

Merit System Protection Board Annual Report FY2019

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Harriet E. Davidson, *Vice Chair*
Angela Franco, *Associate Member*

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FY 2019
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (Board or MSPB) is composed of three members who are appointed by the County Council pursuant to Article 4, § 403, of the Charter of Montgomery County, Maryland. Board members must be County residents and may not be employed by the County in any other capacity. No member may hold political office or participate in any campaign for any political or public office during the member’s term of office. One member is appointed each calendar year to serve a term of three years. Members of the Board conduct work sessions and hearings during the work day and in the evenings, as required, and are compensated with a set annual salary as prescribed by law. The Board is supported by a part-time Executive Director and an Office Services Coordinator.

The Board members in Fiscal Year 2019 were:

Michael J. Kator	Chair
Harriet Davidson	Vice Chair
Angela Franco	Associate Member

DUTIES AND RESPONSIBILITIES
OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in the Charter of Montgomery County, Maryland, Article 4, “Merit System and Conflicts of Interest,” § 404, *Duties of the Merit System Protection Board*; the Montgomery County Code, Article II, Merit System, Chapter 33; and the Montgomery County Personnel Regulations, § 35, Merit System Protection Board Appeals, Hearings, and Investigations. Below are excerpts from some of those provisions.

1. Section 404 of the Charter establishes the following duties for the Board:

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral

argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

2. Section 33-7 of the Montgomery County Code sets out the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein must be exercised by the Board as needed to rectify personnel actions found to be improper. The Board must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, must establish its staffing requirements and define the duties of its staff.

* * *

(c) *Classification standards.* With respect to classification matters, the County Executive must provide by personnel regulation, adopted under Method (1), standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

- (1) The necessary components of class specifications;
- (2) Criteria for the establishment of new classes, modification or elimination of existing classes;
- (3) Criteria for the assignment of positions to classes;
- (4) Kinds of data required to substantiate allocation of positions;
- (5) Guidelines for comparing levels of job difficulty and complexity; and
- (6) Criteria for the establishment or abolishment of positions.

The Board must conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and must submit audit findings and recommendations to the County Executive and County Council.

* * *

(f) *Personnel regulation review.* The Merit System Protection Board must meet and confer with the Chief Administrative Officer and employees and their organizations from time to time to review the need to amend these regulations.

(g) *Adjudication.* The Board must hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(h) *Retirement.* The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

(i) *Personnel management oversight.* The Board must review and study the administration of the county classification and retirement plans and other aspects of the merit system and transmit to the Chief Administrative Officer, County Executive and County Council its findings and recommendations. The Board must conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations must cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this section.

(j) *Publication.* Consistent with the requirements of State law, confidentiality and other provisions of law, the Board must publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

3. Section 35-20(a) of the Montgomery County Personnel Regulations states:

The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

DISCIPLINARY ACTIONS

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. To initiate the appeal process, the employee must file in writing or by completing the Appeal Form on the Board's website. Montgomery County Personnel Regulations (MCPR), § 35-4. Under MCPR § 35-3, the employee must file the appeal within ten (10) working days after the employee has received a Notice of Disciplinary Action involving a demotion, suspension or removal. The appeal must include a copy of the Notice of Disciplinary Action. MCPR § 35-4(d)(1). Employees are encouraged to complete the on-line Appeal Form, which permits the uploading of documents and is available on the Board's website:
<http://www.montgomerycountymd.gov/MSPB/AppealForm.html>.

In accordance with § 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final disciplinary action of the Fire Chief or a local fire and rescue department, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within thirty (30) days after receiving a final notice of disciplinary action, unless another law or regulation requires that an appeal be filed sooner.

After receipt of the Appeal Form, the Board sends a notice to the parties, requiring each side to file a prehearing submission, including a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which potential witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is set by the Board in consultation with the parties. The Board requires all parties to comply with its [Hearing Procedures](#). After the hearing, the Board prepares and issues a written decision.

During fiscal year 2019 the Board issued the following decisions on appeals concerning disciplinary actions.

DISMISSAL

CASE NO. 17-20

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant. On March 13, 2017, Appellant filed this appeal with the Board, challenging his dismissal from a Correctional Officer III position with the Department of Correction and Rehabilitation (DOCR).

The discipline in this matter relates to a sexual assault on a female inmate at the Montgomery County Detention Center (MCDC). Appellant was also charged criminally in connection with the same incident. On November 27, 2017, in the Circuit Court for Montgomery County, Appellant pleaded guilty to malfeasance in office.

As a consequence of Appellant's guilty plea and conviction in Circuit Court, on March 19, 2018, the Board found that Appellant was precluded from challenging the facts underlying the misconduct charges against him, or that those facts demonstrate a nexus to his County employment. The Board held further that the County was still required to carry its burden concerning the appropriate level of discipline. A hearing limited to the appropriate level of discipline was held on April 25, 2018. Thereafter the parties submitted post-hearing briefs, including proposed findings of fact and conclusions of law. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was hired as a Correctional Officer with DOCR on April 17, 2006. County Exhibits (CX) 13 and 14.¹ On September 27, 2015, Appellant was assigned to work the first shift

¹ The Board admitted into evidence the following County Exhibits:

- CX 1 - Montgomery County Police Department Incident Report 15049216
- CX 12 - Memorandum prohibiting Appellant from DOCR facilities, April 12, 2016
- CX 13 - Statement of Charges – Dismissal, January 27, 2017
- CX 14 - Notice of Disciplinary Action – Dismissal, February 22, 2017
- CX 15 - Agreement Between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County, July 1, 2013 through June 30, 2016
- CX 16 - MCDOCR Policy and Procedure 3000-7
- CX 17 - Section 33 of Montgomery County Personnel Regulations
- CX 18 - Certified record of the Docket Entries in State v. [Appellant], Circuit Court Case No. 129815C
- CX 19 - Recording of plea hearing in State v. [Appellant], Case No. 129815C, November 27, 2017
- CX 20 - Notice of Disciplinary Action, October 19, 2012
- CX 21 - Notice of Disciplinary Action, December 31, 2012
- CX 22 - Notice of Disciplinary Action, October 25, 2013
- CX 23 - Notice of Disciplinary Action, June 20, 2014
- CX 24 - Notice of Disciplinary Action, May 27, 2015
- CX 25 - Notice of Disciplinary Action, May 29, 2016
- CX 26 - Notice of Disciplinary Action, January 27, 2017

from 10:30 p.m. until 7:00 a.m. on September 28. Appellant then worked overtime on the September 28 second shift, from 7 a.m. to 3 p.m., as a Pre-Trial officer responsible for facilitating and coordinating new inmate movements through the Pre-Trial process. *Id.*

Shortly before 1:00 p.m. on September 28, Appellant entered the cell of female inmate E.L. CX 14. Appellant was in the cell alone with inmate E.L. for approximately 45 seconds. *Id.* Subsequently, inmate E.L. reported that she had been sexually assaulted by Appellant. *Id.* An investigation was conducted by DOCR and the incident was reported to the Montgomery County Police (MCPD). April 25, 2018, Hearing Transcript (Tr.) 23. After the initial police interview with the victim, the MCPD Special Victim's Investigations Division conducted a full investigation. CX 1; CX 13 & 14.

DOCR Director RG testified that he ordered a DOCR internal investigation and that Appellant was re-assigned to a position involving no inmate contact. Tr. 24-25. The DOCR Director stated that the purpose of the temporary re-assignment was to allow a thorough investigation while giving Appellant the benefit of doubt until the facts had been established. Tr. 35. Pursuant to the police investigation, officers swabbed E.L.'s breast for DNA and submitted the swabs for analysis. The criminal investigation was suspended pending the results of the DNA analysis. CX 1, p. 5.

As a result of the MCPD investigations of the September 28, 2015, sexual assault on inmate E.L., Appellant was arrested and criminally charged in District Court on April 11, 2016. CX 1, p.6; CX 13, p. 5. District Court trial date was set for July 8, 2016. CX 1, p. 6.

On April 12, 2016, Appellant was banned from all DOCR facilities and placed on Administrative Leave with pay. CX 12 & 13; Tr. 26, 67. On April 20th or 25th, 2016, Appellant was issued a Statement of Charges (SOC) and placed on leave without pay status pending the outcome of criminal charges or trial. CX 25.² Appellant participated in Alternative Dispute Resolution where the parties agreed to leave Appellant on leave without pay status, and a Notice of Disciplinary Action (NODA) for the suspension was issued on May 29, 2016. CX 25; Tr. 30-31, 63.

On July 7, 2016, Appellant was charged in Circuit Court by way of a Criminal Information with malfeasance in office, a common law offense, as well as second degree assault under MD Code Ann., Crim. Law, § 3-203; sexual contact between a correctional officer and an inmate, § 3-314; and two counts of fourth degree sexual offense, § 3-308. CX 18, Circuit Court Criminal Case No. 129815, Docket Entry (DE) #s 1-5. After other preliminary proceedings, a trial date was initially set for December 19, 2016. CX 18, DE #23. The trial was continued to March 6, 2017. CX 18, DE #50.

CX 27 - Notice of Disciplinary Action, February 22, 2017

CX 28 - Prison Rape Elimination Act, various sections

CX 29 – Code of Maryland Regulations (COMAR) 12.10.01.03

CX 30 – COMAR 12.10.01.04

² The May 29, 2016, NODA for the suspension without pay pending trial states that the SOC for the suspension pending was issued April 25, 2016, (CX 25), while the SOC for dismissal of January 27, 2017, (CX 13), and the NODA of February 22, 2017, (CX 14), state that the SOC for the suspension pending was issued on April 20, 2016. The discrepancy is minor and of no significance.

On January 27, 2017, while the criminal case was still pending, a SOC for Appellant's dismissal was issued charging Appellant with the following violations of the Montgomery County Personnel Regulations (MCPR): § 33-5(c) (violates any established policy or procedure); § 33-5(d) (violates laws or regulations or is convicted of a criminal offense where there is a nexus with County employment); § 33-5(e) (fails to perform duties in a competent or acceptable manner); § 33-5(t) (assaults another while on duty on County government property). CX 13. On February 22, 2017, a NODA was issued dismissing Appellant from County employment effective March 3, 2017. CX 14.

The DOCR Director testified that the delay in issuing the SOC and NODA seeking Appellant's dismissal was attributable to delays in the investigation and the criminal justice proceedings. Tr. 34. With regard to the appropriate level of discipline for Appellant's actions, the Director testified that he considered the factors listed in MCPR § 33-2(d), CX 17, and the MCGEO Collective Bargaining Agreement, § 28.1. CX 15. The Director stated that he considered the "nature and gravity of the offense" to be "egregious" because the most basic responsibility of a correctional officer is to "take care, to do no harm, [and] to safeguard" inmates. Tr. 38-39.

The Director testified that it is the policy of DOCR to fully comply with federally mandated Prison Rape Elimination Act (PREA) standards, and that DOCR is able to maintain its accreditation from the American Correctional Association for that reason. Tr. 55-56; CX 28. The PREA standards require a zero-tolerance policy regarding sexual abuse. Tr. 56; CX 28, pp. 10 and 29. The Director further testified that in all other cases of sexual assault against an inmate the correctional officer who committed the offense was dismissed by DOCR. Tr. 50. The Director emphasized that Appellant's behavior shocked the conscience and represented one of the most severe violations a correctional officer could commit. Tr. 41.

The Board officially received this Appeal on March 13, 2017. On May 30, 2017, Appellant's then-attorney filed a Motion to Withdraw as Attorney for Appellant and Extend the Time for Appellant to Submit His Prehearing Submission. That same day the Board granted Appellant's requests and extended until July 5, 2017, the time within which his prehearing submission was due. On July 5, 2017, Appellant's current attorney entered his appearance and filed a Motion for Enlargement of Time to File Appellant's Prehearing Submission and/or in the Alternative to Stay the Prehearing Order and the Entire Proceedings Pending a Disposition of the Criminal Matter Involving Appellant. The Board granted the stay on July 24, 2017, and ordered that Appellant file his prehearing submission within fifteen (15) days of a verdict in the Circuit Court criminal case.

After further continuances of the Circuit Court trial date, on November 27, 2017, a hearing in the criminal case was held on the record in the Circuit Court for Montgomery County before Judge M. CX 18, DE #105. At the hearing, Appellant orally entered a plea of guilty to the charge of malfeasance in office. CX 18, DE #107. The basis for the plea was the September 28, 2015, sexual offense against inmate, E.L. According to the proffer of facts presented at the hearing, Appellant entered E.L.'s cell and sexually assaulted her by touching her breast with his hand, placing her breast in his mouth, and touching her genital area. CX 19, Recording of Plea Hearing, Circuit Court Criminal Case No. 129815, November 27, 2017, at 10:59:20 – 11:00:30. The State

further proffered that test results confirmed with 95% accuracy that saliva found on E.L.'s breast matched Appellant's DNA.

The Court explained to Appellant that under the plea agreement he would be pleading guilty to having committed "malfeasance in office by taking advantage of [Appellant's] position as a correctional officer and corruptly [having] unwarranted sexual contact with an inmate." CX 19, at 10:55:22 – 42. Appellant acknowledged that he understood the elements of the offense to which he was pleading guilty. CX 19, at 10:55:44 – 51. Appellant was also advised that by his plea he would be able to avoid incarceration. CX 19, at 10:56:18. The Court found that Appellant's plea was knowing and voluntary, and that there were sufficient facts to support the malfeasance in office charge. CX 19, at 11:02:22-40.

In his argument urging a more lenient sentence, Appellant's attorney told the Court that Appellant had already been held accountable since he "can no longer work in the jail system or be part of the jail system," CX 19, at 11:19:19-23, and that he "has accepted responsibility." CX 19, at 11:21:42 – 44. The judge reviewed the factors upon which he would determine the sentence, weighing the fact that Appellant had violated the "enormous trust . . . and power" Appellant had over the lives of inmates as a correctional officer against the consideration that Appellant had no prior convictions, had not been charged with another offense in the two years since the incident, and that he had been held accountable by losing his job as a correctional officer. CX 19, at 11:26:48 – 11:27:55. The judge concluded that when a correctional officer violates the great trust and responsibility he has over vulnerable inmates, he must be held accountable, and that merely losing his correctional officer job was insufficient accountability. CX 19, at 11:27:50 – 11:28:36. Appellant was sentenced to two (2) years of incarceration, which was suspended, and one (1) year of supervised probation. CX 19, at 11:27:52 – 11:30:10; DE # 110.

Appellant did not testify, call any witnesses, or introduce any exhibits, having withdrawn the three exhibits he had initially proposed with his prehearing submission. Tr. 11-12.

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:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;
- (d) within-grade salary reduction;
- (e) suspension;

- (f) demotion; or
- (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.

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

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

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

§ 33-3. Types of disciplinary actions.

(f) *Suspension pending investigation of charges or trial.*

(1) *Purpose of suspension pending investigation of charges or trial.* A department director may place an employee in LWOP status for an indefinite period while the employee is:

(A) being investigated by the County or a law enforcement agency for an offense that has a nexus with (is reasonably related to) County employment; or

(B) waiting to be tried for an offense that is job-related or has a nexus with County employment.

(2) *Employee's return to work after suspension.*

(A) The CAO must allow the employee to return to work unless the County dismisses or terminates the employee or the employee is convicted by a court.

(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; . . .

(d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment;

(e) fails to perform duties in a competent or acceptable manner; . . .

(t) . . . assaults another while on duty, on County government property. . .

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:

H. Physical contact or communication of a sexual or romantic nature directed toward a defendant/inmate/resident/participant is prohibited. Prohibited contact includes but is not limited to, sexual abuse, sexual assault, sexual contact, or sexual harassment. Sexual activity between corrections staff, contractor staff and volunteers; such alleged contacts will be investigated and will be referred to local law enforcement when

appropriate.

* * *

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

1. Conformance to Law:

Employees are required to adhere to Departmental Policies and Procedures, County Personnel Regulations, County Administrative Procedures, Executive Orders, Montgomery County Code, and to conform to all laws applicable to the general public.

* * *

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.³
- 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.

³ The language quoted is that which was in effect when the Statement of Charges and the NODA were issued. At the time of the September 28, 2015, incident DOCR Policy 3000-7E.9a. provided that: "No employee shall commit any act which constitutes conduct unbecoming a department employee. Conduct unbecoming includes, but is not limited to, any criminal, civil, dishonest or improper conduct."

United States Department of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), 28 CFR Part 115, (effective August 20, 2012), provide in pertinent part:

§ 115.11 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

§ 115.76 Disciplinary sanctions for staff

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County Government, for the years July 1, 2013 through June 30, 2016 (July 2013), Article 28, *Disciplinary Actions*, which states in applicable part:

28.1 Policy

A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. Except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary actions must be progressive in severity. However, the Employer reserves the right to impose discipline at any level based on cause. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors.

28.2 Types of Disciplinary Actions

Disciplinary actions shall include but are not limited to:

(f) Suspension-Pending Investigation of Charges or Trial

(1) The department director may place an employee in a leave without pay status during investigation as follows:

(A) if the employee is being investigated by a law enforcement agency for an offense that is job-related, the employee shall be placed in a leave without pay status for a period not to exceed 90 days;

(B) if the department is conducting the investigation for misconduct, the employee shall be placed in a leave without pay status for a period not to exceed 60 days; and

(C) while the employee is waiting to be tried for a civil or criminal offense, the suspension may be indefinite.

ISSUE

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

ANALYSIS AND CONCLUSIONS

Timeliness of the Charges

Appellant argues that under MCPR, § 33-2(b)(1) and MD Code Ann., State Personnel and Pensions Article (SPP), § 11-106(b), the charges against him should be dismissed as untimely. Appellant's Proposed Findings of Fact and Conclusions of Law, pp. 4-5.

We find no basis for dismissing the charges against Appellant based on timeliness. MCPR, § 33-2(b)(1) provides that "[a] department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem." It is well settled that use of the term "should" or "may," rather than "shall" or "must," means that the 30-day requirement is precatory, not mandatory. *See e.g., Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 512 (1990) (statute's use of the word "must" is mandatory, and not a mere "nudge"). Moreover, MCPR § 33-2(b)(2), provides that "[a] department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay." Thus, the County Personnel Regulations are readily distinguishable from the mandatory provisions of SPP § 11-106(b), which in any event apply only to State employees in the State Personnel Management System and not County employees. *See Western Correctional Institution v. Geiger*, 371 Md. 125 (2002); MSPB Case Nos. 18-06 and 18-07 (February 27, 2018).

In this case, Appellant was disciplined immediately after the conclusion of the investigations by DOCR and MCPD by being suspended pending his criminal trial.⁴ Given the repeated delays in the criminal proceedings against Appellant (some at Appellant's request), we decline to hold that the delay in issuing the SOC and NODA seeking dismissal in this matter violates the prompt discipline requirements of MCPR, § 33-2(b). DOCR's decision to avoid an administrative "rush to judgment" while criminal charges were pending justified delay in formally seeking dismissal. Moreover, § 28.2(f)(1)(C) of the MCGEO agreement contemplates the realistic possibility that a suspension pending trial may last for an extended period by providing that "while the employee is waiting to be tried for a . . . criminal offense, the suspension may be indefinite."

Appellant cannot reasonably assert that he has suffered any prejudice by a charging delay. He was aware of the allegations against him and the identity of his accuser from the day of the incident. His suspension pending his criminal trial was imposed promptly upon the conclusion of the investigation and his arrest. Finally, the lack of prejudice is further demonstrated by the fact that Appellant understandably asked for the proceedings in this Appeal to be stayed pending final resolution of the criminal charges.

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. 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").

Estoppel

The factual issue in this proceeding is whether Appellant's actions provided cause justifying his dismissal from County employment for misconduct. MCPR § 33-2(c) ("misconduct"); § 33-3(h) ("for cause"); § 33-5 (lists the various causes for disciplinary action). The charges involve Appellant's behavior on the job and in the County detention center. CX 14. Although he pleaded guilty to criminal charges based on his sexual assault of a female inmate Appellant now attempts to question whether the sexual assault occurred.

Application of the doctrine of collateral estoppel is appropriate when a fact or issue is determined by an adjudication that provides procedural protections equal or superior to those provided by this Board. MSPB Case No. 17-15 (2017). Appellant's criminal conviction has preclusive effect in this forum against his attempt to question whether the sexual assault occurred. *See* MSPB Case No. 16-08 (2016). The conviction has preclusive effect whether Appellant was

⁴ As noted above, the NODA for the suspension without pay pending trial says that the SOC for the suspension pending was issued April 25, 2016, (CX 25), while the SOC and NODA for dismissal (CX 13 & 14) use the date April 20, 2016. The discrepancy is immaterial.

found guilty by a jury after a full trial or after a guilty plea. *See Graybill v. United States Postal Service*, 782 F.2d 1567, 1573 (Fed Cir.) *cert. denied*, 479 U.S. 963 (1986) (employee collaterally estopped from asserting innocence in federal Merit Systems Protection Board proceeding after a guilty plea to criminal charges in Maryland state court). Appellant is collaterally estopped from arguing that he did not engage in the conduct underlying the crime to which he pleaded guilty.

Appellant had substantial procedural protections in his circuit court criminal case. The Court could not have accepted Appellant's guilty plea unless it had made a finding on the record that Appellant's plea was knowing and voluntary, and that there was a sufficient factual basis for his guilty plea. Maryland Rule 4-242(c) ("The court may not accept a plea of guilty. . . until after an examination of the defendant on the record in open court . . . the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. . .").

At sentencing, Appellant acknowledged that he understood the elements of the offense to which he was pleading guilty. CX 19, at 10:55:44 – 51. Appellant's attorney also acknowledged on the record that Appellant "can no longer work in the jail system or be part of the jail system," CX 19, at 11:19:19-23, and that he "has accepted responsibility." CX 19, at 11:21:42 – 44. We find that Appellant admitted his culpability in court and conceded that losing his job as a correctional officer was part of the accountability for his actions. *See Campfield v. Crowther*, 252 Md. 88, 100 (1969) ("[a] judicial admission by an attorney in the presence of his client is admissible in subsequent litigation.").

Appellant is also precluded by the principles of judicial estoppel from adopting a position in this forum that is inconsistent with his admission in criminal court. *Brown v. Mayor*, 167 Md. App. 306, 325, 326 (2006) (police officer's admission in a guilty plea that he committed first-degree murder precluded argument in subsequent wrongful death case that he acted in self-defense). *See Eagan v. Calhoun*, 347 Md. 72, 88 (1997); *Lowery v. Stovall*, 92 F.3d 219, 225 (4th Cir.1996) (officer estopped in civil litigation from arguing anything inconsistent with his guilty plea); *Dorsey v. Ruth*, 222 F.Supp.2d 753, 755 (D. Md. 2002).

Appellant had a full and fair opportunity in the criminal proceeding to litigate the issue of his innocence but, after being fully informed of the consequences, he freely chose to plead guilty upon a statement of facts clearly establishing that he had sexually assaulted a female inmate. Appellant cannot now deny the facts upon which his conviction was based and pursue a position inconsistent with that plea or otherwise make arguments contrary to his admissions in court.

Appellant's Behavior Warrants Dismissal

Notwithstanding the serious nature of his offense, Appellant argues that the discipline imposed was excessive and that DOCR failed to engage in progressive discipline. Appellant's Proposed Findings of Fact and Conclusions of Law, pp. 5-6. He asserts that the Director failed to properly apply the *Douglas* factors to evaluate the discipline, instead basing his decision on a subjective assessment. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

The County argues that the personnel regulations and MCGEO agreement do not adopt the *Douglas* factors, unlike the County's Collective Bargaining Agreement with the Fire Fighters which explicitly does identify the *Douglas* Factors as necessary considerations in discipline. *See* Agreement Between Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO and Montgomery County Government, for the years July 1, 2017 through June 30, 2019, Article 30, § 30.1B. The County has its own factors that a department director should consider when deciding to impose discipline on an employee. *See* MCPR § 33-2(b). Because of distinctions between federal requirements and the specifics of Montgomery County's regulations and collective bargaining agreements, this Board has not formally adopted the *Douglas* factors, *see* MSPB Case No. 00-22 (2000), and need not do so at this time.

While the Director testified that he considered Appellant's prior disciplinary history, he concluded that this offense was serious enough that progressive discipline was not required. Rather, the egregious behavior warranted the most severe level of discipline. Tr. 49, 69; CX 20-24. Given the egregious nature of Appellant's action, the Director's position is well supported by the personnel regulations. 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. . ."). Furthermore, the record reflects that DOCR has consistently applied this standard and dismissed all other staff who have engaged in similar behavior, another factor listed in MCPR § 33-2(b) and one of the *Douglas* factors.

As a correctional officer Appellant served in a position of substantial trust and responsibility. This Board has previously found that correctional officers must therefore be held to a higher standard of conduct. MSPB Case No. 15-27 (2017); MSPB Case No. 07-13 (2007). *See Todd v. Dept. of Justice*, 71 MSPR 326, 330 (1996) (correctional officers are held to a higher standard of conduct with respect to the seriousness of their offenses); *Crawford v. Department of Justice*, 45 MSPR 234, 237 (1990) ("the most important consideration" is that a correctional officer is "a position of great trust and responsibility, and must therefore conform to a higher standard of conduct").

Inarguably, it is completely unacceptable for a correctional officer to abuse his or her authority and sexually assault an inmate in the County's care and custody. By enacting the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 *et seq.*, Congress recognized the necessity to eliminate the incidence of sexual assaults in prisons and jails. The Department of Justice regulations implementing the PREA mandate zero-tolerance for sexual abuse, 28 CFR § 115.11, and that "Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse." 28 CFR § 115.76(b). Moreover, as the PREA regulations recognize, while discipline for violations of policies relating to sexual abuse "shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories", those mitigation factors only apply to violations "other than actually engaging in sexual abuse." 28 CFR § 115.76(c). The County appears to have fully embraced the PREA.

For his betrayal of the trust and responsibility vested in him as a correctional officer Appellant was convicted of a serious crime. The offense for which Appellant was found guilty was

malfesance in office, often referred to as misconduct in office.⁵ It is a common law offense involving “corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office.” *Duncan v. State*, 282 Md. 385, 387 (1978). The common law punishment for the offense is “imprisonment or fine to which may be added removal from office and disqualification to hold office.” 282 Md. at 388 (*citing* 4 W. Blackstone, *Commentaries* 141). As discussed above, in an effort to mitigate the criminal sanctions facing Appellant, his attorney acknowledged on his behalf in court that he “can no longer work in the jail system or be part of the jail system,” CX 19, at 11:19:19-23. We agree. In sentencing Appellant, the Court found that he must be held accountable for violating the great trust and responsibility he had over vulnerable inmates and that losing his correctional officer job was a critical aspect of that accountability. CX 19, at 11:27:50 – 11:28:36. A correctional officer who has actually engaged in the sexual abuse of an inmate has disqualified himself from continuing to serve in that job.

We find that the County has proven by a preponderance of the evidence that Appellant’s criminal and corrupt behavior was unacceptable, offensive, and in violation of County policies and regulations. We do not see how the County could tolerate a correctional officer abusing his official authority by engaging in sexually assaultive and harassing behavior against vulnerable inmates. Accordingly, the discipline of dismissal is consistent with law and totally appropriate.

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 MCPB, § 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
September 17, 2018

CASE NO. 18-06

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant. On October 9, 2017, Appellant filed this appeal with

⁵ One may engage in malfesance, misfesance, or nonfesance to satisfy the corruption element of the common law crime of misconduct in office. Misconduct in office may be referred to as malfesance, when the behavior was wrongful in itself; misfesance, if the act was otherwise lawful but done in a wrongful manner; or, nonfesance, when there is a failure to perform an act required by the office. *State v. Carter*, 200 Md. 255, 261 - 67 (1952). Whichever name is used, the offense of misconduct in office is determined by the facts. 200 Md. at 262; *Leopold v. State*, 216 Md. App. 586, 604 - 05 (2014); *Francis v. State*, 208 Md. App. 1, 23 (2012).

the Board challenging his dismissal from a Correctional Supervisor - Sergeant position with the Montgomery County Department of Correction and Rehabilitation (DOCR or Department).

BACKGROUND

The discipline in this matter relates to an April 27, 2017, incident involving the use of force against an inmate at the Montgomery County Correctional Facility (MCCF). On October 3, 2017, DOCR issued a Notice of Disciplinary Action (NODA) dismissing Appellant. County Exhibit (CX) 16. 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). CX 8.

In addition, Appellant was found to have violated multiple DOCR policies, as follows. DOCR Policy Number 1300-10: § III(F) (use of force shall be reported, documented); § V(A) (Except in cases of extreme emergency, only the Shift Administrator/Shift Manager/Assistant Shift Administrator shall authorize the use of physical force); § V(D) (staff involved in a use of force incident must submit a written report); § VIII(E) (any inmate placed in restraints must be seen by medical personnel as soon as reasonably possible). CX 4. Appellant was also found to have violated the following DOCR policies; namely, Policy Number 3000-7: § VII(E)(3) (use of force); § VII(E)(4) (integrity of the reporting system); § VII(E)(9) (conduct unbecoming, false report); § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance). CX 5. Finally, Appellant was found to have violated MCCF Post Order No. 3(C) (Correctional Supervisor Sergeant duties) and MCCF Post Order No. 4(C) (Senior Floor Officer duties). CX 6.

On December 14, 2017, the County filed a prehearing submission and exhibits pursuant to the Board's procedural rules. On January 2, 2018, Appellant filed his prehearing submission and exhibits. Included in Appellant's prehearing submission was a Motion to Dismiss the charges against him as untimely. Appellant Prehearing Submission, pp. 3-4. The County moved to consolidate this matter with MSPB Case No. 18-07, which involves the discipline of another correctional officer, (Corporal RS), in connection with the same April 27, 2017, use of force incident. County Motion to Consolidate, January 16, 2018. Appellant filed a response opposing consolidation on January 23, 2018. On January 25, 2018, Appellant filed an Amended Prehearing Submission. On February 27, 2018, the Board issued an order denying Appellant's motion to dismiss the charges against him.

On March 6, 2018, the parties appeared before the Board for a prehearing conference. Because the prehearing conference in Case No. 18-07 was scheduled to immediately follow the prehearing conference in this case, the Board asked Appellant if he was willing remain in the conference room so that the Board could discuss the consolidation issue with all parties at the same time. Appellant agreed to this approach, as did the appellant in Case No. 18-07 (RS) and his attorney.

The Board discussed with the parties in both cases whether there was an acceptable approach that would obviate the need for the Board to hear the same testimony from the same witnesses in two separate hearings. After discussion, the Board and the parties in both cases agreed

to jointly hear the testimony of witnesses and produce a joint hearing transcript. Except for the taking of testimony the cases were not consolidated. On March 14, 2018, the Board issued a Prehearing Order.

The joint hearing was held over the course of three days, July 16, 17, and 18, 2018. During the hearing the Board heard testimony from ten witnesses, including the appellants in both MSPB Case Nos. 18-06 and 18-07.¹ County Exhibits 1 through 18 and 20 through 21 were admitted into evidence in MSPB Case No. 18-06.² Appellant's Exhibits (AX) 1-7, 9-10, 12-16 and 18-20 were also admitted into evidence in MSPB Case No. 18-06.

Subsequent to the hearing the parties submitted post-hearing briefs, including proposed findings of fact and conclusions of law, and rebuttals. *See* Post-Hearing Brief of Montgomery County, September 17, 2018 (County Brief); Appellant Closing Statement Brief, September 17, 2018 (Appellant's Brief); Appellant Post Hearing Rebuttal Brief, October 15, 2018 (Appellant's Rebuttal); Employer's Response to Appellant Closing Statement Brief, October 18, 2018 (County Response).

After hearing the testimony and reviewing the exhibits and briefs of the parties the appeal was considered and decided by the Board. The Board separately decided the cases and issued separate decisions and orders.

FACTUAL POSITIONS OF THE PARTIES

The Board carefully considered the factual positions of the parties, which we set out below.

Appellant's Factual Position

The following reflects Appellant's position on the facts in this case:

1. Appellant was hired as a Correctional Officer with DOCR on July 12, 2004, after having retired as a sergeant with the State Division of Corrections. CX 15; Tr. 850.
2. On April 27, 2017, Appellant was acting as the Cluster Sergeant in charge of supervising the Crisis Intervention Unit (CIU). Tr. 856-57.

¹ The following witnesses testified and are identified by their initials, or as "Appellant," elsewhere in this decision:

1. Corporal KM
2. Corporal JB
3. Lieutenant AM
4. Lieutenant DL
5. Deputy Warden Captain CSG
6. Captain DW
7. Director RG
8. Sergeant GS
9. Sergeant CR or Appellant
10. Corporal RS

3. As the Cluster Sergeant, Appellant was the highest-ranking officer in the CIU and all other correctional officers were required to obey his commands. Tr. 857.
4. Inmate SG was escorted by Appellant and other officers from the North 1 housing unit to the medical department after SG claimed to have ingested deodorant. Tr. 833, 898, 921.
5. The nursing staff in medical told Appellant that Inmate SG had not drunk enough deodorant to be a health concern, but that he was to be placed on a suicide watch. Tr. 833.
6. While being escorted back to the CIU, Inmate SG made statements suggesting that he would do anything he could to get out of MCCF and to an outside medical facility. Tr. 837, 921.
7. Inmate SG was well-known for being difficult to manage and a disciplinary problem. Tr. 920.
8. After being placed in CIU cell B1, Inmate SG became upset because being placed on suicide watch meant that he would be stripped naked, put into a suicide gown, and have to sleep on a mattress on the floor. Tr. 834.
9. After Inmate SG reluctantly agreed to change into the suicide gown, Appellant and the other correctional officers left the cell. Tr. 835.
10. Shortly after leaving cell B1, Appellant heard loud banging noises coming from B section. Tr. 835, 837, 860-61, 921.
11. Corporal RS informed Appellant that Inmate SG was “banging his head.” Tr. 835, 849, 867, 918, 921.
12. Appellant had worked with Corporal RS for years and had no reason to doubt him. Tr. 922.
13. Corporal JB testified that he too heard banging coming from SG’s cell. Tr. 194.
14. County witness Lieutenant AM conceded that if an inmate is banging his head and his life may be in imminent danger, it would be appropriate to enter the cell to restrain him from further self harm. Tr. 223-24.
15. County witness Lieutenant DL also testified that if the inmate is causing imminent harm to himself the correctional officers on the scene need not wait for a shift commander to enter the cell, but that the shift commander should be notified at the earliest opportunity. Tr. 343.
16. Based on the totality of the circumstances and what Appellant knew about Inmate SG, Appellant believed that SG was causing serious injury to himself in cell B1. Tr. 837, 867.

17. Corporal JB also testified that the only reason he entered SG's cell was to make sure that the inmate was not hurting himself. Tr. 194-95.
18. Accordingly, Appellant gave Corporal KM, the officer assigned to the B section control panel, an order to open the door to SG's cell. Tr. 835-36.
19. After Corporal KM opened the door to cell B1 Officers JB, JG, and RS entered the cell. Tr. 836.
20. Inmate SG was standing in the back of the cell when they entered. Tr. 836.
21. Appellant was standing in the doorway. Tr. 836.
22. Appellant ordered Officers JB, JG, and RS to handcuff Inmate SG. TR. 836.
23. At some point, Inmate SG became a little resistant, so Appellant ordered the officers to lay him down on the mattress on the floor. Tr. 836.
24. Appellant checked Inmate SG's head for injuries. Tr. 837.
25. Appellant did not see any sign of injury. Tr. 837.
26. Appellant then walked out of the cell and turned around to observe what was happening in the cell. Tr. 837.
27. Inmate SG then quickly flipped himself up and jumped off the mattress and went towards Corporal RS. Tr. 837-38, 875, 880.
28. Corporal RS then grabbed SG by his jumpsuit or suicide smock, put his right arm over the inmate, and took him face first toward the wall by the sink. Tr. 838-39, 875, 879, 881.
29. Corporal RS then used his knuckles to apply force to the hypoglossal nerve under Inmate SG's jaw. Tr. 838-41.
30. The hold Corporal RS used lasted 2-3 seconds and there was not enough time for Appellant to intervene. Appellant's Brief, p. 5.
31. The maneuver did not seem to work too well so Corporal RS turned Inmate SG around and positioned the inmate against the wall to the rear and reapplied the maneuver. Tr. 839-40.
32. When Corporal RS reapplied the maneuver more successfully Inmate SG said "it hurts, it hurts." TR. 841.
33. Although the inmate also said that he could not breathe, his airway was not cut off, as evidenced by his ability to speak. Tr. 755, 948.
34. After application of the pressure point by Corporal RS Inmate SG calmed down and he and Corporal RS began arguing. Tr. 841.

35. Appellant intervened, telling Corporal RS to be quiet. Appellant's Brief, p. 5; Tr. 841.
36. Corporal RS ceased arguing with the inmate and Appellant was able to calm the inmate and defuse the situation. Appellant's Brief, p. 5; Tr. 842.
37. Inmate SG's handcuffs were then removed, and all officers exited the cell. Appellant's Brief, p. 5; TR. 843.
38. Sergeant GS testified that it is the policy in DOCR "that we use whatever means necessary to guard against attack where serious death or bodily injury could occur." Tr. 750.
39. Sergeant GS also stated that "You can do whatever you deem necessary so long as it appears what a reasonable person would do at the scene rather than hindsight 20/20," and that DOCR trainers do not wish to "incorporate hesitation into the trainees." Tr. 751-52.
40. DOCR Use of Force Policy 1300-10 grants correctional officers the authority to act when an officer reasonably believes force is necessary to protect others from harm and to prevent self-injury. Appellant's Brief, p. 1.
41. Lieutenant DL testified that in a use of force restraint situation that does not involve use of a restraint chair there is no obligation to call medical "unless the inmate has a visible injury or is complaining about pain somewhere." Appellant's Brief, p. 11; Tr. 363.
42. Appellant testified that after the incident there was no visible sign of injury on Inmate SG. Tr. 837, 867.
43. Appellant testified that there was no visible injury or other evidence that the inmate's head had been struck. Tr. 837.
44. Appellant concedes that he "should have reported to my shift supervisor and documented the incident." Appellant's Brief, p. 3; Tr. 849.
45. The entry into Inmate SG's cell was not planned, it "was spontaneous and fluid." Appellant's Brief, p. 5.
46. Because Appellant believed Inmate SG was causing serious injury to his head and immediate response was necessary, this was not a planned use of force that would have required a call to the shift lieutenant before entering the cell. Appellant's Brief, p. 7; Tr. 867.
47. Corporal KM was outside of Inmate SG's cell and not in a position to observe the incident. Tr. 176, 182, 314, 843, 915-16, 952, 998.

48. Corporal KM's testimony was not credible because he told investigators that he had reported the April 27 incident to Human Resources and then changed his story to say that he had reported it to the Office of the Inspector General (OIG). AX 2; Tr. 81, 84.
49. KM's hearing testimony was fabricated and not credible because he has resentment against Appellant for correcting him on the way he performed his job. Tr. 916-17, 998.
50. There are other cases involving similar infractions where DOCR imposed less severe discipline than that imposed on Appellant. AX 12, 13, and 14.

The County's Factual Position

The County's position on the facts is as follows:

1. The CIU is a housing unit for inmates who have mental health issues or who need to be monitored for suicidal ideations. Tr. 52.
2. Within the CIU is the B unit where individuals who have serious mental health issues are placed. Tr. 223.
3. Cell B1 is a suicide watch cell located in the B unit. Tr. 153.
4. Cell B1 has a mattress but no bed frame. Tr. 153.
5. The cell has a sink and toilet but is otherwise empty. CX 20.
6. The door to cell B1 has windows at the top and bottom of the door, and there is a food slot in between the two windows. Tr. 154, 268; CX 20.
7. An individual standing outside the door to cell B1 and looking through the window can see the entirety of the cell. Tr. 62, 99, 165.
8. On April 27, 2017, Corporal KM and Corporal RS were assigned as correctional officers to the CIU. Tr. 52.
9. Appellant was their supervisor for that shift. Tr. 52.
10. Corporal KM was assigned to the control panel from which he could open and close doors within CIU. Tr. 56-57.
11. The control panel is located in the center of the unit and there are windows at the control unit that look into the B unit. Tr. 56.
12. The proper protocol when entering into an occupied cell on the B unit is to handcuff the inmate through the food slot prior to entry and uncuff the inmate through the food slot after exiting the cell. Tr. 230.

13. Inmate SG was brought to the CIU on April 27, 2017 after a report that he had tried to drink deodorant and had been deemed to have suicidal ideations. Tr. 53-54, 153.
14. After Inmate SG was brought to CIU, he was placed in cell B1. Tr. 55, 153.
15. Inmate SG changed into a suicide gown without incident and the cell door was closed. Tr. 57.
16. Approximately 10:00 p.m., after Inmate SG had changed into the suicide gown and the door was closed, a banging noise was heard coming from that cell. Tr. 58.
17. After the banging began, Corporal RS asked Corporal KM to open the door to Inmate SG's cell. Tr. 58, 157.
18. Upon hearing the request from Corporal RS, Appellant ordered Corporal KM to open the cell door. Tr. 835.
19. Corporal KM opened the door to cell B1 and then ran into the B unit to observe what was happening inside the cell. Tr. 58.
20. Corporal RS entered the cell, followed by Corporal JB and Corporal JG, while Appellant remained outside in the doorway of the cell. Tr. 158.
21. At no time prior to entry into the cell did Corporal RS visually confirm that Inmate SG was banging his head or otherwise harming himself. Tr. 973-74, 977-78.
22. At no time prior to entry into the cell did Appellant visually confirm that Inmate SG was banging his head. Tr. 861.
23. No officer visually confirmed that Inmate SG was actively harming himself before they entered the cell. Tr. 58, 157, 195, 268, 861, 864, 973-74, 977-78.
24. When Corporal RS entered the cell, Inmate SG was not actively banging his head. Tr. 268.
25. At the time officers entered the cell, there was no confirmed on-going emergency that justified entry into the cell. Tr. 274.
26. Prior to entering the cell, there was nothing preventing Appellant from calling a Lieutenant. Tr. 863.
27. Likewise, nothing prevented Appellant from calling a Lieutenant either while the incident was occurring or after the incident concluded.
28. Each officer is equipped with a radio which they carry on their person. The component used to speak into the radio is located on the shoulder of each officer. To place a call on the radio, one needs to press a button on the side of the device located on the shoulder and

speak. That transmission would be heard throughout the facility on each officer's radio, including the Lieutenant's. Additionally, there is a phone at the control station that can be used to call a Lieutenant. Tr. 220-22, 419-20.

29. Once inside the cell, Corporal RS, Corporal JB, and Corporal JG handcuffed Inmate SG pursuant to Appellant's order. Tr. 59.
30. Corporal JB and Corporal JG then assisted Inmate SG to stand up and faced him towards the wall by the sink. Tr. 65, 296; *See* CX 20 for visual reference.
31. At the time that Inmate SG was handcuffed and standing by the wall, he was under control. Tr. 69-70, 121, 167.
32. Corporal RS came behind Inmate SG as he was facing the wall and choked him by placing his right hand and arm around Inmate SG's neck. Tr. 66, 70, 100, 166.
33. The move was also described as a headlock. Tr. 165.
34. This action caused Inmate SG to say, "I can't breathe." Tr. 66, 256-57, 891, 948.
35. Inmate SG also said that the action caused him pain. Tr. 256-57, 882, 889, 948.
36. Inmate SG also said that Corporal RS was choking him. Tr. 259.
37. After Inmate SG made those statements, Corporal RS released his grip on Inmate SG and then choked him again. Tr. 67, 259.
38. The second time Corporal RS placed his hands on Inmate SG, he did it "really hard, hard and fast so it would hurt very much." Tr. 281-82.
39. After releasing the hold Corporal RS asked Inmate SG if he was going to behave. Tr. 67.
40. Inmate SG was still handcuffed behind his back. Tr. 168, 296, 302.
41. At the time that Corporal RS put his arm around Inmate SG's neck, Inmate SG was compliant and there was no need for any force to be used. Tr. 103-04, 167, 201-02, 205-06, 229.
42. Inmate SG had not made any aggressive or assertive act towards Corporal RS or any other officer prior to Corporal RS placing his hands on Inmate SG. Tr. 71-72, 166.
43. Inmate SG had not made any threats or engaged in spitting, kicking, or biting. Tr. 121-122, 166.
44. Corporal RS did not apply an approved or taught pressure point on Inmate SG when he placed his hand and arm around Inmate SG's neck. Tr. 106.

45. After Corporal RS choked Inmate SG, Appellant ordered the officers to place SG down on the mattress inside the cell and remove his handcuffs. The officers did so and then exited the cell and the door was closed. Tr. 168-69.
46. Once the incident was over, the other officers involved specifically asked Appellant whether they needed to document the incident and Appellant told them they did not have to write reports. Tr. 73-74, 169, 893.
47. Appellant told Corporal JB that he was willing to take responsibility if there was an issue regarding the failure to report. Tr. 171.
48. Appellant was asked multiple times by multiple officers whether they needed to write a report, and each time Appellant told them not to write a report. Tr. 73-74, 170.
49. Appellant admitted that when he told Corporal JB, "we are good," it could be construed as a directive not to write a report. Tr. 893.
50. At no time prior to, during, or after the incident did Appellant contact the Lieutenant on duty to report the incident. Tr. 223, 893.
51. Appellant was required to report the incident. Tr. 204, 206; CX 4.
52. Appellant, as shift supervisor, was required to ensure that use of force reports were written. Tr. 295.
53. When there is a use of force outside of normal or routine procedures, the medical unit must be called to evaluate the inmate. Tr. 401-02; CX 4, § (VII)(E).
54. At no time during or after the incident did Appellant contact the medical unit to have Inmate SG evaluated for injuries. Tr. 894.
55. Appellant is neither a doctor, nor a paramedic. Tr. 853.
56. Inmate SG should have been seen by medical after the incident. Tr. 291.
57. After the choking incident, Appellant completed a report regarding Inmate SG's visit to the medical unit prior to coming to CIU. Tr. 847; CX 17.
58. Appellant did not complete a Use of Force report (DCA 36) to document the incident in CIU, cell B1. Tr. 849, 892.
59. Later during the shift on April 27, 2017, Appellant called the CIU to check on Inmate SG. Tr. 109-10, 847, 957-58.
60. Appellant told Corporal RS and other Correctional Officers not to report the use of force. Tr. 73, 86, 170-71.

61. According to Corporal KM, after the use of force against inmate SG, Corporal RS asked Appellant “do we have to write anything?” Tr. 73.
62. Appellant’s response was, “Don’t worry about it. I did not see anything.” Tr. 73-74; 86.
63. Corporal JB asked Appellant whether he should file a report on the incident and was told that it was a “minimal incident” that did not require a report. Tr. 170.
64. When JB asked again the next week, Appellant said that “he had gone back and spoken with the inmate and he was fine,” so no report was necessary. Tr. 171.
65. Appellant assured JB “that if something were to come over, that he would take responsibility for us not writing a report.” Tr. 171.
66. Notwithstanding Appellant’s order not to write a report, Correctional Officers KM and JB eventually reported the use of force to the OIG. CX 1; Tr. 79, 137, 171-72.
67. The OIG conducted an investigation of the incident and submitted a written report to Director RG on June 5, 2017. CX 1; Tr. 574-75.
68. Upon receipt of the report, Director RG ordered an internal investigation of the incident, which was completed by Captain MW. CX 2; Tr. 576.
69. When a Use of Force report (DCA 36) is written by an officer, it is submitted to the Sergeant and then to the Lieutenant. Tr. 133.
70. The Lieutenant conducts an investigation including a use of force checklist, gathers all reports, reviews video surveillance, and then forwards the information to the Deputy Warden with a recommendation on whether the use of force was justified. Tr. 219, 421; CX 4, §§ (V)(D) and (V)(E). That process did not happen because no DCA 36 was filed.
71. The Use of Force Policy of the DOCR is available, at all times, on a shared drive accessible to all correctional officers. Tr. 120-21, 521, 587.
72. Officers are told to review the policy. Tr. 120-21.
73. Additionally, officers receive use of force training during pre-shift training. Tr. 525.
74. Use of force training does not include training on the use of pressure points or defensive tactics techniques. Tr. 332.
75. Appellant received Use of Force training in 2009, 2010, 2011, 2014, 2015, 2016, and 2017. Tr. 851.
76. Appellant received training in report writing in 2014, 2015, and 2016. Tr. 852.

77. Corporal RS has never taken a Defensive Tactics training while employed by DOCR. Tr. 316, 344.
78. Corporal RS was not interested in and never requested to take a Defensive Tactics course while employed by DOCR. Tr. 284, 286-87.
79. Appellant took a Defensive Tactics course while employed by DOCR, in 2010. Tr. 854.
80. The Defensive Tactics training did not cover headlocks or choke holds. Tr. 854.
81. The Defensive Tactics course is offered monthly by DOCR. Tr. 523.
82. It is not a State law requirement to take the Defensive Tactics class every year. Rather, it is a departmental goal for all officers to take yearly defensive tactics training. Tr. 522.
83. The Defensive Tactics course is taught by Lieutenant DL, who is also the instructor for the Emergency Response Team (ERT). Tr. 324.
84. Defensive Tactics is a hands-on class. Tr. 332.
85. Only five pressure point techniques are taught in the Defensive Tactics course, to include the mandibular angle, infraorbital, C-clamp, femoral, and common peroneal. Tr. 333.
86. The Defensive Tactics course does not teach officers to place inmates in headlocks or chokeholds. Tr. 336, 340.
87. The pressure point known as the mandibular angle is effectuated by applying pressure to the soft spot behind the earlobe with a part of the thumb while having counter pressure against the head. Tr. 333.
88. This pressure point does not require the head to be secured by a hand. Tr. 333.
89. At the time of the incident, there were no surveillance cameras filming inside the cell or inside the B unit. Tr. 493.
90. At the time of the incident, there was a surveillance camera filming the central part of the CIU unit. Tr. 493.
91. By the time DOCR had notice that the incident occurred the video footage was no longer available due to the system recording over video more than two to four weeks old, depending on movement in the area being recorded. Tr. 492, 632.
92. Appellant learned within a week to 10 days after the incident that the OIG was investigating the incident. Tr. 894.
93. Even after learning about the OIG investigation Appellant at no time requested that the surveillance video be preserved. Tr. 894.

94. Prior to this incident, Corporal KM did not hold any resentment towards Appellant. Tr. 88.
95. At the conclusion of the incident, Inmate SG asked Corporal RS why he was doing this to him, and Corporal RS told him that's what you get for not listening. Tr. 67.
96. Corporal RS admitted that he told SG that he wanted him to stop and behave. Tr. 999.
97. As a result of the incident, Director RG, with guidance from Warden SM and Deputy Warden CSG, decided to dismiss Appellant. Tr. 580.
98. Director RG issued a Statement of Charges for Dismissal for Appellant on August 24, 2017. CX 15.
99. Director RG issued a Notice of Disciplinary Action (NODA) for Dismissal for Appellant on October 3, 2017, with an effective date of October 13, 2017. CX 16.
100. Appellant, Corporal RS, and Sergeant GS are personal friends. Tr. 903.
101. Appellant was hired by the [County] County Jail on November 2, 2017 and was still employed there at the time of the hearing. Tr. 903-04.

FINDINGS OF FACT

After hearing testimony, reviewing exhibits, and weighing the proposed findings of fact of both parties, the Board has made the following factual findings.

On April 27, 2017, Appellant was the Sergeant in charge of supervising the CIU, and the other correctional officers were under his command. On that day, Inmate SG claimed to have ingested deodorant and expressed suicidal ideations. After examination by the medical unit at MCCF it was determined that he had not consumed enough deodorant to cause him harm. The medical staff ordered that SG be placed on a suicide watch, so Inmate SG was taken to the CIU and placed in cell B1, a suicide watch cell. Cell B1 had a mattress with no bed frame, a sink and toilet, but was otherwise empty.

Inmate SG was less than pleased with the conditions he would face in the suicide watch cell. Tr. 834. However, after SG and Appellant discussed the situation, SG complied with Appellant's instructions that he change into a suicide gown. Tr. 57. After he did so without incident Appellant and other correctional officers left cell B1. Tr. 835. The cell door was then closed. Tr. 57.

A short time later, around 10:00 p.m., officers heard "loud banging" coming from Inmate SG's cell. Tr. 58, 194, 835, 837, 860-61, 921. Corporal RS testified that he went to the cell door and he and Inmate SG began yelling at each other. Tr. 936, 973. Appellant acknowledged that in addition to the banging noise he also heard "arguing going on in the B pod area," and that he "couldn't see what was going on in there." Tr. 835.

Corporal RS attempted to handcuff Inmate SG through the food slot of the closed cell door, but SG refused to cooperate and retreated to the back of the cell. Tr. 936-38. It was at that point that Corporal RS said that SG was "banging his head." Tr. 835, 849, 867, 918, 921. Corporal RS

asked that the cell door be opened, and Appellant ordered Corporal KM, the officer at the control panel, to open the door to SG's cell. Tr. 58, 157, 835-36.

Appellant testified that he could not see what was happening in cell B1 and relied on the statement of Corporal RS that Inmate SG was banging his head. Tr. 835, 921-22. Neither Appellant, Corporal RS, nor any of the other correctional officers actually saw Inmate SG banging his head. Tr. 58, 157, 195, 268, 861, 864, 973-74, 977-78.³ Once Corporal RS went to Inmate SG's cell door the banging ceased. Tr. 268-69.

Appellant and officers JB and JG responded to cell B1. Tr. 835, 849, 867, 918, 921. Appellant states that he ran to the cell, which was about 30 to 35 feet away, and arrived in about three (3) seconds. Tr. 866. Appellant stated that he did not begin moving towards cell B1 until after he had ordered that the cell door be opened. Tr. 865.

Entering the cell was no small matter. To reduce the risk of assault on correctional officers the appropriate protocol is to handcuff the inmate through the food slot prior to entry. Tr. 230. Presumably, that is why Corporal RS attempted to handcuff Inmate SG through the food slot prior to asking for the cell door to be opened. Tr. 936.

When SG argued with Corporal RS, refused to be handcuffed, and instead went to the back of his cell, the banging had ceased. Tr. 268-69, 936-37. Corporal RS nevertheless asked for the door to be opened. Tr. 938. Appellant was a few steps away from the cell and admits that he heard the loud banging followed by the verbal exchange between Corporal RS and Inmate SG, Tr. 835, yet he made no attempt to verify that an emergency existed that would require immediate entry into cell B1.

Appellant's witness, Sergeant GS, and County witnesses Lieutenant AM and Lieutenant DL all testified that if an inmate is violently banging his head or otherwise causing imminent harm or danger to himself it would be appropriate to immediately enter a cell to prevent self harm. The testimony of Lieutenant AM and Lieutenant DL was based on hypotheticals, while the testimony of Sergeant GS was based on his review of the investigative report and conversations with Appellant and Corporal RS.

The record evidence, however, does not support Appellant's claim that such a situation existed prior to his order that Inmate SG's cell door be opened. Upon hearing the loud noise coming from SG's cell Appellant had an ample opportunity to accurately assess the situation by quickly taking a few steps and looking into the cell. Tr. 866. Instead, Appellant says that he chose to trust Corporal RS because they have known each other for years. Tr. 922. Appellant's decision was likely influenced by his personal friendship with Corporal RS, as were the opinions expressed in the testimony of Sergeant GS. Tr. 903. Appellant's reliance on the word of a friend, his failure to verify whether an emergency existed before authorizing entry into Inmate SG's cell, and the subsequent use of force were not reasonable under the circumstances. That is especially so because by the time Appellant's order to open the cell was given the banging had ceased. In the absence of a true emergency, Appellant was instead obligated under DOCR Policy 1300-10.V.A to contact

³ Corporal RS provided inconsistent testimony concerning Inmate SG's behavior. At one point Corporal RS seemed to suggest that he may have seen Inmate SG banging his head from the corner of his eye (Tr. 935, 971-72), but later conceded that he never saw Inmate SG banging his head or otherwise harming himself and had made an assumption because he saw the inmate's face in cell door window while the noise was being made. Tr. 972-74, 977-78.

the Lieutenant supervising the shift in order to obtain authorization for “the use of physical force to either move or restrain an unruly or uncooperative inmate.”

Corporal KM was on the unit and operating the control panel, which is in the center of the unit. Tr. 56. After Corporal KM opened the door to cell B1, Appellant watched Officers JB, JG, and RS enter the cell. Tr. 836. Appellant remained in the doorway and ordered the other officers to handcuff Inmate SG, who was standing in the back of the cell. Tr. 836. Corporal KM testified that the control panel was about 10-15 steps away from cell B1, and that after he opened the cell door he too went to the cell to see what was happening. Tr. 58.

Corporal KM further testified that when he got to cell B1 he saw officers JB and JG handcuff Inmate SG and order him to lay on the ground. Tr. 59, 63-64. Corporal KM said that Inmate SG was not resisting, and that Corporal RS kicked Inmate SG in the “facial area.” Tr. 64. No other witness testified to observing Corporal RS kicking the inmate. Tr. 184, 200, 845, 954.

Appellant challenges Corporal KM’s testimony and seeks to discredit him by suggesting that it was not possible for KM to observe what happened in the cell because Appellant did not see KM by the cell door. Appellant’s Brief, p. 14. However, Appellant admitted that he was facing the cell and that his focus was on what was happening inside the cell. Tr. 846. Corporal JB also stated that his field of view did not include where Corporal KM said he was standing outside the cell. Tr. 182-83. Corporal RS also testified that his focus was on his dealings with the inmate and not on who was standing in the cell doorway. Tr. 952, 981. We find it more likely than not that Corporal KM did go to the cell to observe events and that the other officers, including Appellant, were occupied with the inmate and did not notice where KM was standing. We conclude that KM had the opportunity and capacity to observe what took place after the other officers entered cell B1.

Appellant also suggests that Corporal KM harbored personal resentment against him and therefore gave false testimony at the hearing and to the investigator, Captain MW. Appellant’s Brief, p. 14. Appellant speculates that KM resented him “for making corrections to his units, the way he runs his pod.” Tr. 916. Corporal KM denied ill will or resentment toward Appellant and testified that he had not been disciplined or written up by Appellant. Tr. 88. Other than Appellant’s unsupported allegation there is no evidence in the record that KM had a motivation to be untruthful. We find no evidence in the record of any discipline of KM by Appellant, or that there was any reason for KM to harbor resentment against Appellant. We find that the allegations of KM’s personal bias against Appellant are unsubstantiated and unconvincing.

Appellant also argues that KM is not to be believed because KM allegedly told the investigator that he first reported the April 27 incident to OHR, and in a subsequent interview said that he had first spoken to the OIG. Corporal KM testified at the hearing that there may have been miscommunication during the first interview. Tr. 84. Corporal KM said that he never told the investigator that he went to OHR. Tr. 83. In any event, the issue was clarified in a subsequent interview when KM explained to the investigator that he had discussed the incident with the OIG. CX 2. This misunderstanding over a minor and immaterial fact hardly suggests dishonesty. Whether KM misspoke or the investigator misheard is unimportant and certainly does not suggest a motivation for KM to testify untruthfully under oath.

KM’s decision to report the incident despite instructions to the contrary, and his frank acknowledgement of his regrets about previously failing to report certain unspecified incidents

while serving in military detention facilities overseas, add credence to his testimony. Tr. 136-37.⁴ For the reasons discussed above, because his version of events was plausible, and based on his straightforward, consistent, and believable demeanor while testifying, we find Corporal KM to be a credible witness and give weight to his testimony.

With specific regard to KM's testimony that he saw Corporal RS kick Inmate SG in the "facial area," neither direct nor cross examination elicited additional useful detail as to the circumstances. Thus, while we credit KM's testimony generally, we are unable to adequately assess the likelihood that KM may, in the confusion of the moment, have seen a kick to the face or merely a movement that he erroneously interpreted as a kick. Moreover, because of the failure to refer Inmate SG for medical examination, we have no medical evidence concerning the presence or absence of an injury to SG's face, head, or neck. In any event, we need not reach a conclusion as to whether or not RS actually did kick SG to conclude, as we do below, that Appellant improperly allowed an unnecessary use of force and failed to prevent the excessive use of force.

Appellant testified that after Inmate SG was handcuffed and the other officers had placed him face down on the mattress, he checked SG's head for injuries and found none. Tr. 837, 880. Appellant then walked out of the cell and turned to observe what was happening in the cell. Tr. 837.

According to Appellant, Inmate SG then suddenly rises from a face down position to his knees, "flips himself up," and jumps off the mattress towards Corporal RS. Tr. 837-38, 875, 880. When asked how SG could quickly rise to his knees without rolling over, jump to his feet, and lunge at Corporal RS from a position face down on the mattress with his arms handcuffed behind his back, Appellant responded that SG was "young" and "pretty flexible." Tr. 880. Corporal RS told investigators that Inmate SG "stood up quickly (from a laying-down position while handcuffed in the back) and approached him and the other officers." CX 2, p. 13; Tr. 315.

The Board finds this version of events espoused by Appellant and Corporal RS implausible. We find more credible the testimony of KM that, because it is so difficult for a person to stand up after being handcuffed behind the back and face down on the floor, Corporals JB and JG helped Inmate SG to stand up. Tr. 65. Corporal JB also testified that Inmate SG "was stood up." Tr. 162-63. If Inmate SG had gotten to his feet from such an awkward position it could not have been as quickly as Appellant suggests. We conclude that Inmate SG was not in a position to and did not attempt to lunge at or assault Corporal RS.

We find that after Inmate SG was under control, handcuffed behind his back and face down on the mattress, officers JB and JG helped him to his feet. Tr. 65. They then had him stand facing the wall of the cell, next to the sink. Tr. 66, 296; CX 20. We credit the testimony of Corporals KM and JB that while Inmate SG was handcuffed and facing the wall he was under control and not resisting. Tr. 69-70, 121-22, 163, 166-67.

Although Inmate SG was compliant, he was continuing to talk in an agitated manner. Tr. 163, 167. Corporal JB testified that while Appellant was talking to Inmate SG, Corporal RS came

⁴ "I served in the U.S. Army. I served overseas, five tours. So I work in different detention facility. And I saw stuff that I never reported. But later on, it come back and I feel guilty about it because I thought I must say something. So I wasn't allowed to be pretty much proud of me later on in my life. Because it can happen to me. It can happen to my son. It can happen to anyone. I mean, we are trusted with this inmate (inaudible) making sure they are safe, they are secure in the facility. And to be honest with you, the other thing I was thinking the inmate can later on go back and report it, so I better come forward and do the right thing." Tr. 136-37.

up behind Inmate SG, put his right arm around SG's neck in a headlock, and moved him face first towards the wall by the sink. Tr. 165-67. Corporal KM gave similar testimony. Tr. 66, 70, 100. The headlock or chokehold Corporal RS applied to Inmate SG caused him to exclaim, "I can't breathe." Tr. 66, 256-57, 259, 891, 948, 987.

After Inmate SG claimed that he was choking, Corporal RS released his grip, and then immediately endeavored to apply the maneuver more effectively. Tr. 67, 259, 987. Corporal RS admits that the second time he applied the pressure point to Inmate SG he did so "really hard, hard and fast so it would hurt very much." Tr. 282, 987. Corporal RS was successful in his second attempt and Inmate SG exclaimed that he was in pain. Tr. 256-58, 841, 882, 889, 948. Corporal RS testified that the application of the hold and use of the pressure point on Inmate SG, who was handcuffed behind his back and did not represent a threat to Corporal RS or the other officers, was for "pain compliance." Tr. 296, 302.

Corporal RS acknowledged that after he finished successfully applying the "pain compliance" maneuver the second time, he told Inmate SG to behave. Tr. 999. Although not remembering the exact words, Corporal KM recalled Corporal RS telling Inmate SG "that's what you get" for not behaving. Tr. 67.

Corporal RS and Inmate SG continued to talk and Appellant intervened, telling Corporal RS to be quiet. Tr. 841, 956. Appellant spoke to Inmate SG and then ordered the other officers to place SG down on the mattress inside the cell and remove his handcuffs. The officers then exited the cell and the door was closed. Tr. 168-69, 842-43.

DOCR policy mandates that each correctional officer involved in a use of physical force incident must file a report using form DCA 36 before the end of their shift. CX 4, DOCR Policy 1300-10, § (V)(D); Tr. 204, 206. The policy also requires that supervisory personnel ensure that the incident is documented, including photos of the inmate. *Id.*

It is undisputed that, contrary to DOCR policy, the use of force incident was not reported in writing by Appellant by way of a DCA 36 or otherwise. Tr. 849, 892. Nor did Appellant report the incident to the Lieutenant who was the shift commander on duty. Tr. 223, 893.

As a supervisor, Appellant was also required to ensure that use of force reports were submitted by subordinates who were involved in the use of force. Tr. 295. Appellant failed to carry out that responsibility and instead instructed the officers under his command not to file reports on the use of force. Tr. 73-74, 86, 169-71, 893. Appellant told Corporal JB that he would take responsibility if there was an issue regarding the failure to report, Tr. 171, and admitted that when he told Corporal JB, "we are good," it could be construed as a directive not to write a report. Tr. 893. When other officers asked Appellant whether they should write reports Appellant told them not to file reports. Corporal KM testified that when Corporal RS asked Appellant "do we have to write anything?" Appellant's response was, "Don't worry about it. I did not see anything." Tr. 73-74; 86. In response to Corporal JB asking, Appellant told him that it was a "minimal incident" that did not require a report. Tr. 170. When Corporal JB asked again the next week, Appellant said that "he had gone back and spoken with the inmate and he was fine," so no report was necessary. Tr. 171. Appellant further assured JB, "that if something were to come over, that he would take responsibility for us not writing a report." Tr. 171.

Eventually Officers KM and JB reported the use of force to the OIG. CX 1; Tr. 79, 137, 171-72. The OIG investigated the incident and provided a report to Director RG on June 5, 2017.

CX 1; Tr. 574-75. Director RG then ordered an internal investigation of the incident, which was completed by Captain MW. CX 2; Tr. 576.

DOCR policies also mandate that when there is a use of force outside of routine procedures, the medical unit must be notified so that the inmate may be evaluated. Tr. 291, 401-02; CX 4, DOCR Policy 1300-10, § (VII)(E). However, contrary to DOCR policy, after the use of force Appellant did not refer Inmate SG to the medical unit so that he could be evaluated for injuries. Tr. 894.

After the incident, Appellant submitted a report concerning Inmate SG's visit to the medical unit, which occurred prior to his being taken to the CIU, but made no mention of the subsequent use of force. Tr. 847; CX 17.

APPLICABLE LAW

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:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;
- (d) within-grade salary reduction;
- (e) suspension;
- (f) demotion; or
- (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.

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

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

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

§ 33-3. Types of disciplinary actions.

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

§ 33-5. Causes for disciplinary action. The following, while not all-inclusive, may 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:

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.

4. Integrity of the Reporting System:

Employees shall submit all necessary reports in accordance with established departmental policy and procedures. These reports shall be accurate, complete, and timely and shall be submitted before the end of the employee's tour of duty whenever possible. Unless an operational emergency or injury precludes this, employees will be compensated for working beyond their scheduled shift to complete reports, before leaving the facility.

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 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.
- * * *
- F. All incidents of use of force shall be reported, documented, and reviewed by the Deputy Warden of Custody and Security or designee.

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.

- D. In any situation where physical force is used, the Shift Administrator/Shift Manager/Assistant Unit Manager ensures that the incident is properly documented. Each staff member who is involved in the incident must submit a written report (DCA-36) detailing both why the use of force was necessary and the amount of force that was used to accomplish the assigned task. The officer's written report must be submitted before the end of his/her tour of duty. The Shift Administrator/Shift Manager/Assistant Unit Manager ensures that two (2) photos of all inmates involved in the incidents are taken.

VIII. INSTRUMENTS OF RESTRAINT

- E. Any inmate placed in restraints or placed in the restraint chair must be seen by Medical personnel as soon as reasonably possible to determine if the inmate has suffered any injury while he/she was being subdued and to check the application of restraints.

Montgomery County Correctional Facility (MCCF) Post Order No. 3, Correctional Supervisor Sergeant (2015), provides, in part:

C. Duties:

1. The Sergeant provides oversight and facilitates the work performance of the correctional staff assigned to the unit and ensures that Policies and Procedures and directives are appropriately carried out and seeks Lieutenant's input on a regular basis.

2. The Sergeant provides leadership, direction, and instruction to subordinate officers on institutional rules, regulations and procedures in their assigned subsection. Resolves informal complaints of officers assigned to their assigned work area. . .

5. The Sergeant is responsible for the basic security of the subsection. He/she must provide oversight for all security operations to prevent escapes, disorders, destruction of property, suicide, fire or other actions affecting the safety and security of the facility staff and inmates. . .

Montgomery County Correctional Facility (MCCF) Post Order No. 4, Senior Floor Officer (2015), provides, in part:

C. Duties:

1. Due to MCCF staffing patterns, the Senior Floor Officers (SFO's) assume the duties of all post positions.
2. The SFO is responsible for the supervision of all officers assigned to the subsection. He/she observes the conduct and activities of these officers and initiates corrective measures to remedy inappropriate behavior by staff. . . .
16. The SFO is responsible for making certain that all unusual incidents are documented and he/she alerts the Shift Manager/Assistant Unit Manager/Sergeant to those problems, which need further attention. When the Shift Manager/Assistant Unit Manager/Sergeant is not immediately available, the SFO may order the temporary lock-in of problem inmates until he/she has the opportunity to confer with supervisors.

ISSUE

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

ANALYSIS AND CONCLUSIONS

Timeliness of Discipline

As previously noted, Appellant moved to dismiss the charges against him, asserting that they were brought too late. On February 27, 2018, the Board issued an order denying Appellant's motion to dismiss. Under Montgomery County Personnel Regulations (MCPR), § 33-2(b)(1), "[a] department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem." The Board concluded that it is well settled that use of the term "should" or "may," rather than "shall" or "must," suggests that the 30-day requirement is not absolute. Moreover, MCPR § 33-2(b)(2), provides that "[a] department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay." Thus, the County Personnel Regulations are readily distinguishable from the mandatory State statute construed by the Court of Appeals in *Western Correctional Institution v. Geiger*, 371 Md. 125 (2002).

Appellant also referenced MSPB Case No. 11-02 (2011), where the Board found that the County had not taken prompt discipline when the department director waited over one year after he became aware of the alleged misconduct to issue a statement of charges. In this case the

statement of charges was issued 43 days after the investigative report on the incident had been finalized. Thus, we decline to hold that an alleged delay of less than two weeks violated the prompt discipline requirements of MCPR, § 33-2(b).

Burden of Proof

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) (“the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability”).

Appellant's Testimony Lacked Credibility

Appellant's testimony and that of other witnesses differ on certain key points. 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. 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).

It was Appellant's testimony that, after being handcuffed behind his back and placed face down on a mattress on the floor, Inmate SG was able to quickly leap to his feet and lunge at Corporal RS. Tr. 837-38, 875, 880. Critically, this purported maneuver was what Corporal RS testified impelled his use of force against Inmate SG. As noted above, however, no other witnesses besides Appellant and Corporal RS testified to seeing any such maneuver or threatening behavior from Inmate SG. Rather, they testified that they “stood up” Inmate SG and that he was compliant and under control when Corporal RS thrust him against the wall and began using physical force against him. Moreover, no matter how “young” or “flexible” Inmate SG may have been, the act of springing to one's feet from a mattress on the floor with one's hands cuffed behind the back seems implausible, if not impossible. Because we find Appellant's description of events on this critical point contradicted by the testimony of disinterested witnesses and implausible, we conclude that Appellant's testimony is not worthy of credence. For that reason, we also view his testimony on other points with skepticism.

Appellant's acknowledgement that he used poor judgment in failing to report or document the use of force incident, and his expression of regret, may express genuine remorse but they certainly cannot excuse his misconduct. His stated explanations for his failure to report included: it was late in the shift; he did not want to write up officers in another unit for lying to Inmate SG about conditions on the CIU; there were no injuries to SG; and, the incident was not that serious. Tr. 922-23. Appellant maintained his effort to avoid documentation and reporting of the use of force incident even after repeated questions from subordinate officers about the need to submit the

required reports. Appellant did not reconsider his failure to report until other officers had gone to the OIG and investigations were launched. We thus view Appellant's failure to report, and his orders to his subordinates to neglect their reporting obligations, as a conscious effort to deceive DOCR leadership and protect himself and Corporal RS from the potential consequences of their actions. Had the other officers similarly lacked the integrity to step forward and subject their actions to review it is quite likely that the April 27 incident would never have become known to the DOCR leadership ultimately responsible for the security and safety of inmates and staff at MCCF.

Appellant's explanations for his failure to report the April 27 incident come across as *post hoc* rationalizations, and his scheme to conceal a serious use of force incident from appropriate review by ordering his subordinates to do the same, strongly suggest that his testimony was unreliable. We conclude that on certain key points Appellant's testimony was self-serving and ultimately not credible. *See* MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010).⁵

Appellant Improperly Allowed Officers to Enter Inmate SG's Cell

It is undisputed that Inmate SG was unhappy when he realized that being placed on suicide watch meant that he would be stripped naked, put into a suicide gown, and have to sleep on a mattress on the floor of CIU cell B1. Tr. 834. It is also undisputed that Inmate SG soon agreed to cooperate, after which Appellant and the other correctional officers left the cell. Tr. 57, 835.

Some time after Appellant and the other officers left cell B1 they heard a loud banging coming from the cell. While Appellant heard the banging, he could not see into the cell from his position and did not know how the inmate was creating the noise. Even though he was only a few steps away from the cell door, Appellant admitted that he took the word of Corporal RS that Inmate SG was banging his head. Appellant made no attempt to confirm that SG was indeed engaged in such troubling behavior despite his proximity to cell B1.

Appellant admitted that he was relatively close to the cell and that it only took him about three seconds to get from the control station to the cell door. Tr. 786. It is appropriate and reasonable for DOCR to expect a front-line supervisor to take three seconds to visually confirm the existence of an emergency justifying the opening of a cell door and sending in three officers. As Lieutenant AM testified, if a correctional officer is concerned that an inmate with mental health issues may be banging his head in a cell and causing himself harm, the officer should "look at what's exactly happening." Tr. 223.

⁵ Unlike the circumstances in MSPB Case No. 08-09 (2008), where Appellant's dismissal for allegedly leaving an inmate in handcuffs for eight hours as punishment was reduced to a 30-day suspension based on Appellant's testimony that his behavior was unintentional, Appellant here is not claiming that his actions during and after the April 27 incident were inadvertent or simply negligent. Instead, Appellant admits that he made a conscious decision not to report the use of force incident. Tr. 849, 922-23. We hasten to add that we do not consider MSPB Case No. 08-09 in determining the appropriate level of discipline in this case. Rather, we distinguish the facts in that case to explain any possible perceived differences in our reasoning. Because the DOCR Director did not consider MSPB Case No. 08-09 for purposes of making his decision regarding the severity of discipline in this case, we sustained Appellant's objection to cross examination questions concerning the Last Chance Agreement in MSPB Case No. 08-09. Tr. 907-09.

Appellant argues that DOCR Policy 1300-10 on use of force states that “it is the policy of 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 . . . 7. The prevention of the individual from self-harm.” Appellant asserts that by allowing Corporal RS and the other officers to enter cell B1 he was trying to protect Inmate SG from himself and to prevent self-harm. The reasonableness of the decision to enter the cell was evident, in his view, due to the loudness of the banging, the fact that Corporal RS said that SG was banging his head, the prior statements of Inmate SG that he would do anything to be sent to an outside medical provider, and Inmate SG’s claim to have consumed deodorant. Appellant Brief, p. 5.

Citing the testimony of Lieutenants AM and DL, the County concedes that were Inmate SG in actual imminent danger of bodily harm, it may have been appropriate to enter the cell. Tr. 223-24, 343. However, the record evidence does not support Appellant’s position that an emergency situation involving the imminent risk of harm to Inmate SG had been established prior to Appellant ordering the cell door opened. No officer looked into the cell to verify that SG was harming himself.

Appellant argues that he reasonably believed that the banging noise from the cell indicated that Inmate SG was harming himself. However, at the time Appellant ordered the cell door opened Appellant could not see inside the cell to confirm that Inmate SG was harming himself and the banging had ceased. Tr. 268-69, 780, 787, 835, 936-37.

Appellant notes that Corporal JB also testified that he believed Inmate SG was injuring himself in the cell. Appellant Rebuttal, p. 5. However, Corporal JB’s testimony in response to a question from the attorney for Corporal RS was that he “couldn’t see the cell . . . [and] just went on the noise and *what was being said*.” Tr. 194 (emphasis added). To the next question, “prior to entering the cell did you know whether or not the inmate was hurting himself,” he responded “No, I didn’t know.” Tr. 195.

This testimony suggests to us that Corporal JB was responding not just to the noise, but also to the declaration by Corporal RS that the inmate was “banging his head,” the argument between Corporal RS and Inmate SG, and to Appellant’s order that the cell door be opened. Corporal JB was not acting in a supervisory or decision-making capacity. He was following the lead of the more senior officers at the scene. In our view, his testimony does not provide support for Appellant’s suggestion that his actions were reasonable. Appellant, the supervisor on the scene, ordered the cell door opened without attempting to ascertain whether Inmate SG was indeed harming himself and in need of assistance.

While both Appellant and Corporal RS asked for the cell door to be opened, Appellant was the supervisor in charge, and it was his order that was obeyed. We discern no valid reason for Appellant’s failure to verify that an emergency existed or comply with the mandate in DOCR Policy 1300-10 (V)(A) that he contact the Lieutenant supervising the shift in order to obtain authorization for “the use of physical force to either move or restrain an unruly or uncooperative

inmate.” And, as the County correctly notes, even Corporal RS conceded that he never should have entered the cell “in the first place.” Tr. 1000.

We conclude that Appellant’s actions therefore constituted violations of MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10(V)(A); DOCR Policy 3000-7(VII)(E)(3) & (10); and MCCF Post Order Nos. 3(C) and 4(C).

Failure to Prevent or Mitigate the Excessive Use of Force

Once officers entered Inmate SG’s cell the use of force was significantly more likely because of DOCR protocols designed to protect the safety of the officers. Thus, even though Inmate SG was standing in the back of his cell, was not exhibiting any threatening or aggressive behavior, and the banging had ceased, Appellant ordered Corporals RS, JB, and JG to handcuff Inmate SG and lay him down on the mattress. Tr. 268-69, 836, 936-37.⁶

The record evidence suggests that Inmate SG was under control once the three officers handcuffed him behind his back and placed him face down on the mattress on the floor. Tr. 64-65, 163. Then Corporal JB and Corporal JG assisted Inmate SG to stand up and faced him towards the wall by the sink. Tr. 65, 296. As discussed above, we do not find the testimony of Appellant and Corporal RS credible when they claim that Inmate SG somehow leapt up and behaved in an aggressive manner. For that reason, we conclude that the subsequent use of force actions by Corporal RS were unnecessary and unauthorized.

Appellant goes to extensive effort to persuade the Board that Corporal RS did not perform a chokehold on Inmate SG but instead executed a headlock while using his thumb on a pressure point to inflict pain. The Board need not delve into the distinctions between a chokehold and a headlock or determine which specific maneuver was employed.⁷ The record evidence indicates that Inmate SG was not a threat to the safety of the officers or himself when Corporal RS applied the hold to him. SG was still handcuffed behind his back and facing the wall. While he may have been agitated and argumentative, he was not behaving in an aggressive, combative, or even non-compliant manner.

Appellant observed Corporal RS come up behind Inmate SG and wrap his right arm around SG in what appeared to be a chokehold or headlock and attempt to apply a pressure point to him. It is undisputed that Inmate SG pleaded that he was being choked and could not breathe. He further said that the hold applied by Corporal RS hurt. Tr. 66, 256-57, 259, 891, 948. Yet Appellant did nothing, and Corporal RS immediately put SG in the hold for a second time, rotated his thumb into

⁶ Director RG and the DOCR training manager testified concerning DOCR’s efforts to convey its use of force policies to correctional officers. The Board is nevertheless concerned that DOCR may not have an adequate amount of mandatory training on the use of force and may not have administrative procedures in place to ensure that every front-line correctional officer has received all necessary training. Tr. 526-36. We urge that use of force policies receive greater emphasis in DOCR’s training efforts, including stress on the requirement that inmates receive adequate medical care immediately following a use of force.

⁷ With regard to Appellant’s credibility, we also note that although Appellant’s post-hearing brief suggested that Corporal RS’ hold was the mandibular pressure point, which is taught by DOCR, at the hearing he specifically testified that the hold was instead the hypoglossal pressure point, a technique that apparently is not taught in DOCR’s Defensive Tactics class. *Compare* Appellant’s Brief, p. 14 with Tr. 838; *see* Tr. 283, 333, 948.

SG's jaw "really hard, hard and fast so that it would hurt very much," Tr. 281-82, 987, and only released SG after asking if he was ready to behave. Tr. 67, 999. We find that Appellant, as the supervising officer, did not take any steps to ameliorate the situation despite having adequate time to react.

Appellant cites *Graham v. Conner*, 490 U.S. 386 (1989), a Fourth Amendment search and seizure case, for the proposition that the reasonableness of the use of force against inmate SG "must be judged from the perspective of a reasonable officer on the scene rather than with 20/20 vision of hindsight." Appellant's Brief, p. 4. He further argues that:

[I]t was after I examined Inmate [SG's] head for visible signs of injury and found none that I determined that he must have used his shower shoes to band [*sic*] the cell door. My reasons for going into the cell in the first place are sound and the fact that I determined that he must have banged the cell door with his shower shoes does not alter that fact.

Id.

Appellant's failure to verify the alleged emergency, as discussed above, led us to conclude that there was no reasonable basis for entry into the cell in the first place. Had Appellant behaved as a reasonable officer there most likely would have been no reason for any use of force. Further, once the cell was opened and officers verified that Inmate SG was not, in fact, seriously hurting himself there was no justification for the use of any physical force, let alone that which was applied. It appears that Corporal RS was motivated by a desire to discipline SG for being loud and difficult, and perhaps to physically impress upon him that future transgressions were intolerable to and would be punished by Corporal RS. The actions of Corporal RS were not justified by the need for him to protect himself from an assault or to protect the inmate or another officer from serious bodily injury. Correctional officers have no right or authority to impose their personal attitudes concerning proper behavior on inmates through physical intimidation and harm. And Appellant, as the supervisor of Corporal RS, had a duty to prevent his unjustified behavior if at all possible.

Even were there a justification for using force against Inmate SG, which we do not agree existed, Corporal RS applied a headlock or similar maneuver and a pressure point after the risk that he claims justified the use of force had passed. A correctional officer may not use retaliatory physical force against an inmate for making noise and complaining. DOCR policies permit the use of force and restraints only to protect an inmate or others from harm and to maintain order within the facility. The use of force or restraints to punish inmates is prohibited. The use of a headlock or similar hold and application of a pressure point to obtain "pain compliance" did not constitute a good faith effort to maintain or restore discipline, but instead involved the use of force to maliciously and sadistically cause unnecessary pain to an inmate. *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.").

The evidence unequivocally demonstrates that the inmate was not assaulting or threatening officers. Tr. 71-72, 121-22, 166. There was thus no need to use force to get Inmate SG under control, restrain, or subdue him. He was not a threat to himself or another. The actions of Corporal RS amount to an unjustified and seemingly emotionally-driven assault against an inmate.

Appellant's duty as the immediate supervisor of Corporal RS was to prevent, if at all possible, his subordinate's ill-advised conduct. Appellant was on the scene and in a position to intervene to prevent the unnecessary use of force. Indeed, at one point Appellant did appear to intervene when he ordered Corporal RS to "be quiet" and disengage with the inmate. But this was too little, too late. Instead, Appellant stood by and watched Corporal RS unnecessarily use excessive force against Inmate SG. We find that Appellant stood by and allowed Corporal RS to gratuitously inflict pain on Inmate SG in order to punish past conduct, deter future conduct, and intimidate. It is completely unacceptable and contrary to established DOCR policies for a supervisor to stand by and do nothing while a correctional officer behaves in that manner.

Appellant should have intervened once he saw Corporal RS using unnecessary force and attempting to execute a hold involving Inmate SG's head and neck. Appellant had a realistic opportunity to prevent Corporal RS from using excessive force--he was standing in the cell or its doorway during essentially the entire duration of the critical events here-- yet he failed to do so. Instead, Appellant stood by and watched as Corporal RS twice applied a painful hold to a vulnerable inmate with his arms handcuffed behind his back. Appellant only stepped in afterwards and told Corporal RS to be quiet and stop arguing with the inmate. Appellant's failure to make any effort to intervene and attempt to stop what we find to have been a punitive action fell far short of the standard expected of a frontline DOCR supervisor. The County need not tolerate a supervisor's deliberate indifference and failure to intervene to prevent the unnecessary and excessive use of force against an inmate in the care and custody of the County. We therefore find that Appellant violated MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10(V)(A); DOCR Policy 3000-7(VII)(E)(3) & (10); and MCCF Post Order Nos. 3(C) and 4(C).

Failure to Refer Inmate SG for Medical Evaluation

In addition to Appellant's failure to report and document the use of force, DOCR policy requires that the medical unit be called after a use of force. CX 4; Tr. 291. The policy is undoubtedly designed to determine if an individual subjected to the use of force had any injuries, including those not evident to a lay person.⁸

Appellant argues that County witness Lieutenant DL testified that "unless the inmate has a visible injury or is complaining about pain somewhere" there is no obligation to call medical, Appellant's Brief, p. 11. Appellant's argument is completely unpersuasive, as he fails to acknowledge the very next question and answer:

⁸ Presumably the policy is also intended to provide documentation necessary for the County to defend itself in tort or civil rights lawsuits concerning allegations of injury.

Q. If, in the course of interaction with an inmate, the inmate at some point said, it hurts, it hurts, or, I can't breathe, would it have been appropriate to call medical?

A. Yes.

Tr. 363.

We find that Appellant's failure to refer Inmate SG to the medical unit was, at least in part, due to his desire to avoid reporting that the use of force had occurred and that the failure to have Inmate SG checked by medical professionals after the use of force incident clearly violated DOCR policy. DOCR need not tolerate its supervisors disregarding policies that are essential to the health and safety of inmates. Irrespective of his motive, Appellant had a duty to refer the inmate for medical evaluation and indisputably he failed to perform that duty. Accordingly, we find that Appellant violated MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10(V)(E); DOCR Policy 3000-7(VII)(E)(10); and MCCF Post Order Nos. 3(C) and 4(C).

Failure to Report the Use of Force

Appellant concedes that his failure to document and report the use of force incident was improper and in violation of DOCR policy.

I understand that I should have documented it. That was a big mistake. I really do understand that. If I had documented it and ordered the officers to document that incident, we wouldn't be here today. I fully get that and understand that. And I fully regret that.

Tr. 849. Thus, there is no dispute that Appellant is guilty of violating several County regulations and DOCR policies.⁹ However, it is troubling that even Appellant's confession is carefully couched in an attempt to downplay or limit his responsibility. Even if Appellant's remorse is genuine, he nonetheless offered no reason for his utter failure to comply with DOCR's explicit mandates for reporting use of force. Worse, fully aware of these directives, he dissuaded his subordinates from fulfilling their reporting obligations. The conclusion is inescapable that Appellant's failure to report the incident, and his efforts to ensure that no one else did, were born of a desire to ensure that no one was ever to be held to account for what transpired in Cell B1.

Appellant's subsequent explanations to investigators and the Board regarding the events of April 27 lacked complete candor, and his actions that evening and the following days, as well as during the subsequent investigation, fell far short of the integrity expected of supervisory correctional officers charged with protecting the health and safety of inmates in County custody. To highlight but one of the charges against Appellant, we find that Appellant's behavior is

⁹ See MCPR § 33-5(c) (violates any established policy or procedure); MCPR § 33-5(e) (fails to perform duties in a competent or acceptable manner); MCPR § 33-5(h) (negligent or careless in performing duties); DOCR Policy Number 1300-10, § III(F) (use of force shall be reported, documented), § V(D) (staff involved in a use of force incident must submit a written report); DOCR Policy Number 3000-7, § VII(E)(4) (integrity of the reporting system), § VII(E)(9) (conduct unbecoming, false report), § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance); MCCF Post Order Nos. 3(C) (Correctional Supervisor Sergeant duties) and 4(C) (Senior Floor Officer duties).

unquestionably conduct unbecoming, which includes neglect of duty, misconduct which tends to undermine the good order, efficiency, or discipline of DOCR, or which reflects discredit upon DOCR or its employees, or which is prejudicial to the efficiency and discipline of the DOCR. DOCR Policy 3000-7, § VII(E)(9), CX 5.

We therefore find that Appellant violated MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10(III)(F) and (V)(D); DOCR Policy 3000-7(VII)(E)(4), (9), and (10); and MCCF Post Order Nos. 3(C) and 4(C).

The Appropriate Level of Discipline is Dismissal

Appellant, as a supervisory correctional officer, was responsible for maintaining institutional security, properly supervising the officers under his command, and for the custody and care of inmates. As detailed above, the County has proven the charges against Appellant of improperly allowing officers to enter Inmate SG's cell, failing to prevent the excessive use of force by Corporal RS, failing to refer Inmate SG for medical evaluation, and both failing to report the use of force and ordering his subordinates to not report the incident. The remaining question is the appropriate level of discipline.

Appellant admits that he improperly failed to report the use of force against Inmate SG but, notwithstanding the serious nature of his offense, argues that the evidence does not support his dismissal. He contends that the Director failed to properly take into account comparable DOCR cases before making the decision to dismiss him from County employment.

Appellant served as a Correctional Supervisor - Sergeant, which is a correctional supervisory position of substantial trust and responsibility. This Board has previously found that correctional supervisors must be held to a higher standard of conduct and a higher degree of trust. MSPB Case No. 15-27 (2016); MSPB Case No. 07-13 (2007). *See Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990) (“the most important consideration” is that a correctional officer is “a position of great trust and responsibility, and must therefore conform to a higher standard of conduct”); *Luongo v. Department of Justice*, 95 M.S.P.R. 643 (2004), *aff'd*, 123 Fed.Appx. 405 (Fed.Cir. 2005) (higher standard of conduct and higher degree of trust are required of law enforcement supervisors). *See also* MSPB Case No. 09-11 (2009) (Employee in a public safety agency with an “impeccable” 28 year County employment record may be held to a higher standard as a supervisor in a position of trust and responsibility); MSPB Case No. 05-07 (2006)(“The County is allowed to hold a supervisor to a higher standard as a supervisor holds a position of trust and responsibility and should be a role model for the supervisor’s subordinates.”).

The officers under Appellant’s command specifically asked him about their obligation to comply with DOCR reporting protocols. Appellant repeatedly ordered them not to file the appropriate reports—indeed, he told them that any failure on their part to report would be “on him.” Appellant’s failure to immediately document and report the use of force against inmate SG, and to order those under his command not to document and report, was a conscious and considered attempt to avoid scrutiny by DOCR leadership of the serious use of force incident. Appellant’s behavior strongly suggests that he was aware that review of the incident by his supervisors would likely result in critical findings and discipline. His apparent efforts to evade responsibility, and to

protect Corporal RS from the consequences of his actions, was an egregious breach of trust.

By attempting to prevent mandatory reports from being written and filed, Appellant delayed the investigation and the preservation of evidence, such as the cell block video recordings. From these facts we infer that Appellant intended to avoid, obstruct, and hinder any investigation into the April 27, 2017 incident.¹⁰

The Director testified that he considered Appellant's offense serious enough that progressive discipline was not required. Rather, the egregious behavior warranted the most severe level of discipline. Tr. 582-83 ("misconduct where the level of use of force that was used in his immediate presence, his duty to protect his staff that are assigned, junior officers. His duty to protect the inmate population from abuse and punishment."); CX 16. Director RG also considered the fact that Appellant endeavored to cover up the improper use of force by ordering his subordinates to not document and report the incident. Tr. 585, 648.

The DOCR Director testified that the incident at issue had caused him to lose confidence in the Appellant. Tr. 591-92. He also testified that it is important for supervisors to make sound decisions that are based on policies, directives, and law. Tr. 592. Appellant, as a front-line supervisor, generally oversees a less experienced workforce, and such junior employees look to their supervisors for appropriate guidance and direction. Appellant's behavior thus set a poor example for those subordinate officers and undermined the trust and confidence management had bestowed on him. Appellant's actions were antithetical to the agency's mission and rightfully caused the DOCR Director to lose confidence in Appellant's ability to protect inmates, lead other officers, and uphold the high standards expected of every Correctional Officer. *Cristia v. Dep't of Justice*, 36 M.S.P.R. 75, 1988 WL 7965 (1988), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988) (Agency is entitled to hold a supervisory correctional officer to a higher standard of conduct).

The County personnel regulations vest the DOCR Director with the discretion to eschew progressive discipline and move directly to termination given the serious nature of Appellant's misbehavior. 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. . .").

When the state takes individuals into custody it also takes on the responsibility to protect them from harm. Appellant had a fundamental responsibility to protect the health and safety of Inmate SG. He and the correctional officers under his command had no authority to impose *ad hoc* punishment, and Appellant had a duty to prevent such behavior by his subordinate. And Appellant certainly did not have the authority to cover up a serious incident. Appellant abused his position as a supervisor by ordering his subordinates to not report a use of force incident. Those actions violated DOCR policies and had the potential to encourage a dangerous culture of silence within a correctional facility.

¹⁰See, *Lee v. State*, 65 Md. App. 587, 593-94 (1985); *Sibiga v. State*, 65 Md. App. 69, 80-81 (1985) (Obstruction of justice includes an act or omission that hinders an investigation).

We consider whether DOCR has consistently applied this standard and dismissed other staff who have engaged in similar behavior, a factor listed in MCPR § 33-2(d)(3). Appellant must show that he and the comparison employees engaged in similar misconduct without differentiating or mitigating circumstances so as to warrant distinguishing the misconduct or the appropriate discipline for it. MSPB Case No. 10-04 (2010), *citing Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009).

Appellant referenced a case where a Correctional Officer III was suspended for improperly entering a cell and engaging in a verbal and physical confrontation with an inmate, but the use of force that followed was determined to be in self-defense. AX 12. Another case involved the five-day suspension of a Correctional Officer III for pushing a teenaged citizen out the front door of a facility, not the use of force against an inmate in custody. AX 13. In both cases reports were written and submitted and there was no attempt to cover up. We find the facts of those two cases to be readily distinguishable and, because neither officer was a first-line supervisor such as Appellant, they are not valid comparators with regard to discipline. MSPB Case No. 10-04 (2010).

In one case cited by Appellant a Correctional Sergeant received a one-day suspension for applying a hold to an inmate. AX 14. In that case, the inmate was combative and there was no allegation that the goal of the use of force was to punish the inmate. In addition, a report was filed. We thus find that case to be distinguishable on its facts from this one and do not treat it as an appropriate basis for comparison.

Moreover, the case is distinguishable for two additional reasons. First, Director RG testified that the suspension in that case was, in retrospect, insufficient:

The discipline in this case should have and could have been higher, but because we under disciplined in this case I do not need to make the same mistake twice and that does not set a precedent. But we did as a Department in this case under discipline the individual, in my view.

Tr. 616. An agency may legitimately contend that a penalty in a previous case was too lenient and that, as Director RG testified, 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.¹¹ 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

¹¹ We also note that the five-day penalty imposed in the case involving the non-inmate teenager (AX 13) was also the result of a settlement agreement.

lesser penalties imposed against other employees whose charges were resolved by settlement), *aff'd*, 975 F.2d 869 (Fed. Cir.1992).¹²

The record simply does not reflect that there have been any other cases sufficiently similar to the circumstances in this one. Director RG testified that he was not aware of other DOCR cases involving excessive use of force and a conscious effort to cover up the incident. Tr. 585. We are unaware of any comparators who had been charged with the full range of misconduct present here. *Reid v. Department of the Navy*, 118 M.S.P.R. 396 (2012) (no disparate penalty where comparison cases involved similar conduct for only one of multiple charges for which appellant was dismissed). No case brought to our attention involved excessive force, failure to report, an intentional effort to cover up the excessive use of force, and a failure to obtain a medical evaluation for an inmate subjected to the excessive use of force. There is not enough similarity between both the nature of his misconduct and the other factors to lead a reasonable person to conclude that DOCR has treated similarly situated employees differently.

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 supervisory correctional officer abusing his official authority by allowing the unnecessary use of force against a vulnerable inmate, failing to report the use of force or have the inmate evaluated by medical personnel, and by ordering his subordinates to not report the use of force. MSPB Case No. 07-10 (2007) (dismissal appropriate for unnecessary confrontation and use of force on an inmate).

Appellant displayed extremely poor judgment that certainly justified the imposition of the most significant discipline. Considering the seriousness of the Appellant's misconduct, that he occupied a position of trust and responsibility as both a correctional officer and a supervisor, and even though there were mitigating factors such as his work record and years of service, the penalty of dismissal was well within the bounds of reasonableness.

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

ORDER

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

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 24, 2019

¹² Although the settlement agreement in AX 14 was not made part of the record, such agreements typically specify that they may not be considered precedent in other cases. That may be what Director RG was referencing when he said it "does not set a precedent."

CASE NO. 18-07

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant. On October 10, 2017, Appellant filed this appeal with the Board challenging his dismissal from a Correctional Officer III position with the Montgomery County Department of Correction and Rehabilitation (DOCR of Department).

BACKGROUND

The discipline in this matter relates to an April 27, 2017, incident involving the use of force against an inmate at the Montgomery County Correctional Facility (MCCF).¹ On October 3, 2017, DOCR issued a Notice of Disciplinary Action (NODA) dismissing Appellant. County Exhibit (CX) 15. 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), CX 7.

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); § III(F) (use of force shall be reported, documented); § V(D) (staff involved in a use of force incident must submit a written report), CX 4. Appellant was also charged with the following violations of DOCR Policy Number 3000-7: § VII(E)(3) (use of force); § VII(E)(4) (integrity of the reporting system); § VII(E)(9)(b) (conduct unbecoming, false report); § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance), CX 5. Finally, Appellant was charged with violating MCCF Post Order No. 5(D) (Use of Force), CX 6.

On December 14, 2017, the County filed a prehearing submission and exhibits pursuant to the Board's procedural rules. On January 3, 2018, Appellant filed his prehearing submission and exhibits as well as a Motion to Dismiss Charges and/or to Bifurcate Issue of Timeliness, asserting that the charges against him were brought too late. The County moved to consolidate this matter with MSPB Case No. 18-06, which involves the discipline of another correctional officer, (Sergeant CR), in connection with the same April 27, 2017, use of force incident. County Motion to Consolidate, January 16, 2018. Appellant filed a response opposing consolidation on January 22, 2018. On January 30, 2018, the County filed a Supplement to its Prehearing Submission. On February 27, 2018, the Board issued an order denying Appellant's motion to dismiss the charges against him and to bifurcate.

On March 6, 2018, the parties appeared before the Board for a prehearing conference. The prehearing conference in Case No. 18-06 immediately preceded the prehearing conference in this case. The Board asked the appellant in Case No. 18-06 if he was willing to remain in the conference

¹ The inmate will be referred throughout this decision as "Inmate SG" or "the inmate."

room so that the Board could discuss the consolidation issue with all parties at the same time. Appellant agreed to this approach, as did the appellant in Case No. 18-06 (Sergeant CR).

The Board discussed with the parties in both cases whether there was an acceptable approach that would obviate the need for the Board to hear the same testimony from the same witnesses in two separate hearings. After discussion, the Board and the parties in both cases agreed to jointly hear the testimony of witnesses and produce a joint hearing transcript. Except for the taking of testimony the cases were not consolidated. On March 14, 2018, the Board issued a Prehearing Order.

The joint hearing was held over the course of three days, July 16, 17, and 18, 2018. During the hearing the Board heard testimony from ten witnesses, including the appellants in both MSPB Case Nos. 18-06 and 18-07.² County Exhibits 1 through 7, 12 through 16, and 20-21 were admitted into evidence in MSPB Case No. 18-07. Appellant's Exhibit (AX) 1 was also admitted into evidence in MSPB Case No. 18-07.³

Subsequent to the hearing the parties submitted post-hearing briefs, including proposed findings of fact and conclusions of law, and rebuttals. *See* Post-Hearing Brief of Montgomery County, September 17, 2018 (County Brief); Appellant's Written Closing Statement, September 17, 2018 (Appellant's Brief); Appellant's Response to County's Post-Hearing Brief, October 18, 2018 (Appellant's Response); County Reply to Appellant Closing Statement Brief, October 18, 2018 (County Reply).

After hearing the testimony and reviewing the exhibits and briefs of the parties the appeal was considered and decided by the Board. The Board separately decided the cases and issued separate decisions and orders.

FACTUAL POSITIONS OF THE PARTIES

The Board carefully considered the factual positions of the parties, which we set out below.

Appellant's Factual Position

The following reflects Appellant's position on the facts in this case:

² The following witnesses are identified by their initials, or as "Appellant," elsewhere in this decision:

1. Corporal KM
2. Corporal JB
3. Lieutenant AM
4. Lieutenant DL
5. Deputy Warden SG
6. Captain DW
7. Director RG
8. Sergeant GS
9. Sergeant CR
10. Corporal RS or Appellant

³ Although Appellant marked his exhibit as Appellant Exhibit A we have redesignated it as Appellant Exhibit 1.

A. Appellant's Employment Record and Performance

1. Appellant was employed as a Correctional Officer by DOCR at MCCF since on or about August 1, 2011. CX 14.
2. Appellant was promoted to Corporal on or about November 17, 2013. CX 14.
3. Prior to the incident in question, Appellant had been a stellar Correctional Officer. Tr. 345-46, 594-95.
4. Lieutenant DL testified that he evaluated Appellant's performance as "above expectations."
5. DOCR Director RG testified that Appellant's work record was "very good," he was a "trusted instructor," and that he did not have "other issues that sometimes plague an individual in corrections." Tr. 594-95.
6. Appellant never previously received discipline for using excessive force on an inmate.
7. Sergeant CR, Appellant's supervisor for approximately two-and-a-half years, never witnessed Appellant use excessive force on an inmate. Tr. 848.
8. Corporal JB never witnessed Appellant use excessive force on an inmate. Tr. 195.
9. Lieutenant AM, who had been Appellant's supervisor for approximately 6-7 years never witnessed Appellant use excessive force on an inmate. Tr. 244.
10. Lieutenant DL never witnessed Appellant use excessive force on an inmate. Tr. 403.
11. At the time of the incident, Appellant primarily worked in the Crisis Intervention Unit ("CIU"). CX 14; Tr. 931.
12. The inmates housed in the CIU are often suicidal and/or have severe emotional issues and, thus, are generally more difficult, unruly and/or disruptive. Tr. 931 (Appellant); Tr. 190 (Corporal JB confirming that CIU inmates are generally "more volatile"); Tr. 404 (Lt. DL).

13. Appellant had received specialized training on how to deal with the type of inmates typically housed in CIU. Tr. 931.
14. Appellant was primarily assigned to the CIU because he did a good job dealing with such difficult inmates. Tr. 931.
15. In an apparent attempt to get himself removed from MCCF and sent to an outside hospital, Inmate SG falsely reported to staff that he had ingested a bottle of deodorant. CX 2, p. 3.
16. Inmate SG admitted that he lied about ingesting deodorant for such purpose. CX 2, p. 3; Tr. 842 (Sgt. CR).
17. Inmate SG was assessed by a nurse and cleared to be housed in the CIU, subject to a 15-minute suicide watch until he could be assessed by a CIU therapist the next day. CX 14; Tr. 833 (Sgt. CR).
18. Inmate SG was escorted to his CIU cell (B-1) by Sgt. CR, Corporal JB, and Corporal JG. Tr. 153 (Cpl. JB); Tr. 833-34 (Sgt. CR).
19. During that time, the Inmate SG made statements about doing whatever he needed to do to get removed to medical. Tr. 837 (Sgt. CR).
20. Once inside the cell, Inmate SG was instructed to remove his clothing so that he could be placed in a suicide gown, however, Inmate SG initially refused to comply, was angry, and had to be calmed down by Sgt. CR. Tr. 858-59 (Sgt. CR).
21. Inmate SG was generally a very disruptive and noncompliant inmate who had initiated altercations with other officers on multiple occasions and had a reputation in MCCF. Tr. 920 (Sgt. CR); Tr. 189-90 (Cpl. JB confirming that Inmate SG was in fights in the facility and in and out of CIU “quite a bit”).

22. As noted by Corporal JB, it was his belief that the Inmate was going to do whatever he thought he had to do to get transferred to outside medical. Tr. 185-86.
23. After Inmate SG was placed in his suicide gown and the other officers had left, Inmate SG began banging some part of his body, possibly his head, against the cell door. Tr. 936 (Appellant testifying that he told the Inmate to stop banging his head and the Inmate replied “F you”); Tr. 157 (Cpl. JB testifying that he heard Appellant say that the Inmate was banging his head); Tr. 833, 837 (Sgt. CR testifying that he heard Appellant say that the inmate was “banging his head” and that Sgt. CR believed the inmate was banging his head when they entered the cell and only after the Incident was over did Sgt. CR believe the Inmate may have been using his shower shoes to bang the cell).
24. Appellant did not know with 100% certainty which part of his body Inmate SG was banging against the cell door, however, Appellant believed at the time of the Incident that it was the Inmate’s head. CX 2, p. 10 (Officer JG confirming that Appellant stated Inmate SG was “banging his head”); Tr. 306, 972, 990 (Appellant).
25. Under such circumstances where an inmate presents a threat of injury to himself (including possibly banging his head against the cell), a correctional officer is permitted to enter the cell to intervene without calling a supervisor since it is an emergency situation. CX4; Tr. 776, 817-19, 827 (Sgt. GS testifying that officers should/will respond when an inmate kicks or bangs on the cell, that if there is a risk of damage to property and/or the inmate then use of force can be used to quell the disturbance, and that officers can enter cell without first contacting supervisor if inmate is banging his body against the cell since that is an emergency situation); Tr. 300, 993-94 (Appellant testifying that he entered the cell because he believed the Inmate was injuring himself by banging his head against the cell and that

the Inmate was in imminent danger); Tr. 164, 194-95 (Cpl. JB testifying that entering the cell was appropriate under the circumstances since they entered the Inmate's cell because "*we were all under the impression that [the Inmate] was hurting himself*") (emphasis supplied); Tr. 236 (Lt. AM testifying that if officers believe that an inmate is in imminent danger then officers may enter the cell); Tr. 343, 383-85 (Lt. DL acknowledging that if the inmate "is causing imminent harm to himself" then the shift commander does not need to be called and present before the officers enter the cell and testifying that entering cell and use of force would be appropriate if inmate is "causing self-injurious harm").

26. If the Shift Commander had been notified so that a planned use of force could be initiated rather than the officers entering the cell immediately, it might take 45 minutes for the Emergency Response Team (ERT) to respond. Tr. 307 (Appellant).
27. Appellant believed that waiting that long to take action would have made the situation worse for the inmate, not better. Tr. 307.
28. Allegations that Appellant improperly entered the cell are beyond the scope of the charges brought against him and which formed the basis for his dismissal. CX 14 & 15; Tr. 226-27.
29. Appellant instructed the Inmate to come to the door and attempted to handcuff the Inmate (through the food slot from outside the door) in order to calm him down, maintain order, and/or restrict the Inmate's movements/banging. Tr. 936 (Appellant).
30. Appellant had a hold of the Inmate's suicide jumper but once he attempted to cuff the Inmate, the Inmate pulled away before Appellant could cuff the Inmate, resulting in the suicide jumper coming off the Inmate. Tr. 937-38.

31. Sgt. CR was the most senior supervisor on the floor at the time of the Incident. Tr. 857 (Sgt. CR testifying that he was the cluster sergeant and senior floor officer at the time of the Incident and, therefore, that he was the highest ranking officer on the CIU floor).
32. Upon hearing the commotion Sgt. CR ordered Inmate SG's cell door to be opened. Tr. 833.
33. Corporal KM was stationed at the Control Panel and opened the door to Inmate SG's cell remotely. Tr. 835-36 (Sgt. CR); Tr. 157 (Cpl. JB).
34. The Control Panel is located on the other side of the hall from Inmate SG's cell but on a diagonal and, moreover, there is a stairwell that runs between the line of sight from the Control Panel to Inmate SG's cell (B-1). CX 12, 20; Tr. 95-96 (Cpl. KM).
35. None of the Officers (other than Corporal KM himself) testified to seeing Corporal KM in or around the cell at any time during the Incident. Tr. 835-36, 843, 915-16 (Sgt. CR testifying that Corporal KM was at the control panel/station and was not in/at cell B-1 at any time during the Incident); Tr. 176 (Cpl. JB testifying that he never saw KM in the cell area during the Incident).
36. Furthermore, since inmates were free in the day room, if KM left the Control Panel that would have been a breach of safety protocol. Tr. 87-88 (KM).
37. Appellant and officers JB and JG entered Inmate SG's cell, with Sgt. CR standing in the doorway of the cell. Tr. 835-36, 844, 870 (Sgt. CR); Tr. 158, 163-64 (JB confirming that Sgt. CR was standing in the doorway to the cell).
38. Inmate SG was resisting so Sgt. CR ordered the Inmate to get down on the ground but he did not comply and had to be forcibly placed on the ground. Tr. 836-37, 871-72 (Sgt. CR); Tr. 938-39 (Appellant); Tr. 161-62.

39. Appellant grabbed a suicide gown and placed it on the Inmate so that he was not naked. Tr. 940-43 (Appellant).
40. Inmate SG was then placed in handcuffs in order to restrain him. Tr. 836 (Sgt. CR).
41. However, even though the Inmate was placed in handcuffs, he was still resisting the Officers. Tr. 836 (Sgt. CR testifying that he ordered the officers to handcuff the inmate, which they did, but that the Inmate was still “resistive”); Tr. 161-62 (Cpl. JB confirming that Inmate was resisting the Officers both before and after the handcuffs were placed on the Inmate).
42. Although Inmate SG was placed in handcuffs, he still had the ability to injure the Officers present in the cell, whether by kicking, biting, grabbing with hands, etc. Tr. 358 (Lt. DL); Tr. 951 (Appellant testifying that he has had his genitals grabbed by a cuffed inmate); Tr. 191 (Cpl. JB confirming that a handcuffed inmate can still cause harm/injury to officers).
43. Moreover, officers are not required to wait until such injury takes place before applying use of force to a non-compliant inmate. Tr. 809 (Sgt. GS).
44. After Inmate SG was placed in handcuffs and placed on the ground, the Officers released the Inmate and began to leave the cell, at which time Inmate SG got up from the ground and quickly approached the Officers and/or Appellant. CX 2, p. 13; Tr. 837 (Sgt. CR testifying that the Inmate “gets up pretty fast and comes toward” Appellant); Tr. 873 (Sgt. CR testifying that the Inmate “got up and approached [Appellant] quickly”); Tr. 315 (Appellant).
45. Appellant then grabbed Inmate SG by the collar with his left hand, placed Inmate SG against the wall (so that Inmate SG was located between Appellant and the wall), reached his right arm around the front of Inmate SG and placed his right hand/knuckle under Inmate

SG's chin in order to apply a pressure point for pain compliance. Tr. 837-40, 879-82 (Sgt. CR); Tr. 281, 948-51 (Appellant).

46. Such pain compliance (including pressure points) is authorized under County policy and is used, as its name suggests, in order to make a non-compliant inmate compliant. CX 4; Tr. 856 (Sgt. CR testifying that the County - Lt. DL - taught him pressure points as authorized pain compliance technique).
47. As testified to by the County's own use of force instructor (Sgt. GS), pressure points can be used for pain compliance purposes on an inmate who is already handcuffed/restrained until the inmate is under full control. Tr. 775.
48. Appellant then released the pressure point and re-applied it since it did not appear to be working. Tr. 839-41 (Sgt. CR).
49. Upon applying it the second time, Inmate SG appears to have stated words to the effect that "it hurts" and/or that he "couldn't breathe." Tr. 948 (Appellant).
50. An inmate yelling "it hurts" is consistent with the application of a pressure point. Tr. 350 (Lt. DL).
51. Furthermore, if Inmate SG truly could not breathe, then he would not be able to say he "couldn't breathe," as confirmed by the County's own use of force instructors. Tr. 351 (Lt. DL testifying that if an inmate is able to speak, then he is able to breathe); Tr. 754-55 (Sgt. GS, based on his CPR training/knowledge, testifying that if an inmate is able to speak then they are able to breathe).
52. Similarly, if an inmate is being choked, then the inmate cannot speak and/or yell because the inmate's airway would be cut off. Tr. 755 (Sgt. GS).

53. Furthermore, inmates often lie about being in pain and/or being injured in order to avoid and/or be released from such pain compliance techniques. Tr. 403 (Lt. DL testifying that he has personal knowledge of inmates doing that “numerous times,” possibly dozens of times).
54. Accordingly, Appellant had every reason to believe the Inmate was lying about not being able to breathe and there is a high probability (if not certainty) that the Inmate was in fact lying about not being able to breathe since it is impossible for a pressure point to the chin to cause an inmate to stop breathing. Tr. 949 (Appellant confirming his belief that Inmate SG was lying about not being able to breathe).
55. Upon confirming that Inmate SG would stop resisting the Officers and behave properly, Appellant released the pressure point. Tr. 950, 999 (Appellant).
56. As testified to by the County’s own use of force instructor (Sgt. GS), asking an Inmate if he is done acting out and/or misbehaving is not improper. Tr. 811.
57. Only after Appellant applied the pressure point(s) did the Inmate finally and fully cease resisting and/or become compliant. Tr. 841 (Sgt. CR testifying that the Inmate finally “calmed down” only after Appellant applied the second pressure point), Tr. 844 (Sgt. CR testifying that he gave the Inmate “several orders to calm down because he was argumentative,” that the Inmate did not obey any of those orders “until after [Appellant] had applied the pressure point the second time” since the first time was ineffective); Tr. 166, 178, 190 (Cpl. JB confirming that the Inmate was acting “very agitated” during the entire Incident and only became fully compliant after Appellant placed the Inmate against the wall); Tr. 309-10 (Appellant).

58. The entire Incident from beginning to end was very brief, perhaps a matter of less than a minute. Tr. 950 (Appellant).
59. Appellant only applied the pressure points for pain compliance for a matter of seconds. Tr. 167 (Cpl. JB describing the hold being applied for 2-3 seconds).
60. Appellant was not applying any use of force technique that would have interfered with the Inmate's breathing. Tr. 949-50 (Appellant).
61. At no time did the Inmate show signs of actually being unable to breathe (*e.g.*, inability to speak, loss of consciousness, etc.). Tr. 954 (Appellant).
62. Appellant never kicked the Inmate (in the face or otherwise). Tr. 845 (Sgt. CR); Tr. 954 (Appellant); Tr. 184, 199-200 (Cpl. JB).
63. Appellant never placed the Inmate in a chokehold and/or any other hold which could, would, and/or did obstruct the Inmate's flow of blood and/or oxygen to the brain, which could cause serious injury or death. Tr. 308, 315, 954(Appellant); Tr. 165-66, 177, 191 (Cpl. JB describing it as a headlock used to control the Inmate and stating that at no time during the Incident was the Inmate being choked).
64. Although Corporal JB testified that he did not think the headlock was necessary, he also admitted that he was not the one holding the Inmate, so he was not sure. Tr. 201-02.
65. Corporal KM admitted that he has no idea how much pressure, if any, Appellant applied to the Inmate. Tr. 102.
66. The Inmate suffered absolutely no injuries of any kind from/during the Incident. Tr. 954 (Appellant); Tr. 766-67 (Sgt. GS testifying that the lack of injuries are very significant in evaluating whether an excessive amount of force was used and that the lack of any injuries to the Inmate signifies that the least amount of - and appropriate amount of - force was

used); Tr. 190-91 (Cpl. JB confirming that he saw absolutely no signs of any injury to the Inmate, not even a scratch).

67. After the Incident, out of concern for the Inmate's mental/emotional state, Appellant regularly checked in on Inmate SG to make sure Inmate SG was doing OK. Tr. 956-57, 989 (Appellant).

68. Appellant even gave the Inmate a Bible since the Inmate had asked Appellant for something to read. Tr. 957 (Appellant).

69. Appellant informed Sgt. CR that Inmate SG was doing OK. Tr. 847-48 (Sgt. CR); Tr. 957-58 (Appellant).

70. As testified to by the County's own use of force expert/instructor (Sgt. GS), Appellant followed County use of force protocol, did not use excessive force, and acted appropriately under the circumstances (other than failing to properly document the Incident). Tr. 746-47, 816. *See also* Tr. 769 (Appellant "could have taken the Inmate to the ground potentially and we would've wound up with an injured inmate. Instead, he kept the inmate on his feet. He protected the inmate from harm. The inmate was not harmed. No other staff members were harmed in the incident. And that's a good day.").

71. Sgt. GS has worked for the County for over 20 years, and for all but four of those years Sgt. GS is/was a field trainer for the County. Tr. 727.

72. For over 10 years, Sgt. GS has been a general instructor for the County, which includes use of force training. Tr. 728, 758.

73. Sgt. GS is one of the most active use of force instructors of the County, Tr. 746, and Sgt. GS has testified as a use of force expert for the County in other cases. Tr. 739.

74. Although Sgt. GS considers Appellant a friend, he would not give testimony that was anything less than truthful for Appellant or anyone else for that matter. Tr. 784, 822.
75. Sgt. CR similarly testified, based on his 10 years working in the CIU, that Appellant's use of force/pressure points was "highly appropriate" based on the Inmate's conduct. Tr. 849.
76. If any Officer present (JG, JB and/or CR) believed that Appellant was using excessive force, they could have and should have intervened. Tr. 567-68 (Deputy Warden SG).
77. A timely Incident Report was not made by any of the Officers involved, including Appellant. Although Appellant understands that he was required to and should have prepared a report, he did not prepare one since the incident was minor in his opinion (*i.e.*, low level use of force and no injuries to Inmate). Tr. 295-97.
78. The other Officers involved in the Incident who did not properly complete reports and/or refer the Inmate to medical were given minimal discipline. Tr. 195 (Cpl. JB initially was given a five-day suspension which was subsequently reduced to the forfeiture of 8 hours of leave time); Tr. 113 (Corporal KM received merely a written reprimand); Tr. 550 (Deputy Warden SG recommended a 3-day suspension for Corporal JG).
79. Furthermore, other staff knew about the Incident and also did not report it, without any disciplinary repercussions. Tr. 910-14 (Sgt. CR).
80. No County correctional officer has ever been terminated for failing to properly file an Incident Report and/or termination would not be an appropriate level of discipline for failing to report. Tr. 552 (Deputy Warden SG).
81. No evidence was ever presented by the County demonstrating a "cover up" but, rather, it was merely a technical violation of the reporting requirements (in a low-level use of force incident without any resulting injuries), and it has been acknowledged by Appellant and

Sgt. CR that a report should have been prepared under the County's guidelines. Tr. 910 (Sgt. CR); Tr. 958 (Appellant); Tr. 503 (Deputy Warden SG testifying that there is no evidence of a “cover up,” *i.e.*, an affirmative effort or conspiracy to hide the Incident, other than the fact that the Officers did not in fact write up a report).

82. In practice, as testified to by Sgt. GS, the only time inmates are checked by medical after being placed in restraints (e.g., handcuffs) is when they are placed in a restraint chair. Tr. 738.

83. Similarly, although Sgt. GS generally errs on the side of calling medical (*i.e.*, is “conservative”), if he were the Sergeant present during the Incident, he probably would not have called medical since the Inmate had no signs of injury. Tr. 748-50.

84. It was well established at trial that even a handcuffed inmate can cause injury/harm to himself and/or others. Tr. 753 (Sgt. GS testifying that handcuffed inmate can still kick you and push you and that he repeatedly teaches officers that a handcuffed inmate can still be a threat); Tr.953-54 (Appellant).

85. Furthermore, Sgt. GS testified that the preferred method of dealing with a handcuffed inmate is to place him up against a wall (which is what Appellant did), since doing so decreases the chances of injury to the inmate. Tr. 753-54.

86. According to the County’s own use of force instructor (Sgt. GS), Appellant’s behavior did not objectively appear punitive in nature and the Officers were merely responding and restraining an unruly and/or uncooperative inmate. Tr. 769-70, 810-11.

87. Appellant was clearly in control of his emotions and/or conduct during the Incident, as he immediately obeyed his commanding officer (Sgt. CR) and ceased arguing with the Inmate as soon as he was ordered to do so by Sgt. CR. Tr. 841-43, 849-50 (Sgt. CR testifying that

Appellant immediately obeyed his command and was in control of his actions); Tr. 956 (Appellant).

88. As explained by Appellant, sometimes you have to yell or raise your voice when dealing with CIU inmates in order to get through to them. Tr. 955-56.

89. Although Appellant had threatened to spray the Inmate with pepper spray, that was a ploy and Appellant did not spray the Inmate because he did not want to cause the Inmate unnecessary harm/injury (which also demonstrates that Appellant was in control of himself and his emotions). Tr. 309, 938, 952 (Appellant).

90. Appellant also refrained from taking the Inmate “down to the floor” because he did not want to cause the Inmate unnecessary harm/injury. Tr. 953.

91. Appellant has not and would not place an inmate in a “choke hold” because it could cause death to an inmate. Tr. 954.

92. Appellant used one of the lowest levels of force permitted under the County’s use of force policy specifically because he did not want to cause any unnecessary harm to the Inmate. Tr. 955.

93. Correctional officers are not expected to be experts in use of force techniques and should perform such techniques as best as they are able to in any given situation. Tr. 755-56, 773 (Sgt. GS); Tr. 349 (Lt. DL).

94. “Pressure points, joint locks, restraints, [and] handcuffs are the most minimum level of force that a staff member can employ.” Tr. 766 (Sgt. GS).

95. Such techniques have a minimal probability of causing injury/danger to the inmate. CX 4; Tr. 773, 776.

96. A pressure point cannot cause an inmate to stop breathing. Tr. 651 (Director RG).

97. Thus, pressure points and/or restraints are a lower level of force than the use of pepper spray and/or take down. CX 4; Tr. 242 (Lt. AM); Tr. 400-01 (Lt. DL).
98. Lt. AM testified that he would have sprayed the Inmate with pepper spray rather than enter the cell of an inmate banging their head (unless they were bleeding “profusely”) and that he has done so “many times,” which is a greater use of force than what Appellant used. Tr. 246-47.
99. Similarly, Lt. DL testified that he would have sprayed the Inmate with pepper spray under the circumstances, claiming it is a lesser use of force, despite the fact that it is actually a greater use of force under the County's own written policy. Tr. 342, 373-75 (Lt. DL); CX 4.
100. The harmful/painful effects of pepper spray can last about 45 minutes. Tr. 250 (Lt. AM); Tr. 375 (Lt. DL).
101. The pain from a pressure point ceases immediately as soon as the pressure point is released. Tr. 375 (Lt. DL).
102. “Pain compliance” are techniques used to cause pain in order to gain an inmate’s compliance. Tr. 774 (Sgt. GS).
103. A pressure point is a form of pain compliance that causes temporary pain but does not cause injury to the inmate. Tr. 774 (Sgt. GS); Tr. 390 (Lt. DL admitting to using pressure points for pain compliance over an inmate).
104. A headlock cannot be applied incorrectly. Tr. 337 (Lt. DL).
105. It is used for control of the head, while a choke hold is used to do harm or render someone unconscious. Tr. 347-48.

106. However, an officer who is not properly trained or educated in such matters could confuse the two holds/techniques as being one and the same. Tr. 350.
107. A headlock can be appropriate in a less than deadly force situation. Tr. 192 (Cpl. JB).
108. The County's own use of force witness was unaware of a headlock ever causing serious injury to any County inmate. Tr. 393 (Lt. DL).
109. Even assuming (arguendo) that Appellant put the inmate in a headlock, such a technique is permissible, unlike a choke hold which cuts off the flow of oxygen. Tr. 770-71 (Sgt. GS); Tr. 192 (Cpl. JB confirming that head locks are an approved use of force technique).
110. A headlock is on the low end of the use of force continuum as a soft empty-hand technique along with pressure points, restraints and/or handcuffs. Tr. 771 (Sgt. GS).
111. Furthermore, there is no technique which an Officer is "barred" from using and an Officer should use whatever force/means is necessary in the situation as viewed from the perspective of a reasonable Officer (not using 20/20 hindsight). Tr. 751 (Sgt. GS); Tr. 309, 954 (Appellant); Tr. 342, 375-76 (Lt. DL acknowledging that no technique is barred under the County's written use of force policy).
112. Although Lt. DL also testified that officers are taught not to employ choke holds in defensive training class, Appellant was never scheduled for such defensive training classes by the County and/or never received such training. Tr. 341-44 (Lt. DL); Tr. 929 (Appellant).
113. It is the administrative lieutenant's duty to register officers like Appellant for such training classes and ensure that officers receive the required training. Tr. 367 (Lt. DL).

The County's Factual Position

The County's factual position is as follows:

1. Appellant was employed with DOCR for approximately five (5) years from 2012 until his dismissal in 2017. Tr. 928.
2. Prior to his employment with the County, Appellant was employed as a correctional officer with Franklin County Jail in Franklin County, Pennsylvania from 2008 through 2012. Tr. 929.
3. Appellant admits that his responsibilities as a correctional officer included being responsible for the safety and security of inmates. Tr. 928.
4. The Crisis Intervention Unit (“CIU”) is a housing unit for inmates who have mental issues or who need to be monitored for suicidal ideations. Tr. 52.
5. Within the CIU is the B unit where individuals are placed who have serious mental health issues. Tr. 223.
6. Cell B1, a suicide cell, is located in the B unit. Tr. 153.
7. Appellant contended that he was assigned to the CIU the majority of the time. Tr. 931.
8. B1 has a mattress but no bed frame. Tr. 153.
9. The cell is otherwise empty but for a sink and toilet. *See* Montgomery County’s Prehearing Submission “MC” No. 20.
10. The door to cell B1 has a window at both the top of the door and the bottom of the door, and there is a food slot in between the two windows. Tr. 154, 268; CX 20.
11. If an individual were to stand outside the door to cell B1 and look through either window, they would be able to see the entirety of the cell. Tr. 62, 99, 165.
12. On April 27, 2017, Appellant and Corporal KM were assigned as correctional officers to the CIU. Tr. 52.
13. Sergeant CR was their supervisor for that shift. Tr. 52.

14. Corporal KM was assigned to the control panel from which he could open and close doors within CIU. Tr. 56-57.
15. The control panel is located in the center of the unit and there are windows at the control unit that look into the B unit. Tr. 56.
16. The proper protocol when entering into an occupied cell on the B unit is to handcuff the inmate through the food slot prior to entry and uncuff the inmate through the food slot after exiting the cell. Tr. 230.
17. Inmate SG was brought to the CIU on April 27, 2017, after a report that he had tried to drink deodorant and therefore was deemed to have possible suicidal ideation. Tr. 53-54, 153.
18. After Inmate SG was brought to CIU, he changed into a suicide gown without incident and the door to his cell was closed. Tr. 57.
19. Inmate SG was placed in cell B1. Tr. 55,153.
20. After Inmate SG changed into the suicide gown and the door was closed, a banging noise could be heard coming from that cell. Tr. 58.
21. After the banging began, Appellant ordered Corporal KM to open the door to Inmate SG's cell. Tr. 58, 157.
22. Corporal KM opened the door to cell B1 and then ran into the B unit to observe what was happening inside the cell. Tr. 58.
23. Appellant entered the cell, followed by Corporals JB and JG, while Sgt. CR remained outside of the cell in the doorway of the cell. Tr. 158.
24. At no time prior to entry into the cell did Appellant visually confirm that Inmate SG was banging his head or otherwise harming himself. Tr. 973-74, 977-78.

25. When Appellant came to the cell, Inmate SG was not actively banging his head. Tr. 268.
26. No one present was able to visually confirm that Inmate SG was actively harming himself before they entered the cell. Tr. 58, 157, 195, 864, 973-74.
27. At the time of entry into the cell, when Inmate SG was standing in the back of the cell screaming, there was not a confirmed on-going emergency that justified entry into the cell. Tr. 274.
28. Each officer is equipped with a radio, which they carry on their person, and the component used to speak into the radio is located on the shoulder of each officer. In order to place a call on the radio, including to a Lieutenant, one needs to press a button on the side of the device located on the shoulder and speak. That transmission would be heard throughout the facility on each officer's radio. In addition to the radio, there is a phone at the control station that can be used to make a call to a Lieutenant. Tr. 220-22, 419-20.
29. Once inside the cell, Appellant, Corporal JB, and Corporal JG handcuffed Inmate SG. Tr. 59.
30. Corporals JB and JG then assisted Inmate SG to stand up and faced him towards the wall by the sink. Tr. 65, 296; *see also* CX 20 for visual reference.
31. At the time that Inmate SG was handcuffed and standing by the wall, he was under control. Tr. 69-70, 121, 167.
32. Appellant further agrees that after Inmate SG was handcuffed, he was cooperative. Tr. 944.
33. After Inmate SG was handcuffed, Appellant used a maneuver on Inmate SG that caused Inmate SG to utter "I can't breathe." Tr. 66, 256-57, 891, 948.
34. Inmate SG also said that the action caused him pain. Tr. 256-57, 882, 889, 948.
35. Appellant admits that Inmate SG said that Appellant was choking him. Tr. 259, 987.

36. After Inmate SG made those statements, Appellant released his grip on Inmate SG and then did the maneuver again. Tr. 67, 259, 987.
37. The second time Appellant placed his hands on Inmate SG, he did it “really hard, hard and fast so it would hurt very much.” Tr. 282, 987.
38. At that point, Appellant had an exchange with Inmate SG asking him effectively, if he was going to behave. Tr. 67, 999.
39. During this time, Inmate SG was still handcuffed behind his back. Tr. 168, 296, 302.
40. Appellant contends Inmate SG’s actions led him to believe he was going to do something to harm himself, but admits that he did not actually see Inmate SG bang his head or any other part of his body. Tr. 977-78.
41. Inmate SG did not make any threat to or engage in spitting, kicking, or biting. Tr. 121-22, 166.
42. Appellant was not an Emergency Response Team (ERT) member and admits that when he tried the pressure point techniques previously, they did not work. Tr. 981-82.
43. Appellant admits that once the incident was over, he did not write or submit a report. Tr. 995-97.
44. At no time prior to, during, or after the incident did Appellant contact the Lieutenant on duty to report the incident. Tr. 223, 893.
45. Appellant was required to report the incident. Tr. 204, 206; *see also* the Use of Force Policy at CX 4.
46. Appellant admits that he knew he should write a report and did not. Tr. 995-96.
47. Appellant further admits that all five involved officers failed to write a report. *Id.*

48. At no time during or after the incident did Appellant contact the medical unit to have Inmate SG evaluated for injuries. Tr. 290.
49. Inmate SG should have been seen by the medical unit as a result of this incident. Tr. 291.
50. It is a requirement that when there is a use of force, outside normal or routine procedures, the medical unit must be called to evaluate the inmate. Tr. 401-02.
51. After the incident on April 27, 2017, Appellant checked on Inmate SG multiple times throughout his shift. Tr. 954.
52. As a result of being told not to write a report after having witnessed an excessive and unjustified use of force, several officers spoke with the Office of the Inspector General (OIG). *See* OIG Memorandum, CX 1.
53. The OIG conducted an investigation of the incident and submitted a written report to Director RG on June 5, 2017. Tr. 574-75; CX 1.
54. Upon receipt of the report, Director RG ordered an internal investigation of the incident, which was completed by Captain MW. Tr. 576; *see* Internal Investigation at CX 2.
55. When a Use of Force report (DCA 36) is written by an officer, it gets submitted to the Sergeant and then to the Lieutenant. Tr. 133.
56. The Lieutenant then conducts an investigation, including a use of force checklist, gathers all reports, reviews video surveillance, and then forwards the information to the Deputy Warden with a recommendation on whether the use of force was justified. Tr. 219, 421. That did not occur in this case because this incident was not reported.
57. The Use of Force Policy of the DOCR is available, at all times, on a shared drive accessible to all correctional officers. Tr. 120-21, 521, 587.
58. Officers are told to review the policy. Tr. 120-21.

59. Additionally, officers receive use of force training during pre-shift training. Tr. 525.
60. Use of force training does not include training on the use of pressure points or defensive tactics techniques. Tr. 332.
61. Appellant received Use of Force training and report training during his time at DOCR. *See* CX 18.
62. Appellant has never taken a Defensive Tactics training while employed by DOCR. Tr. 316, 344.
63. Appellant never requested to take a Defensive Tactics course while employed by DOCR. Tr. 284.
64. According to the Appellant, it simply did not interest him to take the class. Tr. 286-87.
65. The Defensive Tactics course is offered monthly by DOCR. Tr. 523.
66. It is not a State law requirement to take the class every year; rather, it is a departmental goal for all officers to take yearly defensive tactics training. Tr. 522.
67. Defensive Tactics is taught by Lieutenant DL, who is also the instructor for the ERT. Tr. 324.
68. Defensive Tactics is a hands-on class. Tr. 332.
69. Only five pressure point techniques are taught in the Defensive Tactics course, to include the mandibular angle. Tr. 333.
70. The course does not teach officers to place inmates in headlocks or chokeholds. Tr. 336, 340.
71. The pressure point known as the mandibular angle is effectuated by applying pressure to the soft spot behind the earlobe with a part of the thumb while having counter pressure against the head. Tr. 333.

72. At the time of the incident, there were no surveillance cameras filming inside the B1 cell or even the B unit. Tr. 493. There was, however, a surveillance camera filming the CIU unit. Tr. 493.
73. By the time DOCR had notice that the incident occurred, the video footage was no longer available due to the system recording over video more than two to four weeks old depending on movement in the area being recorded. Tr. 492, 632.
74. Prior to this incident Corporal KM did not have any prior disagreements with Appellant. Tr. 112.
75. At the conclusion of the incident, Inmate SG looked at Appellant and asked why he was doing this to him, and the Appellant responded back something to the effect of that's what you get for not listening. Tr. 67.
76. Appellant admitted that he responded back to Inmate SG that he wanted him to behave. Tr. 999.
77. Both Lieutenant AM and Lieutenant DL testified that without visual confirmation that Inmate SG was causing himself harm, there was no reason to enter his cell. Tr. 223, 343, 417.
78. The Use of Force policy is clear that only if this had been an "extreme emergency" would Appellant have been permitted to take action including entering the cell. Tr. 223-24; CX 4.
79. Deputy Warden SG testified that "an emergency would be something that would seriously harm the inmate or something that the inmate was trying to kill himself or do something to seriously hurt himself." Tr. 467.

80. Both Corporals JB and KM observed Appellant's interactions with Inmate SG and testified that once Inmate SG was handcuffed inside the cell, he was under control and compliant. Tr. 69-70.
81. In fact, the last time anyone had to tell Inmate SG to calm down was when he was being handcuffed. Tr. pg. 188.
82. Despite Inmate SG being under control and in handcuffs, Appellant inexplicably came from behind Inmate SG and applied what was described as a headlock/choke hold on Inmate SG. Tr. 66, 165.
83. At that point, there was no justification to become physical with Inmate SG. Officers are not supposed to go hands-on with an inmate if they are handcuffed and not kicking, biting, etc. Tr. 131.
84. Both Corporal KM and Corporal JB testified that when Inmate SG was handcuffed, he was not biting, kicking, spitting, or threatening to do any of those acts. Tr. 121-22, 166.
85. Sgt. CR testified that the only "resistance" Inmate SG displayed was a "passive aggressive stiffening," not actual combativeness. Tr. 845. This was corroborated by Appellant. Tr. 939.
86. Both Corporal KM and Corporal JB state they were not touching Inmate SG when Appellant placed him on the wall and applied a headlock. Tr. 69, 202.
87. If Inmate SG had truly attacked Appellant, it is likely that the four other officers present would have come to his aid. Tr. 567.
88. The hold used by Appellant on Inmate SG was not an authorized pressure point. Lieutenant DL is the expert on defensive tactics and pressure points. Lieutenant DL described the mandibular pressure point as a "soft spot behind the earlobe." Tr. 333.

89. Appellant described a maneuver underneath the jaw/chin. Tr. 838, 948.
90. The hold used by Appellant on Inmate SG was a headlock which caused Inmate SG to lose his breath, thereby making it more comparable to a chokehold. Appellant described putting his “hand across the front of” Inmate SG. Tr. 948.
91. Corporal KM stated that Appellant “put his hand around [Inmate SG’s] neck and he choked him.” Tr. 66.
92. Corporal JB testified that Appellant “applied a headlock and held [Inmate SG] against the wall.” Tr. 165.
93. Sgt. CR even described Appellant as having his “arm reached from behind the inmate... strapped around the inmate... and closed his arm in such a way that the knuckle of his right hand, thumb, was resting underneath the jawbone.” Tr. 839.
94. Sergeant GS testified that the Appellant’s use of force was appropriate given the level of resistance presented by Inmate SG, however, that testimony should be given little, if any weight. Sergeant GS is not an instructor in defensive tactics. Tr. 742. He is not an ERT member. Tr. 742. He was not present for the incident. Tr. 791.
95. Sergeant GS did not interview anyone regarding the incident. Tr. 745. The only people he spoke to about the incident were Appellant and Sgt. CR, in fact, he conceded that he spoke to them “in depth” about the matter. Tr. 784.
96. Sergeant GS did not sit in during the trial to hear what other witnesses had to say regarding what they saw. Tr. 745.
97. Sergeant GS is admittedly good friends with both Appellant and Sgt. CR. Tr. 784. This fact was confirmed by Appellant who admitted that the two hunt and fish together. Tr. 903.

98. Sergeant GS admitted that he framed his opinion that the force used was appropriate before reviewing any reports, which means he formed his opinion only after having spoken to Appellant and Sgt. CR. Tr. 785, 823.
99. Sergeant GS conceded that he believed his friends' version of the events without doing his own independent investigation. Tr. 786.
100. Sergeant GS admitted that once the inmate was compliant, all maneuvers should stop (Tr. 793), that it is improper to initiate force when it is not needed (Tr. 793), that officers should be trained in any maneuvers they may want to use on an inmate (Tr. 799-800), and that he has never personally seen a use of force where the inmate was not later seen by medical, and if an inmate declines to go to medical, it still needs to be documented (Tr. 807).

FINDINGS OF FACT

After hearing testimony, reviewing exhibits, and weighing the proposed findings of fact of both parties, the Board has made the following factual findings.

Appellant was employed as a Correctional Officer by DOCR at MCCF since August 1, 2011, and was promoted to Correctional Officer III (Corporal) November 17, 2013. CX 14. On April 27, 2017, Appellant was assigned to the CIU. Tr. 933. On that day, Inmate SG claimed to have ingested deodorant and expressed suicidal ideations. After examination by the medical unit at MCCF it was determined that he had not consumed enough deodorant to cause him harm. The medical staff ordered that SG be placed on a suicide watch, so Inmate SG was taken to the CIU and placed in cell B1, a suicide watch cell. Cell B1 had a mattress with no bed frame, a sink and toilet, but was otherwise empty.

Inmate SG was unhappy with the conditions he would face in the suicide watch cell. Tr. 834. However, after Inmate SG and Sergeant CR discussed the situation, Inmate SG complied with Sergeant CR's instructions that he change into a suicide gown. Tr. 57. After he did so without incident, Sergeant CR and other correctional officers left cell B1. Tr. 835. The cell door was then closed. Tr. 57.

A short time later, around 10:00 p.m., Appellant and other officers heard "loud banging" coming from Inmate SG's cell. Tr. 58, 194, 835, 837, 860-61, 921, 935. Appellant testified that he went to the cell door, that Inmate SG was "yelling and screaming" that he did not wish to be in the cell, and that he wanted to go to the hospital. Tr. 936, 973. According to Appellant, he told Inmate SG to stop banging his head and Inmate SG replied, "F you." Tr. 936. In response, Appellant ordered Inmate SG to come to the door so that he could apply handcuffs. Tr. 936. Appellant

attempted to handcuff Inmate SG through the food slot of the closed cell door, but SG refused to cooperate and retreated to the back of the cell. Tr. 936-38.⁴

Even though neither Appellant, Sergeant CR, nor any of the other correctional officers saw Inmate SG banging his head, Tr. 58, 157, 195, 268, 861, 864, 977-78, Appellant shouted that SG was “banging his head” and emphatically demanded that the cell door be opened. Tr. 938 (“open the damn door”). Sergeant CR then ordered Corporal KM, the officer at the control panel, to open the door to SG’s cell and he did. Tr. 58, 157, 835-36, 938. Sergeant CR and officers JB and JG responded to cell B1. Tr. 835, 849, 867, 918, 921.

Appellant provided inconsistent and contradictory testimony concerning Inmate SG’s alleged self-harming behavior. Appellant stated with certainty that Inmate SG was banging his head against the cell door. Tr. 264. Appellant also seemed to suggest that before he went to the cell door, he may have seen Inmate SG banging his head from the corner of his eye. Tr. 935, 971-72. Appellant then conceded that he never actually saw Inmate SG banging his head or otherwise harming himself and had made the assumption because he saw Inmate SG’s face in the cell door window while the noise was being made. Tr. 972-74, 977-78; Appellant’s Response, p. 8.

Appellant admitted that once he went to Inmate SG’s cell door the banging had ceased. Tr. 268-69. Appellant later testified that after his failed attempt to handcuff Inmate SG the inmate went to the back of the cell and was “banging, or attempting to bang his head on the rear wall” of the cell. Tr. 938. On cross examination Appellant then conceded that when Inmate SG went to the back of the cell he was not doing anything to harm himself. Tr. 977. When asked why he testified earlier that he had seen Inmate SG banging his head on the rear wall he said, “I don’t remember.” Tr. 977. Given a moment to reflect on his answer, Appellant hesitated and ultimately testified that “I’m going to say no, he did not bang his head on the wall in the back.” Tr. 978. Appellant further admitted that at no time did he see Inmate SG engaging in self harming behavior. Tr. 979.

Given Appellant’s contradictory testimony on this crucial point, and observing his hesitancy and demeanor on the stand, we find his testimony to lack credibility. We find that at the time Appellant demanded that Inmate SG’s cell door be opened he knew that the inmate was not banging his head or otherwise engaged in self harming behavior.

Appellant’s witness, Sergeant GS, and County witnesses Lieutenant AM and Lieutenant DL all testified that if an inmate was violently banging his head or otherwise causing imminent harm or danger to himself it would be appropriate to immediately enter a cell to prevent self-harm. The testimony of Lieutenant AM and Lieutenant DL was based on hypotheticals, while the testimony of Sergeant GS was based on his review of the investigative report and conversations with Appellant and Sergeant CR.

The record evidence, however, does not support Appellant’s claim that such a situation existed prior to his demand that Inmate SG’s cell door be opened. Upon hearing the loud noise coming from SG’s cell Appellant had an ample opportunity to accurately assess the situation by

⁴ To reduce the risk of assault on correctional officers the appropriate protocol is to handcuff an inmate through the food slot prior to entering a cell. Tr. 230.

looking into the cell. When he did so he saw no indication that Inmate SG was attempting to cause harm to himself or that an emergency existed. The opinions expressed in the testimony of Sergeant GS concerning the need to enter Inmate SG's cell are thus not based on the factual circumstances faced by Appellant.

We conclude that Appellant's decision to seek entry into Inmate SG's cell and his subsequent use of force were not reasonable under the circumstances. In the absence of a true emergency, Appellant was instead obligated under DOCR Policy 1300-10 § V(A) to contact the Lieutenant supervising the shift in order to obtain authorization for "the use of physical force to either move or restrain an unruly or uncooperative inmate." Indeed, Appellant admitted that since he did not see Inmate SG injuring himself, he could have waited outside the cell for backup and that he was "wrong for going into the cell." Tr. 979, 1000.

After Corporal KM opened the door to cell B1, Appellant and Officers JB and JG entered. Tr. 836. Sergeant CR remained in the doorway and ordered the officers to handcuff Inmate SG, who was standing in the back of the cell. Tr. 836. Corporal KM testified that the control panel was about 10-15 steps away from cell B1, and that after he opened the cell door he too went to the cell to see what was happening. Tr. 58.

Corporal KM further testified that when he got to cell B1 he saw officers JB and JG handcuff Inmate SG and order him to lay on the ground. Tr. 59, 63-64. Corporal KM said that Inmate SG was not resisting, and that Appellant kicked Inmate SG in the "facial area." Tr. 64. No other witness testified to observing Appellant kicking the inmate. Tr. 184, 200, 845, 954.

Appellant expressly accuses Corporal KM of "committing perjury on the stand." Appellant's Brief, pp. 16-17, 20-21. Appellant suggests that it was not possible for KM to observe what happened in the cell because Appellant and other officers did not see KM by the cell door. Appellant's Brief, p. 20. However, Appellant admitted that his focus was on his dealings with the inmate and not on who was standing in the cell doorway. Tr. 952, 981. The same is true of the other officers. Corporal JB stated that his field of view did not include where Corporal KM said he was standing outside the cell. Tr. 182-83. Sergeant CR also admitted that he was facing the cell and that his focus was on what was happening inside the cell, not behind him. Tr. 846.

We find that Corporal KM did go to the cell to observe events and that Appellant and the other officers were occupied with Inmate SG and did not notice where KM was standing. We conclude that KM had the opportunity and capacity to observe what took place after the other officers entered cell B1.

As an explanation for why Corporal KM might testify untruthfully Appellant adopts Sergeant CR's theory that Corporal KM harbored resentment against Sergeant CR. Appellant's Response, p. 6, n. 4. Contrary to that suggestion in Appellant's Response, there is no evidence in the record that KM had a motivation to be untruthful because he had been disciplined by Sergeant CR. Sergeant CR merely speculated that KM resented him "for making corrections to his units, the way he runs his pod." Tr. 916. Appellant's own explanation for why he disbelieved KM's testimony was entirely unsupported speculation:

I think sometimes people get caught up into things and it's a snowball effect and they like to act like they know more than they do and then one lie begets another that begets another. And all of a sudden it gets too big and you've got to live with it. Tr. 998.

Corporal KM denied ill will or resentment toward Sergeant CR and testified that he had not been disciplined or written up by Sergeant CR. Tr. 88. Other than Sergeant CR's unsupported allegation there is no evidence in the record that KM had a motivation to be untruthful. We find no evidence in the record of any discipline of KM by Sergeant CR, or that there was any reason for KM to harbor resentment against Sergeant CR or Appellant. We find that the allegations of KM's personal bias against Sergeant CR are unsubstantiated and unconvincing, and that there is no basis for any assertion that KM had such bias against Appellant.

KM's decision to report the incident despite instructions to the contrary, and his frank acknowledgement of his regrets about previously failing to report certain unspecified incidents while serving in military detention facilities overseas, add credence to his testimony. Tr. 136-37.⁵ For the reasons discussed above, because his version of events is plausible, and based on his straightforward, consistent, and believable demeanor while testifying, we find Corporal KM to be a credible witness and give weight to his testimony.

With specific regard to KM's testimony that he saw Appellant kick Inmate SG in the "facial area," neither direct nor cross examination elicited additional useful detail as to the circumstances. Thus, while we find that KM's testimony was truthful, we are unable to adequately assess the likelihood that KM may, in the confusion of the moment, have seen a kick to the face. Moreover, because of the failure to refer Inmate SG for medical examination, we have no medical evidence concerning the presence or absence of an injury to SG's face, head, or neck. In any event, we need not reach a conclusion as to whether or not Appellant actually did kick SG to conclude, as we do below, that Appellant improperly used unnecessary and excessive force against Inmate SG.

Sergeant CR testified that after Inmate SG was handcuffed and the other officers had placed him face down on the mattress, he checked SG's head for injuries and found none. Tr. 837, 880. Sergeant CR then walked out of the cell and turned to observe what was happening in the cell. Tr. 837.

Appellant told investigators that as he started to leave the cell Inmate SG "stood up quickly (from a laying-down position while handcuffed in the back) and approached him and the other officers." CX 2, p. 13; Tr. 315, 944-45. Appellant repeatedly testified that Inmate SG "jumped up" from the mattress. Tr. 941-42, 945-46, 948. Similarly, Sergeant CR testified that Inmate SG suddenly rose from a face down position to his knees, "flips himself up," jumped off the mattress, and went towards Appellant. Tr. 837-38, 875, 880. When asked how from a position face down on

⁵ "I served in the U.S. Army. I served overseas, five tours. So I work in different detention facility. And I saw stuff that I never reported. But later on, it come back and I feel guilty about it because I thought I must say something. So I wasn't allowed to be pretty much proud of me later on in my life. Because it can happen to me. It can happen to my son. It can happen to anyone. I mean, we are trusted with this inmate (inaudible) making sure they are safe, they are secure in the facility. And to be honest with you, the other thing I was thinking the inmate can later on go back and report it, so I better come forward and do the right thing." Tr. 136-37.

a mattress with arms handcuffed behind his back SG could quickly rise to his knees without rolling over, jump to his feet, and lunge at Appellant Sergeant CR responded that SG was “young” and “pretty flexible.” Tr. 880.

The Board finds this version of events espoused by Appellant and Sergeant CR implausible. We find more credible the testimony of KM that, because it is so difficult for a person to stand up after being handcuffed behind the back and face down on the floor, Corporals JB and JG helped Inmate SG to stand up. Tr. 65. Corporal JB also testified that Inmate SG “was stood up.” Tr. 162-63. If Inmate SG had gotten to his feet from such an awkward position it could not have been as quickly as Appellant suggests. We conclude that Inmate SG was not in a position to and did not suddenly “jump up” or attempt to lunge at or assault Appellant.

We instead find that after Inmate SG was under control, handcuffed behind his back, and face down on the mattress, officers JB and JG helped him to his feet. Tr. 65. They then had him stand facing the wall of the cell, next to the sink. Tr. 66, 296; CX 20. We credit the testimony of Corporals KM and JB that while Inmate SG was handcuffed and facing the wall he was under control and not resisting. Tr. 69-70, 121-22, 163, 166-67. We conclude that Inmate SG posed no threat to Appellant and the other officers, and find Appellant’s contrary testimony to be implausible and unworthy of credence.

Although Inmate SG was compliant, he was continuing to talk in an agitated manner. Tr. 163, 167. Corporal JB testified that while Sergeant CR was talking to Inmate SG, Appellant came up behind Inmate SG, put his right arm around SG’s neck in a headlock, and moved him face first towards the wall by the sink. Tr. 165-67. Corporal KM gave similar testimony. Tr. 66, 70, 100. Whether it was a headlock or chokehold that Appellant applied to Inmate SG, it caused him to exclaim, “I can’t breathe.” Tr. 66, 256-57, 259, 891, 948, 987.

After Inmate SG claimed that he was choking, Appellant released his grip, and then immediately endeavored to apply the maneuver more effectively. Tr. 67, 259, 987. Appellant admits that the second time he applied the pressure point to Inmate SG he did so “really hard, hard and fast so it would hurt very much.” Tr. 282, 987. Appellant was successful in his second attempt and Inmate SG exclaimed that he was in pain. Tr. 256-58, 841, 882, 889, 948. Appellant testified that the application of the hold and use of the pressure point on Inmate SG, who was handcuffed behind his back and did not represent a threat to Appellant or the other officers, was for “pain compliance.” Tr. 296, 302.

Appellant further acknowledged that after he finished successfully applying the “pain compliance” maneuver the second time, he told Inmate SG to behave. Tr. 999. Although not remembering the exact words, Corporal KM recalled Appellant telling Inmate SG “that’s what you get” for not behaving. Tr. 67. As Appellant and Inmate SG continued to talk Sergeant CR intervened, telling Appellant to be quiet. Tr. 841, 956. Sergeant CR spoke to Inmate SG and then ordered the other officers to place SG down on the mattress inside the cell and remove his handcuffs. The officers then exited the cell and the door was closed. Tr. 168-69, 842-43.

DOCR policy mandates that each correctional officer involved in a use of physical force incident must file a report using form DCA 36 before the end of their shift. CX 4, DOCR Policy

1300-10, § V(D); Tr. 204, 206. It is undisputed that, contrary to DOCR policy, the use of force incident was not reported in writing by Appellant by way of a DCA 36 or otherwise. Tr. 291, 295-97. Although Sergeant CR told Officers KM and JB that they should not file a report, eventually Officers KM and JB reported the use of force to the OIG. CX 1; Tr. 73-74, 79, 86, 137, 171-72. Appellant, however, admitted that it was his decision not to submit a report, and that he was not ordered by Sergeant CR not to file a report. Tr. 295. Appellant's explanation for his failure to report, which he concedes was improper, is that the use of force was minor and did not result in any injury. Tr. 297; Appellant's Brief, p. 12. Appellant admits that his failure to file a report was a violation of DOCR policy. Tr. 291.

The OIG investigated the incident and provided a report to Director RG on June 5, 2017. CX 1; Tr. 574-75. Director RG then ordered an internal investigation of the incident, which was completed by Captain MW. CX 2; Tr. 576.

DOCR policies also mandate that when there is a use of force involving restraints outside of routine procedures, the medical unit must be notified so that the inmate may be evaluated. Tr. 291, 401-02; CX 4, DOCR Policy 1300-10, § VIII(E). However, contrary to DOCR policy, after the use of force Appellant improperly failed to refer Inmate SG to the medical unit so that he could be evaluated for injuries. Tr. 290-91.

APPLICABLE LAW

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:

- (a) oral admonishment;
- (b) written reprimand;
- (c) forfeiture of annual leave or compensatory time;
- (d) within-grade salary reduction;
- (e) suspension;
- (f) demotion; or
- (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.

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

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

(1) the relationship of the misconduct to the employee's assigned duties and responsibilities;

(2) the employee's work record;

(3) the discipline given to other employees in comparable positions in the department for similar behavior;

(4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and

(5) any other relevant factors.

§ 33-3. Types of disciplinary actions.

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

§ 33-5. Causes for disciplinary action. The following, while not all-inclusive, may 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:

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.

4. Integrity of the Reporting System:

Employees shall submit all necessary reports in accordance with established departmental policy and procedures. These reports shall be accurate, complete, and timely and shall be submitted before the end of the employee's tour of duty whenever possible. Unless an operational emergency or injury precludes this, employees will be compensated for working beyond their scheduled shift to complete reports, before leaving the facility.

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 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.

* * *

F. All incidents of use of force shall be reported, documented, and reviewed by the Deputy Warden of Custody and Security or designee.

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.

D. In any situation where physical force is used, the Shift Administrator/Shift Manager/Assistant Unit Manager ensures that the incident is properly documented. Each staff member who is involved in the incident must submit a written report (DCA-36) detailing both why the use of force was necessary and the amount of force that was used to accomplish the assigned task. The officer's written report must be submitted before the end of his/her tour of duty. The Shift Administrator/Shift Manager/Assistant Unit Manager ensures that two (2) photos of all inmates involved in the incidents are taken.

VIII. INSTRUMENTS OF RESTRAINT

E. Any inmate placed in restraints or placed in the restraint chair must be seen by Medical personnel as soon as reasonably possible to determine if the inmate has suffered any injury while he/she was being subdued and to check the application of restraints.

Montgomery County Correctional Facility (MCCF) Post Order No. 5, Duties of All Correctional Officers (2015), provides, in part:

D. Use of Force:

Force shall only be used consistent with Policy and Procedure 1300-10 Use of Force, Chemical Agents, and Restraints and Policy and Procedure 1300-10-01 Firearms. Only the amount of force reasonable and necessary to achieve and maintain control of an inmate(s) shall be used. All Use of Force instances must be properly documented and forwarded to the Deputy Warden of Custody and Security.

ISSUE

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

ANALYSIS AND CONCLUSIONS

Timeliness of Discipline

As previously noted, Appellant incorporates by reference the timeliness argument made in his Motion to Dismiss Charges and/or to Bifurcate Issue of Timeliness, asserting that the charges against him were brought too late. Appellant's Brief, p. 25. On February 27, 2018, the Board issued an order denying Appellant's motion to dismiss. Under Montgomery County Personnel Regulations (MCPR), § 33-2(b)(1), "[a] department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem." The Board concluded that it is well settled that use of the term "should" or "may," rather than "shall" or "must," suggests that the 30-day requirement is not absolute. Moreover, MCPR § 33-2(b)(2), provides that "[a] department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay." Thus, the County Personnel Regulations are readily distinguishable from the mandatory State statute construed by the Court of Appeals in *Western Correctional Institution v. Geiger*, 371 Md. 125 (2002).

Appellant's Motion to Dismiss Charges and/or to Bifurcate Issue of Timeliness also referenced MSPB Case No. 11-02 (2011), where the Board found that the County had not taken prompt discipline when the department director waited over one year after he became aware of the alleged misconduct to issue a statement of charges. In this case the statement of charges was issued 43 days after the investigative report on the incident had been finalized. We decline to hold that an alleged delay of less than two weeks violates the prompt discipline requirements of MCPR, § 33-2(b).

Burden of Proof

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more

convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) (“the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability”).

Appellant's Testimony Lacked Credibility

Appellant's testimony and that of other witnesses differ on certain key points. 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. 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).

As discussed above, it was Appellant's testimony that, after being handcuffed behind his back and placed face down on a mattress on the floor, Inmate SG quickly jumped to his feet and approached Appellant. Tr. 315, 941-42, 945-46, 948; CX 2, p. 13. As noted above, however, no other witnesses besides Appellant and Sergeant CR testified to seeing any such maneuver or threatening behavior from Inmate SG. Rather, they testified that they “stood up” Inmate SG and that he was compliant and under control when Appellant thrust him against the wall and began using physical force against him. Moreover, no matter how “young” or “flexible” Inmate SG may have been, the act of springing to one's feet from a mattress on the floor with one's hands cuffed behind the back seems implausible, if not impossible. Because we find Appellant's description of events on this critical point contradicted by the testimony of disinterested witnesses and implausible, we conclude that Appellant's testimony is not worthy of credence. For that reason, we also view his testimony on other points with skepticism.

Appellant's acknowledgement that he used poor judgment in failing to report or document the use of force incident, and his expression of regret, may express genuine remorse but they certainly cannot excuse his misconduct. His stated explanation for his failure to report was that he considered the incident to have involved a minor, low level use of force which did not result in injury to Inmate SG. Tr. 295-97. Appellant did not reconsider his failure to report until other officers had gone to the OIG and investigations were launched. We thus view Appellant's failure to report as neglect of his reporting obligations and as a conscious effort to deceive DOCR leadership and protect himself from the potential consequences of his actions. Had the other officers similarly lacked the integrity to step forward and subject their actions to review it is quite likely that the April 27 incident would never have become known to the DOCR leadership, *i.e.*, those officials ultimately responsible for the security and safety of inmates and staff at MCCF.

We find that Appellant's behavior strongly suggests that his testimony was unreliable because, with the assistance of Sergeant CR, he sought to conceal a serious use of force incident from appropriate review. We conclude that on certain key points Appellant's testimony was

contradictory, inconsistent, inherently improbable, self-serving, and ultimately not credible. MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010). *See* MSPB Case No. 13-03 (2013) (appellant’s implausible story and delay in relating his version of events seriously undermines his credibility).

Appellant Improperly Entered Inmate SG’s Cell Intending to Use Force

It is undisputed that Inmate SG was unhappy when he realized that being placed on suicide watch meant that he would be stripped naked, put into a suicide gown, and have to sleep on a mattress on the floor of CIU cell B1. Tr. 834. It is also undisputed that Inmate SG soon agreed to cooperate, after which Sergeant CR and the other correctional officers left the cell. Tr. 57, 835.

After the officers left cell B1 they and Appellant heard a loud banging coming from the cell. Lieutenant AM testified that if a correctional officer is concerned that an inmate with mental health issues may be banging his head in a cell and causing himself harm, the officer should first “look at what’s exactly happening.” Tr. 223. While Appellant went to the cell when he heard the banging, he admitted that he did not see Inmate SG banging his head and was unsure how he was making the noise. The noise could have been caused by Inmate SG banging his sandals against the cell bars, as Sergeant CR conceded. Tr. 837, 920, 923.

Appellant nevertheless asserts that he sought to enter cell B1 due to his reasonable belief that it was necessary to protect Inmate SG from himself and to prevent self-harm. Appellant’s Brief, pp. 4-5; Appellant’s Response, p. 5. Citing the testimony of Lieutenants AM and DL, the County concedes that were Inmate SG in actual imminent danger of bodily harm, it may have been appropriate to enter the cell. Tr. 223-24, 343. However, the record evidence does not support Appellant’s position that an emergency situation involving the imminent risk of harm to Inmate SG had been established prior to Appellant demanding that the cell door be opened. No officer looked into the cell and verified that Inmate SG was harming himself.⁶ Appellant’s argument that he reasonably believed that the banging noise from the cell indicated that Inmate SG was harming himself is without basis since, at the time Appellant demanded he be allowed to enter the cell, the banging had ceased. Tr. 268-69, 780, 787, 835, 936-37. The cell door was opened based on Sergeant CR’s reliance on Appellant’s unconfirmed and inaccurate claim that Inmate SG was banging his head.

We discern no valid reason for Appellant’s failure to verify that an emergency existed or comply with the mandate in DOCR Policy 1300-10 § V(A) that he contact the Lieutenant supervising the shift in order to obtain authorization for “the use of physical force to either move or restrain an unruly or uncooperative inmate.” Indeed, Appellant has conceded that he “was wrong for going into the cell in the first place.” Tr. 1000.

⁶ For example, Corporal JB’s testimony in response to a question from Appellant’s attorney was that he “couldn’t see the cell . . . [and] just went on the noise and *what was being said*.” Tr. 194 (emphasis added). To the next question, “prior to entering the cell did you know whether or not the inmate was hurting himself,” he responded “No, I didn’t know.” Tr. 195. This testimony suggests to us that Corporal JB’s impression that Inmate SG might be harming himself was based not just to the noise, but also to the declaration by Appellant that Inmate SG was “banging his head” and Sergeant CR’s order that the cell door be opened.

Although Appellant suggests that his decision to enter the cell to confront Inmate SG was “stupid, poor judgment,” Tr. 1001, our review of the evidence leads us to the conclusion that his behavior was more than a mere lapse in judgment. Appellant was angry at Inmate SG for his loud and disruptive banging on the cell door, his failure to cooperate by allowing himself to be handcuffed, and his disrespectful language towards Appellant. When Appellant shouted that he wanted the “damn door” opened it was not out of concern for Inmate SG’s health and safety. It was because Appellant became emotional and wished to punish Inmate SG for his annoying behavior. We conclude that Appellant’s conduct was thus unprofessional and in violation of MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10 § III(D) (“Force is not authorized as a means of punishment”); DOCR Policy 3000-7 § VII(E)(3) & (10); and MCCF Post Order No. 5(D).

Appellant Used Excessive Force

Once officers entered Inmate SG’s cell the use of force was significantly more likely because of DOCR protocols designed to protect the safety of the officers. Thus, even though Inmate SG was standing in the back of his cell, was not exhibiting any threatening or aggressive behavior, and the banging had ceased, Sergeant CR ordered Appellant, JB, and JG to handcuff Inmate SG and lay him down on the mattress. Tr. 268-69, 836, 936-37.⁷

The record evidence suggests that Inmate SG was under control once the three officers handcuffed him behind his back and placed him face down on the mattress on the floor. Tr. 64-65, 163. Then Corporal JB and Corporal JG assisted Inmate SG to stand up and faced him towards the wall by the sink. Tr. 65, 296. As discussed above, we do not find the testimony of Appellant and Sergeant CR credible when they claim that Inmate SG somehow leapt up and behaved in an aggressive manner. For that reason, we conclude that the subsequent use of force actions by Appellant were unnecessary and unauthorized. Appellant goes to extensive effort to persuade the Board that he did not perform a chokehold but instead put his arm over the shoulder of Inmate SG and used his thumb on a pressure point to inflict pain. The Board need not delve into the distinctions between a chokehold and a headlock or determine which specific maneuver was employed. The record evidence indicates that Inmate SG was not a threat to the safety of the officers or himself when Corporal RS applied the hold to him. SG was still handcuffed behind his back and facing the wall. While he may have been agitated and argumentative, he was not behaving in an aggressive, combative, or even non-compliant manner.

Appellant came up behind Inmate SG and wrapped his right arm around Inmate SG in an attempt to apply a pressure point to him. It is undisputed that Inmate SG pleaded that he could not breathe and said that the hold applied by Corporal RS hurt. Tr. 66, 256-57, 259, 891, 948. Yet Appellant immediately put Inmate SG in the hold for a second time, rotated his thumb into Inmate

⁷ Director RG and the DOCR training manager testified concerning DOCR’s efforts to convey its use of force policies to correctional officers. The Board is nevertheless concerned that DOCR may not have an adequate amount of mandatory training on the use of force and may not have administrative procedures in place to ensure that every front-line correctional officer has received all necessary training. Tr. 526-36. We urge that use of force policies receive greater emphasis in DOCR’s training efforts, including stress on the requirement that inmates receive adequate medical care immediately following a use of force.

SG's jaw "really hard, hard and fast so that it would hurt very much," Tr. 281-82, 987, and only released Inmate SG after asking if he was ready to behave. Tr. 67, 999.

Appellant argues that the reasonableness of the use of force against Inmate SG must be judged based on his perception of the facts known to him at the time. Appellant's Response, p. 5, n. 3. However, Appellant's failure to verify the alleged emergency, as discussed above, led us to conclude that there was no reasonable basis for entry into the cell in the first place. Had Appellant behaved as a reasonable officer there may have been no reason for any use of force. Further, once the cell was opened and it was clear that Inmate SG was not, in fact, seriously hurting himself there was no justification for the use of any physical force, let alone that which was applied.

We conclude that Appellant was motivated by a desire to discipline Inmate SG for being loud and difficult, and perhaps to physically impress upon him that future transgressions were intolerable and would be punished. The actions of Appellant were not justified by the need for him to protect himself from an assault or to protect the inmate or another officer from serious bodily injury. Correctional officers have no right or authority to impose their personal attitudes concerning proper behavior on inmates through physical intimidation and harm.

Even were there a justification for using force against Inmate SG, which we do not agree existed, Corporal RS applied a headlock or similar maneuver and a pressure point after the risk that he claims justified the use of force had passed. A correctional officer may not use retaliatory physical force against an inmate for making noise, complaining, or for cursing at an officer. DOCR policies permit the use of force and restraints only to protect an inmate or others from harm and to maintain order within the facility. The use of force or restraints to punish inmates is prohibited. The use of a headlock or similar hold and application of a pressure point to obtain "pain compliance" did not constitute a good faith effort to maintain or restore discipline, but instead involved the use of force to maliciously and sadistically cause unnecessary pain to an inmate. *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.").

The evidence unequivocally demonstrates that Inmate SG was not assaulting or threatening officers. Tr. 71-72, 121-22, 166. There was thus no need to use force to get Inmate SG under control, restrain, or subdue him. He was not a threat to himself or another. The actions of Appellant amounted to an unjustified and emotionally driven assault against an inmate for the inmate's defiance and misbehavior.

Appellant gratuitously inflicted pain on Inmate SG in order to punish past conduct, deter future conduct, and intimidate. We conclude that 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 is not authorized as a means of punishment); DOCR Policy 3000-7, § VII(E)(3) (use of force); § VII(E)(9)(b) (conduct unbecoming); § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance); and MCCF Post Order No. 5(D) (Use of Force).

Failure to Report the Use of Force

Appellant concedes that his failure to document and report the use of force incident was improper. Tr. 958. Thus, there is no dispute that Appellant is guilty of violating several County regulations and DOCR policies. *See* MCPR § 33-5(c) (violates any established policy or procedure); MCPR § 33-5(e) (fails to perform duties in a competent or acceptable manner); MCPR § 33-5(h) (negligent or careless in performing duties); DOCR Policy Number 1300-10, § III(F) (use of force shall be reported, documented), § V(D) (staff involved in a use of force incident must submit a written report); DOCR Policy Number 3000-7, § VII(E)(4) (integrity of the reporting system), § VII(E)(9) (conduct unbecoming, false report), § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance); MCCF Post Order No. 5(D) (“All Use of Force instances must be properly documented”).

Appellant argues, however, that his failure to report was a mere “technical violation” of the reporting requirements because the use of force was minor and there were no injuries. Appellant’s Brief, p. 12. We find no merit in Appellant’s attempt to downplay his culpability. Appellant offered no reasonable explanation for his utter failure to comply with DOCR’s explicit mandates for reporting use of force. The conclusion is inescapable that Appellant’s failure to report the incident was born of a desire to ensure that he would not be held to account for what transpired in Cell B1. We have concluded that the use of force was both unjustified and excessive. The apparent absence of visible injury does not lessen the seriousness of Appellant’s actions.⁸

Appellant’s failure to submit the report mandated after the use of force demonstrated a lack of candor and fell far short of the integrity expected of a correctional officer charged with protecting the health and safety of inmates in County custody. Appellant applied a painful hold on a handcuffed inmate who cried out in pain and claimed to be unable to breathe. His explanation that he thought the incident was too minor to report rings hollow.⁹ To highlight but one of the charges against Appellant, we find that Appellant’s behavior is unquestionably conduct unbecoming, which includes neglect of duty, misconduct which tends to undermine the good order, efficiency, or discipline of DOCR, or which reflects discredit upon DOCR or its employees, or which is prejudicial to the efficiency and discipline of the DOCR. DOCR Policy 3000-7, § VII(E)(9).

We therefore find that Appellant violated MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10 § III(F) and (V)(D); DOCR Policy 3000-7 § VII(E)(4), (9), and (10); and MCCF Post Order No. 5(D).

Failure to Refer Inmate SG for Medical Evaluation

In addition to Appellant’s failure to report and document the use of force, DOCR policy requires that the medical unit be called after a use of force involving restraints. CX 4; Tr. 291. The

⁸ Because of Appellant’s failure to refer Inmate SG to the medical unit it is not possible to say with certainty whether there were any injuries.

⁹ Based on the reaction of the other officers who felt the need to go to the OIG to report the incident we trust that the use of force like that utilized by Appellant is not generally considered “minor” in County facilities. On the other hand, it would be troubling indeed if such behavior was considered minor and occurred with frequency in DOCR facilities.

policy is undoubtedly designed to determine if an individual subjected to the use of force had any injuries requiring medical attention, including those not evident to a lay person.¹⁰

Appellant argues that Sergeant GS testified that the only time inmates are checked by medical after being placed in restraints is when they are placed in a restraint chair, and that if he were the sergeant on duty during the April 27 incident he probably would not have called the medical unit since Inmate SG had no signs of injury. Tr. 738, 748-50. We disregard the opinion of Sergeant GS since it was based on the testimony of Appellant and Sergeant CR, both of whom we have determined to be unreliable witnesses. Moreover, his opinion is contradicted by the express words of DOCR Policy 1300-10 § VIII(E) (“Any inmate in restraints *or* placed in the restraint chair *must* be seen by Medical personnel as soon as reasonably possible. . .”) (emphasis supplied). As County witness Lieutenant DL quite reasonably testified, when an inmate claims that a use of force hurts, or that he cannot breathe as the result of a hold, it would be appropriate to contact the medical unit. Tr. 363.

We find that Appellant’s failure to refer Inmate SG to the medical unit was, at least in part, due to his desire to avoid reporting that the use of force involving restraints had occurred and that the failure to have Inmate SG checked by medical professionals clearly violated DOCR policy. DOCR need not tolerate its correctional officers disregarding policies that are essential to the health and safety of inmates. Irrespective of his motive, Appellant had a duty to refer the inmate for medical evaluation and indisputably he failed to perform that duty. Accordingly, we find that Appellant violated MCPR § 33-5(c), (e), and (h); DOCR Policy 1300-10 § VIII(E); DOCR Policy 3000-7 § VII(E)(10); and MCCF Post Order No. 5(D).

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 improperly entering Inmate SG’s cell, using unnecessary and excessive force against Inmate SG as punishment, failing to report the use of force incident, and neglecting to refer Inmate SG for medical evaluation. 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 testified that he considered Appellant’s offense serious enough that progressive discipline was not required. Rather, Appellant’s behavior was so egregious that it “shocks the conscience” and warranted the most severe level of discipline. Tr. 592-93; CX 15, p. 8. Director RG also considered the fact that Appellant and Sergeant CR endeavored to cover up the improper use of force by failing to document and report the incident. Tr. 585, 648, 650.

The County personnel regulations vest the DOCR Director with the discretion to eschew progressive discipline and move directly to termination given the serious nature of Appellant’s misbehavior. MCPR § 33-2(c)(2) (“In some cases involving serious misconduct or a serious

¹⁰ Presumably the policy is also intended to provide documentation necessary for the County to defend itself in tort or civil rights lawsuits concerning allegations of injury.

violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee. . .”).

When the state takes individuals into custody it also takes on the responsibility to protect them from harm. Appellant had a fundamental responsibility to protect the health and safety of Inmate SG. He had no authority to impose *ad hoc* punishment or to cover up a serious use of force incident. Those actions violated DOCR policies and had the potential to encourage a dangerous culture of silence within a correctional facility.

Appellant’s failure to immediately document and report the use of force against inmate SG was more than a technical violation of a documentation requirement. It was a conscious and considered attempt to avoid scrutiny by DOCR leadership. Appellant’s behavior strongly suggests that he was aware that review of the use of force incident by command staff would likely result in critical findings and severe discipline. His effort to evade responsibility was an egregious breach of trust.

Moreover, by failing to immediately submit the mandatory reports, Appellant delayed the investigation and the preservation of evidence, such as the cell block video recordings. We reject Appellant’s spoliation argument, Appellant’s Brief, pp. 24-25, and find that the absence of the cell block video recordings was a consequence of Appellant’s own failure to report his own use of force. From his failure to report the serious use of force incident on April 27, 2017, in which he was the central participant, we infer that Appellant intended to avoid any investigation into his behavior.

We consider whether DOCR has consistently applied its disciplinary policies and dismissed other staff who have engaged in similar behavior, a factor listed in MCPR § 33-2(d)(3). Appellant contends that the Director failed to properly take into account comparable DOCR cases before making the decision to dismiss him from County employment. Appellant’s Brief, pp. 21-24. Appellant must show that he and any comparison employees engaged in similar misconduct without differentiating or mitigating circumstances so as to warrant distinguishing the misconduct or the appropriate discipline for it. MSPB Case No. 10-04 (2010), *citing Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009).

Appellant references the cases in CX 13, the charge in AX 1, and those introduced by the appellant in Case No. 18-06. *See* Appellant Exhibits 12 and 13 in Case No. 18-06.¹¹ He suggests that rather than being comparable to the dismissal charges in CX 13, this matter is akin to the suspension charges in AX 1 and AX 12 and 13 (18-06), and therefore the principles of progressive discipline warranted a penalty less than dismissal. Appellant’s Brief, pp. 21-23.

The case provided by Appellant as his only exhibit involved a Correctional Officer III who was suspended for improperly entering a cell and engaging in a verbal and physical confrontation with an inmate. AX 1. Unlike Appellant’s use of force against the helpless Inmate SG, the inmate in AX 1 was not handcuffed behind his back and assaulted the correctional officer, punching him

¹¹ AX 1 in this case appears to be the same December 15, 2017, discipline as in AX 12 in Case No. 18-06.

repeatedly, including in the face. The use of force that followed was determined to be in self-defense, the officer submitted the required reports, and there was no attempt at a cover up. Tr. 607.

Another case involved the five-day suspension of a Correctional Officer III for pushing a teenaged citizen out the front door of a facility, not the use of force against an inmate in custody. AX 13. Again, unlike this matter, the mandatory report was written and submitted and there was no attempt to cover up. We find the facts of those two cases to be readily distinguishable from this matter and not valid comparators regarding discipline. MSPB Case No. 10-04 (2010).

Director RG also testified about a case cited by the appellant in Case No. 18-06 involving a Correctional Sergeant who received a one-day suspension for applying a hold to an inmate. AX 14; Tr. 615-16. In that case, the inmate was combative and there was no allegation that the goal of the use of force was to punish the inmate. In addition, a report was filed. We thus find that case to be distinguishable on its facts from this one and do not treat it as an appropriate basis for comparison.

Moreover, the case is distinguishable for two additional reasons. First, Director RG testified that the suspension in that case was, in retrospect, insufficient:

The discipline in this case should have and could have been higher, but because we under disciplined in this case I do not need to make the same mistake twice and that does not set a precedent. But we did as a Department in this case under discipline the individual, in my view.

Tr. 616. An agency may legitimately contend that a penalty in a previous case was too lenient and that, as Director RG testified, 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.¹² 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).¹³

The record does not reflect that there have been any other cases sufficiently similar to the circumstances in this one. Director RG testified that he was not aware of other DOCR cases involving excessive use of force and a conscious effort to cover up the incident. Tr. 585. He also

¹² We also note that the five-day penalty imposed in the case involving the non-inmate teenager (AX 13) was also the result of a settlement agreement.

¹³ Although the settlement agreement in AX 14 was not made part of the record, such agreements typically specify that they may not be considered precedent in other cases. That may be what Director RG was referencing when he said it “does not set a precedent.” Tr. 616.

testified that he had never encountered a case where a handcuffed inmate was grabbed from behind in a headlock, possibly choked to the point where he exclaimed “I can’t breathe,” and asked after the use of force “are you going to behave now?” Tr. 695.

We are unaware of any comparators who had been charged with the full range misconduct present here. *Reid v. Department of the Navy*, 118 M.S.P.R. 396 (2012) (no disparate penalty where comparison cases involved similar conduct for only one of multiple charges for which appellant was dismissed). No case brought to our attention involved excessive force, use of force as punishment, failure to report, an intentional effort to cover up the excessive use of force, and a failure to obtain a medical evaluation for an inmate subjected to the use of force. There is not enough similarity between the nature of Appellant’s misconduct and that in the other cases to lead a reasonable person to conclude that DOCR has treated similarly situated employees differently.

In MSPB Case No. 07-10 (2007), where we upheld the dismissal of a correctional officer for unnecessarily confronting and using force on an inmate, we noted that:

Rather than ensure Inmate A’s safety, Appellant used unnecessary physical force on the inmate. This is simply not acceptable behavior for a Correctional Officer.

The same is true regarding Appellant’s behavior towards Inmate SG in this case.

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 a vulnerable inmate, failing to report the use of force, or neglecting to have the inmate evaluated by medical personnel.

Appellant engaged in wholly unacceptable cruel and punitive behavior against a vulnerable inmate in the custody of the County and assigned to a mental health and crisis unit. Moreover, Appellant used extremely poor judgment by failing in his responsibility to document his actions and to otherwise display the integrity required of a correctional officer. Appellant’s misconduct justified the imposition of the most severe discipline. Considering the seriousness of the Appellant’s misconduct, that he occupied a position of trust and responsibility as a correctional officer, and even though there were mitigating factors such as his work record and years of service, the penalty of dismissal was well within the bounds of reasonableness. Even when an employee’s work history is exemplary, the inappropriate and shocking use of force as punishment against an individual under his care and custody, and the effort to hide those actions from his superiors, justifies dismissal.

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

ORDER

For the foregoing reasons, the Board **DENIES** Appellant’s appeal of his dismissal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 24, 2019

DENIAL OF EMPLOYMENT

Montgomery County Code, § 33-9(c), permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with § 6-14 of the Montgomery County Personnel Regulations (MCPR), an employee or an applicant may file an appeal directly with the Board alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Section 35-3 of the MCPR specifies that an employee or applicant has ten (10) working days after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position to file an appeal with the Board. The appeal must be filed in writing or by completing the Appeal Form on the Board's website, available at: <http://www.montgomerycountymd.gov/MSPB/AppealForm.html>. The appeal must include a copy of the notification of nonselection or nonpromotion. MCPR § 35-4(d)(3). Copies of such documents may be uploaded with the online Appeal Form.

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

During fiscal year 2019 the Board issued the following decisions on appeals concerning the denial of employment.

CASE NO. 18-05

FINAL DECISION AND ORDER

On September 18, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board), challenging a determination by the Montgomery County Department of Health and Human Services (Department or DHHS) not to promote her from a Grade 23 Program Manager I position to a Grade 25 Program Manager II position on the DHHS Contract Management Team (CMT).¹ On October 23, 2017, the County filed a response (County Response) opposing the appeal on the merits and moving to dismiss it as untimely.² Appellant filed a reply to the County's response on November 6, 2017 (Appellant's Response).³ On November 22, 2017, the Board requested additional information from the County.⁴ On December 20, 2017, the County filed a supplemental response (County Supplemental Response), providing additional documents and withdrawing the motion to dismiss.⁵

¹ Appellant retired from County service effective September 1, 2017.

² The County Response included two attachments. We will identify the attachments as County Exhibits (CX):

CX 1 - Appellant's Appeal Form, September 14, 2017.

CX 2 - CAO Step 2 decision, July 28, 2017.

The Board requests that when the County provides attachments to its submissions and responses those attachments be properly identified and labeled as exhibits.

³ Appellant's Response included the following attachments, which we will identify as Appellant Exhibits (AX):

AX 1 - Email exchange between Appellant and GB of OHR, June 15, 2017

AX 2 - Email from Appellant to BF, June 16, 2017

AX 3 - Email from Appellant to SH, March 30, 2017

AX 4 - Emails from SH, April 21 & 28, 2017

AX 5 - Memorandum from SH re Oral Admonishment, April 12, 2017

AX 6 - Appellant's Notes, June 16, 2017

AX 7 - Email exchange with Director UA, June 26, 2017

AX 8 - Email exchange, Director UA, July 5, 2017

AX 9 - Email exchange, Director UA apology, July 5, 2017

⁴ The Board's request, in part, was as follows:

[T]he Board has held on numerous occasions that unsworn statements in pleadings are not evidence. *See, e.g.,* MSPB Case Nos. 16-06 (2015); 13-12 (2013); 13-10 (2013); 12-11 (2012); and 08-13 (2008). The Board thus requests that the various assertions in the County's response to the appeal be properly supported . . . with appropriate documentation and sworn statements to support the County's position that the selected applicant was better qualified than Appellant. . . [T]he Board would also appreciate knowing if the County's position on the timeliness of the Appeal has changed, including your view on whether Appellant's time to appeal was tolled while she was on leave, and whether the term "working days" in the Montgomery County Personnel Regulations, Section 35, applies to the schedule of the County agency or to that of the employee. *See Mihailovich v. Dep't of Health & Mental Hygiene*, 234 Md. App. 217 (2017).

⁵ The County Supplemental Response included the following unidentified and unlabeled exhibits, which we identify and number as follows:

CX 3 – Affidavit of VB, December 19, 2017

CX 4 – Affidavit of JM, December 15, 2017

CX 5 – Affidavit of SH, December 15, 2017

CX 6 – Affidavit of RB, December 14, 2017

FINDINGS OF FACT

Appellant applied for a promotion to the position of Program Manager II (vacancy announcement IRC24374) with the DHHS Contract Management Team. County Response p. 1; County Supplemental Response, CX 3, ¶s 3-4. The DHHS CMT manages over 700 contracts. County's Supplemental Response, CX 5, ¶ 1.

Vacancy announcement IRC24374 listed the following preferred criteria:

1. Experience in developing and writing solicitations, contracts and amendments with moderate to complex scope requirements and performing budget and price analysis;
2. Experience with coordinating development of contract agreements with multiple departments/interests, leading negotiations and evaluating proposals;
3. Experience managing and prioritizing multiple projects simultaneously;
4. Experience using public sector procurement regulations, policies and procedures;
5. Experience providing customer service to multiple clients;
6. Experience working independently to problem solve for clients;
7. Experience in contracting for a variety of health and human service programs.

Based on the preferred criteria and the specific job duties of the position, eight interview questions were developed:

1. Considering what you understand to be the mission and vision of [DHHS], what do you perceive to be the role and responsibilities of the Contract Management Team? Please describe your experience in developing contract scopes and managing/monitoring contracts in a public or private organization.
2. Please describe your knowledge and/or experience in supporting and working with IT contracts and procurements.
3. Describe what you see as your strengths related to this position. What do you think you bring to this organization that someone else would not?
4. Many of the functions and challenges of this position, require assistance and collaboration from internal DHHS staff, other Departments in the County, as well as community stakeholders/advocates in the County. What strategies will you use to establish and maintain open lines of communication and support among highly engaged and independent thinkers? Please provide specific examples of where you may have done this successfully.
5. This position requires the oversight of daily program operations that involve a multitude of staff collaboration with various programs across multiple service areas. Please describe your specific experiences with daily program oversight including budgetary and personnel considerations.
6. Discuss your experience in utilizing data and specifically outcome measures to report program efficiency and to enhance programmatic efficiency and effectiveness. Please describe your experience in preparing Excel reports for management review.

7. Give an example of how you have reinvented or redefined a job to meet your organization's changing needs. What proactive steps did you take to increase the output of your position?
8. What is your experience/knowledge of the County Procurement Process, rules and regulations in regard to Council Grants, Community Grants and State/Federal Grants?

County Response; CX 2.

Applicants who met the criteria listed in the vacancy announcement were deemed qualified to be interviewed by a three person interview panel. After the interviews, the interview panel prepared a consensus sheet which rated the candidates on three competencies based on responses to the interview questions. For each question, candidates were rated as well below average, below average, average, above average, or well above average. Grievant received the following scores:

Competency #1 - Job Qualifications:

- Question #1 - Average
- Question #2 - Below Average
- Question #3 - Average
- Question #6 - Average
- Question #8 - Average

Competency #2 - Sound Judgment/Problem Solving:

- Question #4 - Average
- Question #7 - Average

Competency #3 - Results Orientation:

- Question #3 - Average
- Question #4 - Average
- Question #5 - Average

County Response; CX 2. The selected candidate was rated as follows:

Competency #1 - Job Qualifications:

- Question #1 - Above Average
- Question #2 - Above Average
- Question #3 - Above Average
- Question #6 - Average
- Question #8 - Average

Competency #2 - Sound Judgment/Problem Solving:

- Question #4 - Above Average
- Question #7 - Average

Competency #3 - Results Orientation:

- Question #3 - Above Average
- Question #4 - Above Average
- Question #5 - Average

It is undisputed that Appellant lacked experience in Information Technology (IT) procurement. Appeal, p. 2 ("I admitted to the question #2 that I had not worked with IT

Contracts.”); Appellant Response, p. 2 (“when it came to Question 2 – ‘to describe your knowledge and/or experience in supporting and working with IT contracts and procurements,’ I was honest and said that even though I have not directly worked with IT contracts, I would have no difficulty in learning to work on such contracts.”). The selected candidate was rated as “Above Average” on her Question 2 interview response concerning IT contract support knowledge and capability, while Appellant was rated “Below Average.” County Response, p. 2; County’s Supplemental Response, p. 2; CX 2. The selected candidate also received higher ratings than Appellant on Questions 1, 3, and 4, equal ratings on Questions 5 - 8, and was determined to be the best qualified candidate overall. CX 2; CX 4; CX 5; CX 6.

Appellant alleges that the selected candidate had less procurement experience than Appellant but was selected because she was more friendly with SH, the CMT Team Lead. Appeal, p. 2; Appellant Response, p. 2. Appellant also suggests that one of the members of the interview panel was biased because she used to work in the same office as the selected candidate. Appellant Response, p. 2. Appellant also alleges that the selected candidate’s seeming lack of interest when the position was posted (she “did not show interest . . . but was at the file cabinet, filing her files”) was evidence that she had been preselected. *Id.*

Appellant further alleged that she was not allowed adequate time to review the interview questions prior to her interview. Appeal, p. 2; Appellant Response, p. 2. Appellant does not, however, provide any factual basis for concluding that other interviewees had more time than Appellant to review questions prior to their interviews.

Appellant also alleges that her responses to the interview questions were not properly recorded by the members of the interview panel. Appeal, p. 2. Appellant’s allegation appears to be based on the fact that the notes of the interview panel members did not contain everything Appellant said in her interview. Appellant Response, p. 2.

Appellant filed a written grievance on April 25, 2017. Appellant had a Step 2 meeting with Assistant County Attorney BF, the CAO’s designee, on June 14, 2017. In a decision dated July 28, 2017, the CAO denied the grievance. Appellant further alleges that while employed with the DHHS CMT she was subjected to harassment, stress and retaliation for filing a grievance. Appeal, p. 2.

As evidence of retaliation Appellant says that the CMT Team Lead ceased saying “good morning” to her when he arrived at work and otherwise ignored her. Appellant Response, p. 2. Appellant received a memorandum dated April 12, 2017, with the subject line “Oral Admonishment, April 12, 2017.” Appellant Response, p. 3; AX 5. Appellant claims that this oral admonishment was issued in retaliation for her filing a grievance.

The Oral Admonishment purported to discipline Appellant for involving herself in attendance and dress code issues for other employees; challenging the Team Lead’s proposed time management plan; raising her voice at the Team Lead while complaining about another employee she believed was being “vindictive” towards her; advising the Team Lead in writing that she was disappointed in the way he handled the unit and that the standard of the unit had “come down”

under his supervision; and, for creating a hostile work environment for the other staff. AX 5. The April 12 memorandum (AX 5) stated:

1. On a number of occasions, I have directed you to let go of your concerns regarding CMT staff time and the way some staff dress since there is no dress code policy for CMT and since you are not a supervisor, staff schedules are not your concern. You have failed to take my direction which results in your insubordination.
2. You have told me both verbally and in your email dated March 30, 2017, that CMT standards have “come down” and that you are disappointed in the way things are handled by me in CMT. While all staff are free to hold their own opinions, the Team Manager is empowered to make decisions about how work is organized and accomplished, and CMT staff are expected to follow those instructions. Not following direction and undermining the functioning of CMT is counterproductive and will reflect on your performance.
3. Numerous CMT staff have brought to my attention and the attention of the Department management and HR that you have created a “hostile” work environment based on your actions and behaviors. This is not acceptable and will not be tolerated.

Related to management’s apparent concerns over interpersonal conflicts between Appellant and other staff, Appellant’s office was temporarily moved “to alleviate tensions.” AX 7. Appellant, however, disputes the existence of interpersonal issues with other staff and suggests that “there was [*sic*] no tensions, and I in no way showed disrupted behavior but I was penalized for no reason, other than for filing the grievance.” Appellant Response, p. 4.

Appellant admits that she was concerned about the way other employees dressed, and that she took those concerns to SH. Appellant Response, p. 1. According to Appellant, in response to her complaints about the unprofessional attire of other employees SH said “how do you know that I and the ladies do not like you wearing Indian clothes?” *Id.* Appellant viewed the remark as discriminatory and an indication that SH “felt my Indian clothes would not suitable [*sic*] for the position.” *Id.* Appellant appears to infer discriminatory intent from SH’s remark to Appellant that “you seem to go high and low.” Appellant Response, p. 3; AX 3. Appellant viewed the remark as suggesting that she has Bipolar disorder, which she denies. AX 3 (“I connect those words with someone who has BIPOLAR disease, which I know surely has not been diagnosed by my medical doctor.”). The CAO stated in the grievance decision that the Director of DHHS had referred issues between Appellant and other individuals in the office to EEO.

Appellant asserts that the stress of her employment situation caused her to retire: “Due to the harassment, stress and retaliation that I was subjected to, I was forced to retire on September 1, 2017.” Appeal, p. 2. The alleged harassment and retaliation included the temporary office move in late June 2017, just prior to her two-month vacation. Appellant Response, p. 4. Appellant acknowledges that she was told that there would be further discussion of the matter when she returned in mid-September. *Id.*

Appellant also asserts that she did not receive support from DHHS when she “was attempting to get a waiver from the Ethics Commission.” Appellant states that her “husband has assisted living homes. . . [and] I was attempting to assist my husband in the running of the homes.” Appellant Response, pp. 4-5. The waiver request was dropped when Appellant retired. *Id.*

Finally, Appellant submits that she was offended by the DHHS Director’s response to a complimentary email concerning Appellant. Although the Director responded to the sender by saying “Glad [Appellant] provided good service,” she also inadvertently replied all on an email with the comment “Feels like she asked to do this. Sigh.” Appellant Response, p. 5; AX 8. Appellant acknowledges that the Director apologized for her response, but nevertheless felt slighted. Appellant Response, p. 5; AX 9.

ISSUES

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action, which provides, in pertinent part:

(c) *Appeals by applicants.* Any applicant for employment or promotion to a merit system position may appeal decisions of the chief administrative officer with respect to their application for appointment or promotion. . . . Appeals alleging that the decisions of the chief administrative officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the merit system protection board. . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which provides, in pertinent part:

§ 6-5. Competitive rating process.

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

. . .

§ 6-14. Appeals by applicants.

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual’s application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which provides, in pertinent part:

§ 7-1. Use of eligible list.

If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

(a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended June 30, 2015), Section 27, Promotion, which provides in applicable part:

§ 27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

(c) An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.

Montgomery County Personnel Regulations (MCPR), 2001, Section 28, Resignation, which provides, in applicable part:

§ 28-4. Appeal of resignation. An employee may appeal, under Section 34 or 35 of these Regulations, a resignation that the employee believes was involuntary or coerced. If the MSPB finds that an employee submitted a resignation under circumstances that caused the resignation to be involuntary, the MSPB will treat the resignation as a removal.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances, which states in pertinent part:

§ 34-7. Investigation of complaints of harassment or retaliation for filing a grievance.

(a) An employee may file a complaint with the OHR Director if the employee was harassed or retaliated against by a supervisor or coworker for filing a grievance. The employee must include a written description of the harassment or retaliation.

(b) The OHR Director must investigate the complaint and give the employee a written report of findings within 30 calendar days after the OHR Director receives the complaint.

(c) The employee may file an appeal with the MSPB if the OHR Director denies the complaint. The employee must file the appeal within 10 working days after the employee receives the OHR Director's decision.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

(c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

...

(d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

ANALYSIS AND CONCLUSIONS

This is an appeal of a determination by the County DHHS not to promote Appellant to a Grade 25 Program Manager II position. In addition to discussing the reasons she believes the County erred by not selecting her for the promotion, Appellant suggests that she has been the victim of retaliation, harassment, discrimination, and that she was forced into retirement by the stress of the alleged retaliation and harassment. Although the Appeal is expressly limited to the nonselection, we will also address the other issues.

The Board's Jurisdiction is Limited to the Authority Granted by Statute

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over Appeals That Allege Discrimination

The County Code provides that an applicant may challenge the Chief Administrative Officer's decision regarding an application for employment or promotion. However, the Code explicitly requires that appeals alleging discrimination prohibited by Chapter 27 of the Montgomery County Code (MCC) must be filed with the Human Rights Commission. MCC § 33-9(c). Appellant alleges that she may have been denied the promotion and suffered workplace harassment based on her ancestry, national origin, and/or perceived disability. Appellant's claims are outside of the Board's jurisdiction as the Board lacks the authority to adjudicate such claims of discrimination. *See* MCC § 27-19(a), (c) and (g); MCPR § 35-2(d).⁶ MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014).

Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance "employment matters for which another forum is available to provide relief." MCC § 33-12(b). Appellant unquestionably had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 93-25 (1993) (interpreting § 33-12(b)'s "another forum available" limitation as applying to discrimination claims). *See also* MCPR § 27-4(c) ("An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.")⁷ Appellant has not put forth any evidence that she filed a complaint with the Office of Human Rights.

The Board thus lacks jurisdiction over Appellant's discrimination claims.

The Board Lacks Jurisdiction Over Appeals Where There Is A Failure to Exhaust Administrative Remedies

Appellant claims that she was subjected to harassment and retaliation for filing a grievance with the CAO.⁸ Under MCPR § 34-7, complaints of harassment or retaliation for filing a grievance must first be filed with and investigated by the Office of Human Resources (OHR) Director. There is no suggestion in the Appeal or elsewhere in the record that Appellant made any attempt to raise her complaints of harassment or retaliation with the OHR Director or to otherwise follow the dictates of § 34-7 prior to raising these claims in her appeal to the Board. Thus, the Board lacks jurisdiction over this claim because Appellant failed to exhaust her administrative remedies.

⁶ MCC Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

⁷ The County avers that "Out of an abundance of caution, and despite the Department's belief there is no merit to Appellant's claims, [Appellant's] allegations have been referred to the EEO Office by the HHS Director for investigation under MCPR Section 5." County Response, p. 2, n. 2. This was also mentioned in the CAO's Step 2 decision.

⁸ Other than making bald allegations that the admonishment and the office move were taken in retaliation for filing a grievance, Appellant has not offered any proof of a causal connection between her grievance and the adverse treatment.

Appellant Has Not Demonstrated a Constructive Discharge

An employee who leaves County government employment as a direct result of harassment or other improper actions may file a grievance for involuntary or constructive discharge. MCC § 33-12(b) (“A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the event of such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal.”). The Board’s regulations also provide that an employee may file a direct appeal with the Board over discipline, including an involuntary resignation. MCPR § 35-2(a).

Appellant describes a working environment in which she felt her opinions on workplace decorum and efficiency were not appreciated, and her job skills and abilities insufficiently recognized. She was also unhappy that her office was temporarily relocated “to alleviate tensions” with her coworkers. However, Appellant’s allegations, even taken as true, do not support a claim of involuntary resignation or constructive discharge. The circumstances described by Appellant are not so egregious as to suggest that her retirement was involuntary, *i.e.*, that the agency deliberately made her working conditions intolerable with the intent of forcing her to resign. *See Baker v. U.S. Postal Service*, 71 MSPR 680, 695 (1996); *Zygmunt v. Department of Health & Human Services*, 61 MSPR 379, 383 (1994); *Swift v. U.S. Postal Service*, 61 MSPR 29, 32 (1994) (“the ultimate question . . . is whether working conditions were so difficult that a reasonable person in the employee’s position would have felt compelled to resign.”). While Appellant may have disliked a workplace where her opinions were sometimes disregarded, and her job performance insufficiently recognized, “[m]ere allegations of an unpleasant work environment do not rise to the level of forcing an employee to resign.” *Colodney v. MSPB*, 244 Fed. App’x. 366, 369, 2007 WL 2045704 (Fed. Cir. 2007). *See Garcia v. Dep’t of Homeland Security*, 437 F.3d 1322, 1329 (Fed. Cir. 2006) (Forced resignation is “a demanding legal standard,” and resignations are presumed voluntary).

As the court in *Goldsmith v. Mayor & City Council of Baltimore*, 987 F.2d 1064, 1072 (4th Cir. 1993) recognized:

[T]he law does not permit an employee’s subjective perceptions to govern a claim of constructive discharge. Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress. (citations and internal quotation marks omitted)

MCPR § 28-4 states that “If the MSPB finds that an employee submitted a resignation under circumstances that caused the resignation to be involuntary, the MSPB will treat the resignation as a removal.” The alleged personal slights and criticism, the denial of a promotion, and the temporary office relocation, however unpleasant or stressful they may have been, did not compel Appellant’s retirement. Thus, we do not find that Appellant retired under circumstances suggesting that her retirement was forced and involuntary.

Appellant Has Failed to Show That Her Nonselection Was Improper

We now address the crux of this Appeal, the nonselection of Appellant for a promotion. To prevail in a nonselection case, an appellant must demonstrate that the decision was arbitrary, capricious or illegal. MCC § 33-9(c); MCPR §34-9(d)(2). The County argues that Appellant failed to meet her substantial burden of proof.

The County has offered legitimate reasons for selecting an applicant other than Appellant for the CMT Program Manager II position. Selection of a higher rated candidate is consistent with the County personnel regulations. MCPR § 7-1. In a non-selection case, the Board will not substitute its judgment for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee. MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006).

The selection of a candidate for the CMT Program Manager II position was based on applicant ratings assigned by the interview panel based on the job related questions asked of all applicants. Affidavits were submitted by all the members of the interview panel declaring that the selected candidate was the best qualified. It is undisputed that Appellant was forced to concede during her interview that she lacked *any* experience in the important IT contract area. She was therefore appropriately rated as “Below Average” in IT contract support, knowledge, and capability, while the selected candidate was rated “Above Average.” Appellant was also rated below the selected candidate in several other categories. We thus find no merit in Appellant’s claim that she was improperly denied promotion to a position for which she was the best qualified.

Beyond mere speculation, Appellant has not provided any evidence to support her belief that she was denied the promotion for reasons other than those related to her relative qualifications. For example, there is no evidence in the record that other interviewees had more time than Appellant to review interview questions. Indeed, we do not discern any evidence in the record to establish arbitrary and capricious conduct on the part of the County.

Accordingly, we find that Appellant has not met her heavy burden of proving that the County’s decision was arbitrary, capricious or based on other non-merit factors. MCC, § 33-9(c); MCPR, §34-9(d)(2).

Oral Admonishment

Although not raised by either party, the Board is concerned over the April 12, 2017 memorandum purporting to be an oral admonishment. Specifically, the Board is troubled by the manner in which the “oral admonishment” was confirmed in writing to the Appellant and placed in her supervisor’s file. By definition, an “oral admonishment” is not to be provided in writing to an employee. It is “a spoken warning or indication of disapproval.” MCPR § 33-3(a)(2). One reason this lowest level of discipline is not grievable is because there is to be no formal documentation of the action. *See* MSPB Case No. 83-3 (1983); MCPR § 33-9(a)(1). We therefore conclude that the memorandum of April 12, 2017, should be rescinded and removed from Appellant’s personnel files.

ORDER

To the extent Appellant's Appeal is based on alleged human rights violations, it is **DISMISSED** based on a lack of jurisdiction. To the extent that Appellant is raising issues of retaliation or harassment, her Appeal must be **DISMISSED** for failure to exhaust her administrative remedies. Furthermore, to the extent that Appellant is claiming that her retirement was a constructive discharge, her Appeal must be **DENIED**. Finally, because Appellant has failed to demonstrate that the County's decision on her application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, the appeal of her nonselection for the position of Program Manager II with the DHHS CMT (IRC24374), is hereby **DENIED**. Finally, the memorandum of April 12, 2017, shall be **RESCINDED** and removed from Appellant's personnel files.

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 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
October 25, 2018

Appellant's petition for judicial review of this decision was dismissed by the Circuit Court for Montgomery County on April 5, 2019 (Civil Action No. 458647-V).

CASE NO. 18-28

FINAL DECISION AND ORDER

On May 7, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a May 4, 2018 denial of employment in a mail clerk position by the Department of General Services (DGS).¹ On May 21, 2018, Appellant submitted the notification of nonselection he was appealing. Appellant Exhibit 1 (AX 1). The County submitted a response to the appeal on June 25, 2018 (County Response) with five exhibits.² Appellant did not exercise his right to reply to the County Response.

¹ Appellant submitted his online appeal on Sunday, May 6, 2018, at 6:30 a.m., a day and time when the Board's office is not open. Accordingly, the appeal is considered to have been officially received by Board the next business day.

² The County Exhibits (CX) were as follows:

- CX 1 - Affidavit of EP, Human Resources Specialist III, Office of Human Resources, June 22, 2018;
- CX 2 - Affidavit of AD, Chief, Division of Central Services, DGS, June 22, 2018;
- CX 3 - Vacancy Details, iRecruitment Position Vacancy IRC 12580, Mail Clerk 017102, October 10, 2013;
- CX 4 - DGS Request to Abolish/Create Mail Clerk, Grade 11 (017102), April 18, 2018;
- CX 5 - Appellant's letter of resignation, October 19, 2008.

FINDINGS OF FACT

In October 2013, Appellant submitted an application for a Grade 11, Mail Clerk position (017102) with DGS in response to job posting IRC 12580. CX 1, ¶s 3 & 4; CX 3. The County received 392 applications for position 017102, which had been vacant since July 13, 2013. CX 1, ¶ 3; CX 2, ¶s 4 & 6.

Rather than being supported by the County General Fund, the Mail Clerk position was funded by an “Internal Service Fund.” CX 2, ¶ 5. Through the Internal Service Fund, other County departments reimburse DGS Central Duplicating for various services, such as copying, printing, mail delivery and pick up, etc. County Response, p. 2; CX 2, ¶ 5. Because DGS was unable to generate sufficient revenue to fund Mail Clerk position 017102 it could not be filled. CX 2, ¶s 6 & 7. As a result, interviews were not conducted, and the position was never filled. CX 1, ¶ 5; CX 2, ¶s 6 & 7. On April 18, 2018, DGS requested permission to abolish the Mail Clerk position and recreate position 017102 with a lower graded Printer Apprentice classification. CX 4. On April 27, 2018, the Office of Human Resources (OHR) granted a DGS request to abolish the vacant Mail Clerk position and create a lower graded Printer Apprentice position in its place. *Id.*

Unfortunately, when OHR processed the abolish and create transaction in its Oracle system, it was done in a way that triggered an automatic email that erroneously notified all the candidates from the 2013 recruitment (IRC12580) that the position had been filled. CX 1, ¶ 7; CX 2, ¶ 9. That is why, on May 4, 2018, Appellant received an email from the County’s electronic Human Resources recruitment application. AX 1. The entire text of the email was: “The status of your job application for **IRC12580** is changed to **Position has been Filled.**” (emphasis in original). However, the position had not, in fact, been filled. CX 1, ¶ 5; CX 2, ¶ 7; CX 3.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which provides, in pertinent part:

§ 6-14. Appeals by applicants.

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

ISSUE

Was the County's decision to deny Appellant employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS

Appellant has the burden of proving that the County's action with regard to his application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). Despite being given the opportunity, Appellant did not dispute the County's assertions or, indeed, provide any reply to the County's submission.

The County presented evidence demonstrating that the Mail Clerk position in question became vacant July 13, 2013, was advertised in October 2013 (IRC12580), but that the recruitment was abandoned due to insufficient funding. Although Appellant received an erroneous notice stating that the position had been filled, that was not the case. The Mail Clerk position was never filled and was abolished prior to the erroneous notice. This is fatal to the appeal as the Board lacks jurisdiction to consider claims of nonselection where, in fact, no selection has been made. MSPB Case No. 14-14 (2014); MSPB Case No. 14-41 (2014).

Based on the record evidence, the Board concludes that Appellant has failed to meet his burden of showing that the County's decision to not fill the vacant Mail Clerk position and thereby

deny him employment was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors. Moreover, the Board simply lacks jurisdiction because there was no selection for the Mail Clerk position Appellant applied for in 2013.³

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Mail Clerk.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
August 20, 2018

CASE NO. 19-03

FINAL DECISION AND ORDER

On July 30, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a July 28, 2018, denial of employment. The appeal was based on a notice he received advising him that he was not selected for a Traffic Management Technician I, Grade 15 position (IRC29184) because he “Did not meet screening criteria.”¹ The County submitted a response to the appeal on August 17, 2018 (County Response) with four exhibits.² Appellant filed a reply to the County Response on September 4, 2018 (Appellant Response).

FINDINGS OF FACT

In July 2018, Appellant submitted an application for a Traffic Management Technician I, Grade 15 position with DOT in response to job posting IRC 29184. CX 1, ¶5; CX 2. The County received 33 applications for the position. CX 1, ¶ 3. The vacancy announcement stated that the

³ Appellant also alleges that in 2008 he was constructively discharged in retaliation for the filing of discrimination complaints. The Board has previously found on multiple occasions that it lacks jurisdiction over Appellant's discrimination claims. MSPB Case No. 16-01 (2015); MSPB Case No. 16-02 (2015); MSPB Case No. 15-31 (2015); MSPB Case No. 15-15 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). *See* Montgomery County Code, § 33-9(c); MCPR § 35-2(d).

¹Appellant submitted his online appeal on Saturday, July 28, 2018, a day and time when the Board's office is not open. Accordingly, the appeal is considered to have been officially received by Board the next business day.

² The County Exhibits (CX) are as follows:

CX 1 - Affidavit of EP, Human Resources Specialist III, Office of Human Resources, August 6, 2018;

CX 2 - Vacancy Details, iRecruitment Position Vacancy IRC 29184, Traffic Management Technician 003982, created November 24, 2017;

CX 3 - Resume submitted by Appellant;

CX 4 - Exercise Stats for IRC 29184 - DOT - Transportation Management - Traffic Management Technician I, submitted by Appellant, 07/24/18 - 07/25/18

minimum qualifications for the Traffic Management Technician I position included one year of experience in traffic engineering or traffic management:

One (1) year of experience in traffic engineering or traffic management that has required the application of the principles of traffic engineering and mathematics to the solution of traffic management problems involving traffic control, capacity, vehicular speed, and related matters.

CX 2, p. 4. Appellant alleges that his experience met this minimum qualification based on:

more than SEVEN (7) years of experience in Traffic Management Centers. Six and a half with the Pennsylvania Turnpike Commission and one-half of a year of experience within the Maryland State Highway Administration's Traffic Management Centers, as a contractor for Procopio and Associates.

Appeal, p. 2.

Appellant states that his seven years of experience in traffic management includes more than six years as a radio operator at the Pennsylvania Turnpike Commission's Traffic Operations Center. Appellant's Response, p. 2. Appellant's resume provides a detailed listing of Appellant's job duties as a Radio Operator 1 with the Pennsylvania Turnpike Commission. CX 3, pp. 2-3. The job duties of a Radio Operator 1 listed by Appellant in his resume include:

- Manage, monitor, document, and provide resource assistance to all incidents occurring on the PA Turnpike.
- Receives emergency telephone and radio calls, dispatching, coordinating and recording public safety communications involving life-threatening situations and police activities across the 540-Mile PA Turnpike system.
- Responsible for operations of the Communications System and possession of a thorough knowledge of all PTC highway operations, encompassing Pennsylvania State Police, maintenance, fare collection and fire/ambulance services.
- Responsible for following standard operating procedures set forth in the rules and regulations of the Federal Communications Commission (FCC).
- Receive requests from customers and Turnpike employees for assistance, utilize the Commission's Graphical Information System (GIS) to determine proper response, and process, document, and update all communication's activities through the use of the Commission's Computer Aided Dispatch System.
- Notify key personnel of significant and unusual incidents that adversely affects the operation of the roadway in accordance with the Commission's Emergency Procedures.
- Assists customers with traveler information and customer care information via numerous telephone lines, and provide helpful information in utilizing the Commission's Customer Care-online EZ Pass payment system.

- Operates and processes emergency alarms received via the computerized Motorist-Aid Call Box System.
- Dispatch Police and ensure their safety when patrolling the Turnpike, and provide investigatory assistance when requested by the State Police Patrol or Communications Corporal.
- Collects, summarizes and broadcasts roadway and weather conditions and disseminates electronic and verbal weather forecasts received from various forecasting services.
- Monitors and reports unusual activities that develop backlogs of traffic to include disabled vehicles, accidents, and construction.
- Coordinates Fare-Collection hourly radio safety checks of Toll Collectors at single-staffed interchanges and responsible for necessary notifications.

EP, a Human Resources Specialist III with the Office of Human Resources (OHR), reviewed the applications and concluded that ten of the 33 applicants met the minimum qualifications for the position. CX 1, ¶8. She concluded that Appellant’s resume indicates that he only had three months of experience in the field of traffic engineering or management, as a Highway Operations Technician with Procopio & Associates. CX 3, p. 1; CX 1, ¶7. Thus, EP determined that Appellant was one of the 23 applicants who did not meet the minimum qualifications for the Traffic Management Technician I position. CX 1, ¶s 5 and 6.

Appellant also alleges that he is the victim of harassment by County officials and that since 2009 he has been blacklisted from employment in retaliation for filing claims of discrimination based on his religion. Appeal, p. 2.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors, may be filed directly with the Merit System Protection Board. . . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, and June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which provides, in pertinent part:

§ 6-14. Appeals by applicants.

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the

CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.

ISSUE

Was the County's decision to deny Appellant employment arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS

Appellant has the burden of proving that the County's action with regard to his application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015).

The County presented evidence demonstrating that the minimum qualifications for the Traffic Management Technician I position included at least one year of experience in traffic engineering or traffic management that involved applying the principles of traffic engineering and mathematics to the solution of traffic management problems involving traffic control, capacity, vehicular speed, and related matters. Appellant contends that his experience with the Pennsylvania Turnpike Commission and the Maryland State Highway Administration meets this requirement. However, he had much less than a year with a State Highway Administration contractor, and the job duties he described for his job as radio operator in the Pennsylvania customer assistance center do not encompass traffic engineering or management functions. Appellant has failed to demonstrate how his call center customer assistance experience is comparable to traffic engineering or traffic management functions that require "the application of the principles of traffic engineering and mathematics to the solution of traffic management problems involving traffic control, capacity, vehicular speed, and related matters." CX 2, p.4; CX 3, pp. 2-3. Accordingly, we conclude that Appellant has failed to show that the County's determination that he lacked the

requisite experience for the position was arbitrary or capricious.³

Finally, as to Appellant's claim that since 2009 he has been blacklisted and harassed by the County based on his religion, the Board has previously found on multiple occasions that it lacks jurisdiction over Appellant's discrimination claims. *See, e.g.*, MSPB Case No. 18-28 (2018); MSPB Case No. 16-01 (2015); MSPB Case No. 16-02 (2015); MSPB Case No. 15-31 (2015); MSPB Case No. 15-15 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). *See* Montgomery County Code, § 33-9(c); MCPR § 35-2(d).

Based on the record evidence, it appears that rejection of the application based on lack of qualifications was legitimate and that there is no indication that action was based on any impermissible non-merit factor. The Board therefore concludes that Appellant has failed to meet his burden of showing that the County's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors.

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Traffic Management Technician I.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
October 8, 2018

³ Appellant attempted to provide additional detail concerning his experience as part of his response in this appeal, but some of that information was not part of his application. The Board has held in previous cases that the County may rely on the information provided with the application itself, and that the Board will not reverse the County's decision based on subsequently provided information. MSPB Case No. 16-15 (2016); MSPB Case Nos. 15-14 and 15-23 (2015). In any event, we see nothing in the subsequently provided information that would justify altering our finding.

GRIEVANCES

In accordance with § 34-10(a) and § 33-9(b) of the Montgomery County Personnel Regulations (MCPR), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. The appeal must be filed in writing or by completing the [Appeal Form](#) on the Board's website. The appeal must include a copy of the CAO's decision. MCPR § 35-4(d)(2).

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee with a copy of all information provided to the Board. After receipt of the County's response, the employee is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

The Montgomery County Code, § 33-56, also permits an appeal to the MSPB from a decision of the CAO regarding a retirement issue. Appeals of retirement grievances must be filed within fifteen (15) calendar days.

During fiscal year 2019 the Board issued the following decisions in retirement grievance appeals.

CASE NO. 18-09

DECISION GRANTING MOTIONS FOR RECONSIDERATION AND REVISING FINAL DECISION AND ORDER

On January 31, 2019, the Merit System Protection Board (MSPB or Board) issued a Final Decision and Order in the above-captioned matter. On February 5, 2019, Montgomery County filed a memorandum asking that the Board revise the decision because of an erroneous reference to a County regulation, COMCOR 33.86.01. The next day, the Board sent a letter to Appellant's attorney advising her that the Board would treat the County memorandum as a motion for reconsideration and, citing Montgomery County Personnel Regulation (MCPR), § 35-17(b), that any response to the County's motion "must be filed within 5 calendar days from receipt of the request."¹ On February 8, 2019, by electronic mail, Appellant filed a response to the County's memorandum in which he joined the County request to revise the January 31 decision and further requested that the Board reconsider its decision on the merits.

As the Board agrees that the reference to COMCOR 33.86.01 was in error, the Board grants the County's motion for reconsideration, rescinds the January 31, 2019, decision, and hereby issues this revised Final Decision and Order. Although we also grant Appellant's request for reconsideration, as explained below we hold that the erroneous analysis of COMCOR 33.86.01 was immaterial and does not alter our conclusions.

BACKGROUND

Appellant is a former Montgomery County firefighter who, effective July 5, 2001, retired with a non-service connected disability under Montgomery County Code (MCC), § 33-43. On October 16, 2017, Appellant filed this appeal to the Merit System Protection Board (MSPB or Board) challenging the interpretation of the County Chief Administrative Officer's (CAO) decision concerning application of an earnings offset to his disability pension based on his ability to work.² The County filed a response to the appeal (County Response) and Appellant, through his attorneys, filed final comments (Appellant's Reply). The appeal was considered and decided by the Board.

FINDINGS OF FACT

The parties do not dispute the material facts underlying the appeal. Appellant began his employment with the County Department of Fire and Rescue Service (DFRS) on August 27, 1990. County Response at 1. Upon beginning County employment, Appellant became a participant in the Montgomery County Employees' Retirement System (ERS). *Id.* As a firefighter, Appellant participated in the ERS as a Group G member. County Response at 1; County Exhibit A; Appellant's Reply at 6.

¹ The Board has ten (10) days following the receipt of a request for reconsideration to issue a decision. If the Board fails to act within ten days from receipt of the request, the request is deemed denied. Montgomery County Code, § 2A-10(f); MCPR § 35-17(c).

² The appeal was submitted online on Friday, October 13, 2017, a day that the Merit System Protection Board's offices are closed. Accordingly, the appeal was officially received by the Board on October 16, 2017, the Board's next business day. MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015). *See* Montgomery County Code, § 1-301(c)(3).

Appellant was awarded a non-service connected disability retirement under MCC § 33-43, effective July 5, 2001. Appellant had ten years and ten months of credited service. County Response at 1. Appellant was a Firefighter/Rescuer III with the County DFRS at the time of his retirement. Appellant's Reply at 1. Had Appellant not retired on disability in 2001 and instead continued to be continuously employed as a firefighter, he would have reached his normal retirement date with over 20 years of credited service in late 2010. Appellant's Reply at 1.

On August 5, 2016, the County requested documentation of Appellant's 2015 non-pension income. Appellant provided the requested information and, on February 3, 2017, the County notified Appellant that it would be offsetting his disability payments in their entirety starting on March 1, 2017, citing MCC § 33-43(j). Appellant's Reply at 7. In an apparent response to Appellant's objections, on May 19, 2017, RG, the County Retirement Benefits Manager, sent Appellant a letter stating:

For public safety employees who retired on disability retirement prior to their NRD [Normal Retirement Date], the NRD date used in the annual disability income verification is the first of the month after age 55. As required by Montgomery County Code, we will continue to request an annual income verification from you until July 1, 2023 when you turn age 55.

Appellant's Exhibit A.³

Pursuant to MCC § 33-56(a), Appellant requested that the CAO provide a written interpretation of MCC § 33-43(j). Specifically, he asked whether it was proper for his disability pension to be offset for other income since the language of § 33-43(j) appeared to only permit offsets for members who retired with total incapacity. Appellant alleged that he retired with a partial, not total, incapacity. On September 29, 2017, the CAO issued a letter stating that the current MCC "does not apply" to Appellant because he retired in 2001. County Exhibit A.⁴ Furthermore, the CAO concluded that Appellant's years of disability retirement could not be treated as credited service towards his "normal retirement date," the point at which pension offsets normally cease. In reaching that conclusion, the CAO referenced with approval the May 19, 2017,

³ Appellant's Exhibit A, the May 19, 2017, letter from the County Retirement Benefits Manager, RG, was Appellant's only exhibit.

⁴ The County submitted the following nine County Exhibits (CX):

CX A - Letter from CAO, September 29, 2017.

CX B - Changes to County Code 33-43, a two-part document consisting of: (I) an annotated version of § 33-43 created by the Office of the County Attorney and purporting to provide a history of amendments to that provision; and (II) the current published text of § 33-43.

CX C - Bill No. 45-10, Chapter 13, Laws of Montgomery County 2011.

CX D - Affidavit of RG, November 14, 2017.

CX E - ERS Benefit Formula Changes, an undated list of changes to the Employee Retirement System's various benefit formulae prepared by the County Office of Employee Retirement Plans.

CX F - the current published text of County Code § 33-38, with endnotes.

CX G - Bill No. 5-07, Chapter 3, Laws of Montgomery County 2007.

CX H - the current published text of County Code § 33-41, with endnotes.

CX I - the current published text of County Code § 33-47, with endnotes.

letter of the County Retirement Benefits Manager. *Id.*; Appellant’s Appeal at p. 2.⁵ Appellant then filed this appeal.

APPLICABLE LAW

Montgomery County Charter

§ 1-201. Effect of changes in the law.

(a) *Changes.* Unless the law expressly provides otherwise, when the County changes a law, the law does not affect:

- (1) any rights vested in a person before the change became effective;
- (2) any contract rights that existed before the change became effective; and
- (3) any legal actions for a violation of the law that occurred before the change became effective.

(b) *Modifications.* For purposes of acts that occurred before a new law became effective, if the law modifies an existing provision in the Code, then the modified provision continues the existing provision unless:

- (1) The new law states that it does not continue the existing provision; or
- (2) The context indicates that the new law was not intended to continue the existing provision.

Council Bill 45-10, Chapter 13, Laws of Montgomery County 2011

Sec. 3. Effective Date. This Act, other than Section 4, takes effect on July 1, 2012. Section 4 takes effect 91 days after the Act becomes law. The amendments to County Code Chapter 33 made in Section 1 of this Act apply to any disability occurring on or after the date this Act takes effect.

Montgomery County Code

§ 33-38. Normal retirement date, mandatory retirement date, early retirement date, and trial retirement.

(a) *Normal retirement date.* The normal retirement date is the first day of the month elected by a member after the member meets the years of service and age requirements for the applicable membership group. For normal retirement:

* * *

⁵ Although the CAO’s letter referenced “the enclosed letter dated May 19, 2017” from Retirement Benefits Manager RG, the County did not include the RG letter as part of County Exhibit A or otherwise include it with the County’s submission to the Board. The RG letter was made part of the record as Appellant’s Exhibit A.

(6) Group G: The member must have at least:

(A) 15 years of credited service and be at least age 55; or

(B) 20 years of credited service regardless of age.

* * *

(c) *Early retirement date.*

(1) A member, other than a group G member, who has not met the age and service requirements for a normal retirement may elect to receive pension payments beginning on an early retirement date the first day of a month after the following requirements are met: . . .

(2) A group G member is not eligible for an early retirement.

§ 33-41. Credited service.

(a) *Member's credited service.*

(1) A member's credited service is the total service rendered under the employees' retirement system of Montgomery County, plus any credited service earned under the employees' retirement system of the State of Maryland and/or the Montgomery County police relief and retirement fund law plus any other credited service purchased or granted pursuant to this section. . . .

(b) *Procedures for determining credited service.*

(1) Full-Time Members. Service rendered during the full normal working time in a 12-month period, including paid authorized leave or other leave specifically provided here, will equal one year of credited service. The 12-month period referred to in the preceding sentence is the 12-month period that starts on the date (or the anniversary of the date) the employee first completed one hour of County service as a member.

§ 33-43. Disability retirement. [current language since July 1, 2012]

(j) *Adjustment or cessation of disability pension payments.*

(1) If a member receiving service-connected disability pension payments reaches the first day of the month after the member's normal retirement date, the amount of pension then payable must not be less than the amount that would have been payable under Section 33-45(c) if the member had terminated service when the disability pension began and had not elected a return of member contributions with credited interest.

(2) (A) The Chief Administrative Officer may reduce the amount of the disability pension payments of a member retired with total incapacity who:

(i) has not reached the normal retirement date; and

(ii) is engaged in, or is able to engage in, an occupation that pays more than the difference between the disability pension payments and the current maximum earnings of the occupational classification from which the member was disabled.

(B) If a member other than a Group F member meets the criteria in subparagraph (A), the Chief Administrative Officer may reduce the member's disability pension payments until the disability pension payments plus the amount that the employee earned or is able to earn equals the maximum earnings of the occupational class from which the member was disabled.

(C) If a Group F member receives a non-service connected disability pension and meets the criteria in subparagraph (A), the Chief Administrative Officer may reduce the member's disability pension payments until the disability pension payments plus the amount the employee earned or is able to earn equals 120 percent of the maximum earnings of the occupational class from which the employee was disabled.

* * *

(3) If the earnings capacity of a disability retiree with a total incapacity changes, the Chief Administrative Officer may change the amount of the disability retirement pension. In this subsection, "disability pension" is the amount of pension payable without election of a pension payment option.

§ 33-43. Disability retirement. [language prior to July 1, 2012]

(j) *Adjustment or cessation of disability pension payments.*

(1) If a member receiving service-connected disability pension payments reaches the first day of the month following after the member's normal retirement date, the amount of pension then payable must not be less than the amount that would have been payable under the provisions of Section 33-45(c), if the member had terminated service on the date disability pension commenced and had not elected a return of member contributions with credited interest.

(2)(A) The Chief Administrative Officer may reduce the amount of the disability pension payments of a member who:

(i) has not reached the normal retirement date; and

(ii) is engaged in, or is able to engage in, an occupation that pays more than the difference between the disability pension payments and the current maximum earnings of the occupational classification from which the member was disabled.

(B) If a member other than a Group F member meets the criteria in subparagraph (A), the Chief Administrative Officer may reduce the member's disability pension payments until the disability pension payments plus the amount that the employee

earned or is able to earn equals the maximum earnings of the occupational class from which the member was disabled.

* * *

(3) If the earnings capacity of a disability changes, the Chief Administrative Officer may change the amount of the disability retirement pension. For the purpose of this subsection, “disability pension” is the amount of pension payable without election of a pension payment option.

(A) For a disability retiree other than a group F member, the Chief Administrative Officer must ensure that the amount of the revised pension does not exceed:

- (i) the original disability retirement pension plus cost of-living increases; or
- (ii) an amount that, when added to the amount the member earns or is able to earn, equals the maximum earnings of the occupational classification from which the member was disabled.

..

§ 33-45. Vested benefits and withdrawal of contributions.

(c) *Vested benefits.*

(2) On or after July 1, 1989, a member who has completed 5 years of credited service is fully vested in a normal retirement pension that has accrued to date of termination, with payments beginning on the first day of the month following the member’s normal retirement date.

United States Code, 26 U.S.C. § 401, Title 26, Internal Revenue Code, I.R.C. § 401(a).
Qualified pension, profit-sharing, and stock bonus plans,

(9) Required distributions. –

(A) In general. --A trust shall not constitute a qualified trust under this subsection unless the plan provides that the entire interest of each employee--

- (i) will be distributed to such employee not later than the required beginning date, or
- (ii) will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary). . . .

(C) Required beginning date. -- For purposes of this paragraph--

(i) In general. --The term “required beginning date” means April 1 of the calendar year following the later of--

(I) the calendar year in which the employee attains age 70 ½, or

(II) the calendar year in which the employee retires. . . .

ISSUE

Is the Chief Administrative Officer’s interpretation with regard to Appellant’s retirement benefit correct?

ANALYSIS AND CONCLUSIONS

The CAO’s Interpretation of the Retirement Statute is Entitled to Deference, if Reasonable.

The County Council has vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. MSPB Case No. 14-33 (2015). *See Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO’s interpretation is predicated on an error of law, no deference is appropriate. *See Dep’t of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602 (1995); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

The Language of the Statute Together with its Legislative History Support the CAO’s Interpretation of Chapter 13, Laws of Montgomery County 2011

At the time of Appellant’s retirement in 2001, the Montgomery County Code provided that disability retirement payments could be offset if a retiree was engaged in or able to engage in an occupation that pays more than the difference between the disability pension and the maximum earning of the occupational class from which the member retired. MCC § 33-43(j)(2).

Appellant points out that in 2011 the County Council enacted Bill No. 45-10 (Chapter 13, Laws of Montgomery County 2011), which amended § 33-43(j) to create a two-tiered service-connected disability retirement system consisting of partial and total incapacity disability benefits. Chapter 13 amended § 33-43(j)(2)(A) to apply the earnings offset provision only to members who retired with total incapacity.

Appellant argues that since he retired with partial incapacity, under the amended law his pension is not subject to offset. However, § 3 of Chapter 13 expressly states that “The amendments to County Code Chapter 33 made in Section 1 of this Act apply to any disability occurring on or after the date this Act takes effect.” County Exhibit C at p. 16. Thus, under the plain language of the statute the amendments to the statute upon which Appellant relies are to be applied prospectively, *i.e.*, to disabilities occurring on or after the Act’s effective date. As Appellant’s disability occurred a decade before the enactment of Chapter 13, the changes do not apply to him. *See* MSPB Case No. 10-17 (2010) (Statutory amendment to County Code Chapter 33 enacted three years after appellant’s retirement is not applicable).

Although it is often said that a review of legislative history is normally necessary only when the language of a statute is ambiguous, the legislative purpose is also critical to proper interpretation of a statute and must be discerned. Because the legislative purpose controls, we review the legislative history to ascertain whether the plain meaning of the words of the statute are indeed consistent with the bill's purpose and objective, and "comports with common sense and avoids illogical or absurd results." *Kaczorowski v. Mayor & City Council*, 309 Md. 505, 516-17 (1987). See MSPB Case No. 14-33 (2015).

Our review of the bill's legislative history confirms the intent of the County Council as reflected in the explicit language of the bill. As introduced, § 3 of Council Bill 45-10 provided that the amendments to County Code Chapter 33 made by bill would prospectively "apply to any application for disability retirement filed on or after the date this Act takes effect." County Exhibit C at p. 16. To avoid the possibility of any unconstitutional impairment of contract issues when creating the new, two-tiered disability retirement system, the Council amended the language to provide that the amendments would "apply to any disability occurring on or after the date this Act takes effect." *Id.* See Action Packet, Council Bill 45-10, June 28, 2011, Memorandum from Robert H. Drummer, Senior Legislative Attorney, to County Council, pp. 4-5, Available at:

https://www.montgomerycountymd.gov/council/resources/files/lms/bill/2010/Action/pdf/279_754_Action_02162017.pdf.

Based on legal advice from the Office of the County Attorney, and to avoid the possibility of retroactive impairment of vested rights in violation of the United States Constitution's Contract Clause, the County Council amended the bill so that changes in the pension law would only apply prospectively to members for whom disabilities occurred after the bill's effective date.⁶ The bill was jointly considered by the Council's Public Safety and Government Operations and Fiscal Policy Committees, and the committee recommended that the Council "amend the Bill to take effect on July 1, 2012 and apply to cases where the disability occurs on or after the date the Act takes effect." See Action Packet, Council Bill 45-10, pp. 5 and 27.

Appellant argues that because the amendments were beneficial to retirees the Council could have retroactively applied the amendments without impairing vested rights. Appellant's Reply at pp. 3-4. While it may be true that the Council could have constitutionally made "beneficial" changes in the statute retroactively applicable to those who were already retired without impairing vested rights, the Council instead expressly chose to make the changes prospective. The language of § 3 was carefully considered, reflected a conscious decision made by the County Council, and cannot under any reasonable analysis be viewed as "illogical or absurd." Moreover, contrary to Appellant's suggestion, Appellant's Reply at p. 5, § 3 of Chapter 13 is not mere legislative history. It is part of the statute itself and must be given effect.

Whether a statute applies retroactively or prospectively is ordinarily one of legislative intent. *Langson v. Riffe*, 359 Md. 396, 406 (2000). There is also a presumption in Maryland law that statutes operate prospectively. *Pautsch v. Maryland Real Estate Commission*, 423 Md. 229, 263 (2011). See MSPB Case No. 10-17 (2010). That presumption of prospective application, and thus continuation of provisions in effect at the time of amendment, is codified in the Montgomery

⁶ Section 3 of the Act provided that, except for § 4 of the Act, the Act took effect July 1, 2012. Section 4, which was effective October 10, 2011, only concerned collective bargaining, which is not an issue relevant to this matter. The amendment to § 33-43(j)(2), creating the distinction between partial and total disability, was in § 1 of the Act.

County Charter, § 1-201 (“(b) For purposes of acts that occurred before a new law became effective, if the law modifies an existing provision in the Code, then the modified provision continues the existing provision unless: (1) The new law states that it does not continue the existing provision; or (2) The context indicates that the new law was not intended to continue the existing provision”). Under the express language of § 3 of Chapter 13, the provisions Appellant claims were repealed remain in effect for Appellant, since his disability occurred prior to July 1, 2012. The language of the bill and its legislative history unmistakably indicate that the Council’s intent was to make the changes to Chapter 33 applicable only to those for whom a disability occurred on or after July 1, 2012.

Appellant suggests that reading § 3 as applying the amendments prospectively creates an “internal conflict,” since § 33-43(i)(2) applies to certain members who retired between June 26, 2002, and June 30, 2007, and thus cannot also apply to those with a disability occurring on or after July 1, 2012. This argument ignores the fact that Chapter 13 did not amend the language Appellant references in § 33-43(i)(2) concerning benefit calculations for members who retired between June 26, 2002 and June 30, 2007. Since Chapter 13 did not change the language Appellant references, there is no conflict or reason § 33-43(i)(2) may not continue to be given effect.

Even had there been an amendment creating an inconsistency between various provisions of the statute, longstanding rules of statutory interpretation require that an attempt be made to harmonize the conflicting provisions. *Board of Physician Quality Assurance v. Mullan*, 381 Md. 157, 168 (2004); *Board of County Commissioners, v. Bell Atlantic - Maryland, Inc.*, 346 Md. 160, 178 (1997); *Scott v. State*, 297 Md. 235, 245 (1983) (“[A] statute should be construed so that all of its parts are given effect and harmonized if possible”); *Associated Acceptance v. Bailey*, 226 Md. 550, 556 (1961) (apparent contradiction between two parts of a statute should be interpreted to harmonize those parts together).

Accordingly, the Board finds that Chapter 13’s amendments to § 33-43(j)(2) do not apply to disability retirees, such as Appellant, who retired prior to July 1, 2012.

Appellant’s Normal Retirement Date is at Age 55

Appellant argues that the earnings offset should no longer apply to him because he has reached his “normal retirement date.” Under Montgomery County Code, § 33-38(a), a member’s normal retirement date is the first day of the month he or she decides to retire after meeting the years of service and age requirements for his or her membership group. As a member of Group G, Appellant’s normal retirement date under the statute is when he had at least 15 years of credited service and reached age 55, or when he had 20 years of credited service, regardless of age. § 33-38(a)(6).

However, Appellant retired on disability with just short of eleven years of credited service. Appellant argues that the years he would have worked had he not retired on disability should be imputed to his credited service so that he would meet the requirements of 15 years and age 55, or 20 years of credited service. Appellant’s Reply at p. 6. The County maintains that Appellant does not yet qualify for normal retirement because he had less than 15 years of service at the time he received a disability retirement and “imputed” service is nowhere authorized under the statute. County Response at p. 3; County Exhibit A. In his May 19, 2017, letter to Appellant, the County Retirement Benefits Manager stated that based on advice from the County Attorney “we cannot impute service to compute your Normal Retirement Date.” Appellant Exhibit A.

A review of the applicable statute does not reveal a basis for imputing the credited service necessary to reach a normal retirement date in the manner Appellant suggests. County Code § 33-41, which addresses credited service, nowhere provides for imputing service, for purposes of determining a normal retirement date, to time in a disability retirement status. That conclusion is buttressed by specific statutory provisions providing for imputed service in other circumstances. For example, credited service for purposes of calculating a normal retirement date may be imputed for time spent in military service. County Code § 33-41(c) & (e). Applying the maxim of legislative interpretation *expressio unius est exclusio alterius*, the Board concludes that the specific provision of imputed service for time spent in military service strongly suggests that the absence of an express requirement for time in a disability retirement status means that there is no such authority. See MSPB Case No. 17-07 (2017).

Appellant also argued that under COMCOR 33.86.01 his time as a disability retiree should count towards a calculation of credited service. In our January 31, 2019, initial decision, after reviewing the Code, we also analyzed the regulation. Subsequently, the County moved for reconsideration of the decision, pointing out that COMCOR 33.86.01 was not applicable to Appellant since that regulation only applies to those participating in a now repealed disability benefits program in Article VI of Chapter 33 of the Code, while Appellant receives his disability retirement benefits under Article III of Chapter 33. In response, Appellant acknowledged that although he had cited and relied on COMCOR 33.86.01, he now agrees with the County that it is not applicable. Appellant also argues that the Board should reconsider its opinion on the merits because the Board “based a critical portion of its analysis” on COMCOR 33.86.01. Appellant’s Response to County Memorandum, February 8, 2019. Appellant misconstrues our decision, as the analysis of COMCOR 33.86.01 simply supported the conclusions we reached in construing the applicable Code provisions and was included in order to address points raised in Appellant’s Final Comments. As we stated in the January 31 decision, COMCOR 33.86.01 “does not alter our view that ‘credited service’ for purposes of determining a normal retirement date does not include imputed time while on disability retirement.”

Finally, Appellant argues that since there is no statute or regulation that provides for a “normal retirement date” using age 55 alone, no disability retiree with less than the required minimum credited service could ever reach a normal retirement date. Appellant’s Reply at p. 6. Although the County’s Response does not assert that Appellant has a normal retirement date, the May 19, 2017, RG letter states that “For public safety employees who retired on disability retirement prior to their NRD [Normal Retirement Date], the NRD date used in the annual disability income verification is the first of the month after age 55.” Appellant Exhibit A.

The Board is unable to identify any other mechanism in County statute or regulation to compute the normal retirement date for a Group G member with less than 15 years of credited service. We do not agree with Appellant’s suggestion that the absence of a statutory normal retirement date for a vested individual failing to meet the age and credited service requirements means that such an individual would never qualify for retirement benefits. If, under the Code, age 55 alone could not be treated as the normal retirement date in the absence of sufficient credited service, the County would not be permitted to totally deny retirement benefits to members who have vested rights. The alternative would necessarily be the date the Internal Revenue Code mandates the pay out of retirement benefits to individuals not still employed, *i.e.*, when they reach age 70½. 26 USC § 401(a)(9).

In our view, Appellant need not wait that long. We regard the May 19 letter from the County Retirement Benefits Manager to be an acknowledgement by the County that age 55 will be treated as the normal retirement date for Appellant, notwithstanding his insufficient credited service. The letter was expressly adopted by and incorporated into the CAO's decision, and there is nothing in the County's Response or elsewhere in the record suggesting a contrary interpretation of County law and practice. Accordingly, for purposes of this case, the Board concludes that the May 19 letter, as adopted by the CAO, is an admission by the County that Appellant's normal retirement date is the first of the month after he reaches age 55. *See Crane v. Dunn*, 382 Md. 83, 96 (2004); *Montgomery County v. Herlihy*, 83 Md. App. 502, 510 (1990). On that date, any earnings offset of Appellant's retirement benefits must cease. § 33-43(j).

ORDER

Based on the foregoing, the Board **DENIES** Appellant's appeal from the CAO's interpretation of the statute providing for an earnings offset to his disability pension based on his ability to work. Furthermore, the County is hereby **ORDERED** to treat the first of the month after Appellant reaches age 55 as his normal retirement date, cease application of any earnings offset when Appellant reaches age 55, and, for the purpose of calculating the appropriate level of retirement benefits at age 55, provide Appellant with credited service under any Code, regulation, or policy provisions applicable to a disability retiree who has reached the normal retirement date.

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 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
February 13, 2019

CASE NO. 18-24

FINAL DECISION AND ORDER

Appellant is a former Montgomery County employee who, effective January 1, 1999, retired and began receiving pension benefits.

On March 26, 2018, Appellant filed this appeal challenging a March 7, 2018, decision by the Montgomery County Chief Administrative Officer (CAO) of the annual cost of living (COLA) calculation applied to her monthly retirement benefit. On March 27, 2018, the Board acknowledged receipt of the appeal and requested that Appellant submit a copy of the CAO's decision. Appellant provided a copy of the CAO decision on April 9, 2018.¹

¹ In addition to the CAO's decision, Appellant included five attachments with her appeal letter dated March 21, 2018. We will designate the unmarked attachments and the CAO's decision as Appellant Exhibits (AX):

The County filed a response to the appeal (County Response) on May 24, 2018,² and Appellant filed final comments (Appellant's Reply) on June 18, 2018.³ The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was hired by the County and became a participant in the Employees' Retirement System (ERS) on February 27, 1983. Effective January 1, 1999, Appellant retired from her County position as an Office of Human Resources benefits specialist and began receiving retirement benefits.

In 2013, the County asserted that an audit had revealed that the ERS had erroneously applied an incorrect COLA calculation to Appellant's benefits. The County determined that Appellant had been allowed a 100% annual COLA with no cap or maximum, a benefit that the County maintained only applied to employees hired prior to July 1, 1978. It was the County's view that employees hired on or after July 1, 1978, like Appellant, were only entitled to an annual COLA of 60% of the change in the Consumer Price Index (CPI) greater than 3%, with an annual cap of 5% for retirees younger than 65. Montgomery County Code (MCC) § 33-44(c)(3)(A).

On March 13, 2013, the County notified Appellant of the error and advised her that she must repay the most recent three years of overpayments. CX 2. Appellant requested a waiver of the repayment requirement by letter dated March 27, 2013. CX 4. In her letter Appellant challenged

-
- AX 1 - Excerpt from Employees' Retirement System Summary Description, November 2001.
 - AX 2 - Excerpt from Employees' Retirement System Summary Description, July 2010.
 - AX 3 - Excerpt from Employees' Retirement System Summary Description, October 2015.
 - AX 4 - Montgomery County Employee Retirement Plans (MCERP) presentation materials, October 2017.
 - AX 5 - Bill 25-01, pp. 1-2, 27-32.
 - AX 6 - Letter from CAO, March 7, 2018.

² The County submitted the following thirteen County Exhibits (CX):

- CX 1 - Letter from CAO, March 7, 2018.
- CX 2 - Letter from RG, March 13, 2013.
- CX 3 - Notices sent by ERS to retirees regarding COLAs from 2013 to 2017.
- CX 4 - Letter from Appellant to RG, March 27, 2013.
- CX 5 - Acknowledgement of appeal in MSPB Case No. 14-05, August 12, 2013.
- CX 6 - County response in MSPB Case No. 14-05, August 30, 2013 (excluding exhibits D - J).
- CX 7 - Appellant response in MSPB Case No. 14-05, September 6, 2013.
- CX 8 - Final Decision and Order, MSPB Case No. 14-05, November 19, 2013.
- CX 9 - Affidavit of RG, May 22, 2018.
- CX 10 - ERS Benefit Formula and COLA Changes.
- CX 11 - Agenda Item 6, Bill No. 19-01, June 26, 2001.
- CX 12 - Text of Montgomery County Code § 33-35.
- CX 13 - Letter from DLR, WMM, Inc., with attachments, April 18, 2001.

³ Appellant's Reply included two exhibits, which we will designate as follows:

- AX 7 - Letter from Appellant to MSPB, August 8, 2013.
- AX 8 - Letter from MCERP to Appellant, November 25, 2013.

the County's effort to recover the overpayments but admitted that the correct COLA calculation was 60%: "I was receiving 100 percent of the COLA instead of the 60 percent to which I was entitled . . . I am in agreement to having my monthly pension reduced to the correct amount on May 1, 2013." CX 4.

When Appellant's request was denied by the ERS and the CAO Appellant filed an online appeal to the MSPB on August 2, 2013, and the matter was docketed as MSPB Case No. 14-05. CX 5.

Following her online appeal, Appellant sent an August 8, 2013, letter to the Board concerning her case. AX 7. In that letter Appellant argued the reasons why she should receive a waiver of any obligation to repay the County,⁴ but conceded that she had improperly received the higher COLA: "I was only eligible to receive 60% instead of 100% of the COLA. . . I consider this to be a nonfault overpayment on my part. . . these overpayments were created through no fault on my part." AX 7.

The County provided a response to the appeal on August 30, 2013. CX 6. In addition to argument concerning Appellant's repayment obligation and the waiver process, the County response included a review of the legislative history of the COLA and an explanation of how the Code applied to Appellant. The response stated "At the time of [Appellant's] retirement, Section 33-44(c) of the County Code provided for an annual COLA of 60% of the cost of living adjustment up to a total adjustment of 5 percent in any year except at age 65 at which point the maximum does not apply." CX 6, p. 1. In a footnote on that page the County stated:

Section 33-44(c) was subsequently amended as a result of collective bargaining in 1999 (for police officers) and 2001 (for all other participants) through Bills 18-99 and 25-01. These provisions applied to those participants retiring after those dates and not those retired. While the County Code does not specify that this provision applies only to active employee participants, legislative history indicates the intent to apply the COLA to only active participants . . . [Appellant] is not challenging the amount of the COLA.

CX 6, p. 1, n. 1. The County included copies of the bills and legislative packets with its submission in MSPB Case No. 14-05.

Appellant filed a response to the County submission dated September 6, 2013. CX 7. In that response Appellant did not contest the County's calculation of the COLA applicable to her. The only mention of the law concerning the COLA calculation was Appellant's argument that the law was unnecessarily ambiguous:

It was stated that Section 33-44 Pension Payment Options and COL's Adjustments in the Code was amended. However, the amendment failed to make it clear that it only impacted active employee participants. It is now 2013. Looking back on past laws, neglecting to include every provision, the door was left open to interpretations

⁴ Appellant challenged the County effort to recover the overpayment based on the length of time before the error was discovered, the fact that she was not to blame, and the hardship the recovery would cause.

and relying on standard operating procedures (SOP). It would seem to be in the best interest of the County to close that door.

CX 7, p. 1.

The Board considered the appeal and on November 19, 2013, issued a Final Decision and Order. CX 8. The Board granted Appellant's appeal from the CAO's determination that she was not eligible for a waiver of overpayment and found that she had provided evidence sufficient to carry her burden of proof. The Board held that Appellant was eligible for a waiver of collection of the overpayment because she was not at fault for the error and on the basis of financial hardship. The County was ordered to reimburse Appellant for monies already deducted from her pension payments, and to waive recoupment of past overpayments of her pension benefits. CX 8, p. 6.

Although the Board's decision focused on Appellant's eligibility for a hardship waiver of the County's efforts to recoup the overpayments, the Board made the following finding with regard to application of the COLA law to Appellant:

At the time of Appellant's retirement, Section 33-44(c)(3) of the County Code provided for an annual COLA of 60% of the COLA up to a total adjustment of 5 percent in any year, except at age 65 at which point the maximum does not apply. . . An administrative error by the County resulted in Appellant receiving the wrong COLA. She received a COLA of 100% with no cap . . . This COLA, in the County Code Section 33-44(c)(3)(A) only applies to participants hired before 1978.

CX 8, p. 2.

The appeal of March 26, 2018, in this case suggests that the error in her COLA calculation was the result of the County using an incorrect code on her retirement papers. Her appeal then relates that in October 2017 she received the Montgomery County Retirees Association (MCREA) newsletter that caused her to investigate the basis for the calculation of her COLA. Upon her review of various materials, including the County Code, she contends that the County was in error in 2013 when it determined that the annual COLA of 60% of the CPI was applicable to her.

Appellant's Reply to the County's submission states that in 2013 she "acknowledged that I was paid 100% of the Cost of Living" and that she immediately appealed the monthly deduction the County made to her pension benefits to recoup the overpayment. Appellant explains that subsequent to the Board's decision in her favor on the waiver issue her research revealed that the County has misinterpreted the legal effect of Bill 25-01 and improperly calculated her COLA since July 1, 2002. Accordingly, she requests that her COLAs for the past 17 years be recalculated at the 100% level instead of at 60%, and that she be reimbursed for the difference, with interest.

Pursuant to MCC § 33-56(a), Appellant requested that the CAO provide a written interpretation of the applicability of the Code's current COLA provision. On March 7, 2018, the CAO issued a letter stating that because Appellant retired January 1, 1999, the law applicable to her provides for an annual COLA of 60% of the COLA up to a total adjustment of 5% in any year, except that at age 65 the maximum or cap does not apply. AX 6, CX 1. The CAO's letter also noted that during Appellant's 2013 appeal seeking a waiver of her obligation to repay the erroneous COLA amounts she "questioned the COLA because the COLA had been amended in Bill 25-01." The CAO went on to note that in 2013 the County provided a detailed explanation of the legal

basis for its position on the COLA and that the Board’s decision included a finding that she was not entitled to the 100% COLA Appellant seeks. Appellant then filed this appeal.

APPLICABLE LAW

Montgomery County Code [language prior to November 1, 2001]

§ 33-44. Pension payment options and cost-of-living adjustments.

* * *

(c) *Cost-of-living adjustment.* A retired member or beneficiary . . . must receive an annual cost-of-living adjustment in pension benefits computed as follows:

* * *

(3) The percentage cost-of-living adjustment of pension benefits must be obtained by dividing the most recent index determined under paragraph (2) by the next preceding index multiplied by 100 less 100.

(B) A member enrolled on or after July 1, 1978, must receive 60 percent of the cost-of-living adjustment up to a total adjustment of 5 percent in any year. The 5-percent annual limitation does not apply to :

(i) a retired member who is disabled; or

(ii) a pensioner aged 65 or older for a fiscal year beginning after the date the pensioner reaches age 65.

ISSUE

Did the County err in denying Appellant’s request to calculate her annual COLA based on 100% of the CPI instead of 60% of CPI?

ANALYSIS AND CONCLUSIONS

The CAO’s Interpretation of the Retirement Statute is Entitled to Deference, if Reasonable.

The County Council has vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. MSPB Case No. 14-33 (2015). *See Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO’s interpretation is predicated on an error of law, no deference is appropriate. *See Dep’t of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602 (1995); MSPB Case No. 18-09 (2019); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

Res Judicata and Collateral Estoppel

This is Appellant’s second appeal to the Board concerning her retirement benefits COLA. In MSPB Case No. 14-05 she appealed the determination of the CAO that she was obligated to

reimburse the County for overpayments due to an error in the calculation of her COLA.⁵ The County contended that she was overpaid from July 1, 1999, through April 1, 2013.

The Board decided in MSPB Case No. 14-05 that Appellant was eligible to receive a waiver of the overpayment collection. In its decision, the Board also found that “[a]t the time of Appellant’s retirement, Section 33-44(c)(3) of the County Code provided for an annual COLA of 60% of the COLA up to a total adjustment of 5 percent in any year, except at age 65 at which point the maximum does not apply.” MSPB Case No. 14-05, p. 2. *See* MSPB Case No. 14-06 (2013) (same). The Board went on to say that an “administrative error by the County resulted in Appellant receiving the wrong COLA. She received a COLA of 100% with no cap. . . This COLA, in the County Code Section 33-44(c)(3)(A) only applies to participants hired before 1978.” MSPB Case No. 14-05, p. 2.

The County contends that the 100% COLA does not apply to Appellant since she retired prior to the 2001 amendment, that the proper COLA was already the subject of an appeal to the Board, and that she conceded the 60% COLA calculation was correct in her 2013 appeal. The County argues that Appellant’s current challenge to the COLA calculation is barred by *res judicata* and collateral estoppel.

While Appellant could have challenged the COLA calculation in her 2013 appeal, MSPB Case No. 14-05, she instead conceded that the 60% calculation applied to her and that payment of the 100% COLA was in error. AX 7, CX 4. Although Appellant did not contest the County’s position that she had been paid sums in error, or that the correct COLA calculation should have been 60% of the CPI instead of 100%, her submission to the Board dated September 6, 2013, did address and briefly discuss what she believed to be the ambiguity of the statute. CX 7.

Thus, the record demonstrates that not only did Appellant have the opportunity to raise the issue of the proper COLA calculation applicable to her, she did raise it to the Board, albeit without much vigor. The Board specifically addressed the issue in its decision and found that it was an error for the County to give her a 100% COLA.

Appellant’s claim is thus precluded because the elements of *res judicata* are satisfied: (1) the parties are the same as in MSPB Case No. 14-05; (2) the subject matter (calculation of the COLA) is the same as that which could have or should have been litigated in the prior cases; and (3) there was a final judgment on the merits.

Appellant cannot argue that she failed to raise the issue of the proper COLA calculation, nor may she avoid the requirements of *res judicata* by her own failure to effectively challenge the COLA calculation in the prior case. *See* MSPB Case No. 14-38 (2014):

Res judicata restrains a party from litigating the same claim repeatedly and ensures that courts do not spend time adjudicating matters that have been decided or could have been decided fully and fairly. Almost 130 years ago, the Supreme Court made this point in *Cromwell v. County of Sac*, 94 U.S. 351, 358 (1876): “The plea of [*res judicata*] applies, except in special cases, not only to the points upon which the

⁵ Appellant argues that Bill No. 25-01 (Chapter 21, Laws of Montgomery County 2001), which amended § 33-44(c)(3)(B), effective November 1, 2001, to provide for a COLA calculation of 100% of the CPI for retirees age 65 and over, applies to her.

court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” . . .

“The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.” *MPC, Inc. v. Kenny*, 367 A.2d 486 (Md. 1977) (quoting *Alvey v. Alvey*, 1,71 A.2d 92, 94 (Md. 1961)); *see also Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 710 (1982) (“A party cannot escape the requirements of. . . *res judicata* by asserting its own failure to raise matters clearly within the scope of a proceeding.”).

Appellant’s claim is also precluded under the doctrine of collateral estoppel. *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359 (2016), holds that when an issue is litigated and decided by an administrative agency, and the determination was essential to that decision, the determination may be conclusive in a subsequent administrative action between the parties, whether on the same or a different claim. MSPB Case No. 17-15 (2017).

The Board in MSPB Case No. 14-05 decided the identical COLA calculation at issue in this appeal. There was a final judgment on the merits. The parties are the same, and Appellant had a fair opportunity to be heard on the issue in the prior litigation.

For these reasons, the Board need not reach the merits of Appellant’s arguments to affirm the CAO’s decision.

ORDER

Based on the foregoing, the Board **DENIES** Appellant’s appeal from the CAO’s interpretation of the statute concerning calculation of Appellant’s Cost of Living Adjustment.

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 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
June 24, 2019

CASE NO. 18-25

FINAL DECISION AND ORDER

Appellant is a former Montgomery County Executive Administrative Aide employed as an Office of Human Resources benefits specialist who, effective March 1, 1998, retired and began receiving pension benefits.

On March 26, 2018, Appellant filed this appeal challenging a March 7, 2018, decision by the Montgomery County Chief Administrative Officer (CAO) of the annual cost of living (COLA) calculation applied to her monthly retirement benefit. County Exhibit (CX) 1.¹

The County filed a response to the appeal (County Response) on May 24, 2018,² and Appellant filed final comments (Appellant's Reply) on June 11, 2018.³ The appeal was considered and decided by the Board.

¹ Appellant submitted the following seven attachments with her appeal, which we will designate as Appellant Exhibits (AX):

- AX 1 - MCREA newsletter, October 2017.
- AX 2 - Letter of March 13, 2013 from RG.
- AX 3 - Letter of July 22, 2013 from CAO.
- AX 4 - Excerpt from Employees' Retirement System Summary Description, October 2015.
- AX 5 - Bill 25-01, selected pages.
- AX 6 - Bill 11-11, pages including § 33-44(c).
- AX 7 - COLA Spreadsheets.

² The County submitted the following sixteen exhibits:

- CX 1 – Letter from CAO, March 7, 2018.
- CX 2 – Letter from RG, March 18, 2013.
- CX 3 – Notices sent by ERS to retirees regarding COLAs from 2013 to 2017.
- CX 4 – Letter from Appellant to RG, March 25, 2013.
- CX 5 – Acknowledgement of appeal in MSPB Case No. 14-06, August 12, 2013.
- CX 6 – County response in MSPB Case No. 14-06, August 30, 2013 (excluding exhibits D – J).
- CX 7 – Final Decision and Order, MSPB Case No. 14-06, November 12, 2013.
- CX 8 – Acknowledgement of further appeal in MSPB Case No. 14-06, March 10, 2014.
- CX 9 – Final Decision and Order, MSPB Case No. 14-46, January 15, 2015.
- CX 10 – Circuit Court Opinion and Order, Civil No. 401164V (November 18, 2015), transcript of the Hearing, and briefs of the County and Appellant.
- CX 11 – Court of Special Appeals Opinion, No. 2234 (November 16, 2016).
- CX 12 – Affidavit of RG, May 22, 2018.
- CX 13 – ERS Benefit Formula and COLA Changes.
- CX 14 – Agenda Item 6, Bill No. 19-01, June 26, 2001.
- CX 15 – Text of Montgomery County Code § 33-35.
- CX 16 – Letter from DLR, WMM, Inc., with attachments, April 18, 2001.

³ Appellant's Reply included the following additional eight exhibits, some of which were also provided with the original appeal of March 26, 2018:

1. Copy of May 24, 2018 County Response, with notations.
2. April 12, 2018 Letter from MSPB Executive Director re scheduling.
3. FEDEX Tracking webpage.

FINDINGS OF FACT

Appellant was hired by the County in December 1981 and became a member of the Employees' Retirement System (ERS). Appellant retired approximately seventeen years later and began receiving pension benefits on March 1, 1998.

In 2013, the County asserted that an audit had revealed that the ERS had erroneously applied an incorrect COLA calculation to Appellant's benefits. The County determined that Appellant had been allowed a 100% annual COLA with no cap or maximum, a benefit that the County maintained only applied to employees hired prior to July 1, 1978. It was the County's view that employees hired on or after July 1, 1978, like Appellant, were only entitled to an annual COLA of 60% of the change in the Consumer Price Index (CPI) greater than 3%, with an annual cap of 5% for retirees younger than 65. Montgomery County Code (MCC) § 33-44(c)(3)(A).

On March 18, 2013, the County notified Appellant of the error and advised her that she must repay the most recent three years of overpayments. CX 2. Appellant then requested a waiver of the repayment requirement. CX 4. When her request was denied by the ERS and the CAO, Appellant appealed to the MSPB, which docketed the matter as MSPB Case No. 14-06. CX 5.

The County provided a response to the appeal on August 30, 2013. CX 6. In addition to argument concerning Appellant's repayment obligation and the waiver process, the County response included a review of the legislative history of the COLA and an explanation of how the Code applied to Appellant. The response stated "At the time of [Appellant's] retirement, Section 33-44(c)(3) of the County Code provided for an annual COLA of 60% of the COLA up to a total adjustment of 5 percent in any year, except at age 65 at which point the maximum does not apply." CX 6, p. 1. In a footnote to that sentence the County stated:

Section 33-44(c) was amended as a result of collective bargaining in 1999 (for police officers) and 2001 (for all other participants) through Bills 18-99 and 25-01. These provisions were applied to those participants retiring after those dates, and not those retired. While the County Code does not specify that this provision applies only to active employee participants, legislative history indicates the intent to apply the COLA to only active employees. . .

CX 6, pp. 1-2. The County included copies of the bills and legislative packets with its submission in MSPB Case No. 14-06.

The Board considered the appeal and on November 12, 2013, issued a Final Decision and Order. CX 7. As Appellant had not contested the County's interpretation of the law concerning the applicable COLA or the fact that she had received overpayments of her pension due to the County's

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4. Barcodes from FEDEX Envelope.
 5. CAO's July 22, 2013 Letter.
 6. Section 33-34 of the County Code.
 7. Section 33-47 of the County Code.
 8. Excerpt from Employees' Retirement System Summary Description.

error, the Board's decision focused on the County's efforts to recoup the overpayments. The Board granted Appellant's appeal from the CAO's determination that she was not eligible for a waiver of overpayment and finding that while Appellant could request a waiver of collection of the overpayment, she had the burden of proving that she was eligible. The County was ordered to reimburse Appellant for monies already deducted from her pension payments, and to develop proper waiver guidelines to determine if she was entitled to an adjustment or complete waiver of the overpayment.

On March 10, 2014, Appellant, now represented by counsel, filed a second appeal which she titled as a "further appeal." The appeal alleged that the County had improperly denied her waiver request and failed to comply with the Board's order in MSPB Case No. 14-06 (2013). CX 8, pp. 2-8. Appellant's appeal did not question that the County had erroneously calculated the correct COLA and overpaid Appellant. Rather, the appeal challenged whether Appellant was entitled to an adjustment or complete waiver of her repayment obligation. CX 8, pp. 2-4. The appeal was accepted and docketed as MSPB Case No. 14-46. CX 8, p. 1.

The Board issued a Final Decision and Order on January 15, 2015. CX 9. In its decision the Board concluded that Appellant was not entitled to a waiver of the overpayment based on financial hardship because she had failed to meet her burden of proof due to her refusal to provide her Federal income tax returns. MSPB Case No. 14-46 (2015).

Appellant sought judicial review of the Board's decision in MSPB Case No. 14-46. CX 10, pp. 45-62 (Appellant's MD Rule 7-207 Memorandum on Appeal, May 15, 2015). Appellant presented six questions for review, but none of the questions concerned the appropriate calculation of the 60% of CPI COLA applicable to Appellant. Nor did Appellant raise a challenge to the application of the 60% of CPI COLA in the July 6, 2015, Reply Memorandum. CX 10, pp. 73-80. Indeed, the May 15, 2015, memorandum concedes that "the County applied the wrong provision for her COLA, resulting in a total overpayment of \$7,636.62 from March 1, 1998 through December 1, 2012."

The Circuit Court for Montgomery County held oral argument in Civil No. 401164V on November 10, 2015. CX 10, pp. 21-44 (transcript of hearing). During the oral argument Appellant's attorney conceded that payment of the 100% of CPI COLA was in error:

THE COURT: Well, isn't that the crux of the matter? Whether this was in fact her property or not? The payments were made. Is there really a contest as to whether they were made in error?

[Counsel]: There was no contest about that. Everybody acknowledges that the County made an error. . . .

CX 10, p. 27, (transcript p. 8, lines 4-9).

On November 18, 2015, the Circuit Court issued an Opinion and Order in *[Appellant] v. Montgomery County Merit System Protection Board*, Civil Case No. 401164V. CX 10, pp. 1-19. The Court found that the Appellant had received overpayments of her pension as the result of the County's erroneous application of the incorrect COLA: "The COLA provision that was erroneously applied was '100% with no cap,' a provision that only applied to County employees hired before 1978." *Id.*, p. 2. Among other findings, the Court concluded that Appellant's refusal to provide tax returns was unreasonable and that she had no right to the funds she received as a

result of the County’s error. The Circuit Court denied Appellant’s petition for judicial review and affirmed the Board’s order.

Appellant then appealed to the Court of Special Appeals. CX 11. Appellant’s brief on appeal presented seven questions. None of the questions concerned whether the appropriate calculation of the COLA applicable to Appellant was the 60% of CPI or the 100% of CPI COLA. CX 11, pp. 25, 31. As she did in the Circuit Court, Appellant conceded that “the County applied the wrong provision for her COLA, resulting in a total overpayment of \$7,636.62 from March 1, 1998 through December 1, 2012 . . .”. *Id.*, p. 32.

The Court of Special Appeals issued a decision on November 16, 2016, affirming the Board’s decision. CX 11, pp. 1-22. In its decision the Court of Special Appeals found that Appellant had erroneously “been allowed a 100% annual COLA with no cap, a benefit that did not apply to employees hired after July 1, 1978.” *[Appellant] v. Montgomery County Merit System Protection Board*, 2016 WL 6876648, p. 1 (Md. Ct. Spec. App., November 16, 2016) (Unreported). In footnote 2 the Court explained in more detail:

Pursuant to section 33-44(c)(3)(A) of the Montgomery County Code (“MCC”), retirees who were hired by the County prior to July 1, 1978 were entitled to an annual COLA equal to 100% of any change in the consumer price index (“CPI”) for the month preceding the end of the prior fiscal year. Retirees hired after that date, like [Appellant], were entitled to a COLA of 60% of the change in the CPI greater than 3%, with an annual cap of 5% for retirees younger than 65.

The appeal of March 26, 2018, in this case suggests that in 2013 Appellant discovered an error in her COLA calculation that was the result of the County using an incorrect code on her retirement papers. Her appeal then recounts that she appealed the County’s attempt to recoup the overpayments and that the Board upheld the County’s right to recover the funds in its January 2015 decision in MSPB Case No. 14-46. Appellant then states that in October 2017 she received the Montgomery County Retirees Association newsletter that caused her to investigate the basis for the calculation of her COLA. Upon her review of various materials including the County Code she contends that the County was in error in 2013 when it determined that the annual COLA of 60% of the CPI was applicable to her.

Pursuant to MCC § 33-56(a), Appellant requested that the CAO provide a written interpretation of the applicability of the Code’s current COLA provision. On March 7, 2018, the CAO issued a letter stating that because Appellant retired in 1998, the law applicable to her provides for an annual COLA of 60% of the COLA up to a total adjustment of 5% in any year, except that at age 65 the maximum or cap does not apply. CX 1. The CAO’s letter also noted that Appellant’s 2013 and 2014 appeals seeking a waiver of her obligation to repay the erroneous COLA amounts “did not contest the County’s determination of the error and [the] COLA you are entitled to receive.” *Id.* Appellant then filed this appeal on March 26, 2018.

APPLICABLE LAW

Montgomery County Code [language prior to November 1, 2001]

§ 33-44. Pension payment options and cost-of-living adjustments.

* * *

(c) *Cost-of-living adjustment.* A retired member or beneficiary . . . must receive an annual cost-of-living adjustment in pension benefits computed as follows:

* * *

(3) The percentage cost-of-living adjustment of pension benefits must be obtained by dividing the most recent index determined under paragraph (2) by the next preceding index multiplied by 100 less 100.

(B) A member enrolled on or after July 1, 1978, must receive 60 percent of the cost-of-living adjustment up to a total adjustment of 5 percent in any year. The 5-percent annual limitation does not apply to :

(i) a retired member who is disabled; or

(ii) a pensioner aged 65 or older for a fiscal year beginning after the date the pensioner reaches age 65.

ISSUE

Did the County err in denying Appellant’s request to calculate her annual COLA based on 100% of the CPI instead of 60% of CPI?

ANALYSIS AND CONCLUSIONS

The CAO’s Interpretation of the Retirement Statute is Entitled to Deference, if Reasonable.

The County Council has vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. MSPB Case No. 14-33 (2015). *See Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO’s interpretation is predicated on an error of law, no deference is appropriate. *See Dep’t of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602 (1995); MSPB Case No. 18-09 (2019); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

Timeliness

Appellant’s Reply urges that the County response should be disregarded as untimely. The Board denies this request as the County filed its submission with the Board on May 24, 2018, the due date. Appellant’s receipt of the submission the next day does not constitute a late filing or prejudice to Appellant.

Res Judicata and Collateral Estoppel

This is Appellant’s third appeal to the Board concerning her retirement benefits COLA. In MSPB Case Nos. 14-06 and 14-46 she appealed the determination of the CAO that she was obligated to reimburse the County for overpayments due to an error in the calculation of her COLA. The County contended that she was overpaid from March 1, 1998, through December 1, 2012. Appellant did not contest the County’s position that she had been paid sums in error or that the correct COLA calculation should have been 60% of the CPI, not 100%.

The Board decided in MSPB Case No. 14-06 that Appellant was eligible to apply for a waiver of the overpayment collection. In its decision in MSPB Case No. 14-06, the Board also found that “[a]t the time of Appellant’s retirement, Section 33-44(c)(3) of the County Code provided for an annual COLA of 60% of the COLA up to a total adjustment of 5 percent in any year, except at age 65 at which point the maximum does not apply.” MSPB Case No. 14-06 (2013). *See* MSPB Case No. 14-05 (2013) (same). The Board went on to say that an “administrative error by the County resulted in Appellant receiving the wrong COLA. She received a COLA of 100% with no cap. . . This COLA, in the County Code Section 33-44(c)(3)(A) only applies to participants hired before 1978.” MSPB Case No. 14-06.

In MSPB Case No. 14-46 the Board determined that while Appellant was eligible to apply for a waiver of the overpayment collection, the waiver was properly denied because of her refusal to submit a copy of her tax return for review. Appellant sought judicial review of that finding but did not challenge the County’s calculation of her COLA. Indeed, Appellant expressly conceded during oral argument that payment of the 100% COLA was in error:

THE COURT: Well, isn’t that the crux of the matter? Whether this was in fact her property or not? The payments were made. Is there really a contest as to whether they were made in error?

[Counsel]: There was no contest about that. Everybody acknowledges that the County made an error. . .

CX 10.

The Board’s decision in MSPB Case No. 14-46 was affirmed by the Circuit Court and the Court of Special Appeals. In its decision, the Court of Special Appeals specifically found:

Pursuant to section 33-44(c)(3)(A) of the Montgomery County Code (“MCC”), retirees who were hired by the County prior to July 1, 1978 were entitled to an annual COLA equal to 100% of any change in the consumer price index (“CPI”) for the month preceding the end of the prior fiscal year. Retirees hired after that date, like [Appellant], were entitled to a COLA of 60% of the change in the CPI greater than 3%, with an annual cap of 5% for retirees younger than 65.

[Appellant] v. Montgomery County Merit System Protection Board, 2016 WL 6876648, p.1, n.1 (Md. Ct. Spec. App., November 16, 2016) (Unreported).⁴

Appellant is now for the first time challenging the County’s calculation of her COLA, arguing that in 2001 the County Council enacted Bill No. 25-01 (Chapter 21, Laws of Montgomery County 2001), which amended § 33-44(c)(3)(B), effective November 1, 2001, to provide for a COLA calculation of 100% of the CPI up to 3% and 60% for amounts over 3% up to 7.5%. The County has applied the 60% COLA to Appellant’s benefits since May 2013.

⁴ Because we rely on an unreported decision of the Court of Special Appeals for its preclusive effect with regard to the same parties, and not as precedent within the rule of *stare decisis* nor persuasive authority, Maryland Rule 1-104 is inapplicable.

The County contends that the 100% COLA does not apply to Appellant since she retired prior to the amendment, and that the proper COLA was already the subject of an appeal to the Board. The County argues that Appellant's current challenge to the COLA calculation is barred by *res judicata* and collateral estoppel.

Appellant could have challenged the COLA calculation in her 2013 and 2014 appeals (MSPB Case Nos. 14-06 and 14-46), but instead conceded (as she did in her subsequent appeals to the Circuit Court and Court of Special Appeals) that the 60% calculation applied to her and that payment of the 100% COLA was in error. The Board and the courts specifically addressed the issue and found that it was an error for the County to give her a 100% COLA.

Appellant's claim is thus precluded because the elements of *res judicata* are satisfied: (1) the parties are the same as in MSPB Case Nos. 14-06 and 14-46; (2) the subject matter (calculation of the COLA) is the same as that which could have or should have been litigated in the prior cases; and (3) there was a final judgment on the merits.

Appellant cannot avoid the requirements of *res judicata* by arguing her own failure to challenge the COLA calculation in the prior case. *See* MSPB Case No. 14-38 (2014):

Res judicata restrains a party from litigating the same claim repeatedly and ensures that courts do not spend time adjudicating matters that have been decided or could have been decided fully and fairly. Almost 130 years ago, the Supreme Court made this point in *Cromwell v. County of Sac*, 94 U.S. 351, 358 (1876): "The plea of [*res judicata*] applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." . . .

"The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit." *MPC, Inc. v. Kenny*, 367 A.2d 486 (Md. 1977) (quoting *Alvey v. Alvey*, 1,71 A.2d 92, 94 (Md. 1961)); *see also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982) ("A party cannot escape the requirements of. . . *res judicata* by asserting its own failure to raise matters clearly within the scope of a proceeding.").

Appellant's claim would also be precluded under the doctrine of collateral estoppel. *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359 (2016), holds that when an issue is litigated and decided by an administrative agency, and the determination was essential to that decision, the determination may be conclusive in a subsequent administrative action between the parties, whether on the same or a different claim. MSPB Case No. 17-15 (2017).

The Board in MSPB Case Nos. 14-06 and 14-46 decided the identical COLA calculation at issue in this appeal. There was a final judgment on the merits that was affirmed by the Court of Special Appeals. The parties are the same, and Appellant was represented by counsel and had a fair opportunity to be heard on the issue in the prior litigation.

Finally, Appellant is also precluded by the principles of judicial estoppel from taking a position in this appeal that differs from the admission she made in the prior appeal. Appellant represented to the Circuit Court and the Court of Special Appeals that there was “no contest” that the County had erroneously calculated her COLA at the 100% level; having made these representations to the courts, she cannot be heard now to argue that the County had in fact correctly calculated her COLA at the level. *See* MSPB Case No. 17-20 (2018).

For these reasons, the Board need not reach the merits of Appellant’s arguments to affirm the CAO’s decision.

ORDER

Based on the foregoing, the Board **DENIES** Appellant’s appeal from the CAO’s interpretation of the statute concerning calculation of Appellant’s Cost of Living Adjustment.

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 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
June 24, 2019

DISMISSAL OF APPEALS

Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if, among other reasons, the appeal is untimely, the appellant fails to prosecute the appeal or comply with appeal procedures, the Board lacks jurisdiction, the appeal is or becomes moot, the appellant failed to exhaust administrative remedies, there is no actual (*i.e.*, justiciable) controversy, or the appellant fails to comply with a Board order or rule. The County's Administrative Procedures Act (APA), Montgomery County Code § 2A-8(j), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal.

During fiscal year 2019, the Board issued the following dismissal decisions.

DISMISSAL FOR FAILURE TO COMPLY WITH ESTABLISHED APPEAL PROCEDURES

CASE NO. 18-30

ORDER OF DISMISSAL

On May 24, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a May 11, 2018 denial of employment by the Department of Police. That same day an acknowledgement letter was sent to Appellant advising him that the Board could not process the appeal until it received a copy of the notice of nonselection. The letter also referenced Montgomery County Personnel Regulation (MCPR), § 35-4(d)(3). A second letter was sent on July 11, 2018, when Appellant had failed to respond to the Board's first letter or provide the Board with a copy of the notice of nonselection. The July 11 letter advised Appellant that if the Board had not received a notice of nonselection by August 2, 2018, an order dismissing the appeal may be issued. To date, the Board has received no response or copy of a notice of nonselection.

MCPR §35-4(d) provides that an applicant contesting a nonselection action “*must* include the following documentation with the appeal: (3) If the employee or applicant is contesting a nonselection/nonpromotion decision, a copy of the notification of nonselection/nonpromotion *must* be provided.” (emphasis added).

After being given ample opportunity, Appellant has not provided a copy of a notice of nonselection. Thus, the Board must dismiss this matter for failure to comply with established appeal procedures. MCPR § 35-7(b). Accordingly, it is hereby **ORDERED** that the appeal in Case No. 18-30 is dismissed.¹

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
August 9, 2018

¹ Although the appeal references Appellant's belief that he is the victim of discrimination, the Board lacks jurisdiction over appeals that allege human rights violations. The Board has previously informed Appellant on several occasions that the County Code is explicit in that appeals alleging discrimination prohibited by Chapter 27 of the Code must be filed with the Human Rights Commission. Montgomery County Code, § 33-9(c). *See, e.g.*, MSPB Case No. 14-40 (2014); MSPB Case 15-04 (2015); MSPB Case No. 15-15 (2015); MSPB Case 15-31 (2015); MSPB Case No. 16-01 (2015).

CASE NO. 19-06

ORDER OF DISMISSAL

On September 5, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging a denial of employment as a police officer.¹ That same day an acknowledgement letter was sent to Appellant advising him that the Board could not process the appeal until it received a copy of a notice of non-selection. Montgomery County Personnel Regulation (MCPR), § 35-4(d)(3). Having received no response to its letter, the Board issued a Show Cause Order on October 24, 2018, instructing Appellant to provide a statement of such good cause as exists for why he has failed to provide a required notice of non-selection. The statement was ordered to be filed on or before close of business November 20, 2018. The Show Cause Order advised Appellant that, absent the filing of the required notice of non-selection, or a finding by the Board that there was good cause for his failure to file a notice of non-selection, the Board will dismiss this appeal for lack of jurisdiction. MCPR § 35-7(b) & (c). To date, Appellant has not responded to the Board's letter, Show Cause Order, or provided the Board with a copy of a notice of non-selection.

MCPR §35-4(d) provides that an applicant contesting a nonselection action “*must* include the following documentation with the appeal: (3) If the employee or applicant is contesting a nonselection/nonpromotion decision, a copy of the notification of nonselection/nonpromotion *must* be provided.” (emphasis added).

After being given ample opportunity, Appellant has not provided a copy of a notice of nonselection. Thus, the Board must dismiss this matter for failure to comply with established appeal procedures. MCPR § 35-7(b). Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-06 is dismissed.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
November 29, 2018

¹ Appellant submitted his online appeal September 4, 2018 at 10:13 p.m., after MSPB business hours. Accordingly, the appeal was considered to have been officially received the Board's next business day.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 19-02

ORDER OF DISMISSAL

Appellant filed this appeal concerning denial of employment as a Supervisor, Strategic Industry Partnerships, with the Montgomery County Public Schools (MCPS). The appeal was submitted online to the Merit System Protection Board (MSPB or Board) on Friday, July 27, 2018, a date when the MSPB office is not open. Accordingly, the appeal was considered to have been officially received the next Board business day. On July 30, 2018, an acknowledgement letter was sent to Appellant's attorney and the County, establishing a schedule for the County and Appellant to submit information and complete documentation concerning the appeal. The letter also advised Appellant's attorney:

that the MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. Accordingly, I urge you to explore your client's appeal rights, if any, to the MCPS.

The County submitted a Motion to Dismiss on August 27, 2018, asserting that the MSPB lacked jurisdiction. Appellant's reply was due on September 24, 2018, but no reply or other pleading has been filed with the MSPB to date.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See Montgomery County Personnel Regulations (MCPR)*, § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction."). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Montgomery County Code (MCC) grants the MSPB jurisdiction over appeals from applicants for employment in a merit system position with the County. MCC § 33-9(c) ("Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion."); MCPR § 6-14 ("Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB"). Thus, the MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. MSPB Case No. 09-08 (2009).

Merit system employees are defined by the Montgomery County Code, § 33-6, as “All persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law.” See MCPR § 1-39. It is undisputed that Appellant is appealing his nonselection for a supervisory position with the MCPS. The appeal states that the position Appellant sought was that of Supervisor, Strategic Industry Partnerships with the Montgomery County Public Schools. The exhibits attached to the appeal include a July 5, 2018, email from ALF, Coordinator, Montgomery County Public Schools, Office of Human Resources and Development, advising Appellant that he had not been selected for the position.

The position Appellant was denied was not a merit system position with the executive or legislative branches of the County government; rather, it was a position with a separate entity, the MCPS. *Board of Education of Montgomery County v. Montgomery County*, 237 Md. 191, 197(1964) (“The board of education is not a part of the executive branch of the county government nor an agency under its control.”). The MCPS has personnel authority over its employees that is independent of the executive and legislative branches of County government. Md. Code Ann., Educ. § 4-103(a) (county board of education shall appoint personnel); § 6-201(a)(1) (“the county board shall employ individuals in the positions that the county board considers necessary for the operation of the public schools in the county.”). See *Donlon v. Montgomery County Public Schools*, 460 Md. 62, 90 (2018); *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 138-39 (2000) (“teachers, principals, and other professional, administrative, clerical, security, transportation, and maintenance staff” are hired by and employees of the county school board “in accordance with a personnel system established by the county board.”).

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant’s appeal of his nonselection for a position with the MCPS. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-02 is dismissed for lack of jurisdiction.

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*, an appeal 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
October 11, 2018

CASE NO. 19-07

ORDER OF DISMISSAL

On September 12, 2018, Appellant, a supervisor in the County Office of Public Information’s MC311 unit, filed an appeal of a written reprimand. Attached to the appeal form was a September 6, 2018, memorandum with the subject line “Statement of Charges – Written

Reprimand.” Appellant alleged in his Appeal that although Manager K.J. told him on September 11, 2018, that the Statement of Charges would be rescinded, she “changed her mind on 9/12/18 as a retaliation for my appeal.”

On September 13, 2018, the Board sent a letter to Appellant advising him that it was unclear whether the September 6 document he had filed with his appeal, as required under Montgomery County Personnel Regulations (MCPR), § 35-4(d)(1), was the Notice of Disciplinary Action (NODA) he intended to appeal. The letter noted that the document submitted purported to be a Statement of Charges and did not appear to contain the applicable appeal rights required to be included with a NODA under MCPR § 33-6(c)(1)(E) & (F). The appeal was held in abeyance pending receipt of Appellant’s clarification or submission of a NODA. The September 13 MSPB letter to Appellant also stated:

Please be advised that the Merit System Protection Board (MSPB) only has jurisdiction over disciplinary appeals involving a demotion, suspension, termination, dismissal, or involuntary resignation. MCPR, § 35-2(a). An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the Chief Administrative Officer (CAO). MCPR, § 33-9(a)(1), MCPR § 33-9(b)(2), MCPR, § 34-4(e), MCPR § 35-2(b), and MCPR § 35-4(d)(2). Please review the Montgomery County Personnel Regulations carefully to protect your appeal rights.

On September 18, 2018, Appellant submitted a NODA, dated September 12, 2018, imposing a written reprimand. Although the NODA advises Appellant that he has the right to file a grievance, he has not indicated whether he has done so.

This Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. *See, e.g.*, MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See, Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995). *See* MCPR § 35-6(c) (“The MSPB must dismiss an appeal if it determines it lacks jurisdiction.”).

The right of a merit system employee to have an opportunity for a hearing before the Board concerning a suspension, demotion or dismissal is granted by § 404 of the Montgomery County Charter. The Montgomery County Code, § 33-12(a), provides that merit system employees who have been “notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board. . .”.

The Board takes seriously any allegation that there may be retaliation against a County employee for attempting to exercise his right to appeal to the Board. However, there is no right of direct appeal to the Board with regard to a written reprimand. MSPB Case No. 18-26 (2018); MSPB Case No. 15-10 (2015). In such a circumstance, a grievance is a prerequisite to the filing of an appeal to the Board. MCPR, § 33-9(b)(2); § 35-2(b) (a merit system employee may appeal to the Board “after receiving an adverse final decision on a grievance from the CAO.”). As we

have no record of a grievance being filed over the written reprimand, or of any adverse final decision of the Chief Administrative Officer for the Board to review, the Board lacks jurisdiction to hear an appeal of the written reprimand due to a failure of Appellant to exhaust his administrative remedies. MSPB Case No. 18-26 (2018).¹

If he has not done so already, Appellant may file a grievance concerning the written reprimand, including any allegations of retaliation. He may then appeal the written reprimand and any retaliation claim to the CAO. Should an adverse CAO decision be issued regarding the written reprimand or alleged retaliation, Appellant may then timely file an appeal to the MSPB.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-07 is dismissed without prejudice.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
October 4, 2018

CASE NO. 19-08

ORDER OF DISMISSAL

Appellant filed this appeal concerning denial of employment as a temporary, seasonal, part-time Library Page position, with the Montgomery County Public Libraries (MCPL). The appeal was submitted online to the Merit System Protection Board (MSPB or Board) on October 3, 2018. On October 4, 2018, an acknowledgement letter was sent to Appellant and the County, establishing a schedule for the parties to submit information and complete documentation concerning the appeal.

The County submitted a response on November 5, 2018, asserting that the appeal should be dismissed for lack of jurisdiction because it was filed a day late. The County response also argued that the denial of employment was appropriate. Appellant did not submit a reply or other pleading.

¹ This Board has held that where an employee otherwise has the right to file a direct appeal of discipline to the Board they may also raise retaliation claims against the same individuals who were involved in the disciplinary action. MSPB Case No. 07-17 (October 1, 2007). Allegations of retaliation in connection with lesser discipline, such as a written reprimand, should normally be addressed through the grievance process. *See also* MCPR § 34-7, which addresses complaints of harassment or retaliation for filing a grievance. This decision should not, however, be interpreted as deciding that there are no circumstances under which we will accept a direct appeal of a retaliation claim by an employee attempting to utilize the Board's appeals process.

After reviewing the County response, the Board sent the parties a request for clarification on November 29, 2018. The Board asked the County to provide an explanation of the merit system status of the temporary, seasonal, part-time Library Page position, and address the Board's jurisdiction if the position is not in the merit system. Appellant was provided with an opportunity to respond to the County.

On December 14, 2018, the County submitted a response to the clarification request. The County response argued that the appeal should be dismissed for lack of jurisdiction and provided a Class Specification which indicates that the Library Page position is not in the merit system. Although Appellant was again provided with an opportunity to respond, she failed to do so.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See Montgomery County Personnel Regulations (MCPR)*, § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction."). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Montgomery County Code (MCC) grants the MSPB jurisdiction over appeals from applicants for employment in a merit system position with the County. MCC § 33-9(c) ("Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion."); MCPR § 6-14 ("Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB"). Thus, the MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. MSPB Case No. 19-02 (2018); MSPB Case No. 16-02 (2015); MSPB Case No. 09-08 (2009).

Merit system employees are defined by the Montgomery County Code, § 33-6, as "All persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law." *See MCPR* § 1-39. A temporary position is a non-career position classified and filled under merit system principles. MCPR § 1-75. Thus, there can be no dispute that Appellant is appealing her nonselection for a temporary, seasonal, Library Page position that is not in the merit system.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant's appeal of her nonselection for a non-merit system Library Page position with the MCPL. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-08 is dismissed for

lack of jurisdiction.¹

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
January 24, 2019

¹ Appellant has available to her other avenues to address potential allegations of disability discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights.

DISMISSAL FOR MOOTNESS

CASE NO. 18-19

ORDER OF DISMISSAL

On December 20, 2015, Appellant filed a grievance appeal with the Merit System Protection Board (Board or MSPB). MSPB Case No. 16-09. On April 4, 2016, Appellant filed two additional grievance appeals. MSPB Case Nos. 16-11 and 16-12. The Board concluded that Appellant's claims should be addressed together and, on May 26, 2016, ordered consolidation of MSPB Case Nos. 16-09, 16-11, and 16-12. Subsequent to the consolidation of the first three appeals, Appellant filed four additional grievance appeals: MSPB Case No. 17-02 (August 18, 2016); MSPB Case No. 17-04 (September 26, 2016); MSPB Case No. 17-08 (November 10, 2016); and, MSPB Case No. 17-23 (April 3, 2017).

On February 1, 2018, the Board consolidated MSPB Case Nos. 16-09, 16-11, 16-12, 17-02, 17-04, 17-08, and 17-23 into this case, which we designated as MSPB Case No. 18-19. In the February 1, 2018, Order, and pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations (MCPR), § 35-2(b), the Board also ordered that MSPB Case No. 18-19 be referred to the Montgomery County Office of Zoning and Administrative Hearings (OZAH) for a Hearing Examiner to conduct an evidentiary hearing, rule on motions, and issue a report and recommendation to the Board with proposed findings of fact and conclusions of law, and a proposed decision. The Hearing Examiner's findings and recommendations were to be subject to written exceptions by the parties prior to the Board reaching a final decision.

For over a year the parties have engaged in extensive discovery, contested various motions and cross-motions, and participated in hearings before the Hearing Examiner.¹ By our count, the Hearing Examiner has issued 28 orders, including those that are procedural. The Board itself has issued four orders, three in response to Appellant's motions.²

On March 27, 2019, Appellant filed a Notice of Withdrawal of Appeal seeking to dismiss MSPB Case No. 18-19, including all of the consolidated appeals referenced above. Notwithstanding the Board's delegation to the Hearing Examiner, Appellant has filed this motion directly with the Board itself. Because of the nature of the motion and in the interest of judicial economy, we choose to hear and decide Appellant's motion without the necessity of review by the Hearing Examiner.

Pursuant to MCPR § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 17-18 (2017); MSPB Case No. 17-11 (2017). *See* MCPR §35-7(b) (Board may

¹ The County's Response states that "Appellant filed approximately 13 motions with OZAH and/or the MSPB." While the Board is aware of various motions filed by Appellant, it has not verified the exact number filed with OZAH.

² In addition to our Order Consolidating Appeals and Referring to Hearing Examiner (February 1, 2018), we have issued an Order Dismissing Interlocutory Appeal (May 16, 2018), an Order Denying Motion for Disqualification (August 22, 2018), and an Order Denying Motion for Hearing and Disqualification (March 21, 2019).

dismiss an appeal if the appellant fails to prosecute the appeal). *See also* Montgomery County Code, § 2A-8(h)(4) & (10).

The County's Response to Appellant's Notice of Withdrawal of Appeal does not oppose a dismissal, but requests that the dismissal be with prejudice.

Under the authority of MCPR, § 35-7(b) & (d), and the Code, § 2A-8(h), the Board has used its discretion to dismiss voluntary dismissal cases "with prejudice."³ The Court of Appeals, in *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 420 (2007), explained the analysis that should be used to decide whether a voluntary dismissal after the filing of a responsive pleading should be with or without prejudice:

Whether a plaintiff is entitled to voluntary dismissal without prejudice, *i.e.*, the defendant would not suffer "plain legal prejudice" in the event of dismissal, is resolved traditionally by analysis according to the following four factors: (1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation, *i.e.*, whether a motion for summary judgment or other dispositive motion is pending.

In our view, application of the four factors listed in the *Aventis Pasteur* case to MSPB Case No. 18-19 favors dismissal with prejudice. Accordingly, for the above reasons, the Board hereby **ORDERS** that the above-captioned consolidated appeals be **DISMISSED**, with prejudice.

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 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
April 4, 2019

CASE NO. 18-21

ORDER OF DISMISSAL

On February 7, 2018, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board). Appellant is a retired firefighter challenging a reduction in her service connected disability retirement benefits. The Board concluded that the processing of Appellant's appeal would benefit from adherence to the steps required by § 33-56 of the County Code and a written decision by the Chief Administrative Officer (CAO). On June 7, 2018, the Board ordered

³ *See, e.g.*, MSPB Case No. 17-18 (2017); MSPB Case No. 17-11 (2017).

that the appeal be remanded to the CAO and held in abeyance until the CAO had issued a written decision.

On August 2, 2018, the CAO issued a letter granting Appellant what appears to be full relief. The Board's June 7 Order provided that, within 15 days after receiving the CAO's response, Appellant could either submit a written request that the Board resume processing her appeal or, if satisfied with the CAO's response, withdraw her appeal. When Appellant failed to advise the Board of which course of action she wished to pursue the Board issued a Show Cause Order dated August 21, 2018, requiring Appellant to show good cause as to why the Board should not dismiss her appeal as moot. On August 30, 2018, Appellant filed a request to withdraw her appeal, stating that the County has agreed to retroactively pay Appellant for the retirement benefits which had been reduced, as well as prospectively pay the appropriate amount of retirement benefits.

Pursuant to Montgomery County Personnel Regulations, § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that when the County provides the relief sought by the Appellant, the appeal should be dismissed as moot. MSPB Case Nos. 16-14 & 16-16 (2016); MSPB Case No. 89-52 (1990); MSPB Case No. 89-15 (1989); MSPB 89-45 (1989).

Accordingly, the Board concludes that the appeal in Case No. 18-21 is moot, and hereby **ORDERS**, that it be **DISMISSED**, with prejudice.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
September 20, 2018

CASE NO. 18-32

ORDER OF DISMISSAL

Appellant filed a grievance appeal, officially received by the Merit System Protection Board (Board or MSPB) on June 19, 2018. That same day, the Board acknowledged the Appeal, assigned the matter the above referenced case number, and requested that the County submit a response. The County filed its response on July 23, 2018. Appellant filed an email with the Board asking to withdraw her Appeal in the above-captioned case on July 26, 2018. The request was considered officially filed as of July 30, 2018, the Board's next business day.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long held that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 18-15 (2017); MSPB Case No. 17-11 (2017); MSPB Case No. 16-17 (2016); MSPB Case No. 88-15 (1990). *See* MCPR § 35-7(b) (Board

may dismiss an appeal if the appellant fails to prosecute the appeal). Appellant's request to withdraw her Appeal in this matter renders the Appeal moot.

Accordingly, the Board hereby **ORDERS**, that the above-captioned appeal be **DISMISSED**.

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 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
July 31, 2018

CASE NO. 19-01

ORDER OF DISMISSAL

Appellant filed a grievance appeal, officially received by the Merit System Protection Board (Board or MSPB) on July 2, 2018. That same day, the Board acknowledged the Appeal, assigned the matter the above referenced case number, and advised Appellant that processing of his Appeal would be stayed until he provided the Board with a copy of the Step 2 decision by the Chief Administrative Officer as required under Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2). Appellant filed an email with the Board asking to withdraw his Appeal in the above-captioned case on July 26, 2018. The request was considered officially filed as of July 30, 2018, the Board's next business day.

Pursuant to MCPR § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long held that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 18-15 (2017); MSPB Case No. 17-11 (2017); MSPB Case No. 16-17 (2016); MSPB Case No. 88-15 (1990). *See* MCPR § 35-7(b) (Board may dismiss an appeal if the appellant fails to prosecute the appeal). Appellant's request to withdraw his Appeal in this matter renders the Appeal moot.

Accordingly, the Board hereby **ORDERS**, that the above-captioned appeal be **DISMISSED**.

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 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
July 31, 2018

DISMISSAL FOR UNTIMELINESS

CASE NO. 19-09

FINAL DECISION AND ORDER

On October 4, 2018, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board), challenging his nonselection for the position of Work Force Leader II with the Department of Liquor Control (Department or DLC). That same day, pursuant to Montgomery County Personnel Regulations (MCPR), §35-4(d)(3), the Board requested that Appellant submit a copy of the notification of his non-selection and any other relevant documents. On October 8, 2018, Appellant provided the Board with a copy of an email notification of non-selection dated May 14, 2018. On November 8, 2018, the County filed a response (County's Response) to the appeal which included two exhibits. The County's Response also moved to dismiss the appeal as untimely. Appellant filed a reply (Appellant's Reply), dated November 15, 2018, but received by the Board on December 3, 2018.

On December 5, 2018, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why the appeal regarding his denial of a promotion should not be dismissed as untimely. Appellant filed a response to the Show Cause Order by electronic mail on December 11, 2018, and by mail on December 17, 2018. The appeal was considered and decided by the Board.

FINDINGS OF FACT

It is undisputed that Appellant received notice of his nonselection by email from the County on May 14, 2018. County Response, Exhibit 1; Notice of Denial submitted by Appellant, October 8, 2018. The Appeal was filed with the MSPB on October 4, 2018, 100 working days after Appellant received notice of the denial from the County. Appellant does not dispute that the Appeal was filed late. Appellant's Reply at p. 1 ("I filed untimely").

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion... Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the Merit System Protection Board.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

§ 35-3. Appeal period.

- (b) An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position.

ISSUE

Is the appeal timely?

ANALYSIS AND CONCLUSIONS

Under the applicable personnel regulations Appellant had ten (10) working days to file an appeal challenging a denial of employment. It is undisputed that Appellant was notified on May 14, 2018, of the Department’s decision not to select him for the Work Force Leader II position. However, Appellant did not file his appeal until October 4, 2018, 100 working days later. Appellant does not dispute that the appeal was untimely filed. Appellant’s Reply at p. 1 (“I filed untimely”).

While the Board may waive filing time limits for good cause shown, the Board generally does not waive the 10-day filing limit. *See* MSPB Case No. 14-43 (2014); MSPB Case No. 14-08 (2013). Appellant has provided no evidence or persuasive argument for why the Board should do so in this case.

Appellant argues that he had “good reason” to file his appeal late and that “[t]o err is human.” Appellant’s Reply at p. 1. As justification for the delay in filing his appeal Appellant suggests that he was led to believe that there would be another promotional opportunity in the near future and that he would be selected for that position. There is no indication that Appellant was affirmatively misled as to his appeal rights or that he received any firm assurance of a promotion. Appellant admits that it was only after no promotional opportunity arose during the ensuing months that he decided that it was time to file an appeal. *Id.* Appellant also suggests that while the warehouse manager promised to meet with him to discuss Appellant’s concerns about the May 14, 2018, nonselection, the meeting never took place. Appellant’s Response to Show Cause Order, p.1. We do not find any of these allegations to be sufficient justification to waive the applicable time limits for filing an appeal of a nonselection decision four months late.

Appellant does not explain in what way he was led to believe that there would be another promotional opportunity and that he would be given the job. He provided no documentation of a written promise, does not suggest that he received a specific oral promise, and did not allege that

an individual with final authority to make a promotion decision actually made such an assurance. Even had Appellant explicitly asserted that the doctrine of equitable estoppel would bind the County to the alleged promises, Appellant has not sufficiently alleged the elements of equitable estoppel. MSPB Case No. 16-07 (2016). More importantly, even were Appellant able to prove the elements necessary for estoppel, that doctrine may not be used to confer jurisdiction on the Board. *Id.*

Appellant also suggests that his late filing should be excused because the written notice informing him of his nonselection did not contain information concerning his appeal rights. *Id.* at p. 2; Appellant Response to Show Cause Order, p. 1. Appellant's argument is unavailing because, as the Board has previously ruled on this precise issue, the County Code and regulations do not require the County to provide information concerning an applicant's appeal rights in a notice of non-selection. MSPB Case No. 17-07 (2017).

Moreover, the Board does not lightly consider a waiver of the mandatory time limits, and the length of delay is always a critical factor in assessing whether an untimely filing may be excused. Here the extremely long delay strongly militates against any finding of good cause. MSPB Case No. 17-22 (2017) (appeal filed seven weeks late); MSPB Case No. 14-07 (2013) (appeal filed 10 weeks late); MSPB Case No. 13-03 (2013) (appeal filed 14 months late). This is not a circumstance where the County misinformed or deceived the employee. Appellant claims only that he erroneously relied on what, at most, were vague reassurances that his concerns would be discussed and that perhaps there would be another promotional opportunity. He then waited four months before ascertaining his appeal rights and attempting to act upon them. Appellant's four-month delay in ascertaining his appeal rights does not demonstrate due diligence and cannot be characterized as reasonable. MSPB Case No. 10-08 (2010) (appellant waiting nearly a year to appeal "was not diligent in attempting to discover and exercise her appeal rights in a timely manner"). *Cf.*, MSPB Case No. 18-16 (2018) (appellant waited 11 months before inquiring as to the status of his appeal).

Accordingly, Appellant's appeal must be dismissed as untimely.

ORDER

Based on the foregoing, Appellant's appeal regarding his denial of a promotion is hereby **DISMISSED** as untimely.

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 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
January 30, 2019

DISMISSAL ON MULTIPLE GROUNDS

CASE NO. 18-23

ORDER OF DISMISSAL

On February 26, 2018, Appellant filed this appeal of the decision of the Department of Corrections and Rehabilitation (DOCR) not to select him for a promotion to the rank of Lieutenant. Appellant alleged, in part, that he had improperly been given incomplete study materials for the promotional examination. On March 28, 2018, the County provided a response to the appeal, asserting that Appellant had not asked for all the materials, the DOCR test process was conducted appropriately, and that Appellant was unable to show that the County acted in a manner that was arbitrary and capricious, illegal, based on political affiliation or other nonmerit factors, or in violation of examination and scoring procedures.

On July 2, 2018, the Board asked the County for additional information concerning the actions of DOCR with regard to test preparation materials.¹ The County responded to the request for further information on July 24, 2018. The Board again asked the County for further information by letter dated August 8, 2018, including additional affidavits from officers who distributed test preparation study materials, and the status of the eligible list resulting from the Lieutenant's exam, the number of applicants on the list, the schedule for future exams, and current vacancies at that rank. The Board also asked Appellant for certain information.

The County responded to the second request for information on September 10, 2018. As part of that response the County advised that Appellant had been promoted to the rank of Lieutenant effective September 2, 2018. Appellant did not respond to the Board's request.

In light of the promotion, on September 18, 2018, the Board requested that the parties advise the Board by October 1, 2018, how they wished to proceed with the appeal. The County submitted a Motion to Dismiss on October 1, 2018, asserting that the MSPB should dismiss this appeal as moot since Appellant was promoted to the rank of Lieutenant, the position he had sought. Appellant's reply was also due on October 1, 2018, but he has filed no response or communication of any sort with the Board. Nor has Appellant provided a reply the County's motion explaining why, having received the relief he had sought in his appeal, his case should not be dismissed as moot.

Appellant has not opposed the County's motion to dismiss for mootness or responded to the Board's August 8 and September 18 letters. Pursuant to Montgomery County Personnel

¹The letter asked for "clarification as to: (a) whether there was a Correctional Law book available on August 6th when Appellant obtained the study source materials; (b) whether Appellant was offered a Correctional Law book at any time; (c) what was included in the "study packet" Appellant and other applicants signed for, and whether every applicant received the same materials; (d) whether the Correctional Law book was included with the study source material packet in other years or for other exams; (e) how many of the individuals obtaining study source materials received the Correctional Law book and whether there is a written record; and, (f) whether or not those who received the Correctional Law book made specific requests for a copy."

Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot, and under MCPR § 35-7(b) the Board may dismiss an appeal for failure to prosecute. MSPB Case No. 15-19 (2015); MSPB Case No. 09-07 (2009).

Accordingly, the Board grants the motion to dismiss and hereby **ORDERS**, that the appeal in MSPB Case No. 18-23 be **DISMISSED**, with prejudice, on the basis of mootness and for failure to prosecute the appeal.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
October 29, 2018

CASE NO. 19-10

ORDER OF DISMISSAL

Appellant, an employee of the Department of Transportation, filed an appeal with the Merit System Protection Board (MSPB) on October 8, 2018. Although Appellant submitted a copy of a Statement of Charges (SOC) with his appeal, Montgomery County Personnel Regulations (MCPR), § 35-4(d)(1), requires a copy of a Notice of Disciplinary Action (NODA) in order for the MSPB to consider the appeal. Accordingly, on October 8 the MSPB acknowledged receipt of the appeal and requested that Appellant submit a copy of a NODA. The Board's letter advised Appellant that unless the County had issued a NODA taking disciplinary action against him, the MSPB would lack jurisdiction over the appeal.

After receiving no response from Appellant, on November 29, 2018, a second letter was sent advising him that under MCPR § 35-8(c), he was required to respond to an MSPB request for documentation within 15 working days. The letter further advised him that if the MSPB did not receive a copy of the required documentation, *i.e.*, a NODA, by December 24, 2018, an order dismissing the appeal may be issued.

Having received no response to the requests for documentation, the Board issued a Show Cause Order on December 26, 2018, requiring Appellant to provide a statement of such good cause as exists for why he has failed to provide a required NODA. Appellant did not respond to the Show Cause Order even though it advised Appellant that absent the filing of a NODA or a finding by the Board of good cause for his failure to file a NODA, the Board would dismiss his appeal for lack of jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015). Moreover, pursuant to MCPR § 35-7(b), the Board may dismiss an appeal if the appellant fails to prosecute the appeal or comply with the Board's appeal procedures. It is well settled that the sanction of dismissal may be imposed if a party fails to prosecute or defend an appeal. MSPB Case No. 15-19 (2015).

After being given the opportunity, Appellant has not provided a copy of a NODA. Thus, because Appellant has not provided the copy of the NODA or responded to several letters from the Board and a Show Cause Order, the Board must dismiss this matter for failure to comply with established appeal procedures, due to Appellant's failure to prosecute his case, and because the Board lacks jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 17-17 (2017); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015). Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-10 is **DISMISSED**.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
January 17, 2019

CASE NO. 19-12

ORDER OF DISMISSAL

On September 13, 2018, the County Chief Administrative Office (CAO) denied a grievance appeal filed by Appellant. The last paragraph of the CAO's September 13 decision stated, in its entirety: "Under County Code Section 33-56, you have 15 days to appeal this decision to the Merit System Protection Board." The Montgomery County Code, § 33-56(c), requires that an appeal to the MSPB from the decision of the CAO regarding a retirement issue must be filed within 15 calendar days.

By letter addressed to the CAO and postmarked October 3, 2018, Appellant indicated a desire to appeal to the Merit System Protection Board (MSPB). The October 3 letter stated, in its entirety: "Thank you for responding to my appeal and yes I would like to appeal to the Merit Board." On October 19, 2018, Associate County Attorney ASM responded to Appellant, advising him that she had forwarded his request to the MSPB and suggesting that he contact the MSPB directly. Ms. M also provided Appellant with the MSPB's telephone and email contact information. On October 22, 2018, the MSPB sent a letter to Appellant providing information on how to file an appeal to the MSPB. To date, Appellant has not filed an appeal or otherwise responded to the Board's letter. Having received no response to its letter, the Board issued a Show Cause Order on November 15, 2018, instructing Appellant to provide a statement of such good cause as may exist for why he has failed to file a timely appeal with the MSPB. The statement was ordered to be filed on or before close of business November 27, 2018. The Show Cause Order advised Appellant that, absent the filing of an appeal and an explanation providing good cause for his failure to file a timely appeal, the Board would dismiss this appeal. To date, Appellant has not responded to the Board's letter, Show Cause Order, or provided the Board with an appeal or an explanation for his failure to file a timely appeal.

After being given ample opportunity, Appellant has not provided a statement of such good cause as exists for why he has failed to file a timely appeal with the MSPB. Thus, the Board will dismiss this matter for untimeliness and failure to comply with established appeal procedures. Montgomery County Code, § 33-56(c); Montgomery County Personnel Regulations, § 35-7. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-12 is dismissed.

Pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, if any party disagrees with the decision of the Merit System Protection Board they may within 30 days file an appeal with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 5, 2018

CASE NO. 19-15

ORDER OF DISMISSAL

Appellant, an employee of the Department of Liquor Control, filed an appeal with the Merit System Protection Board (Board or MSPB) on December 24, 2018. By letter that same day the Board acknowledged the appeal and advised Appellant that it was necessary for him to provide a copy of the Notice of Disciplinary Action (NODA) or Notice of Termination he was appealing within 15 working days. Montgomery County Personnel Regulations, §35-4(d)(1), §35-8(c). On December 31, 2018, Appellant submitted copies of a Statement of Charges – Dismissal, dated December 12, 2018, and his response thereto. The Board responded by letter that day again advising Appellant that he was required to file a NODA in order for the MSPB to consider the appeal. Appellant then telephoned the Board’s office on January 2, 2019, and told the Board’s Office Services Coordinator that he had provided documents to the Office of Human Resources (OHR) Equal Employment Opportunity and Diversity (EEO) unit. That afternoon the MSPB again wrote to Appellant and reminded him of his responsibility to file a NODA with the Board in order to pursue his appeal.

Having received no response to the requests for documentation, the Board issued a Show Cause Order on December 26, 2018, requiring Appellant to provide a statement of such good cause as exists for why he has failed to provide a required NODA. Appellant did not respond to the Show Cause Order even though it advised Appellant that absent the filing of a NODA or a finding by the Board of good cause for his failure to file a NODA, the Board would dismiss his appeal for lack of jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015). Moreover, pursuant to MCPR § 35-7(b), the Board may dismiss an appeal if the appellant fails to prosecute the appeal or comply with the Board’s appeal procedures. It is well settled that the sanction of dismissal may be imposed if a party fails to prosecute or defend an appeal. MSPB Case No. 19-10 (2019); MSPB Case No. 15-19 (2015).

After being given the opportunity, Appellant has not provided a copy of a NODA. Thus, because Appellant has not provided the copy of the NODA or responded to letters from the Board

and a Show Cause Order, the Board must dismiss this matter for failure to comply with established appeal procedures, due to Appellant's failure to prosecute his case, and because the Board lacks jurisdiction. MCPR § 35-7(b) & (c); MSPB Case No. 19-10 (2019); MSPB Case No. 17-17 (2017); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015). Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-10 is **DISMISSED**.

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*, an appeal 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
February 5, 2019

CASE NO. 19-17

ORDER OF DISMISSAL

Appellant, an employee of the Department of Correction and Rehabilitation, filed an appeal of a five day suspension with the Merit System Protection Board (Board or MSPB) on January 22, 2019. By letter dated February 4, 2019, Appellant was advised that his Prehearing Submission was due on or before April 1, 2019. Having received no prehearing submission, on April 9, 2019, the Board wrote to Appellant asking him to promptly file his Prehearing Submission or advise the Board in writing if he no longer wished to pursue his appeal. The letter also advised him that the Board may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. Montgomery County Personnel Regulations (MCPR), § 35-7(b). Under MCPR § 35-8(c), Appellant had fifteen (15) business days to comply with the Board's request.

On May 1, 2019, the County filed a Motion to Dismiss noting that Appellant had not filed any response within 15 business days and that the Board has authority to dismiss the appeal pursuant to MCPR § 35-7(b).

Having received no response from Appellant to the requests for documentation or the County's Motion to Dismiss, the Board issued a Show Cause Order on May 23, 2019. The order required Appellant to provide, by June 10, 2019, a statement of such good cause as exists for why this case should not be dismissed. Appellant has not responded to the Show Cause Order even though it advised Appellant that absent a finding by the Board of good cause for his failure, the Board would dismiss his appeal.

Thus, because Appellant has not provided the prehearing submission, or responded to requests from the Board and a Show Cause Order, the Board shall dismiss this matter for failure to comply with established appeal procedures and due to Appellant's failure to prosecute his case. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-17 be and hereby is **DISMISSED**.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 18, 2019

RECONSIDERATION

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code, § 2A-7(c) of the Administrative Procedures Act (APA). There is no specific time limit for filing such a motion under the APA or the Board's current procedures. Rather, the APA indicates that motions should be filed promptly.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days from a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within ten (10) days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

During fiscal year 2019, the Board issued the following decision on a Request for Reconsideration of a Preliminary Matter.

CASE NO. 18-10

ORDER

On July 26, 2018, Appellant's new representative¹ filed a Request for Reconsideration of the MSPB's Prehearing Order, issued on July 10, 2018.² Appellant urges that the Prehearing Order be amended to require the testimony of the Director of the Office of Human Resources (OHR) and the County Chief Administrative Officer (CAO). The Board has carefully considered the motion and the County's August 9, 2018, opposition thereto.³

At the prehearing conference Appellant objected to the County calling as its witness KP instead of the OHR Director. Appellant again argues that Ms. P was not involved in the decision to terminate Appellant, was not her supervisor, and has no direct knowledge of Appellant's job performance. The Board approved Ms. P as a witness and sees no reason to alter that decision. While it is not for Appellant to decide how the County can best make its case, Appellant has at all times been free to request fact witnesses for her case. Nevertheless, Appellant did not designate the OHR Director as a proposed witness in her prehearing submission. Nor does it appear that she is requesting that her witness list be amended to add the OHR Director. If Appellant decides that she wishes to call the OHR Director as her witness the Board would look favorably upon that request, but it will not order the County to call this particular witness for its case in chief.

The following passage in Appellant's motion purports to describe events at the prehearing conference regarding this issue:

According to [Appellant], at the Board's prehearing conference on June 21, 2018, Vice Chair Michael Kator at one point expressed the view that [SS] should be testifying and wanted to know why she wasn't. County attorney [SK] stated that she would explain that in private. [Appellant] did not know to object to that *ex parte* process. Appellant has a right to know why [SS] will not be testifying at the hearing. Assuming that [SS] is leaving County employment soon, if she is still on the payroll on October 9, 2018, she should be made to appear and testify.

No member of the Board invited any *ex parte* discussion. We assume Appellant misunderstood Member Kator's remarks to SK regarding the County's choice of witnesses as between the OHR Director and KP. Member Kator noted that the Board generally preferred to hear from the

¹ Appellant's representative entered his appearance on July 11, 2018. Prior to obtaining representation Appellant represented herself *pro se*.

² While a request for reconsideration of a MSPB decision on a preliminary matter is to be filed within 5 calendar days of the ruling or order, MCPR § 35-11(a)(5), the Prehearing Order expressly provided ample time for the parties to request changes regarding witnesses prior to the hearing:

The Board requests that proposed changes to the witness lists and any additional documents be submitted to the Board by **September 24, 2018**. Should the parties have any additional exceptions or requested modifications or revisions to this Order, they shall present them to the Board no later than **September 17, 2018**.

Accordingly, the Board will consider Appellant's motion as a request for revisions pursuant to the Prehearing Order and not as an untimely request for reconsideration of a preliminary order under MCPR § 35-11(a)(5).

³ Chair Angela Franco did not participate in this decision.

appropriate decisionmaker, but that it was up to the County to determine how best to try its case and meet its burden of proof. No *ex parte* contact has occurred before or after the prehearing conference.⁴

In her June 14, 2018, filing Appellant requested a subpoena to obtain the testimony of the County's CAO even though Appellant's prehearing submission did not include the CAO on her proposed witness list. The Board denied Appellant's request to call the CAO as a witness because his proposed testimony concerning Appellant's disability retirement matter is of questionable relevance to this termination case. Appellant will be permitted to introduce documents and present further argument at the hearing on the merits as to the relevance of the disability retirement determination to this case.

For the Board
August 22, 2018

⁴ The Montgomery County Administrative Procedures Act, Montgomery County Code (MCC), § 2A-8(b)(2), provides that "Section 19A-15(b) applies to any *ex parte* or private communications received by a member of a hearing authority." MCC § 19A-15(b), provides that:

- (1) A public employee decision-maker must not consider any communication made outside of the record regarding any matter that must be decided on the basis of a record . . .
- (2) Except as otherwise expressly authorized by law, any public employee decision maker, and any public employee who directly advises a decision maker, must not: (A) initiate or participate in any communication outside the record with any person regarding a matter that must be decided on the basis of a record; . . .
- (4) This subsection does not restrict a communication that consists solely of: (C) a procedural question that does not involve the substance of facts in a record. . . .

MOTIONS

The County's Administrative Procedures Act (APA), Montgomery County Code, § 2A-7(c), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to dismiss a party and substitute another, motions to quash subpoenas, motions *in limine* (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions may be filed at any time during a proceeding. The opposing party is given ten (10) calendar days to respond. MCPR § 35-11(a)(4). The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning or end of the hearing, rule on the motion.

During fiscal year 2019 the Board issued the following decision on motions filed during the course of an appeal proceeding.

MOTION FOR DISQUALIFICATION OF HEARING EXAMINER

CASE NO. 18-19

ORDER DENYING MOTION FOR DISQUALIFICATION

Having reviewed and considered Appellant's Motion for Disqualification of Hearing Examiner and the opposition thereto, the Merit System Protection Board (MSPB or Board) hereby denies that motion for the reasons stated herein.¹

On February 1, 2018, the Board consolidated MSPB Case Nos. 16-09, 16-11, 16-12, 17-02, 17-04, 17-08, and 17-23 into this case, MSPB Case No. 18-19. In the February 1, 2018, order, and pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations, § 35-2(b), the Board also ordered that MSPB Case No. 18-19 be referred to the Montgomery County Office of Zoning and Administrative Hearings for a Hearing Examiner to conduct an evidentiary hearing and rule on motions. The order further required the Hearing Examiner to provide the Board with a report and recommendation that included proposed findings of fact and conclusions of law, and a proposed decision. The Board's order explicitly specified that the Hearing Examiner's findings and recommendations would be subject to written exceptions by the parties and oral argument to the Board prior to the Board reaching a final decision.

Appellant's motion asserts that the Hearing Examiner and the Office of Zoning and Administrative Hearings (OZAH) have a conflict of interest due to the "command influence" of the Chief Administrative Officer (CAO). Appellant further argues that it would be futile and inappropriate for the matter to be remanded to the Hearing Examiner because the grounds for recusal are clear and significant, and because of OZAH's failure to disclose the alleged conflict of interest. Finally, Appellant contends that a remand would be inappropriate because the Hearing Examiner and OZAH have prejudged the motion.

In the Board's view, alleged bias by a Hearing Examiner without final decision making authority is an issue that must be exhausted. *Cf. Public Service Commission v. Wilson*, 389 Md. 27 (2005); *Board of Dental Examiners v. Fisher*, 123 Md. App. 322, cert. denied, 352 Md. 335 (1998). Moreover, in May the Board rejected an interlocutory appeal filed by the Appellant. The Board found that the Hearing Examiner's orders were not subject to interlocutory appeal because they do not finally determine rights and liabilities, have immediate legal consequences or result in irreparable harm. *See Order Dismissing Interlocutory Appeal, MSPB Case No. 18-19 (May 16, 2018).*

In an apparent attempt to sidestep the Board's recent decision concerning interlocutory appeals, Appellant makes the curious argument that the Motion for Disqualification is not actually interlocutory because a motion for recusal was never presented to the Hearing Examiner:

This is not an interlocutory appeal of an order of Hearing Examiner . . . because, as shown below, [the Hearing Examiner] has not yet ruled on any motion relating to her recusal because there is no motion before her. Had a motion been made and had

¹ Board Chair Angela Franco did not participate in this decision.

she ruled, an appeal of that order would have been interlocutory. Instead, this Motion is being appropriately directed first to the Board, given OZAH's prejudice and bias, and its refusal to disqualify itself is inconsistent with the provisions of the Maryland Code of Judicial Conduct.

Motion for Disqualification, p. 1, n. 2. Appellant may not avoid her obligation to exhaust her administrative remedies by this stratagem. A request for recusal must first be addressed to the decision maker who is being accused of bias. *See Miller v. Kirkpatrick*, 377 Md. 335, 358 (2003); *Conwell Law LLC v. Tung*, 221 Md. App. 481, 516-17 (2015). Although for this reason alone Appellant's motion should be denied, in the interests of judicial economy, and to avoid further unnecessary delay, the Board will also address the merits of Appellant's motion.

We begin by noting that it is a longstanding and bedrock principle of law that a trial judge is presumed to be impartial, and that a party asserting bias has a heavy burden of proof to overcome that presumption. *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 297 (2003); *Jefferson-El v. State*, 330 Md. 99, 107 (1993); *Karanikas v. Cartwright*, 209 Md.App. 571, 579 (2013). *See* 3 W. Blackstone, *Commentaries on the Laws of England* 361 (1st ed. 1769) ("the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea"). Similarly, as administrative decision makers the Hearing Examiner and Director of OZAH are entitled to a strong presumption of impartiality, honesty, and integrity. *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011); *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397, 410 (1999).

We have carefully reviewed Appellant's motion and discern no basis to find that the Hearing Examiner or the Director of OZAH have a bias against Appellant, or that they are unable to conduct the hearing fairly and objectively.

Regarding the alleged impropriety of the Office of the County Attorney (OCA) providing counsel to the Hearing Examiner or the Director of OZAH, both have expressly stated that they have not sought counsel from the OCA. Appellant is thus contesting the *possibility* of such consultation. It is quite possible that the situation may never come to pass. We refuse to engage in speculation or to conclude that the mere possibility that the Hearing Examiner may someday consult with OCA is a basis for her disqualification.

Moreover, as we have previously found, such consultation with OCA by administrative decision makers would not necessarily be improper. MSPB Case No. 17-23 (May 8, 2017). As we discussed in that decision, in *Consumer Protection Division v. Morgan*, 387 Md. 125, 193-94 (2005), the Maryland Court of Appeals expressly rejected an argument that the combination of prosecutorial and adjudicatory functions in the Office of the Attorney General, on its face, necessarily "makes the adjudicatory process farcical" and violates due process. If the Hearing Examiner ever decides that it would be beneficial to consult with an attorney in the OCA Appellant will be free to present facts and arguments to the Hearing Examiner explaining why she believes that an actual conflict exists regarding the particular attorney who may have been appointed to act as OZAH's counsel.

Appellant's allegations that the CAO and County Executive exercise indirect "command influence" on the Hearing Examiner and OZAH, because they have authority to propose the budget and to refer cases to OZAH, are speculative and baseless. The CAO, who reports directly to the

County Executive, is only charged with supervision of “departments, offices, and agencies of the Executive Branch.” Montgomery County Charter, § 211. OZAH, however, is a unit of the Legislative Branch and does not report to the CAO and County Executive. It is the County Council that has ultimate say over the OZAH budget. This lack of command and control by the County Executive and CAO is a critical distinction from the situation addressed in *Mayer v. Montgomery County*, 143 Md. App. 261 (2002). Unlike in *Mayer*, the Hearing Examiner is not a subordinate of the County Executive or CAO.

The Board declines to assume that the Hearing Examiner will fail to perform her job with independence and integrity, or unthinkingly follow any advice provided by an attorney acting as her counsel. *Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011). Appellant has not demonstrated that the Hearing Examiner has any bias, that is, a predisposition for or against either party based on factors unrelated to the facts of record. Appellant does not cite to any evidence which would support a finding of bias on the part of the Hearing Examiner. Her claim that there is pre-judgment bias because in the course of these proceedings, but prior to the filing of the Motion for Disqualification, OZAH and the Hearing Examiner attempted explain the actual reporting responsibilities of OZAH are without merit. It is difficult for us to imagine that a reasonable person, knowing all the facts, would believe that the Hearing Examiner is biased. *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397 (1999).

In her Reply to Respondent’s Opposition to Motion for Disqualification of Hearing Examiner Appellant now suggests that a hearing is no longer necessary and that the Board should decide her grievance appeals on the record after the parties submit briefs. Having decided that there is no basis for disqualifying the Hearing Examiner, and that the record would benefit from her findings and recommendations, the Board declines Appellant’s suggestion that we rescind the referral to OZAH and decide the matter on the record. Pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations, § 35-2(b), the Board on February 1, 2018, referred these consolidated grievance appeals to a Hearing Examiner to conduct a hearing and issue a report and recommendations to the Board with proposed findings of fact and conclusions of law, and a proposed decision. The Hearing Examiner shall continue carrying out the delegation contained in the Board’s February 1 order.² After the Hearing Examiner has fulfilled her responsibilities, either party may waive their right to present oral argument on the record to the Board prior to the Board reaching a final decision.

For the above reasons, it is hereby **ORDERED** that the Motion for Disqualification of Hearing Examiner is hereby **DENIED**.

For the Board
August 22, 2018

² We believe the Hearing Examiner has the authority to determine the appropriate scope and extent of the hearing, and to consider any requests from the parties to issue her report and recommendations without the necessity of an evidentiary hearing.

MOTION FOR HEARING

CASE NO. 18-19

ORDER DENYING MOTION FOR HEARING AND DISQUALIFICATION

The Merit System Protection Board (MSPB or Board) has received a March 5, 2019, Motion for Hearing filed by Appellant. The motion asks the Board to: hold a hearing determine whether there was improper disclosure of confidential information relating to Appellant's grievance appeals; order the production of documents; disqualify the Montgomery County Office of Zoning and Administrative Hearings (OZAH) Hearing Examiner; and vacate all orders issued by the Hearing Examiner in this appeal.¹ On March 6, 2019, Appellant filed a Supplement to Motion for Hearing requesting that as additional relief the Board decide the merits of the grievance appeals based on motions and cross motions for summary decision and the record. On March 14 the County filed a reply to which Appellant responded on March 18, 2019.

This is Appellant's second request to have the Board disqualify the Hearing Examiner. The Board denied the first request in an order dated August 22, 2018. That decision held that Appellant could not obtain an interlocutory appeal since the Hearing Examiner was not delegated authority to issue a final decision. Further, Appellant should have in any event first filed her motion to disqualify with the Hearing Examiner. We nevertheless went on to address the merits of that motion in an effort to avoid unnecessary additional proceedings. Subsequently, Appellant filed a motion with the Hearing Examiner asking her to recuse herself. That motion was denied by the Hearing Examiner on February 19, 2019. No attempt to appeal that ruling was filed with the Board.

The current motion alleges impropriety by the Hearing Examiner, the director of OZAH, various members of the County Council staff, and outside counsel representing the County in Appellant's litigation regarding Public Information Act (PIA) requests and Ethics complaints.²

The Board has reviewed the motion, exhibits, and replies, and can discern no reason for the Board to hold the requested hearing or to disqualify the Hearing Examiner. The alleged disclosures appear to do nothing more than mention that Appellant has a number of grievance appeals pending, that those appeals were referred to the OZAH Hearing Examiner, and that Appellant sought to disqualify the Hearing Examiner. The substance of the grievance appeals does not appear to have been disclosed. Further, several of the exhibits Appellant has submitted to support her argument that OZAH and Council staff have revealed confidential information seem to demonstrate the opposite. For example, Appellant sent an email to a County Councilmember complaining about the County Attorney and his senior staff, and apparently attaching the

¹ On February 1, 2018, the Board consolidated Appellant's seven grievance appeals into this case and referred the matter to OZAH for a Hearing Examiner to conduct an evidentiary hearing and rule on motions. The Hearing Examiner's proposed findings and recommendations will be subject to exceptions by the parties prior to the Board reaching a final decision.

² Appellant also filed a tort claim against OZAH and the Hearing Examiner alleging violation of various rights because of the alleged disclosures. Appellant's Exhibit 18. Appellant has also sent a series of emails urging Board action. *See, e.g.*, Appellant Exhibits 19 and 20.

complaint she had filed with the County Ethics Commission. The email informed the Councilmember that the matter has been appealed to court, and expressly states that the Ethics complaint “is publicly available and by no means confidential.” Appellant Exhibits 4, 5, and 9.

In our view, the mere existence of Appellant’s MSPB appeal is no longer confidential. One year ago, Appellant filed a motion with the Hearing Examiner requesting that the hearing be open to the public. Appellant’s March 7, 2018, Notice of Request and Motion for a Public Hearing. The Hearing Examiner granted that motion by order dated March 29, 2018. By asking for a public hearing Appellant has waived her right to keep the existence of her grievance appeals confidential. Appellant attempts to deal with this inconvenient reality by arguing that an open hearing does not necessarily mean that everything in the record is public. While that may be true, there is no allegation that anything in the record has been disclosed, other than the fact that there are appeals and that motions to disqualify the Hearing Examiner were filed. *See, e.g.*, Appellant Exhibits 1 and 2. The Montgomery County Code, § 33-14(a), provides that an MSPB “[h]earing shall be open to the public with reasonable notice, if requested by the employee.”³ That provision suggests that the public is entitled to know about an appeal hearing that is open to the public, even if some of the underlying documents in the record may not be disclosed (*e.g.*, medical records, social security numbers, and the personnel information of other employees).

Further, even if Appellant had shown the existence of improper disclosures by various County employees, offices, and their attorneys, disqualification of the Hearing Examiner would not necessarily follow. Nothing presented to us suggests that the Hearing Examiner knowingly violated any confidentiality requirements. The Board perceives no abuse of discretion by the Hearing Examiner that has prejudiced Appellant’s substantive rights. The alleged disclosures involving Appellant and her representative are collateral matters, not material to the substance of these appeals. There is nothing in the record to suggest that the Hearing Examiner is incapable of carrying out her duties in an unbiased and professional manner.

Moreover, we have already held that the Hearing Examiner’s orders are not subject to interlocutory appeal because they do not finally determine rights and liabilities, have immediate legal consequences, or result in irreparable harm. *See* Order Dismissing Interlocutory Appeal, MSPB Case No. 18-19 (May 16, 2018); Order Denying Motion for Disqualification, MSPB Case No. 18-19 (August 22, 2018).

In addition to filing a Supplement to Motion for Hearing on March 6, 2019, Appellant sent an email late that afternoon responding to an Order Disclosing *Ex Parte* Communication issued by the Hearing Examiner earlier that day. On March 4, 2019, Appellant’s representative had copied the Hearing Examiner on emails he sent to the County Council accusing the Director of OZAH and other Council staff of misconduct. He did not copy the attorneys representing the County in Appellant’s grievance appeals. The Hearing Examiner deemed it appropriate to treat the communications as *ex parte* and provided them to the lawyers for the County. Appellant’s response

³ *See also* Montgomery County Code, § 2A-8(a) (“hearings shall for the purpose of the taking of evidence upon a contested matter shall be held at such time and place as designated in the notices therefor . . . [and] such hearings shall be public except where otherwise ordered by the hearing authority or provided by law.”). Montgomery County Personnel Regulation, § 35-10(g), provides that MSPB hearings are not open to the public “unless the appellant requests it. . .”.

questioned why other communications between the OZAH Director and Council staff were not treated the same way.⁴ As the Hearing Examiner has not had an opportunity to address Appellant's concerns, it is premature for the Board to consider the matter.

Finally, Appellant's March 6 Supplement to the Motion for Hearing again asks that the Board not hold a hearing on the merits and instead decide the grievance appeals on the record and the cross motions for summary decision. The Board has previously decided the record would benefit from the Hearing Examiner's proposed findings of fact, conclusions of law, and recommendations. Order Denying Motion for Disqualification, MSPB Case No. 18-19 (August 22, 2018). We again find that the Hearing Examiner has the discretion to determine the appropriate scope and extent of the hearing, and to decide whether an evidentiary hearing is necessary and desirable. As we have said before, after the Hearing Examiner has fulfilled her responsibilities either party may waive their right to present oral argument on the record to the Board prior to the Board reaching a final decision.⁵

For the above reasons, it is hereby **ORDERED** that the Motion for Hearing and disqualification of the Hearing Examiner is hereby **DENIED**.

For the Board
March 21, 2019

⁴ We note that Appellant's representative mischaracterizes Exhibit 6, the August 6, 2018, email from the Director of OZAH as "discussing Appellant's grievances at length." Exhibit 6, however, only discusses the existence of the grievance appeals, the fact that Appellant had moved to disqualify the Hearing Examiner, and outlines the basis for Appellant's motion to disqualify. There is no discussion of the substance and nature of the various grievance appeals themselves.

⁵ The Board expects the hearing, if any, to be held relatively promptly and the Hearing Examiner's recommendations to be issued expeditiously thereafter.

MOTION TO DISMISS

CASE NOS. 19-19 & 19-26

ORDER DENYING MOTION TO DISMISS

On March 4, 2019, Appellant, an employee of the Department of Correction and Rehabilitation, filed an appeal of a disciplinary action. The Merit System Protection Board (Board or MSPB) docketed the appeal as MSPB Case No. 19-19, and by letter sent to the address provided on the Appeal Form acknowledged the appeal and advised Appellant that it was necessary for him to provide a copy of the Notice of Disciplinary Action (NODA). Montgomery County Personnel Regulations, §35-4(d)(1). On April 1, 2019, the post office returned the Board's letter as undeliverable, addressee unknown. The day the letter was returned the Board's Office Services Coordinator contacted Appellant and provided him with a copy of the Board's letter by email.

On April 8, 2019, Appellant filed a second appeal, docketed as MSPB Case No. 19-26, and attached an incomplete copy of a NODA dated February 27, 2019. On April 9, 2019, the Board sent Appellant another letter requesting a complete copy of the NODA and asking if both of the appeals were based on the same NODA. The letter requested that Appellant submit a NODA for the March 4 appeal (MSPB Case No. 19-19) if it was based on a different NODA.

On May 16, 2019, the Board received a NODA and a Statement of Charges (SOC) from Appellant. No explanation of whether or not Appellant was appealing two different disciplinary actions was provided. It appears that MSPB Case No. 19-19, which was filed on March 4, was based on the SOC dated January 30, 2019. The second appeal, MSPB Case No. 19-26, was filed April 8 and is based on the NODA dated February 27 and received by Appellant on March 8, 2019. As noted above, the appeal in MSPB Case No. 19-19 was filed March 4, after issuance of the February 27 NODA but before Appellant certified that he had received the NODA.

Because it appears that both appeals involve the same dismissal based on the same events, by order dated May 28, 2019, the Board consolidated the above captioned appeals.

In MSPB Case No. 18-33, the appeal was filed June 27, 2018, without a NODA. As in this case, the Board sent a letter requesting submission of a NODA. The NODA was issued July 5, 2018, but the Board was not so advised. A show cause order was issued August 8, 2018, requiring the appellant to provide a statement of such good cause as exists for why she had failed to provide a required NODA. The appellant provided the NODA and a statement on September 6, 2018. The County did not reply to the appellant's statement, and on September 25, 2018, the Board resumed processing the case and issued the scheduling letter.¹

¹ Similarly, in MSPB Case No. 18-18 the appeal was filed a week before the NODA was issued, and the Board proceeded to process the appeal when the NODA was received.

On the other hand, in MSPB Case No. 17-06 (2017), where the appeal was filed before a NODA was issued, the appellant did not file a NODA after repeated requests and a show cause order. The Board dismissed the appeal and in the order said “Should a NODA ultimately be issued, Appellant may then timely file an appeal.”

In this case, the County seeks to dismiss the appeal because the second appeal, MSPB Case No. 19-26, was filed some 21 working days after Appellant received the NODA. MCPR § 35-3(a)(1) (appeal of a dismissal must be filed within 10 working days of a NODA). The County’s motion argues “[t]hat Appellant filed an appeal of the *SOC* before March 22, 2019 is of no moment.” (emphasis in original). We disagree. Although Appellant’s appeal in MSPB Case No. 19-19 maybe have been considered premature and dismissed by the Board for that reason, the Board did receive the NODA *before* dismissing the appeal. Based on our previous administrative practice and precedent we will consider MSPB Case No. 19-19 to have been timely filed.

Accordingly, it is hereby **ORDERED** that the County’s motion to dismiss is **DENIED**.

For the Board
June 17, 2019

ENFORCEMENT OF BOARD DECISIONS AND ORDERS

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions. Montgomery County Personnel Regulations, § 35-15.

The Board may also be asked to enforce a final decision. The Board, where appropriate, may seek enforcement of its decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. Montgomery County Code, § 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly failed to comply with the Board decision to determine whether there is a basis for seeking enforcement.

During FY19, eight (8) settlement agreements were accepted and entered into the record.

CASE NOS. 18-03, 18-10, 18-11

ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellant filed the three above captioned appeals with the Merit System Protection Board (MSPB or Board). The three appeals pertain to two grievances and Appellant's non-disciplinary termination. On December 3, 2018, the parties filed a fully executed settlement agreement with the Board resolving all three appeals. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf., Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant was represented by counsel, and that the agreement was freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in these matters be entered into the Board's records;
2. That the appeals in Case Nos. 18-03, 18-10, and 18-11 be and hereby are **DISMISSED** as settled;
3. That within 60 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
December 5, 2018

CASE NO. 18-14

ORDER ACCEPTING SETTLEMENT AGREEMENT

On October 31, 2017, Appellant filed this appeal with the Merit System Protection Board (MSPB or Board) challenging a one-day suspension imposed by the Montgomery County Department of Correction and Rehabilitation (DOCR).

On July 10, 2018, the parties filed a settlement agreement with the Board in the above-captioned case. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

As this case involves a disciplinary action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face. Moreover, both parties are represented by counsel and freely entered into the agreement. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records as a settled case;
2. That the appeal in this Case No. 18-14 be and is hereby **DISMISSED** as settled;
3. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
July 12, 2018

CASE NO. 18-18

ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's 10-day disciplinary suspension. On December 12, 2018, the first day of a hearing on the merits was held. Prior to scheduling the second and final day of hearings the parties indicated that they were in settlement negotiations. On December 27, 2018, the County notified the Board that the parties had reached an agreement. On January 10, 2019, the parties filed a fully executed settlement agreement with the Board purporting to resolve the appeal.

As this case involves a disciplinary action, the Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). Because the agreement is a Last Chance Settlement Agreement and Appellant is not

represented by counsel, the Board is required to review it carefully to determine not only whether it is lawful on its face and freely entered into by the parties, but also whether it is fair, and that there is no evidence of agency bad faith or duress. *Weber v. U.S. Postal Serv.*, 47 M.S.P.R. 360 (1991); *Ferby v. U.S. Postal Serv.*, 26 M.S.P.R. 451, 456 (1985). In order to fulfill the Board's responsibilities a conference with the parties was held on January 24, 2019. The Board met with the parties in order to obtain clarification as to the meaning of certain terms of the agreement, to ascertain whether both parties have the same understanding of the terms, and to verify that Appellant's agreement was knowing and voluntary.

The Board reviewed the agreement with the parties and verified that Appellant understood all of the operative terms. He acknowledged understanding that his 10-day suspension would be reduced to a 5-day suspension, which has already been served by forfeiture of annual leave. Appellant understood that he was agreeing to attend certain County training, and that while he would not schedule the training, he will have a responsibility to attend. Appellant further acknowledged that he would not engage in behavior that constituted "yelling, harassing, or speaking in an aggressive, combative, or disrespectful tone with co-workers," and that such behavior would be a violation of the agreement and constitute cause for dismissal. The parties agreed that if the County issues a Notice of Disciplinary Action based on Appellant's violation of the agreement, he nevertheless retains the right to appeal the factual basis for the charges. Appellant explicitly acknowledged that, if the County proves that a violation occurred, he will be subject to dismissal.

The Board finds that the agreement is comprehensive, knowingly and freely made, fair, and that there is no evidence of bad faith or duress. Therefore, the Board agrees to accept the settlement agreement into the record. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board suggests that in future agreements of this nature the County seek to include more explicit language concerning appeal rights, less ambiguous language regarding prohibited behavior, and an anti-retaliation provision. The Board notes with approval that the last chance agreement has a limited duration; however, last chance agreements generally are for a period of one year. Thus, the three-year duration in this case strikes the Board as being the upper limit of an appropriate duration.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That the appeal in Case No. 18-18 be and hereby is **DISMISSED** as settled;
3. That the County will ensure that the required training on Interpersonal Communications, Managing Emotions in the Workplace, Emotional Intelligence, and Building a Respectful Workplace will address sensitivity to cultural differences and, where appropriate, utilize

recorded role-playing exercises that allow participants to watch themselves, learn from, and evaluate their own behaviors.

4. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
5. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
January 28, 2019

CASE NO. 18-29

ORDER ACCEPTING SETTLEMENT AGREEMENT

On May 16, 2018, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's dismissal from his position with the Montgomery County Department of General Services. A pre-hearing conference scheduled for October 17, 2018, was postponed at the request of the parties to permit them to complete settlement negotiations. On June 10, 2019, the County notified the Board by email that the parties had reached an agreement. The parties have filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf., Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.; McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
3. That the appeal in Case No. 18-29 be and hereby is **DISMISSED**, with prejudice, as settled;

4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
June 18, 2019

CASE NO. 18-33

ORDER ACCEPTING SETTLEMENT AGREEMENT

On June 27, 2018, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's suspension pending investigation. A pre-hearing conference scheduled for December 19, 2018, was postponed at the request of the parties and, on December 27, 2018, the County notified the Board that the parties had reached an agreement. On January 10, 2019, the parties filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf., Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.; McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That within 15 calendar days of this Order Appellant will file with the Board a notice indicating that she wishes to withdraw her appeal in Case No. 18-33;
3. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the appeal in Case No. 18-33 be and hereby is **DISMISSED** as settled;
5. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
January 16, 2019

CASE NO. 19-05

ORDER ACCEPTING SETTLEMENT AGREEMENT

On August 7, 2018, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's suspension and dismissal from the Gaithersburg - Washington Grove Volunteer Fire Department (GWGVFD). On January 10, 2019, the parties filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That within two (2) working days of this Order Appellant file with the Board a notice indicating that he wishes to withdraw his appeal in Case No. 19-05;
3. That within ten (10) working days of this Order the GWGVFD provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
4. That the appeal in Case No. 19-05 be and hereby is **DISMISSED** as settled;
5. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
January 16, 2019

CASE NO. 19-14

ORDER ACCEPTING SETTLEMENT AGREEMENT

On November 28, 2018, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's two-day disciplinary

suspension. Appellant's counsel notified the Board on February 4, 2019, that the parties had reached an agreement. The parties filed a settlement agreement with the Board, in the form of an amended Notice of Disciplinary Action (NODA) reducing the discipline to a one-day suspension and resolving the appeal. In response to a request for clarification, Appellant's counsel advised the Board by email that Appellant "does intend to withdraw her appeal and wishes for the Board to enter the amended NODA in the record as a settlement agreement." Appellant's counsel further stated that she had "reviewed the agreement with Appellant and she understands and agrees to its terms."

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15, the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement and finds that it has jurisdiction to accept the settlement agreement into the record. MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That the appeal in Case No. 19-14 be and hereby is **DISMISSED** as withdrawn and settled;
3. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
February 7, 2019

CASE NO. 19-18

ORDER ACCEPTING SETTLEMENT AGREEMENT

On January 29, 2019, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's demotion with a reduction in pay. On April 15, 2019, the County notified the Board that the parties had reached an agreement. On May 6, 2019, the parties filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005).

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That within 30 calendar days of this Order Appellant will file with the Board a notice indicating that she wishes to withdraw her appeal in Case No. 19-18;
3. That within 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement regarding rescinding the discipline against Appellant and removal of documents from the files;
4. That within 15 work days after the County has complied with the terms of the agreement regarding Appellant's upgrade, backpay, and payment of attorneys' fees it shall provide certifications to the Board;
5. That the appeal in Case No. 19-18 be and hereby is **DISMISSED** as settled;
6. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
May 8, 2019

STAYS

Pursuant to Section 35-6(b) of the Montgomery County Personnel Regulations, the Board is empowered on its own motion or pursuant to a request by an appellant to issue a stay if it finds the reasons for said stay are proper and just.

The following is an example of a stay order issued in fiscal year 2019.

CASE NO. 19-04

STAY ORDER

On August 6, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the decision of the Department of Transportation, Division of Transit Services, to suspend him for three (3) days. The discipline was based on the County's allegation that on March 9, 2018, Appellant was driving a County Ride-On bus and illegally passed a school bus operated by the Montgomery County Public Schools that had its stop sign extended.

On January 16, 2019, a hearing on the merits was held before the Board. Appellant indicated during the hearing that he had requested a trial in District Court to contest the citation issued for a school bus monitoring civil violation under Transportation Article (TR), § 21-706. *See* TR § 21-706.1; Montgomery County Code, § 31-9B. At the conclusion of the January 16 hearing the parties asked that this case be stayed pending resolution of Appellant's District Court trial. Further, the County represented to the Board that Appellant's suspension would be rescinded if Appellant was found by the District Court not to have violated TR § 21-706.

The Board finds that it is appropriate to hold the instant appeal in abeyance pending final adjudication of Appellant's school bus monitoring citation in the District Court. Appellant will have five (5) working days from the date of the District Court's ruling to advise the Board of the outcome, in writing.

ORDER

It is hereby **ORDERED** that proceedings in this matter are **STAYED** and that Appellant's appeal is held in abeyance. Within five (5) working days of a ruling by the District Court on Citation [#], Appellant shall provide the Board with a written document indicating whether or not he was found to have illegally failed to stop for a school bus in violation of TR § 21-706. Should Appellant fail to comply with this Order his appeal may be subject to dismissal.

For the Board
January 17, 2019

SHOW CAUSE ORDERS

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to the grievance procedure, MCPR § 34-9(a)(3), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, § 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a show cause order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the Personnel Regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a show cause order to determine whether the appeal is in fact timely.

Finally, the Board may issue a show cause order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

The following is an example of a show cause order issued in fiscal year 2019.

CASE NOS. 19-24 & 19-25

SHOW CAUSE ORDER

Appellant filed the above captioned appeals with the Merit System Protection Board (Board or MSPB) on March 27, 2019. Upon receipt of the Notice of Disciplinary Actions for each case, Appellant was advised by separate letters dated April 8, 2019, from the Board that his Prehearing Submissions in each case were due on May 30, 2019.

Having received no prehearing submissions or other contact from Appellant, on June 4, 2019, the Board wrote to Appellant asking him to promptly file his Prehearing Submissions. The letter also asked that Appellant advise the Board in writing if he no longer wished to pursue his appeals. The letter warned that absent a response the Board may dismiss his appeal for failure to prosecute the appeal or comply with established appeal procedures. Montgomery County Personnel Regulations (MCPR), § 35-7(b). To date, Appellant has not filed his prehearing submission or responded to the Board's June 4 letter.

For the above reasons, the Board hereby **ORDERS** Appellant to provide a statement of such good cause as exists for why he has failed to file the required prehearing submissions. The statement shall be filed on or before close of business **July 3, 2019**, with a copy served on the County. The County shall have the right to file a response on or before **July 10, 2019**.

Appellant is hereby notified that, absent the proper filing of a prehearing submission in either or both cases, and a finding by the Board of good cause for his failure, the Board will dismiss either or both of his appeals. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

For the Board
June 20, 2019

ATTORNEYS FEE REQUESTS

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In *Montgomery County v. Jamsa*, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance to respond. The Board then issues a decision based on the written record.

The Board did not issue any attorneys fee decisions during fiscal year 2019.