throes of an "exciting event" at the time of his statements to Lieutenant JM. *See DeLeon v. State*, 407 Md. 16, 29 (2008); *State v. Harrell*, 348 Md. 69, 77 (1997).

In addition to the video evidence, the testimony of officer AS and Lieutenant JM, the Adjustment Report (DCA 71) written by Appellant stated that he "pulled out the OC spray and disburse a second burst of OC at inmate [W]." CX 14. Considering the contrary credible evidence, Appellant's visible behavior on the video, and Appellant's demeanor at the hearing, we find Appellant's "clarification" of his written statement and denial that he twice used OC spray on Inmate W implausible and unworthy of credence. For these reasons we find Appellant's testimony that he did not disburse the OC spray after being spat upon what he considers the first time unworthy of credence. We find that Appellant disbursed OC pepper spray at Inmate W twice.

Appellant contends that Inmate W spat on him a second time and that in reaction Appellant used the OC spray for the only time. However, unlike the earlier event where Appellant's reaction

⁷ Appellant called Corporal AI to testify as to the what the effects of OC spray would have been on officer AS. Based on viewing the video AI opined that officer AS would have stood up as soon as Appellant disbursed the OC spray, and since he only stood up once there was only one discharge of spray. We did not find AI's testimony persuasive. On cross examination he acknowledged the shortcomings in his analysis and, importantly, he was not qualified as an expert witness on the effects of OC spray. We therefore give his testimony no weight.

to being spat upon was obvious, there is no video support for Appellant's claim that the inmate spat at him a second time. We thus do not credit Appellant's assertion that Inmate W spat on him a second time.

Because we find Appellant's description of events contradicted by the testimony of a disinterested witness and inconsistent with the video evidence, we conclude that Appellant's testimony is not worthy of credence. *See* MSPB Case No. 17-13. Moreover, the Board had ample opportunity to directly observe the demeanor of Appellant during his testimony and to assess his credibility. The Board concludes that Appellant was defensive, evasive, and that his testimony was self-serving and contradictory. Appellant was not credible. MSPB Case No. 10-04 (2010).⁸ For these reasons, we also view his testimony on other points with skepticism.

Appellant's use of the chemical agent OC pepper spray against an inmate was unnecessary, unjustified, and unauthorized

Under DOCR policies the use of a chemical agent such as OC pepper spray is considered a use of force. Policy 1300-10 §II(J) ("Use of force includes . . . chemical agents. . ."). Appropriately, DOCR strictly limits the use of force to circumstances where a correctional officer "reasonably believes such force is necessary to accomplish any of the following objectives:

1. protection of self or others;
2. protection of property from damage or destruction;
3. prevention of an escape;
4. recapture of an escapee;
5. prevention of a criminal act;
6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or
7. the prevention of the individual from self-inflicted harm."

Policy 1300-10 §III(A).

None of the circumstances listed in the policy were present during the incident of February 13, 2020. Inmate W was locked in a medical unit cell and not presenting a threat to others. Tr. 24, 26. There is no evidence in the record that he was engaged in self harm or otherwise a danger to himself, that he was damaging or destroying property, or that he trying to escape. Tr. 28-30, 232. Inmate W's only misbehavior was reaching his arm out of his cell and spitting at Appellant after Appellant threatened him with OC pepper spray. Regarding Appellant's suggestion that Inmate W's spitting was a criminal act, Tr. 145, it is an act that could have been prevented by Appellant

⁸ Appellant's credibility is also called into question by his attempt to suggest that he was misled about the contents of the last chance agreement that resolved MSPB Case No. 18-18 in January 2019, including Appellant's claim that he was orally told that the agreement only had a one-year duration. Tr. 186-87, 242. However, both the agreement and the Order Accepting Settlement Agreement explicitly say that the agreement had a three-year duration. CX 16; CX 17; Board Exhibit 1. Indeed, the Board met with Appellant and the County on January 24, 2019, specifically to ensure that Appellant understood the agreement and to confirm that his agreement was knowing and voluntary. CX 17; Board Exhibit 1. Accordingly the Board made sure that the "record will indicate that the Board went and ensured that [Appellant], who was unrepresented . . . at that point in time . . . understood exactly what the terms of the agreement were and then it was memorialized in our order." Tr. 256. Appellant did not dispute that statement either at the hearing or in his post-hearing brief.

simply walking away. Tr. 30, 51, 61-62, 103-04, 116. The hallway was readily passable. Tr. 197-98, Tr. 202, 223.

Correctional officers may only use OC pepper spray against an inmate in “uncontrolled emergency” situations. DOCR Policy Number 1300-10, §VI(E). In the absence of an emergency, Appellant was instead obligated under DOCR Policy 1300-10 §VI(E) to contact the supervising shift commander, Lieutenant JM, in order to obtain authorization for the use of a chemical agent against the inmate. There was no emergency that warranted deploying OC spray without notifying and obtaining authorization from the shift commander. Tr. 46. With Inmate W locked in a cell the situation was not uncontrolled and did not require an unplanned use of force. Tr. 30, 61-62.

Appellant admits he used OC spray before there was a call to the shift commander. Tr. 226. Appellant’s suggestion that he complied with the policy requiring notification of the shift commander prior to the use of OC spray because he heard officer AS calling Lieutenant JM is unpersuasive. Appellant used the OC pepper spray on Inmate W in a non-emergency, controlled situation without authorization from the shift commander. We conclude that Appellant’s decision to spray OC pepper spray into Inmate W’s cell was not a reasonable use of force under the circumstances.

It is significant that Appellant, who was not assigned to the medical unit post, was just passing through on the way to his assigned post in the Central Processing Unit and evidently had no knowledge of Inmate W’s medical condition. Tr. 55, 135-36. Inmate W was awaiting an initial medical screening, the point at which DOCR would be able to determine whether he had a condition, such as asthma, that might make the use of pepper spray risky.⁹ We thus find it a particularly egregious instance of poor judgment for Appellant to twice use OC pepper spray against a medical unit inmate in a confined space and without sufficient knowledge of whether there was any heightened medical risk in using a chemical agent on that specific inmate.

Appellant Used Force as Punishment

Appellant admitted that he brandished the OC spray and threatened Inmate W as a “reflex.” Tr. 222, 230-31. From the record evidence, including his behavior on the video and his demeanor while testifying, it is clear that Appellant was annoyed with Inmate W as soon as the inmate asked him a personal question and reached for his cup. When Inmate W spat on Appellant his annoyance at the inmate escalated to full blown agitation and anger. Appellant then sprayed the inmate twice in retaliation and as punishment for having been spat on. Appellant freely acknowledged that “I deployed my OC spray . . . because he spat on me.” Tr. 202. Appellant’s anger at Appellant had triggered his “reflex” of unnecessarily escalating the encounter by brandishing the OC spray, which led to the inmate’s inappropriate behavior, and ultimately to Appellant using the OC spray as an immediate response to the provocation of being spat upon. The encounter between Inmate W and Appellant quickly spiraled from an inmate’s disrespectful question and inappropriate attempts to reach Appellant to the use of OC pepper spray because Appellant was unable to control his emotional reactions to the inmate’s misbehavior.

⁹ See U.S. Dep’t of Justice, Nat’l Inst. of Justice, *The Effectiveness and Safety of Pepper Spray*, 1 (2003), <https://www.ncjrs.gov/pdffiles1/nij/195739.pdf> (“exposure to pepper spray was a contributing cause of death in 2 of the 63 fatalities [occurring in custody where pepper spray was used during the arrest], and both cases involved people with asthma”).

While we sympathize with correctional officers who may be exposed to insults, bodily fluids, and other provocations, Appellant's deployment of the OC pepper spray was not justified by the circumstances. There was no urgent need to use pepper spray on an inmate locked in a medical unit cell because Appellant could have easily ended the encounter by leaving. DOCR policies strictly regulate the use of force, including chemical agents. The use of force is not permitted by officers seeking to punish or retaliate against an inmate. DOCR Policy 1300-10 §III(D) ("Force is not authorized as a means of punishment").

Our review of the evidence leads us to the conclusion that Appellant was angry at Inmate W for his disrespectful language, personal questions, the extension of his open hand towards Appellant, and for spitting on Appellant. When Appellant deployed OC pepper spray into Inmate W's cell it was because Appellant became angry and wished to punish Inmate W for his deplorable behavior. Appellant was so upset with Inmate W that he could not control his emotions and sprayed him a second time without further provocation by the inmate. As a correctional officer Appellant had no right or authority to impose his personal attitudes concerning proper behavior on an inmate or to indulge his anger by inflicting painful physical harm. We conclude that Appellant's conduct was unprofessional and in violation of MCPR §33-5(c), (e), and (h); DOCR Policy 1300-10 §III(D); and DOCR Policy 3000-7 §VII(E)(3) & (10). *See* MSPB Case No. 18-07 (2019).

When the state takes individuals into custody it also takes on the responsibility to protect them from harm. DOCR policies permit the use of chemical agents only to protect an inmate or others from harm and to maintain order within the correctional facility. The use of chemical agents to punish an inmate is reprehensible and prohibited. Deploying OC pepper spray against Inmate W while he was alone in a locked cell did not constitute a good faith effort to maintain or restore discipline, but instead was done to punish him by inflicting acute discomfort. *Cf.*, *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . whether or not significant injury is evident."). Inmate W's misbehavior in spitting at Appellant was insufficient justification for Appellant's emotionally driven overreaction. Appellant had a responsibility to protect the health and safety of inmates, including Inmate W. He had no authority to impose *ad hoc* punishment.

Appellant's conduct was completely unacceptable, contrary to DOCR policies on the use of force, and in violation of 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); DOCR Policy 1300-10, §III(D) (force not authorized as a means of punishment); §VI(E) (in controlled situations only shift commander may authorize chemical agent use); DOCR Policy 3000-7, §VII(E)(3) (employee shall not use more force than necessary to control the situation or protect themselves or others from harm; employees shall not use force in a discriminatory manner); §VII(E)(9) (a) & (b) (conduct unbecoming); and §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance).

Appellant Knowingly Made False Statements

As discussed above, Appellant's testimony that he only used the OC pepper spray on Inmate W once was not credible and was contradicted by the testimony of other witnesses and the video evidence. Appellant was untruthful in his statements to investigators when he denied using

the OC spray twice and attempted to explain his use of the term “second burst” in his written report by claiming that he meant a one second burst of spray.

We conclude that Appellant realized during the investigation that he would have a difficult time justifying using the OC pepper spray twice on Inmate W, so he decided his best defense would be to simply deny what he had done. The record evidence does not support his efforts and leads us to the conclusion that the County proved by a preponderance of the evidence that Appellant violated MCPR §33-5(g) (knowingly making a false statement or report), DOCR Policy Number 3000-7, §VII(E)(9)(a) & (b) (conduct unbecoming, false report), and, DOCR Policy Number 3000-7, §VII(E)(14) (untruthful statements).

The Appropriate Level of Discipline is Dismissal

Appellant, as a correctional officer, was responsible for maintaining institutional security and for the custody and care of inmates. As detailed above, the County has proven by a preponderance of the evidence the charges against Appellant of using unnecessary, unauthorized, and excessive force against Inmate W as punishment, as well as making false statements during the investigation. Having determined that the County proved its case by a preponderance of the evidence, the remaining question is the appropriate level of discipline.

The Director of DOCR was responsible for determining the appropriate level of discipline and testified as to the reasons she decided to dismiss Appellant. The Board found the Director to be familiar with the facts of the case and thoughtful in her analysis of the relevant factors she considered to reach her decision.

The record reflects that Appellant’s disciplinary history is significant and relevant to these charges.¹⁰ In 2014 he received a three-day suspension for arguing with a female officer. Tr. 239. Prior to that discipline he received a one-day suspension for yelling at a female co-worker. Tr. 239-40. In July 2016, Appellant was given a five-day disciplinary suspension for using excessive force by pushing a teenaged member of the community out the front door of MCDC. CX 18; Tr. 82-83. Pursuant to a Last Chance Agreement signed in January 2019, Appellant received a ten-day suspension for an incident in which he behaved in an aggressive and intimidating behavior towards a DOCR nurse. CX 16, CX 17; Board Exhibit 1; Tr. 83, 92.

While the Director testified that she focused on the two most recent suspensions in making her decision, Tr. 86, we note that the four disciplinary suspensions Appellant received were applied progressively, going from a one-day suspension to suspension of three, five, and finally ten days. Just as importantly, all the prior disciplinary actions against Appellant were for incidents where he was unable to control his emotions and either acted in an aggressive and intimidating verbal manner or, in the 2016 case where he shoved a young community member out of the door to the lobby of MCDC, where he used unjustified force. Tr. 83. Including the incident giving rise to this appeal, Appellant has repeatedly demonstrated anger and self-control issues that make him ill-suited for a position involving the care and custody of vulnerable people.

¹⁰ Even without considering Appellant’s significant prior discipline the County personnel regulations would allow the DOCR Director to eschew progressive discipline and move directly to dismissal. MCPR § 33-2(c)(2) (“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. . .”).

We consider whether DOCR has consistently applied its disciplinary policies and dismissed other staff who have engaged in similar behavior. MCPR § 33-2(d)(3). To support an assertion that the Director failed to properly take into account comparable DOCR cases before making the decision to dismiss him from County employment Appellant must show that he and any comparison employees engaged in similar misconduct without differentiating or mitigating circumstances that would warrant distinguishing the misconduct or the appropriate discipline. MSPB Case No. 10-04 (2010), *citing Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009).

The Director testified that she reviewed two prior cases involving the inappropriate use of OC spray as possible comparable discipline. Tr. 106. One case involved a one-day suspension for unauthorized use of OC spray on an inmate who was locked in his cell. CX 20. The other case involved a three-day suspension for the unauthorized use of OC spray against an inmate for taking an extra tray of food from a food cart. CX 21. In both cases the level of discipline was the result of a settlement after Alternative Dispute Resolution with the union. For that reason alone, the Director was not obligated to explain why Appellant's discipline was more severe. MSPB Case No. 18-07 (2019) (where discipline is the result of settlement DOCR need not 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."); *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).

Moreover, the facts of the comparable cases are sufficiently different to not be appropriate comparators. *See* MSPB Case No. 18-07 (2019). Neither case involved the use of OC spray against a medical unit inmate by a correctional officer not assigned to the medical unit. The correctional officers disciplined in those cases did not have the same serious history of prior discipline involving aggressive behavior that Appellant had.

We find that the Director appropriately considered the progressive discipline Appellant has received and the possible comparable cases, and properly concluded that dismissal was warranted for his use of a chemical agent against Inmate W.

We also consider whether Appellant has potential for rehabilitation and conclude that he does not. In addition to calling into question Appellant's credibility, Appellant's claim that he was misled concerning the 2019 Last Chance Agreement when great care was taken to ensure that he fully understood and agreed to the terms of the agreement provides evidence of his inability to take personal responsibility for his action. The same is true regarding the July 2016, five-day disciplinary suspension for using unnecessary and excessive force when he pushed a teenager out the front door of MCDC. CX 18. Appellant acknowledged that he settled the matter by accepting a five-day suspension, but denied that that he had engaged in the behavior for which he was charged: "I did not push that guy per se." Tr. 237-38. Indeed, Appellant consistently refuses to acknowledge that any discipline he has received was justified and asserts that he is a victim of shoddy investigations, poor representation, or false allegations. *See, e.g.*, Tr. 171-75, 178, 185, 234, 236-40. For these reasons we conclude that Appellant lacks the potential for rehabilitation.

Finding that the County has proven by a preponderance of the evidence that Appellant's behavior was unacceptable and in violation of County policies and regulations, we have upheld all charges against him. We do not see how the County could tolerate a correctional officer abusing his official authority by engaging in the unnecessary use of force against an inmate. MSPB Case No. 07-10 (2007) (penalty of dismissal is appropriate for the unnecessary use of force).

Appellant engaged in unacceptable and punitive behavior against an inmate in a medical unit cell. Appellant's misconduct justified the imposition of the most severe discipline. The inappropriate use of a chemical agent as punishment against an individual under the County's care and custody justifies dismissal. Considering the seriousness of Appellant's misconduct, his disciplinary record, and that he occupied a position of trust and responsibility as a correctional officer, the penalty of dismissal was well within the bounds of reasonableness. The Board further finds that Appellant has demonstrated anger and self-control issues that make him ill-suited for a position involving the care and custody of the inmate population.

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 a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board

June 8, 2021

████████████████████

Harriet E. Davidson
Chair