

# **Merit System Protection Board Annual Report FY2021**

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**FY 2021  
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 workday and in the evenings, as required, and are compensated as prescribed by law. The Board is supported by a part-time Executive Director and a part-time Office Services Coordinator.

The Board members in Fiscal Year 2021 were:

Harriet E. Davidson	Chair
Sonya E. Chiles	Vice Chair
Barbara S. Fredericks	Associate Member (appointed April 20, 2021)
Angela Franco	Vice Chair (until December 31, 2020)
C. Scott Maravilla	Associate Member (February 9, 2021 to March 16, 2021)

**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 ACTION OR TERMINATION

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, resigns involuntarily, or receives a Notice of Termination. 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.

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. Typically, a merits hearing date is set by the Board in consultation with the parties at the Prehearing Conference. The Board requires all parties to comply with its [Hearing Procedures](#) and [Remote Hearing Procedures](#). After the hearing, the Board prepares and issues a written decision.

During fiscal year 2021 the Board issued the following decisions on appeals concerning disciplinary actions or termination.

# DISMISSAL

## CASE NO. 20-17

### FINAL DECISION

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

### PROCEDURAL BACKGROUND

On March 11, 2020, the Montgomery County Department of Health and Human Services (DHHS or Department) issued a Notice of Disciplinary Action -- Dismissal (NODA) to Appellant. County Exhibit (CX) 1.<sup>1</sup> The NODA charged Appellant with various offenses, including violation of policies concerning the retention of medical records. The NODA charged Appellant with: (1) Montgomery County Personnel Regulation (MCPR) § 33-5(c) (violation of established policy or procedure); (2) MCPR § 33-5(d) (violation of the County Charter, statutes, ordinances, regulations, State or Federal laws); and (3) MCPR § 33-5(h) (negligent or careless in the performance of job duties). The policy she is alleged to have violated is the DHHS policy on Safeguarding Confidential Personally Identifiable Information, § 5.0 and § 5.6. CX 5. *See* 45 CFR § 164.316 and Maryland Annotated Code, Health General Article, § 4-403.

On March 16, 2020, Appellant filed this appeal challenging the decision of the Department to dismiss her from her position as a Community Health Nurse II.

The County filed its Prehearing Submission on May 18, 2020, and Appellant filed her Prehearing Submission on June 18, 2020. A prehearing conference was held on July 15, 2020, and a Prehearing Order was issued by the Board on July 16, 2020. A hearing on the merits was held over the course of two days, August 18 and September 2, 2020. At the close of the hearing, the Board asked for the "Information Privacy and Security Sanction" policy referenced on page 9 of CX 4. In response the County submitted a document entitled "Sanctions Assessment Tool," which was admitted as Board Exhibit 1. The parties filed post-hearing briefs on October 30, 2020.

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<sup>1</sup> County Exhibits 1 through 12 were admitted into the record. The County Exhibits are as follows:

- CX 1 - Notice of Disciplinary Action
- CX 2 - November 17-20 Emails between LK and Appellant
- CX 3 - Incident Report Submitted by LK
- CX 4 - DM's Investigation Report
- CX 5 - DHHS Safeguarding Policy
- CX 6 - DHHS Permission Form to Take Records Home
- CX 7 - Record Retention policy for Healthcare for the Homeless
- CX 8 - Training dates email
- CX 9 - Login dates Email
- CX 10 - NextGen/EHR Email Chain (w/redactions for attorney client privilege)
- CX 11 - EHR Onsite Support Email Chain (w/redactions for attorney client privilege)
- CX 12 - Appointments & Admin Day Email (w/redactions for attorney client privilege)



Board members Harriet E. Davidson and Sonya E. Chiles considered and decided the appeal.<sup>2</sup>

### FINDINGS OF FACT

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

1. JF, Employee and Labor Relations, HHS
2. LK, Program Manager, Health Care for the Homeless, HHS
3. DM, Deputy Privacy Official, HHS
4. MH, Special Assistant to the COO, HHS
5. GM, IT Training Manager, HHS
6. PC, Behavioral Health Therapist, HHS
7. KM, Registered Nurse
8. Appellant

After hearing testimony and reviewing the exhibits<sup>3</sup> the Board made the following factual findings.

In August 2013, Appellant began working with DHHS as a nurse employed by a contractor, Athena Consulting. Hearing Transcript, Day 1 (Tr. (Day 1)) 67; Hearing Transcript, Day 2 (Tr. (Day 2)) 8; CX 1. Appellant was hired in March 2015 as a County employee by DHHS and served as a Community Health Nurse II. CX 1; Tr. (Day 1) 67; Tr. (Day 2) 20. Appellant was assigned to the Healthcare for the Homeless (HCH) program and supervised by Ms. LK from January 2015 until the date of her dismissal in March 2020. Tr. (Day 1) 67.

Ms. LK is the Program Manager for HCH. Tr. (Day 1) 64. HCH is a program that provides nurse case management services to homeless clients who are in the hospital, preparing to transition out of the hospital, or who become homeless while in the hospital. Tr. (Day 1) 64. The program also provides nurse case management for homeless clients who are in shelters, permanent supportive housing, or in apartments throughout the County. Tr. (Day 1) 64-65. The program provides nursing services to homeless clients living on the street. Tr. (Day 1) 65. Often, the clients receiving services from HCH have severe illnesses, such as cancer, diabetes, kidney or heart disease, and mental health disorders. Tr. (Day 1) 235-36. As Program Manager, Ms. LK supervises employees, manages contracts for primary and dental care, provides support for complex cases

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<sup>2</sup>Former Board Member Angela Franco, who resigned effective December 31, 2020, did not participate in the consideration of this decision. Member C. Scott Maravilla, who was appointed by the County Council effective February 9, 2021, and resigned March 16, 2021, also did not participate in the consideration of this decision.

<sup>3</sup> Appellant Exhibits (AX) 1 through 10 were admitted into the record. Appellant’s exhibits are as follows:

- AX 1 - Healthcare for the Homeless (HCH) Hospital Discharge Planning Policy & Procedure
- AX 2 - Protocol for Shelter Referral for HCH Adults Discharged from Hospitals (2009)
- AX 3 - Discharge Protocol for Hospitals (In Patient Hospitalization) in 2016
- AX 4 - Photograph of Purple Bag used for transport of documents
- AX 5 - Performance Review, July 1, 2015 - June 30, 2016
- AX 6 - January 11, 2020 Email
- AX 7 - Work in progress documents from IT
- AX 8 - Community Services Aide III Job Description
- AX 9 - Protocols for Community Health Nurse and Community Service Aide
- AX 10 - January 2017 Email

transitioning out of the hospital, and oversees the process to start a medical respite program. Tr. (Day 1) 65-66.

Appellant was responsible for doing nursing assessments of homeless clients who were transferring into or out of the hospital to shelters or permanent supportive housing programs. Tr. (Day 1) 67. The purpose of a nursing assessment is to determine whether an individual is appropriate to transfer from a hospital to the shelter. Tr. (Day 1) 71. A nursing assessment is initiated when HCH receives a referral by telephone or facsimile. Tr. (Day 1) 69. When making a referral a hospital is asked to provide health and physical documentation, lab work and psychosocial information. *Id.* The hospital is also asked to provide any occupational and physical therapy assessments, and a discharge summary. *Id.* According to Ms. LK, after HCH received a referral, she often placed the faxed referral on Appellant's desk or scanned it and sent it to her over encrypted email. It was Appellant's job to contact the individual making the referral and then conduct an in-person assessment of the patient, as needed. Tr. (Day 1) 71.

Appellant made notes concerning her clients. Tr. (Day 2) 16, 24, 32, 34-36. The notes might include current medications or changes in medication, presenting symptoms on a particular day, and vital signs, such as blood pressure readings. Tr. (Day 1) 74; Tr. (Day 2) 37. According to Ms. LK, the program generally keeps both a physical copy of the client's records, as well as an electronic copy in NextGen, the County's electronic records system. Tr. (Day 1) 73-74. Each client has their own file where this medical information is kept. Tr. (Day 1) 70. Appellant's notes were to be kept with the client's file. Tr. (Day 1) 73-74. HCH keeps a record of an assessment even if it declines to take an individual into a shelter. Tr. (Day 1) 72. Mr. MH testified that certain records, such as vital sign logs, may be kept on site at the homeless shelters in case a client needed to be transported directly from the shelter to a hospital. Tr. (Day 1) 184.

HCH stores the files with client information in a locked storage room at the program office. Tr. (Day 1) 70. Sometimes, the files were kept in boxes at the HCH offices. Tr. (Day 1) 75, 80. Each employee, including Appellant, also has a locking file cabinet at their desk. Tr. (Day 1) 70. According to the testimony of Ms. LK the keys to the file cabinet containing the files on Appellant's clients were kept in Appellant's desk and only members of her team knew where they were. Tr. (Day 1) 119. However, if someone did know where the keys were kept they would be accessible. Tr. (Day 1) 120.

Appellant also provided oversight for clients in medical beds at the various shelters. Tr. (Day 1) 68. That oversight for clients in medical beds required Appellant to visit clients on a daily basis, provide assistance scheduling medical appointments, provide medication management, and assist clients in accessing healthcare. *Id.*

During Appellant's orientation in the HCH program she was given procedures and policies pertinent to her job. Tr. (Day 2) 12-16. *See* Appellant's Exhibit (AX) 1, *Health Care for Homeless (HCH) Hospital Discharge Planning Policy and Procedure*; AX 2, *Protocol for Shelter Referral for Homeless Adults Discharged from the Hospital* (2009).

When Ms. LK became the HCH program manager in January 2015, these procedures were in use. Tr. (Day 2) 15-16. In 2016, Ms. LK issued a procedure for hospital discharge planners to follow. AX 3, *Discharge Protocol for Hospitals (Inpatient Hospitalizations)*. Tr. (Day 2) 16. The policy, which was effective in 2017, does not address the internal DHHS medical records documentation process. Tr. (Day 2) 17. None of the three policies (AX 1-3) purports to be a record retention policy. Appellant testified that the protocol issued by Ms. LK, AX 3, did not change the

way she maintained medical records. Tr. (Day 2) 17. Appellant suggested that although there were discussions concerning the agency's goal to eventually keep all records electronically, in the meantime she understood that she was to maintain the status quo. *Id.*

Because Appellant was required to carry medical records when traveling between the HCH offices and the various shelters where her clients might be located, she was supplied by her DHHS supervisor with a messenger bag or briefcase for that purpose. Tr. (Day 2) 17-18. After Ms. LK joined the DHHS, she replaced the bag Appellant initially received with a purple bag that had a lock. Tr. (Day 2) 18; AX 4.

On November 17, 2019, Ms. LK asked Appellant to provide her "with the written documentation you have been keeping for the clients you have worked with during the reporting period July 1, 2019 - September 27, 2019 along with current clients." CX 2; Tr. (Day 1) 78. Ms. LK testified that she made this request in order to see what challenges her staff was experiencing entering information into NextGen. Tr. (Day 1) 78. Ms. LK also stated that she wanted cases documented in NextGen so as to allow her to efficiently obtain electronic data on hundreds of cases while developing and implementing a medical respite program. *Id.*

Appellant acknowledged that Ms. LK gave her a specific date range and asked for all of her files. Tr. (Day 2) 56. Appellant responded to the request by asking Ms. LK, "What specifically are you requesting?" CX 2. Appellant testified that she asked because to obtain the records she would have to go to eight shelters throughout the County and she wanted to be sure and perhaps shorten the process. *Id.* 58-59. Appellant testified that client medical records were kept at the shelters in the medication room or with the case managers. *Id.* 65-66.

It is undisputed that Appellant never provided any files or records in response to Ms. LK's request. Tr. (Day 2) 58-59; Tr. (Day 1) 83. Appellant told Ms. LK that she could look for the files in the usual places they were kept, but Ms. LK was only able to find 10 to 15 files in the file cabinet. Tr. (Day 1) 86. Ms. LK stated there should have been more files in the filing cabinet, and that when she had previously checked the filing cabinet it did have many more files. Tr. (Day 1) 86-87.

As a result, Ms. LK contacted DM, the DHHS Privacy Officer. Tr. (Day 1) 87. Mr. DM requested, and Ms. LK completed, an incident report on November 28, 2019. Tr. (Day 1) 89; CX 3. In the description of the incident section of the report Ms. LK wrote:

Our program is transitioning from paper charts to the Nextgen electronic health record system. As a part of the process to assure client paper charts records are scanned into the Nextgen system and to help me with data gather statistics, I requested for [Appellant] to have all files from June 1, 2019 to present available for my review by COB Friday, November 22, 2019. Once I realized none of the charts were in the locked cabinet areas discussed, I requested for the paper charts of clients where [Appellant] documented services from January 1, 2019 to present by COB, Friday, November 22, 2019. After checking the three disclosed locked secured areas and no charts were available for my review, I requested assistance on next steps to locate the charts due to [Appellant] resistance to provide me with charts for review. In addition to documented charts not being in the located cabinets, the denials were not present also for the dates requested. The denials are kept also for a record of program referrals and supporting statistical data gathering. Files from previous years were located in the cabinet and boxes in the storage room which is

a locked secured area. I also noticed that one of the locations where previous referrals were kept that the referrals are no longer there and have been moved. I am uncertain where the referrals were moved. Currently, I am uncertain where the requested client referrals and documented files are located.

CX 3, p. 2.

As the Privacy Officer, DM's duties consist of making sure the agency and its employees comply with state and federal laws, including the Health Insurance Portability and Accountability Act (HIPAA). Tr. (Day 1) 133-34.

Mr. DM testified that he was contacted by Ms. LK on November 25, 2019, regarding missing files and asked whether the missing files amounted to a privacy incident. Tr. (Day 1) 135. Mr. DM began his investigation of the incident by asking Ms. LK for an incident report and visiting the HCH offices to look at the filing cabinet where the records were to be kept. Tr. (Day 1) 136. Mr. DM testified that the filing cabinet, as well as Appellant's desk area, were "largely empty" of files. Tr. (Day 1) 136-37.

Mr. DM also asked Appellant for an incident report via email, but she did not respond to his request. Tr. (Day 1) 137. Mr. DM then sent a Notice of Investigation to Appellant and scheduled an interview for December 9, 2019. Tr. (Day 1) 137-38, CX 4.

Appellant requested that her MCGEO union representative, Mr. RC, attend the interview with Mr. DM. However, Mr. RC was delayed and could not attend the meeting. Tr. (Day 2) 30. After waiting 10-15 minutes the meeting was held, notwithstanding Appellant asking if they could wait a bit longer. *Id.*<sup>4</sup> Despite several requests, Appellant was never apprised of the accusations against her. Tr. (Day 2) 39.

According to Appellant, during the interview with Mr. DM she told him that, after she finished working with a client and had written and submitted her medical report, she always disposed of her personal notes in the County's shredder, as these notes contained private client information. Tr. (Day 2) 32-38. Appellant said that she did not destroy any medical records or even her notes before all pertinent medical information had been recorded in the patient's medical file or had been communicated to the necessary individuals or entities, such as Mobile Med. *Id.* 36-37. Appellant suggested that her notes were not themselves medical records. *Id.* at 36.

Mr. DM testified that, to the contrary, during the interview Appellant told him:

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<sup>4</sup> The collective bargaining agreement between the County and United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), § 28.6, provides bargaining unit employees with the right to request union representation at any investigative examination by a representative of the County that the employee reasonably believes may result in disciplinary action. According to Mr. DM's investigatory report, the Notice of Investigation Interview letter advised Appellant of her right to have a union representative. CX 4. The MCGEO agreement, § 28.6(b), provides that the County may delay the interview a reasonable time while waiting for a union representative, but that the interview shall not be unreasonably delayed. While Appellant testified that she lacked union representation at her interview with Mr. DM, Tr. (Day 2) 30, she does not argue that the interview was thus improper and should be considered by the Board in determining whether the charges should be upheld or in mitigation of any penalty. While Appellant does not strongly argue the point, we note that Appellant requested that DM wait for the union representative and DM chose to proceed without him after only waiting a short period of time. This was extremely detrimental to Appellant as the County relied heavily on DM's report and recommended penalty. Thus, we expect that employees' rights to union representation be heeded in all future investigations unless waived or presented with extenuating circumstances.

that she destroys – she told me she destroys the record. When she sees a referral, she goes to see the client, she creates a file, and once the client is medically stabilized, that could take from a couple of days to a couple of months, once the client is medically stabilized she would put the record in the destruction bins that we have at the department and destroy the record.

Tr. (Day 1) 138. Mr. DM further stated that when he asked Appellant why she was following that practice she provided three specific justifications:

So the first one was that her supervisor had never really clearly told her what to do with the files. That said -- oh, and the second one was also that there was a director, apparently a director for – [MH], who he's -- he works in the COO's office, and [MH] had apparently said that no records were to be kept on premises. So I actually rooted this out a little bit. I talked to [Appellant's] coworkers and asked them, Did you know about this? Did [MH] say anything about it? None of them seemed to be aware of it. And I asked [MH] himself and he was completely unaware. He said that it's possible that someone prior to him said that you shouldn't keep files at the homeless shelters, but that's very different from not keeping files on the premises. . . The third reason was [Appellant] said that her colleague, [PC], was keeping a parallel record. And I actually asked her about this, if she was sure that the parallel record could actually account for her own work and she admitted that she could not be sure if that had been so.

*Id.* at 138-40.

Mr. DM summarized his interview with Appellant in his Privacy Incident Investigatory Report. CX 4. The investigatory report indicates that Appellant admitted to keeping client files in her custody from the time she receives a referral until the time she closes a case, keeping files locked in the trunk of her car, and to disposing of client files once a client is medically stabilized. CX 4, p. 3.

Under the County's Safeguarding Policy, files are not to be removed from the worksite unless the employee has agreed to certain safeguards and completed the approved permission form. CX 5, *Safeguarding Policy* (November 30, 2018), §5.6.6 and Appendix C; CX 4, p. 4. *See* CX 6, *Permission Form for Removing PII from the Worksite or Saving PII to a Portable Device*. A permission form remains in effect as long as an employee continues to perform the same job functions that require the removal of personally identifiable information (PII). CX 5, §5.6.6.3; Tr. (Day 1) 148-49. Although Appellant never completed a permission form, Tr. (Day 1) 149, the fact that the program provided her with a bag for carrying documents indicates that her supervisor was aware that she was taking documents containing PII to and from the HCH offices while visiting patients at shelters and for other program purposes and tacitly approved. Indeed, there is no evidence in the record that either Appellant or Ms. LK were aware of the written procedure for taking files from the office or the existence and use of the requisite approval form.

Ms. JF is a Program Manager II within the DHHS Employee and Labor Relations Office. Tr. (Day 1) 23. Ms. JF is responsible for the management and oversight of departmental labor and employee relations issues, including the investigation of complaints or concerns. Tr. (Day 1) 24. She is also responsible for drafting disciplinary memoranda and representing the department at disciplinary hearings. *Id.* Ms. JF testified that she was notified by Mr. DM of a privacy issue concerning Appellant. *Id.*, 24-25. Ms. JF testified that DM's investigative report was submitted to

her and the Director of DHHS. *Id.* Based upon the dismissal recommendation in Mr. DM's report Ms. JF was required to investigate potential violations of either the union contract or the personnel regulations and recommend what level of discipline, if any, was appropriate. *Id.*

Ms. JF interviewed the Appellant on January 16, 2020. Tr. (Day 1) 24. Also present were Appellant's union representative and Mr. DM. *Id.* at 26. Ms. JF testified that she asked Appellant "whether or not there was actual destruction of records, to which [Appellant] stated that she would not call it destruction but rather she disposed of the files." *Id.* at 28. Ms. JF stated that Appellant explained that by "disposed" she meant that "once she was finished with the client the files were placed into the white shred bins." *Id.* Ms. JF indicated that Appellant admitted to Ms. JF that "she did not document anything into NextGen concerning the files." *Id.* It was Ms. JF's assumption that the files Appellant was referencing included "her notes or any recommendations, her diagnosis, those – the client notes related to that client's specific reason for coming into the shelter or being seen by [Appellant]." *Id.* 28-29.

Two witnesses called by Appellant testified favorably concerning Appellant's professionalism as a nurse. Mr. PC, a County employee and case manager for clients in medical beds at the shelters, testified that he regularly worked with Appellant. Tr. (Day 1) 219-20. He further testified that he had no personal knowledge as to what types of records Appellant kept at her HCH office. *Id.* at 229. Mr. PC also testified that Appellant would have medical records at the shelter when Appellant would get the records from the hospital and provide them to Mobile Med, an outside medical provider. *Id.* 223.

Appellant denied that she admitted to disposing of medical records. Tr. (Day 2) 53. In contrast, Mr. DM's report alleges that Appellant did admit to disposing of records and recounts the specific context in which she did so. CX 4, pp. 6-9. DM's report states:

[Appellant] claimed that her previous supervisor had told her which records to retain in the program's files. According to [Appellant], LK had not issued such a directive. Therefore, [Appellant] reasoned, there was no reason to keep any record that she created. . . .

CX 4, p. 6. Both Ms. JF and Mr. DM credibly testified that in their interviews with Appellant she told them that she would place client files in the shred bin after a client was medically stabilized. Tr. (Day 1) 28, 138, 163. However, Ms. JF had the same understanding as Appellant that files included client notes.

Appellant does not dispute that she disposed of her notes and told Mr. DM that she had done so. Tr. (Day 2) 32-33, 36-38. *See* Appellant's Opening Statement, *Id.* 17-18 ("And all these interviews, whether it was with Mr. [DM] or with Ms. [JF], she admitted that she destroyed those notes, but those notes were not medical records."). Appellant testified that she disposed of her notes after the information contained in the notes was communicated to the people caring for the client. *Id.* 37. Appellant denied violating HIPAA or any other record retention law and asserted that she never removed any medical record from patient files or destroyed or shredded such records. *Id.* 54.

Appellant's performance evaluations were favorable. Tr. (Day 1) 51; Tr. (Day 2) 20-21; AX 5. Prior to her dismissal, Appellant had not been the subject of any disciplinary actions. Tr. (Day 1) 51.

## APPLICABLE LAW AND POLICIES

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

### § 33-1. Definition.

*Disciplinary action:* One of the following adverse personnel actions taken by a supervisor against an employee: . . . (g) dismissal . . .

### § 33-2. Policy on disciplinary actions.

(a) *Purpose of disciplinary actions.* A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace. . .

#### (c) *Progressive discipline.*

(1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:

(A) the severity of the employee's misconduct and its actual or possible consequences; or

(B) the employee's continuing misconduct or attendance violations over time.

(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;
- (d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws. . .
- (h) is negligent or careless in performing duties; . . .

**Maryland Annotated Code, Health General Article, § 4-403**

(a) (1) In this section, a “health care provider” means: . . .

(x) A nurse; . . .

(b) Except for a minor patient, unless a patient is notified, a health care provider may not destroy a medical record or laboratory or X-ray report about a patient for 5 years after the record or report is made.

**Code of Federal Regulations, Title 45 - Public Welfare, Subtitle A - Department of Health and Human Services, Subchapter C - Administrative Data Standards and Related Requirements, Part 164 - Security and Privacy, Subpart C - Security Standards for the Protection of Electronic Protected Health Information, 45 CFR § 164.316 - Policies and procedures and documentation requirements.**

**§ 164.316 Policies and procedures and documentation requirements.**

A covered entity or business associate must, in accordance with § 164.306:

**(a) Standard: Policies and procedures.** Implement reasonable and appropriate policies and procedures to comply with the standards, implementation specifications, or other requirements of this subpart, taking into account those factors specified in § 164.306(b)(2)(i), (ii), (iii), and (iv). This standard is not to be construed to permit or excuse an action that violates any other standard, implementation specification, or other requirements of this subpart. A covered entity or business associate may change its policies and procedures at any time, provided that the changes are documented and are implemented in accordance with this subpart.

**(b) (1) Standard: Documentation.**

- (i) Maintain the policies and procedures implemented to comply with this subpart in written (which may be electronic) form; and
- (ii) If an action, activity or assessment is required by this subpart to be documented, maintain a written (which may be electronic) record of the action, activity, or assessment.

**(2) Implementation specifications:**

**(i) Time limit (Required).** Retain the documentation required by paragraph (b)(1) of this section for 6 years from the date of its creation or the date when it last was in effect, whichever is later.

**(ii) Availability (Required).** Make documentation available to those persons responsible for implementing the procedures to which the documentation pertains.



**(iii) Updates (Required).** Review documentation periodically, and update as needed, in response to environmental or operational changes affecting the security of the electronic protected health information.

**Department of Health and Human Services, *Safeguards to Protect Personally Identifiable Information (“Safeguarding Policy”)*** (November 30, 2018):

5.6 Safeguarding PII in Paper Format

5.6.1 Storage of PII

5.6.1.1 Client files and other PII must be stored in a secure environment.

5.6.1.2 Staff that have PII (including files, notes, memos, etc.) at their workstations must secure the information upon departing.

5.6.1.3 Staff should not accumulate large amounts of PII at their workstations.

\* \* \*

5.6.6 Removal of PII in paper format from the worksite

5.6.6.1 In general, PII in paper format must not be removed from the worksite.

5.6.6.2 When there is a work-related need, a program manager may grant permission for specified staff to remove PII from the worksite, provided that the staff person agrees to follow certain safeguards. Permission Form, Appendix C must be used for this purpose.

5.6.6.3 The Permission Form remains in effect for as long as the staff person continues to perform the same program job responsibilities that necessitate the removal of PII, or until the Program Manager notifies the staff person in writing that permission to remove PII from the worksite has been revoked. Revocation Form, Appendix D, may be used to revoke permission.

5.6.6.4 Permission to remove PII and revocations of permission must be filed in the program area and reviewed by supervisors with staff at regular intervals.

5.6.7 Accounting for client files.

5.6.7.1 Each program must have a system in place that accounts for the location of client files. The system must record:

5.6.7.1.1 The location where program files are stored;

5.6.7.1.2 The client files that have been removed from the location where they are stored;

5.6.7.1.3 The name of the staff member who has possession of the file;

5.6.7.1.4 The date the file was removed; and

5.6.7.1.5 The date the file was returned.

5.6.8 Disposal of client information

5.6.8.1 When disposing of documents containing PII, staff must shred the documents or place them in the locked disposal bin at their worksite that has been designated for shredding.

### **ISSUE**

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

### **ANALYSIS AND CONCLUSIONS**

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

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-8(d), § 2A-10(b). 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. 17-20 (2018); 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").

#### ***Disposal of Client Medical Records***

At the heart of this case is the question of whether or not Appellant destroyed or disposed of files containing medical information on agency clients.

Ms. LK credibly testified that a significant number of Appellant's files were missing, and that those files contained medical information. When she discovered that the files were missing, she immediately notified the appropriate DHHS official and filed a contemporaneous written report. Significantly, Appellant does not directly dispute that the client files were missing. Her argument seems to be that because no specific records have been identified the County has not carried its burden of proof that the files were missing. The Board is not persuaded by this argument. We find it more likely than not that some patient files were missing.

There is no direct evidence that Appellant improperly destroyed medical records. There is no evidence in the record identifying any specific medical record that Appellant allegedly destroyed. Tr. (Day 1) 50; Tr. (Day 1) 109-10; Tr. (Day 1) 161. The evidence of Appellant's disposal of files consists of testimony about an unusually small number of files in the file cabinet, Appellant's failure to post client medical information on NextGen, and Appellant's statements to DM and JF concerning her practice of disposing of files once she was finished with them.

We find that there is sufficient evidence in the record to draw the inference that some files were missing. Ms. LK testified that she recalled seeing and using the files weeks before she noticed their absence. Tr. (Day 1) 87. The volume of referrals would justify a significantly larger number of files than were present at the offices of HCH. A file cabinet that was normally full was now virtually empty. And, while Appellant expressed no knowledge as to what had happened to her locked files, she did not dispute that some files were absent.

We have been presented with no explanation as to why Ms. LK would be mistaken on this point. While other members of the HCH team may have had access to Appellant's keys to her file

cabinet, we have not heard a plausible theory concerning why or how someone other than Appellant would have moved or disposed of her files.

There has been much testimony concerning the nature of the documentation Appellant had destroyed. Appellant claims that the discarded documents were patient notes and not official medical records. Ms. JF understood that the files that Appellant mentioned in her interview included client notes. DM testified that Appellant said she destroyed “the record” whereas he wrote in his report that Appellant admitted to disposing of client files. Ms. LK claimed that client files were missing. Based on this testimony, we find that it is more likely than not that Appellant disposed of some medical documentation on patients. The nature and extent of the destruction of patient information is unknown. However, this was unauthorized and contrary to County policy.

### ***Failure to Maintain Medical Records or Document in NextGen***

As a medical professional Appellant was required to comply with County policies, State law, and the Health Insurance Portability and Accountability Act (HIPAA) in terms of the confidentiality and security of client medical information. Appellant contends that her notes were not medical records. However, a health care provider’s notes may contain protected health information and be personally identifiable. For example, a nurse’s notes may include a patient’s name along with their vital signs, diagnosis, or medical history.

Appellant suggests that there was a change in policy under Ms. LK and that the requirements to document and maintain client records were either superseded or eliminated. We find that argument to be without merit. No health care professional could reasonably believe that there were no records retention requirements for client medical files. Further, nothing in the hospital discharge policy issued by Ms. LK spoke to HCH recordkeeping requirements. The policy is clearly aimed at the responsibilities of hospital discharge planners. The earlier protocols still applied, as did County, State and Federal records retention laws.

Appellant’s argument concerning the inability of the County to specifically identify the missing records does not excuse Appellant’s behavior but does expose a critical shortcoming in County procedures. Ms. LK testified that Appellant would be given copies of medical referrals sent by facsimile by having them scanned and emailed to her or by simply placing the document in a folder at her desk. Tr. (Day 1) 71. Ms. LK further testified as to the large number of medical referrals HCH would receive by facsimile, but she did not provide clarification as to how those documents were required to be maintained or preserved by Appellant. Tr. (Day 1) 86. MH testified that he recalled “having conversations around keeping vital signs logs on site at the homeless shelters, diabetes, blood sugars. Blood pressures, that sort of thing in case they needed to be transported to the hospital.” Tr. (Day 1) 184. Medical documentation was also provided to Mobile Med and other third parties. Thus, there certainly was a lack of clarity concerning the precise recordkeeping process Appellant was expected to follow, and the extent to which it was acceptable to maintain files in locations other than the HCH offices. Notwithstanding Appellant’s recordkeeping shortcomings, we find that DHHS and HCH are responsible for inadequate, if not haphazard, recordkeeping procedures. We find it astounding that no log or list is kept of client referrals. Tr. (Day 1) 174-78. We strongly urge the County to take immediate steps to rectify this astonishing lapse in standard operating procedures.

It is clear from the record that Appellant had difficulty using the NextGen electronic record system and that she was lax in documenting client information in NextGen. Although Appellant made a few attempts to use NextGen, the County produced reliable evidence that she had failed to

log in from July 15, 2019, to November 5, 2019. Tr. (Day 1) 189; CX 9. Notwithstanding the difficulties with using NextGen in the field Appellant's failure to even attempt to use NextGen for that period of time reflects a negligent approach to her documentation responsibilities. Appellant's behavior contrasts with that of her own witness, Mr. PC, who on a daily basis entered information into NextGen and only disposed of his notes after the information was entered into NextGen. Tr. (Day 1) 224, 239.

The NextGen platform may be insufficiently user friendly and intuitive, and its launch may have been delayed, but glitches are not unexpected with the implementation of such systems. What should also be expected by management is that employees will have differing levels of ability to adapt to a new system.<sup>5</sup> While efforts were made to provide Appellant with training and assistance, including on a one to one basis, Appellant did make it known that she was still having difficulty. In addition, there were difficulties documenting prior dates of service which could only be rectified by IT support. Management paid insufficient attention to Appellant's struggles with NextGen as evidenced by the fact that Appellant had not successfully logged in to NextGen for four months. Tr. (Day 1) 189; CX 9. While the County introduced this evidence to demonstrate that Appellant was not transferring her notes from paper to NextGen during that time period, it also suggests that management's attention to Appellant's continued difficulties with NextGen should have been more robust. In our view, both Appellant and DHHS management share responsibility for Appellant's inability to fully utilize the NextGen system.

We find that the County has sustained its burden and proven certain of the charges by a preponderance of the evidence. Appellant's unauthorized disposal of client medical records constituted a violation of established policies and procedures as well as State law concerning medical records. MCPR § 33-5(c) & (d). The Maryland Annotated Code, Health General Article, § 4-403(b) provides that a health care provider, including a nurse, must retain patient medical records for five years. By disposing of client medical files Appellant violated Health General, § 4-403(b). Her failure to properly maintain and secure medical records, or to record client information in NextGen, was negligent and careless. MCPR § 33-5(h).

We have also reviewed the HIPAA regulations cited by the County and find that Appellant has not violated 45 CFR § 164.316. Contrary to the testimony of Mr. DM and the arguments in the County's post-hearing brief, HIPAA regulations do not contain a six year medical record retention requirement. What 45 CFR § 164.316(b)(2)(i) requires the County to retain for six years is documentation of its retention policies and procedures, not the actual medical records. Moreover, that regulation does not apply to the paper files Appellant is alleged to have destroyed. *See* 78 Federal Register 5566, 5567 (January 25, 2013) ("The HIPAA Security Rule, 45 CFR Part 160 and Subparts A and C of Part 164, applies only to protected health information in electronic form and requires covered entities to implement certain administrative, physical, and technical safeguards to protect this electronic information."). Rather, only State law governs how long medical records must be retained.

The County also contends that the *Safeguarding Confidential Personally Identifiable Information* policy was also violated by Appellant's failure to store medical records in a secure

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<sup>5</sup> "[R]ather than thrusting new technologies upon employees, organizations should provide them with the right training and support to better use and adopt those tools." Frank-Jürgen Richter and Gunjan Sinha, *Why Do Your Employees Resist New Tech?* Harvard Business Review, August 21, 2020, <https://hbr.org/2020/08/why-do-your-employees-resist-new-tech#>.

location. *See* § 5.6.1.1 “Client files and other PII must be stored in a secure environment.”). The safeguarding policy’s primary focus is on preventing the disclosure of protected health information consistent with HIPAA. However, the County has failed to prove that Appellant removed the great number of files it says were removed from the DHHS offices and kept them in an unsecure location. Rather, the evidence of record indicates that Appellant admitted to disposing of medical records by using the shred bins at the DHHS offices. It appears to us that although Appellant disposed of records that should have been maintained under Maryland law, her method of disposal was suitable had the records been appropriate for destruction, and no disclosure was likely. While Appellant committed a violation of the safeguarding policy by disposing of and not storing the missing files, the severity of her offense is lessened because she did not violate HIPAA or imperil protected health information.

The County also demonstrated that Appellant violated the DHHS policy on *Safeguarding Confidential Personally Identifiable Information*, § 5.6.6, by failing to complete and submit the appropriate forms or obtain the required permissions. *See* CX 5, Appendix C; CX 6. Appellant admits that she took client records to shelters and other off-site locations as a routine part of her job. It is also undisputed that Ms. LK provided Appellant with a bag to carry confidential papers when out of the office. Thus, Appellant’s supervisor was aware that Appellant was carrying medical documents to and from the HCH offices. Furthermore, it is clear that neither Appellant nor her supervisor were aware of any DHHS protocol to document the removal of patient files from the office. Thus, we view this violation of the safeguarding policy to be relatively minor.

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

Because we conclude that the County proved by a preponderance of the evidence that Appellant violated established policy or procedure, failed to perform her duties in a competent or acceptable manner, and was negligent or careless in performing her duties when she improperly failed to maintain and document client medical information, the Board must now address whether the penalty of dismissal is appropriate.

The County personnel regulations vest the DHHS Director with the discretion to eschew progressive discipline and move directly to dismissal 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. . .”). In addition to progressive discipline, MCPR § 33-2(d) states that the County “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 . . . 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.”

Appellant’s violations of County policies and State law concerning medical records went directly to her assigned duties and responsibilities as an RN responsible for the protection and security of protected health information. Moreover, her violations exposed DHHS to possible legal consequences should the information in the missing files be necessary to properly serve clients in the future.

We disagree, however, with the analysis DHHS used to reach the conclusion that dismissal was the appropriate sanction for Appellant’s misconduct. The Department relied heavily on a

recommendation of Mr. DM who, in our view, used an opaque penalty matrix and flawed reasoning. Mr. DM testified that the matrix was developed by his predecessor and that he was not sure if it was based on County, State or Federal law or policy. Tr. (Day 1) 155, 169. Mr. DM's investigative report provided no details on how the penalty matrix was applied to achieve the score that resulted in a recommendation of dismissal. CX 4. His explanation of how he arrived at the score was vague and imprecise. Tr. (Day 1) 154, 170. Although there is a document that contains the details of the matrix and how it is to be used that document was not introduced by the County for inclusion in the record. Tr. (Day 1) 171. Further, Mr. DM erroneously gave significant weight to what he believed to be Appellant's violation of HIPAA by intentionally destroying medical records. Tr. (Day 1) 154. As discussed above, the HIPAA regulations relied on by the County do not support its argument that HIPAA requires the preservation of medical records. Rather, HIPAA is concerned with preventing the improper disclosure of such records and the use of appropriate methods of disposal to reduce the risk of inadvertent disclosure of confidential information.

We did not hear testimony from the ultimate decisionmaker, the Director of the Department, explaining his reasoning for choosing to dismiss Appellant. We have warned the County before that "while the Board is not bound by the County's choice of penalty, and does not defer to that choice in any significant way, it is much more likely to sustain a County-imposed penalty if it is clear on the record that these factors have been considered and the individuals who in fact made those considerations are called to testify." MSPB Case No. 19-20 (2019).

Appellant's skill and dedication as a nurse and in the evaluation and treatment of clients is not in dispute. With the exception of her recordkeeping failures, record evidence indicates that Appellant was a valuable employee with good performance evaluations and no prior discipline.

The County was only able to identify one case that it suggested was somewhat comparable. Tr. (Day 1) 33-35. In that instance an employee improperly took confidential files home without permission and kept the records in the trunk of her car when she went on FMLA leave. When asked about the files the employee found and returned the records and was ultimately punished with a two-day suspension. Although Appellant's offenses were similar in that she improperly removed records without written permission, we agree with the County that Appellant's improper disposal of records was a more serious violation that warrants more severe discipline.

We find that while Appellant clearly understood the need to safeguard client health information, she did not fully appreciate the potential harm in her approach to record maintenance or that premature disposal of that information was contrary to DHHS policy and law. The guidance she received from her supervisor at HCH does not appear to have been a model of clarity and the recordkeeping approach used by that office was less than ideal. Appellant's confusion concerning record retention requirements was understandable and weighs in favor of mitigation of the penalty.

The Montgomery County Code, § 33-14(c), grants the Board substantial latitude in determining the appropriate remedy on appeal. The Board has the authority to modify the discipline imposed by management if it finds that doing so is necessary to protect the employee's rights under the merit system and to rectify personnel actions found to be improper. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986) (Board "must be able to grant appropriate relief" and may modify dismissal to a 30-day suspension). Conversely, the Board may increase discipline if appropriate. MSPB Case No. 07-08 (2007).

We find that the sustained charges were extremely serious considering Appellant's duties and her knowledge of the need to safeguard client health information. Although we do not condone

Appellant's misconduct, there are mitigating factors that deserve consideration in determining the appropriate level of discipline. Despite the seriousness of Appellant's negative behavior, the Board is of the opinion that based on the totality of circumstances, mitigation of the penalty is warranted.

In prior cases where the Board has sustained fewer than all of the agency's charges, the Board has mitigated the agency's discipline to the maximum reasonable penalty. MSPB Case No. 18-02 (2017); MSPB Case No. 13-04 (2013). *Cf.*, *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). Accordingly, weighing the nature and seriousness of Appellant's misconduct together with the mitigating factors and Appellant's strong potential for rehabilitation, the Board has determined that consistent with the concept of progressive discipline the maximum appropriate level of discipline for Appellant's misconduct is a forty-five (45) day suspension. In accord with the principles of progressive discipline, any future transgressions by Appellant may justify her dismissal.

In recognition of the serious charges that the County has proven, Appellant shall be reinstated to her position, or to a comparable position of equal pay, status and responsibility, without backpay. Montgomery County Code, § 33-14(c)(4).

We also find that upon her reinstatement DHHS must develop and implement an effective strategy to provide Appellant with the training necessary for her to succeed in her position. The County shall provide remedial training on record retention policies and documentation protocols.

The County shall also provide additional remedial training on the use of the NextGen recordkeeping system and provide ongoing feedback to Appellant as she attempts to enhance her skills. We strongly recommend that the County assign Appellant a mentor with the responsibility to monitor and follow up on Appellant's progress.

### **ORDER**

For the foregoing reasons, the Board **GRANTS** Appellant's appeal of her dismissal and **ORDERS** that:

1. Appellant's dismissal be rescinded, and the discipline converted to a forty-five (45) day suspension;
2. Any reference to Appellant's discipline as a dismissal shall be removed or redacted from County administrative and personnel records;
3. Appellant be reinstated to her previous position or to a comparable position of equal pay, status and responsibility, without backpay;
4. Within 45 days of this decision the County provide the Board with written certification that the dismissal has been reduced to a suspension, Appellant has been reinstated, and that all County records reflect that change;
5. Upon Appellant's reinstatement, she promptly will be provided with appropriate training and skill development on all aspects of record retention and medical documentation, including privacy standards, and that training on NextGen be provided until she has achieved proficiency; and
6. Because the Board has mitigated the penalty, the County must pay reasonable attorney fees and costs. Under Maryland law and Board precedent, when an appellant partially prevails the Board will only award a portion of the fees sought.

MSPB Case No. 15-27 (2017); MSPB Case No. 13-02 (2013). Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have ten (10) calendar days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, § 33-14(c)(9).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
June 23, 2021

## **CASE NO. 21-01**

### **FINAL DECISION**

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

### **BACKGROUND**

The discipline in this matter relates to a February 13, 2020, incident involving the alleged use of force against an inmate at the Montgomery County Detention Center (MCDC). The Department of Correction and Rehabilitation (DOCR or Department) issued a Statement of Charges for Dismissal dated July 22, 2020, and served on Appellant on July 27, 2020. County Exhibit (CX) 1. On September 24, 2020, DOCR issued an amended Notice of Disciplinary Action - Dismissal to Appellant, which was served on Appellant on September 25, 2020. CX 4. The NODA found that Appellant violated the following provisions of the Montgomery County Personnel Regulations (MCPR): §33-5(c) (violates any established policy or procedure); §33-5(e) (fails to perform duties in a competent or acceptable manner); §33-5(g) (knowingly making a false statement or report); and §33-5(h) (negligent or careless in performing duties), CX 5.

In addition, Appellant was found to have violated multiple DOCR policies, as follows: DOCR Policy Number 1300-10: §III(D) (force is not authorized as a means of punishment); §VI(E) (in controlled situations only shift commander may authorize chemical agent use), CX 8. Appellant was also charged with the following violations of DOCR Policy Number 3000-7: §VII(E)(3) (employee shall not use more force than necessary to control the situation or protect themselves or others from harm; employees shall not use force in a discriminatory manner); §VII(E)(9)(a) & (b) (conduct unbecoming, false report); §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance); §VII(E)(14) (untruthful statements), CX 7.

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



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

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

### **FINDINGS OF FACT**

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

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

Appellant Exhibits<sup>2</sup> (AX) 1 through 4 and County Exhibits<sup>3</sup> (CX) 1 through 21 were admitted into the record.

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

<sup>2</sup> Appellant’s exhibits are as follows:

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

<sup>3</sup> The County Exhibits are as follows:

- CX 1 - Statement of Charges - Dismissal, July 22, 2020.
- CX 2 - Notice of Administrative Leave with Pay, May 19, 2020.
- CX 3 - Notice of Disciplinary Action - Dismissal, September 21, 2020.
- CX 4 - Amended Notice of Disciplinary Action - Dismissal, September 24, 2020.
- CX 5 - Montgomery County Personnel Regulation, § 33.
- CX 6 - MCGEO Collective Bargaining Agreement, Article 28 - Disciplinary Actions.
- CX 7 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics.
- CX 8 - DOCR Department Policy and Procedure 1300-10, Use of Force, Chemical Agents & Restraints.
- CX 9 - Shift Administrator’s Investigative Report, April 23, 2020.
- CX 10 - Video Surveillance of Medical Unit, February 13, 2020.
- CX 11 - Use of Force Checklist, February 13, 2020.
- CX 12 - Incident Report, Written Statement of PFC [AS], February 13, 2020.
- CX 13 - Incident Report, Written Statement of Sgt [MT], February 13, 2020.
- CX 14 - Written Statement of Cpl [MS], February 13, 2020.
- CX 15 - Employee Training Schedule Report for Appellant.
- CX 16 - Last Chance Agreement, finalized January 8, 2019.
- CX 17 - Statement of Charges - Ten (10) Day Suspension, January 5, 2018, Amended Notice of Disciplinary Action - Five (5) Day Suspension taken as Forfeiture of Leave and Last Chance Agreement, February 4, 2019, and Order Accepting Settlement Agreement, January 28, 2019.

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

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- CX 18 - Notice of Disciplinary Action - Five (5) Day Suspension, July 20, 2016, Alternative Dispute Resolution Settlement Conference Intake Form, and work status change documents, Statement of Charges June 14, 2016.
  - CX 19 - Statement of Charges - Dismissal dated August 12, 2020, Notice of Disciplinary Action dated September 21, 2020 and Amended Notice of Disciplinary Action September 24, 2020 (Pending matter).
  - CX 20 - Comparable Discipline, June 11, 2019.
  - CX 21 - Comparable Discipline, February 23, 2015.

<sup>4</sup> The parties agreed to the following stipulations of fact:

**Director AT (background information only)**

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

**Deputy Warden MW (background information only)**

- Current title: Deputy Warden of Custody and Security for MCDC. DW [MW] has been in this position for the past 5 months and was the Acting Deputy Warden for one year prior to that.
- Has been with DOCR for over 27 years.
- Prior Positions held:
  - Captain/Professional Standards and Compliance Manager (included being DOCR’s Internal Affairs Investigator) - 2 years;

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

**Capt. BW**

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

**Sgt. MT**

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

**Nurse LB**

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

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

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

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

The County introduced video of the hallway where the medical unit cell and Medical Post are located and where the February 13, 2020, incident occurred. CX 10. At the beginning of the video Inmate W’s hands are visible resting between the bars and outside of the cell while engaged in a conversation with a correctional officer. During the conversation Inmate W extended his hand and the officer engaged in a handshake with the inmate. CX 10, 19:42:31-36.<sup>5</sup> They shook hands again as the officer prepared to leave the area. 19:43:32-35.

Less than two minutes later Appellant entered the vicinity of the Medical Post desk and inmate cell. 19:45:13. As Appellant passed in front of the cell Inmate W and Appellant began talking. 19:45:23. The inmate reached his arm and open hand out of the cell and towards Appellant as if to shake his hand or reach a cup Appellant was holding, and Appellant responded by suddenly raising his right arm in a swift swatting motion without making contact with the inmate. 19:45:26-27. Inmate W again reached out with his open hand towards Appellant, this time towards but not touching Appellant’s face. 19:45:28. Appellant backed off out of reach, put down the cup he was holding on to the Medical Post desk and reached to his belt for his Oleoresin Capsicum (OC spray or pepper spray). 19:45:28-34. Appellant then held the OC spray up to the cell opening, pointing it into the cell. 19:45:35-36. Appellant then stepped back and lowered his arm while continuing to talk to Inmate W. 19:45:39-42. As Appellant’s interactions with Inmate W began to escalate Officer AS asked Appellant to leave, but Appellant did not do so. Tr. 27, 229; CX 12.

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

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#### **Other Factual Stipulations**

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

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

the door and, while holding the OC spray, put his arm into the cell slightly past elbow depth. 19:45:54-57.

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

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

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

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

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

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

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

Pursuant to a Last Chance Settlement Agreement, in February 2019, Appellant was given a five-day disciplinary suspension for a November 2017 incident involving Appellant's aggressive and inappropriate behavior towards a DOCR nurse. Tr. 83; CX 16, CX 17.<sup>6</sup>

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

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

#### APPLICABLE LAWS AND POLICIES

**Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, Disciplinary Actions**, which provides, in pertinent part:

##### § 33-1. Definition.

*Disciplinary action:* One of the following adverse personnel actions taken by a supervisor against an employee: . . . (g) dismissal . . .

##### § 33-2. Policy on disciplinary actions.

(a) *Purpose of disciplinary actions.* A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace. . .

##### (c) *Progressive discipline.*

(1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:

(A) the severity of the employee's misconduct and its actual or possible consequences; or

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

(B) the employee's continuing misconduct or attendance violations over time.

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

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

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

### **§ 33-3. Types of disciplinary actions.**

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

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

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

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

## **VII. DEPARTMENT RULES FOR EMPLOYEES**

E. Specific Departmental Rules:

### 3. Use of Force:

Employees shall use force only in accordance with the law and departmental policy and procedures and shall not use more force than is necessary to control the situation or protect themselves

and/or others from harm. No employee shall use force in a discriminatory manner.

9. Conduct Unbecoming:

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

10. Neglect of Duty/Unsatisfactory Performance:

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

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

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

**III. POLICY**

It is the policy of the MCDOCR that:



- A. Use of force against an inmate is authorized when the acting staff member reasonably believes such force is necessary to accomplish any of the following objectives:
  - 1. protection of self or others;
  - 2. protection of property from damage or destruction;
  - 3. prevention of an escape;
  - 4. recapture of an escapee;
  - 5. prevention of a criminal act;
  - 6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or
  - 7. the prevention of the individual from self-inflicted harm.
- B. When force is used, the least amount of force reasonably necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved.
- C. Use of force shall be applied in accordance with the force continuum, as defined in Section II of this policy, unless the acting staff member reasonably believes the situation requires immediate escalation to a greater degree of force to accomplish any of the objectives identified in this policy.
- D. Force is not authorized as a means of punishment. . . .

**VI. CHEMICAL AGENTS - GUIDELINES**

- A. MCDOCR is authorized to use Oleoresin Capsicum (O.C.) pepper spray and pepper ball gun (see Policy - 1300-27).
- \* \* \*
- E. Each officer is authorized to carry on his/her person one (1) can of department issued Oleoresin Capsicum on duty. In uncontrolled emergency situations (time not permitting), staff are authorized to use O.C. against an inmate. In controlled situations only, the Shift Administrator/Shift Manager/Assistant Unit Manager or higher authority may authorize the use of a chemical agent against an inmate(s). . . .

**VII. USE OF CHEMICAL AGENTS – PROCEDURES**

- A. Officers limit the use of force against any inmate to that necessary to ensure security and control. All officers who have been trained and

certified in the use of chemical agents are issued pepper spray, expected to carry it, and are authorized to use it to control or break-up assaultive actions by inmates.

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

### **ISSUE**

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

### **ANALYSIS AND CONCLUSIONS**

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

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 18-07 (2019); MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) ("the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability").

#### ***Appellant's Testimony Lacked Credibility***

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

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

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

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

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

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

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

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

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

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

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

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

was under the stress of excitement caused by the event or condition.”). Inmate W’s statement falls within the excited utterance exception as he was clearly still in the throes of an “exciting event” at the time of his statements to Lieutenant JM. *See DeLeon v. State*, 407 Md. 16, 29 (2008); *State v. Harrell*, 348 Md. 69, 77 (1997).

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

Appellant contends that Inmate W spat on him a second time and that in reaction Appellant used the OC spray for the only time. However, unlike the earlier event where Appellant’s reaction to being spat upon was obvious, there is no video support for Appellant’s claim that the inmate spat at him a second time. We thus do not credit Appellant’s assertion that Inmate W spat on him a second time.

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

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

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

1. protection of self or others;
2. protection of property from damage or destruction;
3. prevention of an escape;
4. recapture of an escapee;
5. prevention of a criminal act;

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

6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or
7. the prevention of the individual from self-inflicted harm.”

Policy 1300-10 §III(A).

None of the circumstances listed in the policy were present during the incident of February 13, 2020. Inmate W was locked in a medical unit cell and not presenting a threat to others. Tr. 24, 26. There is no evidence in the record that he was engaged in self harm or otherwise a danger to himself, that he was damaging or destroying property, or that he trying to escape. Tr. 28-30, 232. Inmate W’s only misbehavior was reaching his arm out of his cell and spitting at Appellant after Appellant threatened him with OC pepper spray. Regarding Appellant’s suggestion that Inmate W’s spitting was a criminal act, Tr. 145, it is an act that could have been prevented by Appellant simply walking away. Tr. 30, 51, 61-62, 103-04, 116. The hallway was readily passable. Tr. 197-98, Tr. 202, 223.

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

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

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

### ***Appellant Used Force as Punishment***

Appellant admitted that he brandished the OC spray and threatened Inmate W as a “reflex.” Tr. 222, 230-31. From the record evidence, including his behavior on the video and his demeanor while testifying, it is clear that Appellant was annoyed with Inmate W as soon as the inmate asked

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

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

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

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

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

Appellant’s conduct was completely unacceptable, contrary to DOCR policies on the use of force, and in violation of MCPR §33-5(c) (violates any established policy or procedure); §33-5(e) (fails to perform duties in a competent or acceptable manner); §33-5(h) (negligent or careless in performing duties); DOCR Policy 1300-10, §III(D) (force not authorized as a means of punishment); §VI(E) (in controlled situations only shift commander may authorize chemical agent

use); DOCR Policy 3000-7, §VII(E)(3) (employee shall not use more force than necessary to control the situation or protect themselves or others from harm; employees shall not use force in a discriminatory manner); §VII(E)(9) (a) & (b) (conduct unbecoming); and §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance).

### ***Appellant Knowingly Made False Statements***

As discussed above, Appellant’s testimony that he only used the OC pepper spray on Inmate W once was not credible and was contradicted by the testimony of other witnesses and the video evidence. Appellant was untruthful in his statements to investigators when he denied using the OC spray twice and attempted to explain his use of the term “second burst” in his written report by claiming that he meant a one second burst of spray.

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

### ***The Appropriate Level of Discipline is Dismissal***

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

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

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

While the Director testified that she focused on the two most recent suspensions in making her decision, Tr. 86, we note that the four disciplinary suspensions Appellant received were applied

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<sup>10</sup> Even without considering Appellant’s significant prior discipline the County personnel regulations would allow the DOCR Director to eschew progressive discipline and move directly to dismissal. MCPR § 33-2(c)(2) (“In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee. . .”).

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

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

The Director testified that she reviewed two prior cases involving the inappropriate use of OC spray as possible comparable discipline. Tr. 106. One case involved a one-day suspension for unauthorized use of OC spray on an inmate who was locked in his cell. CX 20. The other case involved a three-day suspension for the unauthorized use of OC spray against an inmate for taking an extra tray of food from a food cart. CX 21. In both cases the level of discipline was the result of a settlement after Alternative Dispute Resolution with the union. For that reason alone, the Director was not obligated to explain why Appellant's discipline was more severe. MSPB Case No. 18-07 (2019) (where discipline is the result of settlement DOCR need not explain the difference in treatment); *Davis v. U.S. Postal Service*, 120 MSPR at 463-64 ("The Board has held that if another employee receives a lesser penalty, despite apparent similarities in circumstances, as the result of a settlement agreement, the agency is not required to explain the difference in treatment."); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325 (agency not required to explain lesser penalties imposed against other employees whose charges were resolved by settlement), *aff'd*, 975 F.2d 869 (Fed. Cir.1992).

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

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

We also consider whether Appellant has potential for rehabilitation and conclude that he does not. In addition to calling into question Appellant's credibility, Appellant's claim that he was misled concerning the 2019 Last Chance Agreement when great care was taken to ensure that he fully understood and agreed to the terms of the agreement provides evidence of his inability to take personal responsibility for his action. The same is true regarding the July 2016, five-day disciplinary suspension for using unnecessary and excessive force when he pushed a teenager out the front door of MCDC. CX 18. Appellant acknowledged that he settled the matter by accepting



a five-day suspension, but denied that that he had engaged in the behavior for which he was charged: “I did not push that guy per se.” Tr. 237-38. Indeed, Appellant consistently refuses to acknowledge that any discipline he has received was justified and asserts that he is a victim of shoddy investigations, poor representation, or false allegations. *See, e.g.*, Tr. 171-75, 178, 185, 234, 236-40. For these reasons we conclude that Appellant lacks the potential for rehabilitation.

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

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

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

### **ORDER**

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

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
June 8, 2021

# TERMINATION

## CASE NO. 18-27

### FINAL DECISION

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

### PROCEDURAL BACKGROUND

On April 4, 2018, the Montgomery County Office of Public Information issued a Notice of Termination to Appellant. County Exhibit (CX) 23. On April 17, 2018, Appellant filed this appeal with the Board challenging the decision to terminate her from a position as a Customer Service Representative in the MC311 call center.

On June 4, 2018, the County filed its Prehearing Submission. Appellant filed her Prehearing Submission on July 5, 2018. Appellant came to the Board's office on July 9, 2018 and updated the Prehearing Submission and her exhibits. A Prehearing Conference was scheduled for September 27, 2018. On September 25, 2018, Appellant retained MF as counsel, who requested a postponement of the Prehearing Conference, which was granted on September 26. The Prehearing Conference was rescheduled for October 17, 2018. At the request of Appellant's attorney, it was again rescheduled until October 23, 2018.

Two members of the Board, Appellant, and the County's attorneys met for the Prehearing Conference on October 23, 2018. However, without notice to the Board Appellant's attorney failed to appear. Appellant told the Board that at the last minute her attorney had decided to cease representing her.

The Board attempted to proceed with the conference, but it quickly became apparent that Appellant was at a disadvantage. After discussions among the parties and the Board, the Board agreed to postpone the Prehearing Conference until Appellant could obtain new counsel.

Appellant had difficulty successfully engaging a new attorney. On December 4, 2018, Appellant emailed the Board stating that she was discussing representation by AL & Associates. However, it was not until June 25, 2019, that Ms. SK of AL and Associates finally entered her appearance as Appellant's attorney.

Appellant submitted a revised witness list and substitute exhibits on September 17, 2019. A Prehearing Conference was held on September 26, 2019, and a Prehearing Order was issued on October 11, 2019, setting the hearing date for December 11, 2019. On December 9, 2019, Ms. SK filed a Motion to Stay Proceedings for Sixty Days so that Appellant could obtain a loan to pay Ms. SK's attorney's fees. Ms. SK represented that if the stay was not granted she would withdraw from the case and Appellant might be required to proceed *pro se*.

The Board reluctantly granted the motion so that Appellant could have legal representation at the merits hearing. On January 13, 2020, Appellant filed a Motion to Extend Stay of Proceedings for an Additional Forty-Five Days because Appellant's loan application had not yet been approved. The Board granted the motion on January 16, 2020, so that Appellant could have competent counsel, but warned that no further extensions would be granted.

The hearing was set for April 14, 2020. On Sunday evening, March 29, 2020, the County advised the Board that a key County witness was no longer available to testify at the scheduled hearing due to his critical involvement in the County's response to the COVID-19 public health crisis. The County requested that the Board hold the case in abeyance and Appellant agreed with that request. The Board granted the postponement request and scheduled a hearing for July.

A remote hearing was finally held on July 7, 2020. Post hearing briefs consisting of written closing arguments and proposed findings of fact and conclusions of law were filed on August 17, 2020. In addition to and separate from the post-hearing brief filed by her attorney, Appellant submitted a document titled "Victim Impact Statement." In that document, Appellant stated that "Due to internet interruptions beyond my control, I was unable to complete my . . . hearing testimony." The County objected to the supplemental document. The Board provided Appellant with the opportunity to submit a written proffer of the testimony she alleged she was prevented from providing during the hearing. Appellant submitted a proffer of her additional testimony on September 17, and the County objected to the additional testimony on September 18.

On October 7, 2020, the Board issued an Order Denying Supplemental Evidence. After carefully reviewing Appellant's proffer and scrutinizing the hearing transcript the Board concluded that although there were technical issues, Appellant and her attorney were given ample opportunity and wide latitude to fully present her testimony. The Board further found that the proffered testimony would have added little that was relevant and material to Appellant's case and, for the most part, "merely emphasizes, elaborates, and focuses testimony provided at the hearing."<sup>1</sup>

### FINDINGS OF FACT

Appellant, a County employee since December 2010, was employed as a Customer Service Representative in the Office of Public Information's MC311 call center. Hearing Transcript, July 7, 2020 (Tr.) 219-20. Appellant was diagnosed with cancer in April 2016. Tr. 221. In April 2016, Appellant went on leave in order to receive treatment, which included surgery, chemotherapy, and radiation treatments. Tr. 221-22.

On July 26, 2016, Dr. LH, M.D., Appellant's oncologist, wrote to the County Occupational Medical Services (OMS) Disability Manager<sup>2</sup> "to provide evidence of medical necessity" for Appellant to be placed on priority consideration for reassignment from her MC311 call center position. Appellant Exhibit (AX) 2. Dr. LH stated that Appellant's description of her position was that it "requires extensive and prolonged sitting and attention to daily operational needs and metrics." *Id.* Dr. LH suggested that the "various daily job related functions may have contributed to her diagnoses of cancer and chronic gastrointestinal issues due to prolonged sitting and chronic stress." *Id.* Dr. LH's medical opinion was that "prolonged daily sitting and chronic stress" contributes "to a number of medical problems" and "can also contribute to emotional and mental distress." *Id.*

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<sup>1</sup> The Board's Order Denying Supplemental Evidence, October 7, 2020, p. 5, also found:

At no time during the hearing or for six weeks afterwards did Appellant or her attorney object or suggest that there was a need for additional testimony. Nor does Appellant's post-hearing brief argue that there was such a need for supplemental testimony. The Board concludes that Appellant had a full and fair opportunity to testify at the hearing, and that there is no justification for admitting additional testimony or other supplemental evidence.

<sup>2</sup> JD, now going by the name JB, is the Program Manager for OMS. Tr. 36. We will refer to her as either Ms. B or the Disability Manager.

The duties of Ms. B, the County Disability Manager, include meeting with and assisting employees in identifying reasonable accommodations. Ms. B testified that when an employee requests an accommodation and provides medical documentation, the information is reviewed by OMS in consultation with the employee's health care provider. Tr. 38. The physicians working for OMS then determine the type of accommodation needed and the Disability Manager "work[s] with the employee and the department to determine how that accommodation, or if that accommodation, can be provided, based on operational need and what the employee's needs are." Tr. 39. The Disability Manager is tasked with implementing the ADA interactive process. Tr. 50. That means that the Disability Manager reaches out to the employee and the County employing agency in an attempt to come up with approaches that allow reasonable accommodations to be made. Tr. 50-51.

On September 24, 2016, Dr. SS (Dr. S), the lead physician for OMS, emailed Ms. B and the FMLA Administrator saying that:

I have just reviewed the medical record sent to me by [Appellant's] specialist. She is asking for accommodation of priority placement to a new position which does not require continuous sitting and mandatory presence during emergency weather conditions. Her medical documentation supports this request.

AX 1, p. 4; Tr. 125.

Dr. S explained that he was referring to the accommodations concerning no continuous sitting or mandatory attendance during emergency weather conditions but was unaware whether those accommodations could be made for an MC311 customer service representative like Appellant. He said that Ms. B as the Disabilities Manager was the person to make the determination if accommodations could be made to Appellant's current job or if a reassignment was needed. Tr. 126-27.

On September 27, 2016, Dr. S emailed the County's Family Medical Leave Act (FMLA) Administrator: "I just talked to [Ms. B] this morning about [Appellant]. She should be in priority placement." AX1, p. 2.

Priority consideration allows certain qualified individuals with disabilities to be considered before other candidates for any available position for which they are qualified and can perform the essential functions of the job, with or without reasonable accommodation. Tr. 43-44, 47, 100-01. Priority consideration is described in the Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), Appendix VIII, as follows:

**2.4 Priority Consideration** - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. . .

CX 17.<sup>3</sup>

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<sup>3</sup> See Montgomery County Personnel Regulations (MCPR), §1-58, ("Priority consideration: Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion."); §1-59, ("Priority eligible

The MCGEO agreement also provides that the employee has a 90-day period in which to choose another available position. If the employee is unable to locate and qualify for a position, under § 4.3 of Appendix VIII the employee will be subject to termination:

**4.3** When an employee needs reassignment as an accommodation for a disability, a maximum of 90 days will be allocated to secure a placement. Priority consideration will be given for any position for which the person qualifies. If it is determined that reasonable accommodation cannot be made, request the employee's department to initiate a disability retirement application.

CX 17.<sup>4</sup>

Dr. S's explanation under cross examination was that he was not saying that she should be in priority placement as he did not have the authority to make that decision, and that he was using the term "priority placement as a shortcut to say they're [Ms. B & Appellant] already communicating about the accommodation process." Tr. 128-29.

On October 14, 2016, Appellant's podiatrist, Dr. TW, advised that Appellant should not "be on her feet continuously for more than 2½ hours at a time; but rather, be intermittently standing/walking/sitting in order to not aggravate" her foot conditions. AX 2.

In October 2016 Ms. B was assisting Appellant in her efforts to find a position outside of MC311, and apparently there were jobs available. AX 10; Tr. 68, Tr. 236-37. Appellant testified that Ms. B said that she was going to place Appellant on priority consideration. Tr. 224. Ms. B conceded that Appellant may have been on priority consideration at some time in October 2016. Tr. 70, 109.

Dr. S testified that he met with Appellant and Ms. B on October 17, 2016, to "enumerate what particular accommodations that [Appellant] was asking for or that her providers were asking for, to enumerate them on a health status report, because Ms. [B] had already started her conversation with Appellant's department manager to see how the work area could be changed to accommodate [Appellant]." Tr. 131. Priority placement was no longer under consideration.

That meeting resulted in an October 17, 2016, Return to Work Health Status Report indicating that the accommodations Appellant should receive at the Call Center were: (1) a wireless headset; (2) the option to use a standing desk; and (3) not to be considered an essential employee during inclement weather or emergency conditions or follow the administrative process, which means reassignment. CX 2.

On October 21 Appellant's call center supervisor contacted her regarding her return to work. CX 3. Appellant said she did not intend to return to work as she was seeking priority consideration for reassignment. CX 3.

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list: The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position."); MCPR, § 6-10 ("(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who: (1) is unable to perform the employee's job because of a disability or injury under the ADA; . . .").

<sup>4</sup> See MCPR, § 29-2 ("(a) A department director may terminate the employment of an employee: . . . (9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee's job; . . .").

Appellant reported an incident of sexual harassment. Tr. 223. Ms. B was aware of the sexual harassment complaint. Tr. 70.

On October 24, 2016, the Director of the call center advised Appellant that she had been informed by Ms. B that Appellant was not being considered for priority consideration because she was able to return to work with temporary reasonable accommodations. Appellant was told to return to work with the accommodations outlined in the October 17 Return to Work Health Status Report. CX 3.

On October 25, 2016, Dr. LH sent another letter advising that for health reasons Appellant should not be placed back in her customer service position in the call center and offering to answer any questions by telephone. AX 2. Ms. B testified that if she received the letter she would have provided it to Dr. S. Tr. 73-74. Dr. S did not have a conversation with Dr. LH after he received the October 25 letter. Tr. 132-33.

On October 26, 2016, Appellant returned to her customer service representative position. CX 4. Appellant testified that she agreed to return to the call center position because she thought that it would only be a day or two before the County reassigned her to another position and because she was concerned that if she did not return to work she might lose her job. Tr. 228-29, 263.

When Appellant returned to the call center, she was assigned less demanding responsibilities on a temporary basis in an effort to accommodate her stress and anxiety. CX 7.

The Call Center provided Appellant with a standing desk, which she “rejected . . . almost immediately” and “[s]he never used it.” Appellant’s Post-Hearing Brief, pp. 7 and 16. Appellant asserted that her medical conditions prevented her from using the standing desk. Tr. 264-65.

On November 22, 2016, Appellant went to see Dr. S with her union representative. Tr. 142. They discussed the accommodations and Appellant told Dr. S that her “gradual return to full duty is moving too quickly, and she feels exasperated at the end of each day.” Tr. 143. Appellant also told Dr. S that the standing desk was not helping much. Tr. 143. That same day Dr. S issued an updated Health Status Report instructing the County to remove the standing desk and to not add to her job duties. AX 2. Dr. S also stated that “Due to increased symptomatology of medical condition, she cannot be advanced in time at work or in tasks or amount of work from what she is currently doing this week.” AX 2.

Appellant was unable to use the wireless headphones because sounds were amplified. Tr. 271. Appellant was offered the option to take multiple ten-minute breaks throughout the day instead of a half-hour lunch and two 15-minute breaks, but this accommodation was not adequate because Appellant never knew when she would need to go to the bathroom. Tr. 268-69.<sup>5</sup>

Appellant provided additional documentation from multiple health care providers indicating that the anxiety, stress, and the amount of sitting required by her call center position prevented her from working in the call center environment and requesting that she be accommodated with reassignment to another position. AX 2; CX 8 - 12

On December 9, 2016, Appellant’s gastroenterologist, Dr. LB, sent a letter expressing his opinion that due to Appellant’s chronic medical issues she should not continue working in the call center. AX 2. In the Patient Clinical Summary, Dr. LB noted that Appellant was experiencing rapid

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<sup>5</sup> The MCGEO collective bargaining agreement, § 13.2(c), provides that “[s]ubject to operational and work load needs, employees are entitled to take two 15-minute rest breaks during the work day, in addition to the half-hour meal period.”

heart rate/palpitations, hoarseness, heat or cold intolerance, abdominal pain, change in bowel habits, gas, nausea, rectal bleeding, dizziness, frequent headaches, vertigo, depression, and anxiety/panic attacks. AX 2. Dr. S acknowledged receiving the letter from Dr. LB, but said that he did not know that the accommodations he had recommended were not working for Appellant. Tr. 133, 136.

On December 21, 2016, Appellant's primary care physician, Dr. MK, sent a memorandum stating that Appellant was unable to perform work duties requiring prolonged sitting, and should not be exposed to excessive mental strain, stress, agitation or excitement:

Due to medical sequella following radiation and chemotherapy (including rectal pain, tinnitus, light headed/dizziness, neuropathy of hands and feet, palpitations, heightened anxiety), she is unable to perform work duties requiring prolonged sitting nor should she be exposed to excessive mental strain, stress, agitation or excitement. It is my medical recommendation that she not work in a call center environment and that she may be intermittently able to walk, stand or sit as tolerated.

AX 2.

After receiving Dr. MKs' letter, Dr. S immediately issued, on December 22, 2016, an updated Health Status Report. CX 5 and 6; Tr. 138. Dr. S acknowledged that Appellant had "increased symptomatology," by which he meant that the symptoms of Appellant's medical condition were increasing after her return to work. Tr. 141. Dr. S also acknowledged that Appellant "certainly . . . had a condition which is -- which is known to be worsened with stress." Tr. 162. Dr. S also stated that "Due to increased symptomatology of medical condition, she cannot be advanced in time at work or in tasks or amount of work from what she is presently doing." CX 6; Tr. 138. The Health Status Report requested that the temporary reduction in job responsibility be continued. CX 5 and 6.

On January 9, 2017, Appellant's oncologist, Dr. MA, requested that she be moved to a position where she could walk and sit throughout the day because she had continued to experience rectal pain that made it difficult to sit for prolonged periods. AX 2.

Dr. S did not speak to Dr. MA because he believed that the concerns raised in his letter had already been addressed by the County. Tr. 143-44. Dr. S was aware that Appellant had requested that the standing desk be removed. Tr. 144-45.

On January 13, 2017, Appellant accepted a voluntary demotion from a Customer Service Representative II (Grade 16) to Customer Service Representative I (Grade 13) with the following accommodations: not to be required to report to work during a declared emergency or liberal leave periods but to be able to telework from home on those days; not to work more than an 8.5 hour day with two 15 minute breaks and a 30 minute lunch period and the eligibility to volunteer for overtime provided the overtime hours are not added to Appellant's scheduled work day. CX 7; Tr. 77, 98-99. This was because her medical condition prevented her from performing some of the essential functions of her Customer Service Representative II (Grade 16) position. CX 5, CX 7. The demotion was considered a reasonable accommodation.<sup>6</sup>

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<sup>6</sup> A December 22, 2016, Health Status Report indicated that due to Appellant's increased symptomatology she could not perform some of the essential functions of a Customer Service Representative II. CX 7.

On March 2, 2017, Appellant's primary care physician, Dr. AR, indicated that Appellant was "unable to perform work duties requiring prolonged sitting nor should she be exposed to excessive mental strain, stress, agitation or excitement." AX 2. Dr. AR reported that Appellant's medical condition had been aggravated by the call center environment, and suggested that "she not work at the call center and that she may be intermittently able to walk, and or sit as tolerated." Dr. AR expressed the opinion that it was medically necessary for Appellant to be placed in a light duty/priority consideration placement immediately. AX 2.

Appellant contends that had she been in priority consideration in March 2017 she could have been reassigned to a Grade 16 Office Services Coordinator position in the division of Licensure and Regulatory Services at the County Department of Health and Human Services (DHHS). AX 8; Tr. 211. However, Appellant was not in a priority consideration status and DHHS instead hired another individual who was on a priority consideration list. AX 8; Tr. 202, 286. Furthermore, because of Appellant's demotion to the Grade 13 level in January, even if she had been on priority consideration in March she would have only been eligible for priority placement for positions that were Grade 13 or below. MCGEO agreement, Appendix VIII, § 2.4

On July 28, 2017, Appellant's Otolaryngologist, Dr. MA, advised that Appellant should not work with a headset in her current work environment. He noted that she had anxiety from the situation. CX 9. Dr. S called Dr. MA and asked for more records. During the conversation Dr. MA reported that Appellant was more anxious when she listened to calls while wearing the headset. Tr. 150-52.

On August 17, 2017, there was an email discussion among various County employees, including an Associate County Attorney, concerning resolution of Appellant's concerns. AX 1. As part of the email exchange it was noted that Appellant's union representative was "looking at some options, including priority placement." AX 1.

On October 4, 2017, Appellant's therapist, LS, LCPC, reported that she had significant stress in her work environment which was impacting her mental and emotional wellbeing. He requested that she be transferred to a work environment more suited to her skills and unique needs and further requested that these accommodations be implemented immediately. CX 10.

On October 5, 2017, Appellant's therapist, TH, requested an immediate change in her work setting to decrease Appellant's symptoms of anxiety and stress. Ms. TH stated that Appellant had symptoms of anxiety related to her work environment. CX 11.

On November 3, 2017, Dr. MA reported that Appellant had pain in her ears with certain sounds and throbbing and headaches from use of headphone sets. He further stated that he agreed with Appellant's request to be removed from her current work environment. CX 8.

On November 16, 2017, Dr. LH again requested that Appellant be reassigned to another position due to the deleterious effects of her current position on her overall health. CX 12.

Dr. S testified that after seeing Dr. LH's November 16, 2017, letter, CX 12, he met with Appellant in late November. Tr. 158-59. Dr. S concluded that based on Dr. LH's view that the call center was having "deleterious effects" on Appellant's "overall health" and his own observation that she was "so stressed out and so anxious," Appellant could no longer perform the essential functions of a Customer Service Representative. Tr. 161-62. Accordingly, on November 28, 2017, Dr. S signed a Health Status Report advising the County that Appellant should be reassigned: "Please move to a different position out of MC311, ASAP. Reasonably accommodate." CX 13.



On December 7, 2017, Appellant was provided with a memorandum dated December 6 advising her that she had been placed on 90-day priority consideration pursuant to the MCGEO agreement. CX 14, 17. Under the MCGEO agreement, Appendix VIII, § 2.4, Appellant could potentially be reassigned to a vacant position before other candidates were considered. CX 17. The County also placed Appellant on 90 days of administrative leave so that she could “pursue [an] alternative placement out of MC311. . .” . CX 15. Unfortunately, on November 30, 2017, the County instituted a “position exemption process” or hiring freeze. CX 19, 20.

Because Appellant had accepted a demotion to Customer Service Representative I, she was only eligible for priority placement to positions that were Grade 13 or below. MCGEO agreement, Appendix VIII, § 2.4; Tr. 91, 106-08. *See Scott v. Montgomery County*, 164 F. Supp. 2d 502, 508 (D. Md. 2001) (Montgomery County MCGEO collective bargaining agreement “only requires that [an employee] be given priority for those positions at his grade level or lower.”). Appellant testified that vacant positions at the Grade 13 level rarely were available. Tr. 279.

Appellant’s pre-hearing submission included a list of positions at various grade levels which are identified as “jobs applied for.” AX 6. With the exception of the DHHS Grade 16 Office Services Coordinator position Appellant applied for in March 2017, Appellant provided little testimony or other evidence concerning those positions. The Board cannot discern the details of a number of those recruitments, such as the dates the positions were available or why Appellant was or was not deemed qualified. Without more, AX 6 does not provide evidence of available vacant, funded positions for which Appellant was qualified with or without reasonable accommodation.

There were several positions listed in AX 6 Appellant pursued while on priority consideration from December 2017 to early April 2018 and that were briefly discussed in her testimony and the subjects of emails contained in County Exhibit 21. Appellant rejected a Recreation Assistant I position because it was a temporary/seasonal, intermittent position. CX 21 (Email from Appellant, January 4, 2018). Appellant turned down a Library Page position because it was a temporary/seasonal position that would not provide benefits. CX 6, 21 (Email from Appellant January 10, 2018); Tr. 277. A Grade 9, Election Aide I position was also temporary/seasonal and would require substantial overtime. CX 21. A Grade 13 Principal Administrative Aide position at the Department of Transportation was not available because there was a delay in filling it and several other positions due to budget constraints. CX 21 (Email from RM, March 22, 2018).

Due to the hiring freeze most of the vacancies were for part-time, seasonal positions, or those at lower grades. Tr. 106. However, under County rules Appellant would retain her salary and benefits even if she accepted a permanent position at a lower grade level. CX 21; Tr. 44, 47, 77, 91, 99, 107. Under that policy, if Appellant accepted a permanent part time position her salary would be prorated based on the number of hours worked. MCGEO agreement, § 5.21 and Appendix VIII, § 4.0.

However, the situation was different for temporary/seasonal positions. Appellant was advised that she would not be eligible to receive health benefits for temporary/seasonal positions. Tr. 277; CX 21 (Email from Ms. B, April 4, 2018). Appellant did not accept reassignment to a temporary/seasonal position due to the lack of health benefits.

Pursuant to the MCGEO CBA, when the 90-day priority consideration period expired Appellant was terminated on April 4, 2018. CX 17; CX 23.

## APPLICABLE LAW

**Montgomery County Personnel Regulations, § 1, Definitions** (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, February 23, 2016, July 17, 2018 and June 1, 2020)

**§ 1-58. Priority consideration:** Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.

**§ 1-59. Priority eligible list:** The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position.

**Montgomery County Personnel Regulations, § 6, Recruitment and Application Rating Procedures** (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)

**§ 6-10. Priority eligible list.**

(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who:

(1) is unable to perform the employee's job because of a disability or injury under the ADA; . . .

**Montgomery County Personnel Regulations, § 8, Medical Examinations and Reasonable Accommodation**, (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015)

**§ 8-7. Required medical examinations of employees; actions based on results of required medical examinations.**

**(g) Application of ADA and reasonable accommodation.**

(4) The department director must first try to reasonably accommodate an employee with a disability in the employee's current job unless the OHR Director determines that accommodation in the current job would impose an undue hardship on the County. . .

(5) If the employee is an individual with a disability who cannot perform the essential functions of the current job with or without accommodation or if accommodation would impose an undue hardship on the County, the department director may:

(A) reassign the employee through a voluntary transfer or demotion to a vacant position for which the employee is qualified, with essential duties that the employee can perform with or without accommodation; or

(B) terminate the employee's County employment, if the employee is not reassigned to a vacant position.

**Montgomery County Personnel Regulations, § 10, Employee Compensation**, (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005,

July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015)

**§ 10-5. Salary-setting policies.**

(a) *General.* A department director must ensure that an employee's base salary does not exceed the pay rate or range for the pay grade or pay band assigned to the employee's class, unless the department director:

(1) demoted the employee because of . . . disability under Section 10-5(d); . . .

**Montgomery County Personnel Regulations, § 29, Termination,** (as amended October 21, 2008)

**§ 29-2. Reasons for termination.**

(a) A department director may terminate the employment of an employee: . . .

(9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee's job; . . .

(c) A department director must not terminate a qualified employee with a physical or mental disability under 29-2(a)(9) above unless efforts at reasonable accommodation as described in Section 8 of these Regulations are unsuccessful.

**Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO)**

**ARTICLE 5 – WAGES, SALARY, AND EMPLOYEE COMPENSATION**

5.21 Reclassification or Reallocation of a Position to a Lower Pay Grade or an Employee Placed in a Lower Pay Grade as a Result of a Disability.

A department director must ensure that an employee whose position is reclassified or reallocated or placed in a lower pay grade as a result of a disability:

(a) keeps the salary the employee received immediately before the effective date of the reclassification or reallocation (or the salary received immediately prior to the effective date of the demotion or change to lower grade in cases of disability); and

(b) receives a general wage adjustment that other employees in the same occupational class covered by the same salary schedule receive even though it results in the employee's salary exceeding the maximum salary for the pay grade or pay band assigned to the position.

**APPENDIX VIII – REASONABLE ACCOMMODATION**

**2.4 Priority Consideration** - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. Employees will be entitled to priority consideration for vacancies in the same branch of government to which they are assigned. . .

**2.6 Reassignment** - Placement of an employee with a disability in a different vacant position for which the employee is qualified and can perform the essential functions of the new position. . .

**2.9 Special Eligible List** - An eligible list which sets forth employees who will receive priority consideration for a vacancy as defined in Section 5-11 of the Personnel Regulations and 2.4 of this procedure. . .

**4.0** When the reasonable accommodation effort results in a voluntary demotion and the maximum for the pay range of the new grade is less than the employee's current salary, the employee will retain his/her current salary. Additionally, the employee will receive any future annual general wage adjustment that other employees in the same (new) occupational class covered by the same salary schedule receive, even though the employee's salary will continue to exceed the maximum salary for the pay grade assigned to the employee's new position, consistent with Section 5.22 of the Agreement.

**4.3** When an employee needs reassignment as an accommodation for a disability, a maximum of 90 days will be allocated to secure a placement. Priority consideration will be given for any position for which the person qualifies. If it is determined that reasonable accommodation cannot be made, request the employee's department to initiate a disability retirement application.

#### **ISSUE**

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

#### **ANALYSIS AND CONCLUSIONS**

Appellant, a County employee since 2010, was a Customer Service Representative in the County's MC311 call center. In April 2016 Appellant was diagnosed with cancer and went on leave in order to receive surgery, chemotherapy, and radiation treatments. The record suggests that before her illness Appellant was an excellent employee. Tr. 140.

As a qualified individual with a disability under the ADA, Appellant was entitled to a reasonable accommodation. Appellant and her medical providers urged the County to provide her with what they believed would be the only effective accommodation, namely reassignment. From October 2016 to late November 2017 the County, however, insisted that Appellant remain in the MC311 call center while other accommodations were tried.

After a year the County finally concluded that the only effective accommodation would entail reassignment to a different position and placed Appellant on priority consideration. Unfortunately for Appellant, by then the County had implemented a hiring freeze for fiscal reasons. Because the hiring freeze dramatically limited the number of vacant, funded positions, Appellant could not find an acceptable position within 90 days. As a result, under the MCGEO agreement and County regulations, Appellant was terminated.

***The County was not obligated to immediately provide the reassignment Appellant requested.***

Appellant argues that Appellant should have been reassigned in October 2016 because that was the accommodation recommended by her health care providers.

It is true that on July 26, 2016, Dr. LH, Appellant's oncologist, provided "evidence of medical necessity for priority consideration to re-assign" Appellant from her call center position. AX 2. Emails written by Dr. S in September 2016 indicate that Appellant's medical record supported reassignment. AX 1. In fact, he specifically wrote that "(Appellant) should be in priority placement." His explanation under cross examination was that he was not saying that she should be in priority placement as he did not have the authority to make that decision, and that he was using the term "priority placement as a shortcut to say they're [Ms. B & Appellant] already communicating about the accommodation process." Tr. 128-29. While it is correct that Dr. S did not have the authority to select the eventual accommodation provided by the County, he did have the authority to evaluate the medical evidence, indicate what the medical information supported, and recommend an accommodation, if warranted. In this case, Dr. S recommended reassignment in two contemporaneous communications.

The evidence of record further indicates that Ms. B informally started the priority placement process for Appellant in October 2016. Under *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. Equal Employment Opportunity Commission, EEOC-CVG-2003-1 (October 17, 2002) (EEOC Enforcement Guidance), reassignment is the reasonable accommodation of last resort; however, "if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer can transfer the employee." CX 24, p. 26.<sup>7</sup> Thus, it was entirely proper for the County to initially pursue this type of accommodation.

At the October 17, 2016, meeting the reassignment "effort" ceased, and the County attempted to maintain Appellant in her current position with reasonable accommodation. This approach appears to be favored under the EEOC Enforcement Guidance ("Reassignment is the reasonable accommodation of last resort"). CX 24, p. 26.

Appellant claims that after she had disclosed to Ms. B that a manager had sexually harassed her, Ms. B told her that priority placement was "off the table" until Appellant had filed an EEO complaint. There is insufficient credible evidence in the record to support this assertion. Ms. B testified that the reason for the change in accommodations was the belief that the County should attempt to accommodate Appellant in her present job. Tr. 51.

While the County was required to provide Appellant with reasonable accommodations, it was not required to provide a specific accommodation she requested. *Peninsula Regional Medical Center v. Adkins*, 448 Md. 197, 237 (2016) ("an employer must only provide a reasonable accommodation and not the accommodation of the employee's choice."); *Reyazuddin v. Montgomery County*, 789 F.3d 407, 415-16 (4th Cir. 2015) ("An employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested."); EEOC Enforcement Guidance, Question 9, CX 24, p. 13 ("(An) employer may choose among reasonable accommodations as long as the chosen one is effective.").

The County had legitimate reasons for exploring other possible accommodations. After meeting with Appellant and Ms. B, Dr. S suggested reasonable accommodations based on his assessment of Appellant's disabilities in the October 17, 2016, Return to Work Health Status Report. The accommodations Appellant was to receive were: (1) a wireless headset; (2) the ability

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<sup>7</sup>Document may also be found at: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

to have a standing desk; (3) to not to be considered an essential employee during inclement weather or emergency conditions. CX 2. These were temporary accommodations. CX 3.

Dr. LH specifically and repeatedly stated that due to Appellant's condition she could not sit for extended periods of time and should avoid stress. *See* AX 2 ("prolonged daily sitting and chronic stress" contributes "to a number of medical problems"). Thus, the accommodations of a standing desk and not being considered an essential employee during inclement weather or emergency conditions were consistent with the Dr. LH's July 26, 2016, medical opinion even if they differed from her proposed accommodation of reassignment.

Indeed, before considering reassignment, the County was required to first consider accommodations that would enable her to remain in her current position. 29 C.F.R. §1630.2(o). Reassignment is the reasonable accommodation of "last resort" and is required only after the employer concludes that accommodations are not possible in her current position:

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.

EEOC Enforcement Guidance, *Reassignment*, CX 24, p. 26. *See Allen v. Baltimore County*, 91 F. Supp. 3d 722, 734-35 (D. Md. 2015); *Reyazuddin v. Montgomery County*, 7 F. Supp. 3d 526, 550 (D. Md. 2014), *aff'd in part, rev'd in part and remanded, Reyazuddin v. Montgomery County, Maryland*, 789 F.3d 407 (4th Cir. 2015) ("Reassignment . . . has traditionally been seen as an 'accommodation of last resort'"); *Henry v. Department of Veterans Affairs*, 108 M.S.P.R. 458, 462 (2008).

A letter from Appellant's primary care physician dated December 21, 2016, sets forth Appellant's conditions arising from her cancer treatment including rectal pain, tinnitus, dizziness, neuropathy of hands and feet, palpitations and anxiety. AX 2. The physician states that Appellant cannot perform duties that require prolonged sitting. In response, Dr. S wrote in a Health Status Review dated December 22, 2016, that due to increased symptomatology, Appellant cannot perform all of the duties of her position. In an attempt to address these issues, the call center director proposed a voluntary demotion to a Customer Service Representative I, Grade 13 position with the following accommodations: not be required to report during an emergency, 8.5 hour day with two breaks and 30 minutes for lunch.

For an accommodation to be reasonable it must be effective. Although the demotion reduced some of Appellant's job duties, it did not adequately address Appellant's medical conditions outlined in the notes submitted by Appellant's two oncologists, gastroenterologist, podiatrist and primary care physician.

Even after the demotion, the County continued to receive medical documentation from Appellant's gastroenterologist in February and her primary care physician in March reiterating Appellant's physical and psychological conditions and repeating their requests that Appellant be reassigned. Thus, at that point in time, it was clear that the accommodations put in place by the County were not effective and were not enabling Appellant to perform the essential functions of

her position. Accordingly, we find that reassignment was warranted after it was apparent that the County's attempts to accommodate Appellant in place were ineffective. As the County did not start the reassignment process until December, we will address the reasons for the delay.

***Appellant has not established that the delay in placing her on priority consideration for reassignment violated the ADA.***

Appellant contends that the County should have continued its efforts to reassign Appellant in October 2016, and not have required her to return to work at the call center. Appellant's argument is that because there was no appropriate accommodation possible in the call center, she should have been placed on priority consideration.

The County attempts to recharacterize Appellant's argument as "in essence, that Appellant was not terminated soon enough, and was given too long of an opportunity to find an appropriate accommodation." County Closing Argument, p. 2. The County further maintains that the "Board should not encourage County departments to begin the termination process before fully and reasonably attempting to accommodate employees in their positions." *Id.*

The County's argument characterizing the priority consideration process as a termination procedure, instead of a policy designed to provide a reasonable accommodation, greatly troubles the Board. It is the policy of Montgomery County to make sincere efforts to provide employees with disabilities with reasonable accommodations before termination. MCPR § 29-3(c) ("A department director must not terminate a qualified employee with a physical or mental disability . . . unless efforts at reasonable accommodation . . . are unsuccessful."). We note that Montgomery County Code, § 27-50, states, in part, "The County government adopts the policy that no qualified person with a disability should, on the basis of their disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of the County government." *See* Montgomery County Code, § 33-7(d) ("(1) Findings. (A) Persons with disabilities are a largely untapped resource for outstanding candidates for County employment. . . (C) Persons with disabilities suffer from a high . . . underemployment rate in the County due in part to unfounded myths, fears and stereotypes associated with many disabilities.").

Priority consideration is part of the County's reasonable accommodation process. As such, it should be viewed as a means to enable qualified individuals with disabilities to be retained in County employment by supporting and assisting them in the reassignment process. We strongly believe that the focus of priority consideration should be to successfully identify a vacant position for which the disabled employee is qualified. County officials should not view priority consideration as a "termination process."

The County appropriately treated reassignment as the accommodation of last resort and attempted other accommodations for Appellant in the call center before deciding that there were no reasonable accommodations that would allow her to perform the essential functions of her position in the call center. *Gile v. United Airlines*, 95 F.3d 492, 498 (7th Cir. 1996) ("an employer may be obligated to reassign a disabled employee only when, even with reasonable accommodation, the employee can no longer perform the essential functions of his present job.").

The reasonable accommodation process is an interactive one, requiring both the employer and employee to work cooperatively to enhance the probability of success. EEOC Enforcement Guidance, Question 9, p. 13 ("as part of the interactive process, the employer may offer alternative

suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.”).

When engaging in the interactive process the employer must not take an inordinate amount of time to identify and implement reasonable accommodations. The EEOC Enforcement Guidance, Question 10, p.14, cautions:

An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible. Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.

A delay does not necessarily require a remedy since it may be part of the process of identifying an effective reasonable accommodation. “[I]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship.” EEOC Enforcement Guidance, Question 32, p. 30. The “employer’s obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.” *Humphrey v. Memorial Hospital Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001)

Whether there was unreasonable delay in providing Appellant with an accommodation is “a matter for a trier of fact to determine.” *Armstrong v. Reno*, 172 F. Supp. 2d 11, 23 (D.D.C. 2001) (delay of over a year before providing accommodations, such as a chair and an accessible parking space, that “were not especially burdensome”). See *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 833 (4th Cir. 1994) (“reasonable accommodation” is a question of fact).<sup>8</sup>

We are unable to find that the delay before finally placing Appellant on priority consideration for reassignment was clearly unreasonable. This is not a situation involving an employer who unjustifiably delayed granting a request for *any* accommodation. *Krocka v. Riegler*, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997) (eight-month delay in assigning employee to a desired shift can constitute an “unreasonable delay in implementing a ‘reasonable accommodation’” when “the employer initially refused outright to consider any accommodation for that particular disability.”). Rather, in this case, the County did attempt to provide additional accommodations after the initial ones did not work. Also, there were attempted or actual discussions between the County Attorney, the Appellant’s supervisor, and union representative in an effort to resolve the situation; however, it took an additional four months before the County eventually concluded that reassignment was warranted. The County’s attempts to provide reasonable accommodations for Appellant from October 2016 until November 2017 may have been less than robust and certainly

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<sup>8</sup> The EEOC Enforcement Guidance, n. 38, suggests the following factors in assessing whether there has been undue delay:

In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.



not stellar, but we are unable to conclude that they were unreasonable or in bad faith. *Jay v. Internet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000) (twenty-month delay in reassignment of plaintiff was not unreasonable because employer acted “reasonably and in good faith.”).

***Appellant Has Not Established That There Were Vacant Funded Positions for Which She Was Qualified***

When Dr. S reviewed Appellant’s medical records in the Fall of 2017 and concluded that Appellant was unable to perform the essential functions of a call center Customer Service Representative, with or without accommodation, she was placed on priority consideration for reassignment without further delay. CX 13, 14. The County also placed Appellant on administrative leave so that she could “pursue [an] alternative placement out of MC311. . .” . CX 15. Unfortunately, the County-wide hiring freeze limited her opportunities. CX 19, 20.

The Disability Manager provided Appellant with a link to a data base of available County positions that was also accessible to non-County employees seeking employment with the County. Tr. 46, 89; CX 21. According to Ms. B, the County’s role in identifying vacant positions was by “providing the employee with all the tools that they need to search the website, search the county available jobs on the website.” Tr. 88. Although Appellant would have priority consideration for positions that were Grade 13 or lower, it was primarily her obligation to identify appropriate positions. The Disability Manager would provide additional assistance only after the employee had on their own found and expressed an interest in a specific vacancy. Tr. 46-47; 87-89.

Appellant strenuously contends that the County’s efforts to assist her in identifying appropriate vacant positions were woefully inadequate. The Board is also disappointed that the County did not undertake a more active and effective role in helping Appellant. Simply pointing an employee with a disability to a website with vacant positions and encouraging them to apply “does not satisfy [the] responsibility to conduct an individualized assessment to formulate an effective accommodation.” *Peninsula Regional Medical Center v. Adkins*, 448 Md. 197, 221 n.16 (2016) citing *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694-95 (7th Cir. 1998). See *Wehner v. Best Buy Stores, L.P.*, 2017 U.S. Dist. LEXIS 34349, 2017 WL 952685 (D. Md. 2017) (“Courts have recognized that the employer is in a far better position than the employee to identify vacant positions that the employee may qualify for because of the employer's advanced capacity and resources.”). See also EEOC Enforcement Guidance, Question 28, p. 29, (“The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time. . . the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment.”).

However, even if the County failed to fully engage in an interactive process to formulate an effective accommodation such as a reassignment, Appellant still bears the ultimate burden of proving that a vacant, funded position for which she was otherwise qualified was available. *Peninsula Regional Medical Center v. Adkins*, 448 Md. at 223-24, quoting *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 233-34 (3d Cir. 2000) (Alito, J.) (“[I]n a failure-to-transfer case [under the Rehabilitation Act], if, after a full opportunity for discovery, the summary judgment record is insufficient to establish the existence of an appropriate position into which the plaintiff could have been transferred, summary judgment must be granted in favor of the defendant - even if it also appears that the defendant failed to engage in good faith in the interactive process.”). See *Reyazuddin v. Montgomery County*, 7 F.Supp.3d 526, 550-51 (D. Md. 2014), *aff’d in part, rev’d*

*in part and remanded* 789 F.3d 407 (4<sup>th</sup> Cir. 2015); *Wehner v. Best Buy Stores, L.P.*, 2017 U.S. Dist. LEXIS 34349, at \*28-29 (D. Md. 2017) (“Crucially, ‘if, after an opportunity for discovery, the employee still has not identified a position into which she could have transferred, the court must grant summary judgment in favor of the defendant.’”) quoting *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002); *Jackan v. N.Y. State DOL*, 205 F.3d 562, 566-67 (2d Cir. 2000) (employee “seeking to hold the employer liable for failing to transfer her to a vacant position as a reasonable accommodation must demonstrate that there was a vacant position into which she might have been transferred.”); *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 53-54 (1998); *Combs v. SSA*, 91 M.S.P.R. 148 (2002) (Appellant must identify “a vacant funded position to which she could be reassigned.”).<sup>9</sup>

Appellant identified a Grade 16 DHHS Office Services Coordinator position she alleges she would have been given in March 2017 if she had been on priority consideration at the time. However, Appellant was demoted in January 2017 to the Grade 13 level. CX 7. That meant that even had she been placed on priority consideration by March 2017 she would not have had priority status for the Grade 16 DHHS position. Appellant was only eligible for priority placement for positions that were Grade 13 or below. *Scott v. Montgomery County*, 164 F. Supp. 2d at 508; MCGEO agreement, Appendix VIII, § 2.4; Tr. 91, 106-08. Appellant also failed to provide evidence that she could have performed the essential functions of the job with or without reasonable accommodation. These failures of proof undermine any claim she may have that the DHHS position was a vacant, funded position for which she was entitled to reassignment. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332 (2005) (employee has burden of showing that she can perform the essential functions of a vacant position).

Appellant provided a list of positions at various grade levels which her pre-hearing submission identified as positions that to which she had applied. AX 6. Unfortunately, largely because of the hiring freeze there were few vacant positions at or below her grade level that were being filled, and most of the ones that were being filled were temporary/seasonal positions that lacked health benefits. Appellant turned down several such positions because of the lack of health benefits. See Findings of Fact, *supra* at p. 9.

The record shows that Appellant could no longer perform the essential duties of her customer service representative position with or without reasonable accommodation. Because Appellant was unable to identify a vacant, funded position for which she could perform the essential functions, with or without accommodation, and that she was willing to accept, at the end of the 90-day period of priority consideration the County was permitted under the ADA and by its regulations and the MCGEO agreement to terminate Appellant’s employment. MCPR § 8-7(g)(5)(B) (“If the employee is an individual with a disability who cannot perform the essential functions of the current job with or without accommodation . . . the department director may: (B) terminate the employee’s County employment, if the employee is not reassigned to a vacant position.”); MCPR, § 29-2 (“(a) A department director may terminate the employment of an

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<sup>9</sup> Although the Appellant bears the burden of proving that there were vacant, funded positions to which she could have been reassigned and for which she was qualified, the Board is troubled by the County’s lack of meaningful efforts in assisting Appellant to remain employed, especially during a hiring freeze. As the Chief of Recruitment and Selection for the County’s Office of Human Resources testified, not all the available positions were on the County website. Tr. 185-88. Moreover, employee transfers within or between departments were specifically exempt from the hiring freeze. CX 19; Tr. 189-92.

employee: . . . (9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee’s job; . . .”). See EEOC Enforcement Guidance, Question 28, “When an employer has identified any vacancies . . . , notified the employee, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.” CX 24, p. 28. See *Elledge v. Lowe’s Home Ctrs., LLC*, 2020 U.S. App. LEXIS 36236 at \*30; \_\_\_ F.3d \_\_; 2020 WL 6750363 (4th Cir. 2020) (no violation of the ADA to terminate employee who declined reassignment to positions with less responsibility and reduced compensation); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177 (10th Cir. 1999) (“If the disabled individual rejects that reassignment, the employer is under no obligation to continue offering other reassignments. . . . Once the employer has offered such a reassignment, its duties have been discharged.”).

### **ORDER**

For the foregoing reasons, the Board **DENIES** Appellant’s appeal of her termination.<sup>10</sup>

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

For the Board  
December 29, 2020

*Appellant’s petition for judicial review of this decision was dismissed by the Circuit Court for Montgomery County on August 19, 2021 (Civil Action No. 484612-V).*

## **CASE NO. 20-10**

### **FINAL DECISION**

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

### **BACKGROUND**

On January 16, 2020, the Department of Health and Human Services (DHHS or Department) issued an amended Notice of Termination to Appellant. County Exhibit (CX) 11; Appellant Exhibit (AX) 10. On February 3, 2020, Appellant filed this appeal with the Board challenging the decision of the Department to terminate her from her position as a Grade 23 Planning Specialist III.

The County filed its prehearing submission on March 3, 2020, and Appellant filed her prehearing submission on April 9, 2020. On May 26, 2020, the parties appeared before the Board

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<sup>10</sup>Member Angela Franco certified that prior to voting on the decision in this matter she reviewed the evidence of record and read the transcript of the hearing. See Montgomery County Code, § 2A-10(c).

for a prehearing video conference. At the prehearing conference the issues to be decided were identified, the Board ruled on proposed witnesses and exhibits, and a date for the merits hearing was established. The parties indicated that they might be able to stipulate to material facts and file cross motions for summary decision in lieu of a hearing on the merits. The parties were given deadlines to submit stipulations of fact, a proposed briefing schedule for cross motions for summary decision, and to advise the Board on the status of settlement negotiations. A prehearing order was issued on May 27, 2020.

On July 6, 2020, the parties filed a pleading titled Joint Stipulations, Request to Hold Hearing in Abeyance in Lieu of Cross-Motions for Summary Decision, and Proposed Briefing Schedule. The pleading asserted that the material facts were not in dispute and they jointly requested that the hearing be held in abeyance while they submit, and the Board considered, cross-motions for summary decision. The Board granted the joint motion on July 8, 2020, postponing and holding the hearing in abeyance until the Board reviewed and ruled on the cross-motions for summary decision.

The parties filed cross motions for summary decision on October 12, 2020 (County) and October 13, 2020 (Appellant),<sup>1</sup> and oppositions to the opposing party's cross-motion for summary decision on October 26, 2020.

After reviewing the cross-motions for summary decision of the parties and the exhibits in the record Board members Harriet E. Davidson and Sonya E. Chiles considered and decided the appeal for the Board.<sup>2</sup>

### **FINDINGS OF FACT**

The parties agree that the material facts are undisputed. On July 6, 2020, the parties filed Joint Stipulations to the following facts:

1. Ms. KC was a Planning Specialist III within Montgomery County Health and Human Services, working as a SAS<sup>3</sup> programmer and reporting to Dr. CL.<sup>4</sup>
2. Ms. KC requested as an accommodation under the Americans with Disabilities act to be given a new supervisor on the basis that she has a disability, which prevented her from performing the essential functions of her job only while reporting to Dr. CL.
3. The County did not place her with a new supervisor, but provided her with a 90 day period of priority consideration for any vacancy for which she met the minimum qualifications, and advised her that if she failed to obtain another position within the County she would be terminated.
4. Ms. KC did not apply to any positions and was thereafter terminated.

The Board has carefully reviewed the record and has made the following additional findings of fact.

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<sup>1</sup> Appellant's pleading is titled Motion for Summary Judgment.

<sup>2</sup> Board Member Angela Franco did not participate in the consideration of this decision.

<sup>3</sup> SAS is a statistical software, sometimes referred to as Statistical Analysis System.

<sup>4</sup> Dr. CL (Dr. L) is the Chief Epidemiologist at DHHS.

Appellant was diagnosed with generalized anxiety disorder by Dr. HW, a psychiatrist. On June 9, 2018, Appellant submitted the medical certification for Family Medical Leave Act (FMLA) qualified leave. AX 18; CX 14. Appellant requested and was apparently granted FMLA leave from May 23, 2018, to August 23, 2018. AX 18; CX 14; Appellant's Motion for Summary Judgment, pp. 1-2.

Dr. SS (Dr. S), the lead physician for the County's Occupational Medical Services (OMS), examined Appellant on August 27, 2018, and found no significant medical impairment. AX 8.

Appellant saw Dr. S again on November 13, 2018, and he issued a Health Status Report indicating that she could return to work on November 26, 2018, "however cannot return to current office." Dr. S recommended that Appellant receive the temporary accommodation of placement in a different office. AX 8; CX 3.

After a December 17, 2018, follow up visit Dr. S issued a Health Status Report finding that Appellant was "not able to resume original position. Reasonably accommodate or follow admin. [administrative] process." AX 8; CX 4. On December 18, 2018, Appellant was placed in a temporary light duty assignment reporting to MH (MH), the Special Assistant to the Chief Operating Officer of DHHS. AX 3; CX 5.

While assigned to MH, Appellant worked on various matters which included new tasks in addition to tasks which were the essential job functions and responsibilities of a Planning Specialist III position, *i.e.*, her position. A. Decl. at ¶ 4.

After that assignment ended on May 31, 2019, Appellant was advised by a memorandum dated June 17 from the Acting Director of DHHS that she could use the 90-day priority consideration process to be considered for other vacant, funded positions for which she was qualified. AX 3; CX 5. The June 17 memorandum also advised Appellant that the assignment to report to MH had been a temporary light duty assignment and that the duties performed by Appellant during that time were "incompatible with [Appellant's] ability to perform the essential functions of the Planning Specialist III position" she held. The June 17 memorandum further advised Appellant that if she did not obtain another position in 90 days, she would be terminated. AX 3; CX 5.

On June 25, 2019, the Disability Manager emailed Appellant with information concerning the priority consideration process and asked Appellant to let her know if any assistance was needed. CX 12. Appellant said that she would contact the Disability Manager if she needed help. CX 12.

Around July 10, 2019, Appellant had an email exchange with MH where he recommended that she contact the DHHS Human Resources Manager, "to see what available position could be a good fit for her." AX 15; CX 9; Appellant's Motion for Summary Judgment, p. 3. According to Appellant, "Unfortunately, there weren't any available positions that matched [Appellant's] skills." AX 15; CX 9. Appellant "continued to search the available positions." AX 15; CX 9; Appellant's Motion for Summary Judgment, p. 3.

During the 90-day period of priority consideration there were at least two positions that DHHS identified for Appellant's consideration, including one recommended to her by MH. CX 11, p. 4. One position was a Program Manager I, Grade 23 (IRC38767). CX 18. That position was

posted on July 15, 2019, with a closing date of August 7, 2019. CX 18.<sup>5</sup> Appellant did not apply for that position. Another Program Manager I, Grade 23 (IRC39127), was posted from August 15, 2019, to August 29, 2019. CX 19. Appellant did not apply for that position either. Furthermore, Appellant did not apply for any available positions. Joint Stipulation 4.

After the 90-day priority consideration period expired on September 17, the DHHS Director sent Appellant a Notice of Proposed Termination dated September 20, 2019. CX 8; AX 9. By memorandum dated October 15, 2019, Appellant responded to the Department via her attorney. CX 9; AX 15.

On October 22, 2019, Appellant filed a grievance dated October 16, 2019, alleging that DHHS had failed to reasonably accommodate her and requesting that she be allowed to meet with the Disability Program Manager to identify “Reasonable Accommodations/Reassignment” and priority consideration if necessary. AX 19; CX 15.

On October 21, 2019, the Disability Program Manager unsuccessfully attempted to contact Appellant and her union representative but received no response. CX 10, 20. The Disability Program Manager then asked the OMS Nurse Manager to contact Appellant regarding a reevaluation of the Health Status Report. On November 5, 2019, the Nurse Manager emailed the Disability Program Manager advising that she had reached out to Appellant who responded by saying that “I don’t have any reason to go to OMS.” *Id.*

The DHHS Director issued a grievance decision dated November 12, 2019. AX 20; CX 16. The decision did not rescind the June 2019 Follow Up to Most Recent Health Status Report, but held the notice of proposed termination in abeyance so that Appellant could meet with the Disability Program Manager to evaluate whether Appellant could perform the essential functions of her position. That meeting was to take place within 5 workdays. *Id.*

Appellant met with the Disability manager about ten days later. Paragraph 13 of Appellant’s sworn Declaration of October 13, 2020, avers that on November 22, 2019, “I told [the Disability Program Manager] that my situation had not changed and that I could perform the essential functions of my job but I needed a different supervisor.”

In a November 25, 2019, email to the Disability Manager Appellant reiterated that she just needed a change of supervisor. CX 17; AX 21. The Appeal Form filed by Appellant in this case states that Appellant “suffered from extreme anxiety, stress and depression and while she could perform the essential functions of her position, she could not do so under [Dr. L’s] supervision.” The same assertion was made in Appellant’s October 15, 2019, response to the Notice of Termination. CX 9; AX 15.

On January 16, 2020, Appellant was issued a Notice of Termination - Amended because she did not find a position within the 90-day priority placement period. CX 11; AX 10. *See* CX 6.

#### **APPLICABLE LAW**

**Montgomery County Personnel Regulations, § 1, Definitions** (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008,

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<sup>5</sup> The January 16, 2020, Notice of Termination - Amended erroneously states that the posting for the position closed on August 6. AX 10; CX 11.

November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, February 23, 2016, July 17, 2018 and June 1, 2020)

**§ 1-58. Priority consideration:** Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.

**§ 1-59. Priority eligible list:** The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position.

**Montgomery County Personnel Regulations, § 6, Recruitment and Application Rating Procedures** (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)

**§ 6-10. Priority eligible list.**

(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who:

(1) is unable to perform the employee's job because of a disability or injury under the ADA; . . .

**Montgomery County Personnel Regulations, § 8, Medical Examinations and Reasonable Accommodation,** (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015)

**§ 8-7. Required medical examinations of employees; actions based on results of required medical examinations.**

**(g) Application of ADA and reasonable accommodation.**

(4) The department director must first try to reasonably accommodate an employee with a disability in the employee's current job unless the OHR Director determines that accommodation in the current job would impose an undue hardship on the County. . .

(5) If the employee is an individual with a disability who cannot perform the essential functions of the current job with or without accommodation or if accommodation would impose an undue hardship on the County, the department director may:

(A) reassign the employee through a voluntary transfer or demotion to a vacant position for which the employee is qualified, with essential duties that the employee can perform with or without accommodation; or

(B) terminate the employee's County employment, if the employee is not reassigned to a vacant position.

**(h) Light duty evaluation; duration of light duty assignment.**

(2) **Duration of light duty assignment.** A department director must not allow an employee's light duty assignment to last longer than 6 months.

**Montgomery County Personnel Regulations, § 29, Termination**, (as amended October 21, 2008)

**§ 29-2. Reasons for termination.**

(a) A department director may terminate the employment of an employee: . . .

(9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee’s job; . . .

(c) A department director must not terminate a qualified employee with a physical or mental disability under 29-2(a)(9) above unless efforts at reasonable accommodation as described in Section 8 of these Regulations are unsuccessful.

**Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO),**

**APPENDIX VIII – REASONABLE ACCOMMODATION**

**2.4 Priority Consideration** - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. Employees will be entitled to priority consideration for vacancies in the same branch of government to which they are assigned. . .

**2.6 Reassignment** - Placement of an employee with a disability in a different vacant position for which the employee is qualified and can perform the essential functions of the new position. . .

**2.9 Special Eligible List** - An eligible list which sets forth employees who will receive priority consideration for a vacancy as defined in Section 5-11 of the Personnel Regulations and 2.4 of this procedure. . .

**4.3** When an employee needs reassignment as an accommodation for a disability, a maximum of 90 days will be allocated to secure a placement. Priority consideration will be given for any position for which the person qualifies. If it is determined that reasonable accommodation cannot be made, request the employee's department to initiate a disability retirement application.

**ISSUE**

Was Appellant’s termination consistent with law and regulation and otherwise appropriate?

**ANALYSIS AND CONCLUSIONS**

The Montgomery County Code, Administrative Procedures Act, § 2A-7(d), provides that a motion for summary decision may be granted if the Board finds that: “(1) there is no genuine issue of material fact to be decided at the hearing; and (2) the moving party is entitled to prevail as a matter of law.” The Board has carefully reviewed the record and the cross motions for summary decision and concludes that there are no genuine issues of material fact that are in dispute and to be decided. Accordingly, we find that summary decision is appropriate.



Appellant was diagnosed with a generalized anxiety disorder by her psychiatrist in June 2018. She was granted several months of FMLA leave and then saw Dr. S for return to work evaluations. In November and December 2018 Dr. S concluded that she could return to work, but not back into the office supervised by Dr. L.

In contrast to MSPB Case No. 18-27 (December 29, 2020), here the County bent over backwards in an effort to accommodate Appellant by immediately providing her with a temporary light duty assignment that was not under the supervision of Dr. L. When the temporary assignment ended under the authority of MCPR § 8-7(h), Appellant was granted priority consideration.

The ADA requires that an employer and a qualified individual with a disability engage in an interactive process in order to arrive at a reasonable accommodation. The reasonable accommodation interactive process requires both the employer and employee to work cooperatively to enhance the probability of success. EEOC Enforcement Guidance, Question 9 (“as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.”). The evidence of record does not suggest that Appellant cooperatively participated in the interactive process. Rather, it appears she insisted that the only accommodation she would accept was to work for a supervisor other than Dr. L. Before and during her time on priority consideration she did not seek or indicate interest in any vacant positions for which she was qualified. Instead, she suggested that her temporary assignment working for MH should be made permanent or that her position have a different supervisor.

Despite Appellant’s insistence that due to anxiety, stress, and depression she needed a change of supervisor, (CX 9, CX 17; AX 15, AX 21), it is undisputed that Appellant failed to apply for any available positions. Joint Stipulation 4. At least two appropriate Program Manager I, Grade 23 positions were available and posted in July and August 2019, while Appellant was on priority consideration. CX18, CX19. Significantly, MH advised Appellant about one of those vacant positions at Appellant’s grade level and encouraged Appellant to apply. CX 11, 16, 18. Appellant did not apply for either position. CX 11; CX 18; CX 19. Essentially, Appellant refused to consider at least two reasonable accommodations involving reassignments during the time she was on priority consideration. This would have given her a new supervisor, which she was seeking, and address her mental health issues.

Priority consideration allows certain qualified individuals with disabilities to be considered before other candidates for any available position for which they are qualified and can perform the essential functions of the job, with or without reasonable accommodation. MSPB Case No. 18-27 (2020). *See* Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), Appendix VIII, (“**2.4 Priority Consideration** - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. . .”). CX 6; AX 4.<sup>6</sup>

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<sup>6</sup> *See* Montgomery County Personnel Regulations (MCPR), §1-58, (“Priority consideration: Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.”); §1-59, (“Priority eligible list: The official list of applicants who have priority consideration and are eligible for reassignment or reemployment

Because Appellant was on priority consideration, had she applied for either of the two Program Manager I positions it is likely she would have been selected and reassigned to a comparable position with a new supervisor. There is nothing in the record to suggest otherwise.

Appellant argues that she was capable of performing the essential functions of her position but, because of a general anxiety disorder, not for a specific supervisor. Appellant suggests that the County should have created a position for her under the supervision of MH and that the failure to do so was a refusal to provide her with an accommodation. Appellant's Motion for Summary Judgment, p. 14.

Appellant's desire for a specific accommodation does not create a legal obligation for the County to provide her with the preferred accommodation. The County is required to provide a reasonable accommodation to a qualified individual with a disability, but not necessarily the specific accommodation requested. *Peninsula Regional Medical Center v. Adkins*, 448 Md. 197, 237 (2016) ("an employer must only provide a reasonable accommodation and not the accommodation of the employee's choice."); *Reyazuddin v. Montgomery County*, 789 F.3d 407, 415-16 (4th Cir. 2015) ("An employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested."); MSPB Case No. 18-27 (2020).

While the County was not obligated to reassign Appellant to a position under another supervisor, it nevertheless attempted to provide that accommodation. EEOC *Enforcement Guidance*, Question 33 ("Does an employer have to change a person's supervisor as a form of reasonable accommodation? No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so."). CX 13.

Moreover, the County was certainly not obligated to create a new permanent position as an accommodation for Appellant, even though that appeared to be her preference. *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006) ("The ADA does not require an employer to create a new position in order to accommodate an employee with a disability, or transform a temporary light duty position into a permanent position. *Buskirk*, 307 F.3d at 169. . . or if to do so would conflict with seniority rules, *see US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)").

We have no difficulty concluding that the County met its reasonable accommodation obligations under the ADA by engaging in an interactive process designed to find and possibly reassign her to a vacant, funded position. Appellant's refusal to apply for any of the identified positions does not render the County's efforts improper. Indeed, Appellant's failure to apply for a position may be considered a failure to participate in the interactive process. *See Wehner v. Best Buy Stores, L.P.*, 2017 U.S. Dist. LEXIS 34349, at \*25-26 (D. Md. 2017) (Where employer was on notice employee wanted a specific position "A reasonable jury could find that [the employee] failed to fulfill his role in the interactive process by not applying for the position, since he obviously knew how to do so."). *See Elledge v. Lowe's Home Ctrs., LLC*, 2020 U.S. App. LEXIS 36236 at \*30; \_\_\_ F.3d \_\_; 2020 WL 6750363 (4th Cir. 2020) (no violation of the ADA to terminate employee who declined to apply for reassignment); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177 (10th Cir. 1999) ("If the disabled individual rejects that reassignment, the employer is under no obligation to continue offering other reassignments. . . Once the employer has offered such a

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to a vacant position."); MCPR, § 6-10 ("(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who: (1) is unable to perform the employee's job because of a disability or injury under the ADA;").

reassignment, its duties have been discharged.”); EEOC Enforcement Guidance, Question 28 (“When an employer has identified any vacancies . . . notified the employee, and . . . offered an appropriate vacancy to the employee . . . the employer will have fulfilled its obligation.”).

It is undisputed that Appellant was unable to perform the essential duties of her position under the supervision of Dr. L. Appellant stipulated that she “requested as an accommodation under the Americans with Disabilities act to be given a new supervisor on the basis that she has a disability, which prevented her from performing the essential functions of her job only while reporting to Dr. [L].” Joint Stipulation 2. Appellant’s position on this point has been consistent. For example, the Appeal Form filed by Appellant to initiate this case states that while she “could perform the essential functions of her position, she could not do so under [Dr. L’s] supervision.” Appellant told the Disability Program Manager that she “could perform the essential functions of my job but I needed a different supervisor.” Appellant’s Declaration ¶13. The same assertion was made in Appellant’s October 15, 2019, response to the Notice of Termination. CX 9; AX 15.<sup>7</sup>

If Appellant cannot perform the essential functions of her position under the supervision of Dr. L, and he is the supervisor of the position she held, then she admits that she was unable to perform the essential functions of her job. Given Appellant’s admission, her refusal to cooperate with the County’s efforts to find her a position with a different supervisor is inexplicable.

We also find unpersuasive Appellant’s suggestion that the temporary light duty assignment working with MH somehow shows that the County should have accommodated her by making the assignment permanent. The County did not permanently change the essential functions of Appellant’s position by giving her a temporary assignment. *Laurin v. Providence Hosp.*, 150 F.3d 52, 60-61 (1st Cir.1998) (“An employer does not concede that a job function is ‘non-essential’ simply by voluntarily assuming the limited burden associated with a temporary accommodation, nor thereby acknowledge that the burden associated with a permanent accommodation would not be unduly onerous.”); *Howell v. Holland*, 2014 U.S. Dist. LEXIS 182306, at \*30-31 (D.S.C. 2014) (“simply because an employer chooses to temporarily accommodate an employee with a disability by eliminating essential duties, the employer may not be required to continue such an accommodation permanently. . .”).

We find that because Appellant was unable to perform the essential functions of her position and was unable or unwilling to locate and qualify for another County position at her grade level or below while on priority consideration, the County could properly subject her to termination. MCPR, § 29-2 (“(a) A department director may terminate the employment of an employee: . . . (9) who has an impairment not susceptible to resolution that causes the employee

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<sup>7</sup> We need not address whether the County could have taken the position that Appellant’s inability to tolerate working for Dr. L was not a disability. *Lewis v. Baltimore City Board of School Commissioners*, 187 F. Supp. 3d 588, 598 (D. Md. 2016) (“not being able to work with a particular supervisor does not qualify as a disability under the ADA.”); *Summers v. Target Corp.*, 382 F. Supp. 3d 842, 848-50 (E.D. Wis. 2019) (“the fact that the plaintiff is unable to work for a particular supervisor, whether because of anxiety or extreme dislike, is not a disability within the meaning of the ADA. . . The failure to assign or transfer an employee to work under a different supervisor does not violate the reasonable accommodation requirement of the ADA when the employee’s disability is specifically tied to a particular supervisor and the employee’s ability to work is inhibited only in connection with working for that supervisor.”). See *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3rd Cir. 1998) (request to be transferred from an individual causing employee stress is unreasonable as a matter of law under the ADA). See also *Lang v. Wal-Mart Stores East, L.P.*, 813 F.3d 447, 456 (1st Cir. 2016) (employer not required to exempt an employee from an essential job function as an accommodation).

to be unable to perform the essential functions of the employee's job;"); MCGEO agreement, Appendix VIII, § 4.3. CX 6; AX 4.

Accordingly, we conclude that there are no genuine issues of material fact and that the termination of Appellant was appropriate and consistent with law.

### **ORDER**

For the foregoing reasons, the Board finds that a hearing is unnecessary, **GRANTS** the County's motion for summary decision, and **DENIES** Appellant's motion for summary decision and the appeal of her termination.

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

For the Board  
December 30, 2020

# 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 Merit System Protection Board [Appeal Form](#) on the Board's website. 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 2021 the Board issued the following decision on an appeal concerning the denial of employment.

# **CASE NO. 20-12**

## **FINAL DECISION**

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 27, 2020. Appellant is appealing a conditional offer of employment for an Administrative Specialist II position (Grade 21) (Call Center Supervisor) in the Department of Finance that was rescinded when the background credit check revealed that she had a significant amount of overdue and unpaid credit card debt. That same day the MSPB sent a letter to Appellant acknowledging the appeal and requesting that she submit a copy of the notification of nonselection, as required by the Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3). The Office of Human Resources (OHR) and the Office of the County Attorney (OCA) were copied on the letter from the Board and provided with the filing.

In response to the MSPB's request, on March 3, 2020, Appellant submitted a letter from OHR dated February 19, 2020. Because the February 19 letter was not a notification of nonselection a second letter from the MSPB was sent advising Appellant: "The February 19 letter states only that the County will be deciding on your application at some point. The MSPB cannot proceed with your appeal until you have submitted a Notice of Nonselection." OHR and OCA were again copied and provided with the document Appellant submitted.

Appellant received a letter dated March 9, 2020, rescinding the conditional offer of employment and submitted it to the Board on March 11. The MSPB then sent a scheduling letter on March 12, 2020. The County submitted its response on May 4, 2020. Appellant's reply was due May 25, 2020. To date, Appellant has not filed a reply or otherwise communicated with the MSPB.

## **FINDINGS OF FACT**

Appellant applied for an Administrative Specialist II position (Grade 21), Call Center Supervisor, in response to County job posting IRC40968. County Exhibit (CX) 1. The position is in the Department of Finance and has access to Countywide systems concerning public assets and citizen tax information. CX 3. Appellant was informed in the job posting that she would be subject to a background investigation, including a check of her credit history. The job posting further advised that the background check "will be a significant factor in the hiring decision." CX 1.

Appellant was interviewed and selected for the position, receiving a conditional offer of employment on January 22, 2020. CX 2. The offer explained that it was contingent upon a background investigation "and on the absence of any additional information that materially bears upon your . . . suitability for employment." *Id.* The offer concluded by stating that if the County received "information evidencing a job-related factor that would hinder or prohibit . . . satisfactory performance of the duties and responsibilities of the position . . . the County reserves the right to withdraw this conditional job offer." *Id.*

The Department of Finance determined that a credit check was necessary because an employee in the position would have access to countywide systems that "secure public assets." CX 3, Affidavit of JC, Contracts and Special Programs Manager, Department of Finance, April 23, 2020, ¶10. According to the Affidavit of JC, he drafted the Department of Finance policy in 2017.

CX 3, ¶8.<sup>1</sup> The guidelines include a requirement that individuals with three or more instances of bad debt in the past seven years, and a total bad debt exceeding \$10,000 not be hired. CX 3, ¶12; CX 5. The Department’s policy also considers whether the trend in bad debt is getting better or worse. CX 5.

The background credit check revealed that Appellant had a significant amount of overdue and unpaid credit card debt. CX 6. The credit report showed that Appellant had four instances of “bad debt” and that the debt was well in excess of \$10,000. Specifically, Appellant had overdue credit card debts with [creditor] (\$14,622), [creditor] (\$2,605), and [creditor] (\$4,974). CX 6. In addition, the credit report disclosed that on October 16, 2019, Appellant was sued by [creditor] for unpaid credit card debt. *Id.*

By certified letter dated February 19, 2020, OHR provided Appellant with a copy of the credit report and an opportunity to contest it or to provide an explanation. CX 6. Appellant did not respond to the February 19 letter but instead filed an Appeal with the MSPB on February 27. The Appeal form stated that Appellant had been denied employment because of the credit check. Because the Appeal did not include the February 19 letter, the MSPB wrote Appellant a letter requesting that she submit a notification of nonselection, as described above.

The Appeal said that Appellant had been employed with the State Department of Assessments and Taxation for 13 years with a spotless record. Appellant acknowledged the unpaid debts, explaining that her husband has medical issues resulting in a substantial drop in income. Appellant also stated that “we have even considered bankruptcy.”

Appellant alleged in her Appeal that she “was denied the position and did not receive the results of my background check via e-mail or through the U.S. mail.” On March 3, 2020, Appellant sent the MSPB an email apologizing for submitting the wrong document with her appeal and attaching a copy of the February 19, 2020 letter from OHR. Appellant did not explain how or when she had received the February 19 letter or why she believed she had been denied the position when the letter explicitly stated that she was being offered an opportunity to contest the credit report or explain why she should be hired notwithstanding the credit report.

On March 9, 2020, based on the credit report and having received no reply to its February 19 letter, the County rescinded the conditional offer of employment. CX 7.

#### **APPLICABLE CODE PROVISIONS AND REGULATIONS**

**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

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<sup>1</sup> The Department of Finance guidelines on background checks drafted by JC, the Contracts and Special Programs Manager, and used since he drafted them in 2017 were submitted as CX 5. The County provided no explanation as to why a document reflecting a policy in place since 2017 was labeled “DRAFT Nov. 2017.” It should go without saying that the County must provide the final adopted versions of a policy or guideline it wishes to introduce, or provide an explanation of why one cannot be provided.

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 relevant part:

**§ 6-4. Reference and background investigation requirements; Review of applications.**

- (a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job related personal characteristics of applicants and employees.
- (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
- (3) All applicants and employees must comply with established reference and investigation requirements.
- (b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if: . . .
  - (5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

**§ 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, 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.

**ISSUE**

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?



## ANALYSIS AND CONCLUSIONS

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 may establish the qualifications for a position and conduct a background investigation before selecting an applicant for a position. MCPR § 6-4(a)(1). If job related, the background investigation may include a credit history check. MSPB Case No. 15-23 (2015). *See* MCPR § 6-4(b)(5).

The Department of Finance reasonably determined that the Call Center Supervisor position should be subject to a credit check because an employee in the position would have access to countywide systems that “secure public assets.” CX 3. The Department’s guidelines include a requirement that individuals with three or more instances of bad debt in the past seven years, and a total bad debt exceeding \$10,000 not be hired. CX 3, ¶12; CX 5. The Department’s policy also considers whether an applicant’s credit problems are recent and whether there is a trend reflecting improvement. CX 5.

According to the Affidavit of JC, the Contracts and Special Programs Manager, the guidelines have been in use by the Department since he drafted them in 2017. CX 3, ¶8. As noted above, the County provided no explanation as to why the copy of the guidelines submitted as CX 5 was labeled “DRAFT Nov. 2017.”

However, even if the 2017 Guidelines were not formalized, Appellant’s credit history was disqualifying under Department of Finance policy and Board precedent predating 2017. In MSPB Case No. 15-23 (2015), a case involving an applicant for a position in the Department of Finance, the Board ruled that the County may decide that “any blemish on [a] credit record, even if it had eventually been resolved, could call into question [an applicant’s] fitness” because “trust is of paramount importance in a position in an office that handles financial transactions.”

Appellant acknowledges the large amount of unpaid debt and does not deny that her credit history and financial situation are troubling. Appellant instead argues that she has been a reliable and trusted employee of the State for 13 years and is of good character. Nevertheless, Appellant’s financial difficulties are the result of her husband’s declining health and are relatively recent. Appellant’s admission that she has considered bankruptcy suggests doubt that the situation is likely to improve anytime soon.

Under these circumstances it is entirely sensible for the County to be concerned about Appellant’s fitness for a Call Center Supervisor position and to be leery of trusting her with access to sensitive County financial systems. Appellant has not therefore carried her burden of proof to show that the County’s action was arbitrary, capricious or illegal.

Moreover, the Board has also held that since the Board must decide “based on the written record in the application process, and absent extraordinary circumstances, . . . it will not consider evidence that was not submitted during the application process.” MSPB Case No. 15-14 (2015), p. 5, n. 4. Because Appellant failed during the hiring process to provide to the Department an explanation of why she is suitable for the position despite her credit history, she may not do so for the first time on appeal to the Board. *See* MSPB Case No. 15-23, p. 7, n. 9.

For these reasons the Board finds that Appellant has failed to prove that the County's decision on her application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors.

**ORDER**

Based on the above analysis, Appellant's appeal of the County's rescission of her conditional offer of employment for the position of Administrative Specialist II (Call Center Supervisor, is hereby **DENIED**.

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  
August 24, 2020

# 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 2021 the Board issued the following grievance decision.

# **CASE NO. 20-16**

## **FINAL DECISION**

Appellant, a Transit Operations Supervisor (TOS) with the Department of Transportation (DOT), filed a grievance in December 2019 challenging the seniority system for scheduling TOS work shifts and days off. On March 10, 2020, Appellant filed an appeal concerning the February 26, 2020 Step 2 grievance response of the Chief Administrative Officer (CAO). The County filed a response to the appeal on May 11, 2020. (County Response). Appellant's due date for a reply was June 1. To date, Appellant has not submitted a reply to the County's submission.

The Appeal was reviewed and considered by the Board.

## **FINDINGS OF FACT**

Appellant was promoted to a Transit Operations Supervisor (TOS) position with the Montgomery County Department of Transportation (DOT), Division of Transit Services, effective April 28, 2019. County Exhibit (CX) 4.

The Division of Transit Services Ride On bus service operates 22 hours a day for 365 days a year. CX 2, ¶3. This means that there is a need for TOS supervisory coverage at night and on weekends and holidays. Transit Services utilizes a shift scheduling procedure whereby TOS employees are allowed to select shifts based on seniority. Under the procedure, seniority is calculated based on time in a TOS position, not total County service. CX 2, ¶5. Because more than one TOS may have the same hire date a tie breaker was created. CX 2, ¶4 & ¶5. The tie breaker compares the sum of the last four digits of each employee's Social Security Number, with the employee having the higher sum deemed the more senior. The tie breaker method has been in use for about 12 years. CX 2, ¶5.

The same seniority tie breaker procedure is utilized in the collective bargaining agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO). CX 2, ¶5.<sup>1</sup> Although as supervisors TOS employees are not in the MCGEO bargaining unit, the Chief of the Transit Division determined that the MCGEO agreement's seniority tie breaking method was reasonable and decided to use it for purposes of scheduling TOS shifts. CX 2, ¶5 & ¶9; CX 3.

Appellant is one of three employees with a TOS hire date of April 28, 2019 and, based on the last four digits of his Social Security Number, has the lowest seniority rank of the three. CX 4. *See* CX 1, Appellant's grievance ("I had a lower Social Security Number").

Appellant was not the only TOS displeased with DOT's method of determining shift assignment seniority. A group of TOS employees, including Appellant, filed grievances which

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<sup>1</sup> The MCGEO collective bargaining agreement, Article 8 – Seniority, uses total County service with a tie breaker being the last four digits of employees' social security numbers to determine seniority ranking:

- § 8.1(a) states that "Length of service (seniority) for the purpose of this Agreement . . . shall be calculated based on total County service. . .".
- § 8.1(b) provides: "In the event that there is a tie between or among 2 or more employees regarding their calculated seniority, the tie will be broken on the basis of the sum of the last 4 digits of each affected employee's social security number, with the employee having the higher sum of the 4 digits being deemed the more senior."

were consolidated. CX 2, ¶7. In an effort to resolve the concerns of the TOS grievants a meeting was held on September 17, 2019, between DOT management, some of the grievants, and a representative from OHR. CX 3. According to a September 27, 2019, memorandum from the Chief of Transit Services and his affidavit, the parties were able to achieve an amicable resolution to the dispute. CX 3; CX 2, ¶8. The resolution was described in the September 27 memorandum as follows:

The outcome of this discussion was agreed upon by both the Department and the Transit Operation Supervisors. As the TOS grade was previously a 19, but is currently a 21, the calculation for ranking will be based on when the employee became a TOS. An agreement was also reached that someone at a current Grade 21, who performs similar duties to a TOS could transfer to an open TOS slot and their years at the Grade 21 would count toward how they rank at the depot. Any outside person hired as a Transit Operation Supervisor will start at the bottom for “Time in Position” as a Transit Operation Supervisor. Any Transit Operation Supervisor hired on the same day, the calculation for the person with more “Time in Position” will be the standard county practice as outlined in the Personnel Regulations. These rankings will be used for each depot to allow the Transit Operation Supervisors to be able to select their work schedule and annual leave. This selection will take place each December and be effective the first pay period in January.

The Department is satisfied that this arrangement will work for both parties and brings this grievance to a successful conclusion.

CX 3, p. 2.

Although some of the TOS employees may have been satisfied with the outcome it appears that others were not. Appellant filed a grievance dated December 12, 2019, alleging that the seniority system for scheduling TOS work shift assignments and days off is unfair. CX 1. *See* CX 2, ¶8. Appellant’s grievance alleged that his seniority should have been calculated based on his total County service and that he “was denied length of service and lost my seniority due to the fact that I had a lower social security number.” Appellant asserts that his seniority for purposes of TOS work assignment scheduling should be based on the Montgomery County Personnel Regulations (MCPR), §30, Reduction-In-Force. CX 1.

Appellant’s grievance was apparently consolidated with those of several other dissatisfied TOS employees who filed a Step 2 appeal of the DOT September 27 memorandum to the CAO. County Response, p. 1. The CAO’s Step 2 decision on the consolidated grievances, issued on February 26, 2020, found that because MCPR, § 30, only addressed how seniority is calculated for purposes of Reduction-In-Force, it was inapplicable to TOS shift scheduling. The CAO further found that the applicable personnel regulation was MCPR § 15-2(c), which states that “[a] supervisor may change the work schedule of an employee who reports to the supervisor.” The CAO concluded that under § 15-2(c):

[T]he Department has discretion to determine work assignments and days off as operational needs warrant. The Grievants presented no evidence that the

Department abused its discretion with its practice of assigning schedules and days off.

The CAO also determined that “the evidence does not establish that the Grievants have raised a matter that is grievable and even if considered grievable, they have not been able to establish a violation, misinterpretation or improper application of a law, rule, procedure or policy.”

Appellant’s March 10, 2020, Appeal to the Board states: “(1) I am not union member, but they used a union contract to take inappropriate action against my seniority. (2) The reason for denial was not in relation to my actual grievance. (3) If they are using the union contract, then my seniority was calculated incorrectly.”

## **ISSUE**

Did the County properly establish and implement the seniority based work schedule policy for Transit Operations Supervisors?

## **APPLICABLE LAW AND POLICY**

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, and June 30, 2015), Section 15, Work Schedules, Attendance, Hours of Work:**

### **§ 15-2. Work schedules.**

(c) **Authority to change work schedule.** A supervisor may change the work schedule of an employee who reports to the supervisor. However, an employee must request a compressed work schedule, flextime, or job sharing arrangement under Section 15-4(b) or (c), as appropriate, and only the department director may approve an agreement to change to one of these types of alternate work schedules.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended May 20, 2010, July 12, 2011, and June 30, 2015), Section 30, Reduction-In-Force:**

### **§ 30-1. Definitions.**

(n) **Seniority:** The total length of time that an individual has been a County employee in full-time and part-time positions.

### **§ 30-2. Policy on RIF**

(b) If RIF is necessary, a department director must base the transfer, demotion, or termination of an employee on one or more of the following:

- (1) service needs;
- (2) seniority; or
- (3) performance.

### **§ 30-5. Calculation of seniority in a RIF.**

(a) A department director must calculate seniority for all affected employees with merit system status in the department and class by:

- (1) giving seniority credit for continuous County employment from the date of

initial employment in a full-time or part-time position to a fixed date established by the OHR Director;

(2) giving seniority credit for past periods of employment in a full-time or part-time County position if the employee had a break in service;

(3) prorating seniority for part-time employees based on the number of hours worked per week;

(4) giving an employee up to 5 years of seniority credit for periods of military service as required under Section 22 of these Regulations; and

(5) giving an employee seniority credit for service before 1989 as a paid firefighter for a Montgomery County volunteer fire corporation.

(b) A department director must also give additional seniority credit to an affected employee or deduct seniority credit based on the employee's average overall performance rating over the 3 most recently completed rating periods. The department director must calculate the number of extra months of seniority credit by:

(1) giving the employee 24 extra months of seniority for each time the employee received an overall rating of Exceptional Performance or an equivalent rating;

(2) giving the employee 12 extra months of seniority for each time the employee received an overall rating of Highly Successful Performance or an equivalent rating;

(3) giving the employee no extra months of seniority credit if the employee:

(A) received an overall rating of Successful Performance or an equivalent rating; or

(B) did not receive an overall rating during the most recently completed rating period;

(4) deducting 12 months of seniority from the seniority calculated under (a) if the employee received an overall rating of Does Not Meet Expectations or an equivalent rating; and

(5) dividing the total extra months of seniority by 3 to determine the additional months of seniority that the employee must receive.

(c) A department director must give an employee in an affected class who has been employed for less than 3 years:

(1) the average extra months of seniority credit for the employee's last 2 overall performance ratings; or

(2) extra seniority credit for one overall performance rating, as appropriate.

(d) The department director must not give affected employees seniority credit or deduct seniority credit based on performance unless the performance evaluation plan used by the department for the last 3 years:

(1) includes 4 rating categories;

(2) was used uniformly to evaluate the performance of employees in the affected

class;

(3) is consistent with Section 11 of these Regulations for non-bargaining unit employees; and

(4) is consistent with the appropriate labor agreement for bargaining unit employees.

(e) To break a tie, the department director must use seniority within the affected class, as calculated above using employee performance ratings.

(f) The OHR Director must certify the department director's final seniority calculations and confirm that the department director complied with (c) above.

(g) Based on the certified final seniority calculations, the department director must displace employees in an affected class with merit system status by inverse seniority until the total number of positions to be abolished has been reached.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34, Grievances:**

**§ 34-4. Reasons for filing a grievance.** An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

(a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy;

(b) improper or unfair act by a supervisor or other employee . . . ;

(c) improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, RIF, promotional action that was arbitrary and capricious or in violation of established procedures, or denial of an opportunity for training;

(d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential, overtime pay, leave, insurance, retirement, or a holiday . . .

**§ 34-9. Grievance procedure.**

(d) ***Burden of proof.*** . . (2) The grievant has the burden of proof in a grievance on any other issue.

**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.**

(b) 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 CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal



based on the written record.

### ANALYSIS AND CONCLUSIONS

The County argued that Appellant's complaint was not grievable under MCPR, § 34-4, because he did not identify any law, rule, policy or procedure that has been violated by the DOT's method of assigning supervisory work schedules and days off. Nevertheless, we find that Appellant's complaint is grievable as it is alleging a violation of policy and what he alleges to be an unfair act. Accordingly, we shall consider the merits of his grievance appeal.

The authority to establish employee schedules is vested in supervisors under the County's personnel regulations. MCPR § 15-2(c) ("A supervisor may change the work schedule of an employee who reports to the supervisor."). *See* MSPB Case No. 17-21 (2017). There is no County Code or MCPR provision requiring the use of seniority for scheduling work days and days off for supervisory employees.

To support his seniority argument, Appellant cites MCPR § 30(n), a provision dealing with RIFs (Reductions-in-force) and furloughs, which defines seniority as "total length of time that an individual has been a County employee." The seniority calculation for a RIF is quite detailed and extensive. MCPR § 30-5. In a RIF seniority may be increased or decreased based on employee performance, and may even be set aside due to operational needs. MCPR § 30-5(b) - (e); § 30-6.<sup>2</sup>

Because supervisors have wide discretion to determine work schedules they may opt to use the parts of the RIF personnel regulation as a basis for calculating seniority for that purpose, but the RIF seniority calculation in MCPR, § 30, is not referenced, adopted or mandated to be used in work scheduling or any other provisions of the personnel regulations.

We did find one provision in County law that expressly requires the use of the RIF seniority calculation for a non-RIF purpose. The Montgomery County Code, § 33-42A(g), adopted the RIF seniority calculation for tie breaking in the 2010 Retirement Incentive Program: "If more members apply to participate in the program than the number of positions abolished, the participants must be approved in order of County seniority calculated under the RIF personnel regulation in the following order: (1) participants who applied for the proposed 2009 Retirement Incentive Program; and (2) all other participants." In that context the use of the RIF calculation made good policy sense as a purpose of the Retirement Incentive Program was to encourage employees to retire during a fiscal crisis and, perhaps, reduce the number of involuntary RIFs. However, besides that unique circumstance we are unaware of any law that would compel the County to use the RIF personnel regulation seniority provisions for any other purpose.

We thus conclude that Appellant's argument that he was entitled to seniority for his total County service, as opposed to his time in a TOS position, lacks merit.

We also find no merit in Appellant's contention that use of the last four digits of employee Social Security Numbers as a seniority tie breaker was improper because he was not a member of the MCGEO bargaining unit. The Transit Division Chief acknowledged all along that while use of

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<sup>2</sup> Similarly, in setting leave schedules for bargaining unit employees seniority may be overridden by operational needs. The MCGEO collective bargaining agreement, § 14.7, provides that "[t]he County will schedule vacation days of employees, provided however that employee timely vacation preferences will be honored on a seniority basis when the County determines that services and operating efficiency are not substantially impaired."

that tie breaker was not required, he used his supervisory discretion to adopt that approach because he deemed it “reasonable.”

We do not find the Transit Division Chief’s exercise of discretion to be in violation of any County law, regulation, or policy. Nor, based on this record, do we have reason to conclude that it was arbitrary, capricious, or discriminatory. In addition to the MCGEO collective bargaining agreement there is a long history in labor relations of using various methods of seniority tie breaking. Some of those methods essentially rely on chance. *See* Abrams, Roger I. and Nolan, Dennis R., “Seniority rights under the collective agreement” (1986). *Northeastern University School of Law Faculty Publications*, pp. 113-14, (“seniority preference may be determined by the time of hiring interview, clock number, lowest (or highest) social security number, alphabetical order, or toss of a coin. . .”); Board of Education of Prince George’s County Maryland and ACE/AFSCME, Local 2250, AFL-CIO, (July 1, 2018 - June 30, 2022), Section 27, Transportation Employees, J.1.e, p. 27, (“Seniority among individuals with the same date of hire will be determined by a drawing of names”); 2 Education Law, § 6E.03 *Reductions in Force* (2020) (“Tie breakers may include an employee’s start date, actual date or order of hire (rather than start date), and even a drawing by lots.”); *Crafts v. GMC*, 192 F. Supp. 2d 310, 318 (D. Del. 2002)(use of “alphabetic position of the employee’s last name as a seniority tie-breaker” in CBA reasonable and not violation of union’s duty of fair representation).

We nevertheless urge the Transit Division Chief to consider using his discretion to adopt a seniority tie breaking policy using another approach. For example, simply rotating the seniority status among those employees with the same TOS hire date would be straightforward, easy to implement, and likely to be considered equitable by the employees themselves.

Finally, we note that it is significant that despite being provided with the opportunity, Appellant did not contest the County’s Response to his appeal. *See* MSPB Case No. 20-11 (2020); MSPB Case No. 16-01 (2015).

Appellant bears the burden of proof to show by a preponderance of the evidence that the schedule change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2). The County provided a justification for its action, and that justification does not appear to be arbitrary, capricious, or discriminatory. As Appellant has not demonstrated how the County’s implementation of the shift assignment procedure for Transit Operations Supervisors violates any applicable provision of law, regulation, or policy, or was arbitrary, capricious, or discriminatory, the grievance appeal must be denied.

## **ORDER**

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-16 be and hereby is **DENIED**.

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  
August 25, 2020

## **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 2021, the Board issued the following dismissal decisions.

# DISMISSAL FOR MOOTNESS

## CASE NO. 21-02

### ORDER OF DISMISSAL

On August 5, 2020, Appellant filed a direct grievance appeal with the Merit System Protection Board (MSPB or Board) concerning the alleged failure of the Office of Human Resources (OHR) to grant him a within grade salary increase.

Under Montgomery County Personnel Regulation (MCPR) § 34-5, an employee may appeal a Step 2 grievance decision of the County's Chief Administrative Officer (CAO) to the MSPB. Because Appellant had not yet received a Step 2 grievance decision of the CAO and the Board concluded that the processing of Appellant's grievance appeal would benefit from a Step 2 decision by the CAO, on August 10, 2020, the Board issued an Order requesting a Step 2 decision of the CAO. *See* MCPR § 34-9(a)(4).

On September 7, 2020, the designee of the CAO emailed the Board to advise that as a result of the Step 2 meeting the appeal was resolved by granting Appellant's grievance and raising his salary retroactive to March 4, 2020. The CAO's designee indicated that this resolution was satisfactory to all involved, and that Appellant no longer wished to pursue his appeal with the MSPB. Appellant subsequently emailed the Board to confirm that he wished for his appeal to be withdrawn.

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 dismiss an appeal if the appellant fails to prosecute the appeal).

Accordingly, for the above reasons, 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  
September 16, 2020

# **CASE NO. 21-09**

## **ORDER OF DISMISSAL**

Appellant, a Liquor Store Clerk I, filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on October 7, 2020, concerning a September 22, 2020, Notice of Termination issued by the Alcohol Beverage Services (ABS).

Due to procedural errors with the proposed termination, on November 2, 2020, ABS issued a memorandum to Appellant which had as the subject line “Rescind Notice of Termination.” The memorandum stated that “You are hereby notified that the Notice of Termination, dated September 22, 2020, is rescinded and will be removed from your file.” By memorandum dated December 3, 2020, Appellant was informed that she was being placed on paid administrative leave pending termination retroactive to September 14, 2020. The memorandum also advised Appellant that she was “expected to be available to the department between the business hours of 8:30 a.m. until 5:00 p.m. Monday through Friday and must promptly respond to any telephone calls and/or emails from the department.” To the Board’s knowledge, as of today Appellant has not received a new notice of termination.

On November 9, the County filed a Motion to Dismiss the appeal as moot. Attached as exhibits to the Motion to Dismiss were a November 6 Amended Notice of Proposed Termination from the Director of ABS and the November 2 “Rescind Notice of Termination” memorandum. The County’s Motion to Dismiss did not represent or provide certification that it had fully rescinded the September 22 Notice of Termination by making Appellant whole through reinstatement with full back pay and benefits. For that reason, on November 19, 2020, the Board issued a Show Cause Order asking “the County to show good cause as to why the Board should not deny its Motion to Dismiss for failure to fully rescind the Notice of Termination and make Appellant whole by reinstating her with full back pay and benefits.” The County’s November 30 response to the Show Cause Order stated that ABS intended to make Appellant whole through reinstatement with full back pay and benefits, however, ABS still need to “engage with other departments regarding her payroll, retirement, and health benefits.” The County concluded by asking for dismissal “or, in the alternative, . . . additional time to finalize the processing of Appellant’s correction.” Because the County had failed to show with certainty and particularity that Appellant had or would be made completely whole, on December 7, 2020, the Board denied the Motion to Dismiss.

On January 6, 2021, the County filed a second Motion to Dismiss providing additional information as to why it believed that Appellant had now been fully reinstated and made whole. Appellant opposed the motion, arguing that while she had been paid for her unused annual leave and compensatory time when she was originally terminated, she nevertheless wished to have the leave credited back to her now that she has been reinstated. Appellant also argued that she should be paid an amount in addition to her administrative leave payments to compensate her for the time she is expected to be available for emails and phone calls per the December 3 memo.

The Board is persuaded that the September 22, 2020, Notice of Termination has been fully rescinded, and Appellant made whole. We express no opinion as to the merits of Appellant’s claims concerning her alleged entitlement to a restoration of leave hours instead of a cash payout

or to stand by pay while on administrative leave. In our view, the leave and stand by pay matters would best be more appropriately addressed through the grievance procedure.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where an agency completely rescinds the action appealed. *See, e.g.*, MSPB Case No. 19-04 (2019); MSPB Case No. 17-27 (2017); MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014); MSPB Case No. 12-06 (2006); MSPB Case No. 10-12 (2010). The County has demonstrated to the Board that it has fully rescinded the action appealed and made Appellant whole.

Accordingly, the Board hereby **GRANTS** the County's Motion to Dismiss and **ORDERS** that the appeal in Case No. 21-09 be and hereby is **DISMISSED** as moot. Should the County seek to terminate Appellant in the future she may file a timely appeal with the Board within ten (10) working days after receiving a notice of termination.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
February 2, 2021

# DISMISSAL ON MULTIPLE GROUNDS

## CASE NO. 20-14

### ORDER OF DISMISSAL

On March 10, 2020<sup>1</sup>, Appellant, an Income Assistance Program Specialist (IAPS) II with the Department of Health and Human Services (Department or HHS), filed an appeal concerning his January 9, 2020, email request for interpretation of a regulation by the Chief Administrative Officer (CAO). The County filed a response to the appeal on May 7, 2020. (County Response). On May 27, 2020, Appellant filed a reply. (Appellant's Response).

The Appeal was reviewed and considered by the Board.

### BACKGROUND

On March 12, 2020, the Board acknowledged receipt of the Appeal in this matter. In that letter the Board specifically addressed the Appellant's appeal rights and urged him to consider filing a grievance:

Please be advised that the MSPB may not have jurisdiction to hear your appeal. The regulation concerning Interpretations of Personnel Regulations specifically provides that while an "employee may not grieve or appeal a written CAO interpretation," an employee may file a grievance under § 34 of the regulations or file an appeal with the MSPB under § 35 "over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action." Montgomery County Personnel Regulation (MCPR), §2-3(c)(2). Accordingly, you may wish to explore the possibility of filing a grievance before the time for doing so has expired.

Although this Appeal concerns Appellant's request for an interpretation of a regulation by the CAO, on March 2, 2020, Appellant had filed another appeal with the Board alleging that he had been improperly denied a promotion to an IAPS III position. MSPB Case No. 20-13. Because Appellant had not applied for the position when the eligible list was created, the Board dismissed that appeal, stating:

We fail to see how Appellant can maintain a nonselection/nonpromotion direct appeal to the MSPB when he was never an applicant for the position. Instead, Appellant's proper recourse is to file a grievance concerning the promotional process at issue. *See* MCPR § 27-4(a).

*Order of Dismissal*, MSPB Case No. 20-13 (March 18, 2020). The Board's Order of Dismissal further held:

Appellant's failure to file a grievance and to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust his administrative

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<sup>1</sup> The appeal was submitted online Monday, March 9, 2020, after the Merit System Protection Board (MSPB) office hours which are 9:30 a.m. to 3:00 p.m., therefore the appeal was officially considered to have been received on March 10, 2020.

remedies that must result in the dismissal of this appeal. *See* MSPB Case No. 15-28 (2015). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies and is dissatisfied with the CAO's decision.

The Board's Order of Dismissal also mentioned that the Board had sent Appellant a letter in this appeal (MSPB Case No. 20-14) suggesting that Appellant consider filing a grievance.

### **FINDINGS OF FACT**

Appellant, an IAPS II with the HHS, filed an appeal concerning his January 9, 2020, email request for interpretation of a regulation by the CAO. Appellant stated his grievance appeal as follows: "CAO not responding to a 60-day interpretation of County regulations as it applies to Promotions." Appeal Form, p. 2. Appellant's requested relief was: "Get clarification of policy as it pertains to promotions in email sent to CAO on January 9, 2020." *Id.*

The record nowhere indicates that Appellant raised the matter with his supervisor or submitted a written grievance as required by Step One of the grievance procedure. Montgomery County Personnel Regulations (MCPR), § 34-9. There is also nothing in the record indicating that Appellant complied with Step Two of the grievance procedure by submitting a grievance to the Office of Human Resources (OHR) Labor Relations division.<sup>2</sup> It appears from an email string submitted by Appellant that he filed an EEO complaint with the OHR EEO Officer sometime in late 2019, followed by an email to her on January 8, 2020, in response to her December 30, 2019, email offering him the opportunity to meet with her before she closed out the investigation. On January 9, 2020, Appellant sent an email directly to the CAO requesting an interpretation of MCPR § 27-4(a).

Appellant also emailed the OHR Director on February 28, 2020. The email to the OHR Director says:

The following email and the 2 attachments included are self-explanatory. As you will see I'm not in agreement or understanding of our "New" promotion procedure. Any clarification or feedback would be greatly appreciated. Ms. [M] is replacing Ms. [D]'s vacant IAPS III position.

OHR promptly responded. Appellant submitted as an exhibit a March 6, 2020, email response from the Chief of OHR's Recruitment and Selection Division.<sup>3</sup> There is nothing in the record indicating that Appellant contested or sent the March 6 OHR response to the CAO or anyone else other than the Board. This is unsurprising as the February 28 email does not appear to be a grievance or a grievance appeal. We find that neither Appellant nor OHR considered his February 28 email to be a grievance.

### **ISSUE**

Does the Board have jurisdiction to hear the Appeal?

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<sup>2</sup> Effective June 1, 2020, the personnel regulations were amended to reflect the creation of the Office of Labor Relations (OLR) in the office of the County Executive and the movement of some OHR labor relations employees to the OLR. These changes have no bearing on this appeal as they occurred after it was filed.

<sup>3</sup> The OHR Chief of Recruitment and Selection Division submitted an affidavit dated May 4, 2020, to the Board consistent with the March 6, 2020, email to Appellant. County Exhibit 3.



## APPLICABLE LAW AND POLICY

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended September 19, 2006, October 21, 2008, July 27, 2010, June 30, 2015 and June 1, 2020), Section 2, General Provisions:**

### **§ 2-3. Interpretations of Personnel Regulations.**

#### ***(c) CAO response to a request for interpretation.***

(1) The CAO must issue an interpretation in writing within 60 calendar days of receiving the request with copies to interested County departments, offices, employees, or employee groups.

(2) An employee may not grieve or appeal a written CAO interpretation issued under (1) above. An employee may, however, file a grievance under Section 34 of these Regulations or file an appeal with the MSPB under Section 35 over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action.

**Montgomery County Personnel Regulations, (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:**

**§ 6-9. Eligible list.** After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories. The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and June 1, 2020), Section 34, Grievances:**

### **§ 34-2. Eligibility to file a grievance.**

(c) A bargaining unit employee may not file a grievance under this section over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.

**§ 34-4. Reasons for filing a grievance.** An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

(a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy;

(b) improper or unfair act by a supervisor or other employee . . . ;

(c) improper, inequitable, or unfair act in the administration of the merit system, which may include involuntary transfer, RIF, promotional action that was arbitrary and capricious or in violation of established procedures, or denial of an opportunity for training;

(d) improper, inequitable, or unfair application of the compensation policy and employee

benefits, which may include salary, a pay differential, overtime pay, leave, insurance, retirement, or a holiday . . .

**§ 34-9. Grievance procedure.**

(d) *Burden of proof.* . . (2) The grievant has the burden of proof in a grievance on any other issue.

(e) *Steps of the grievance procedure.* The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

<b>STEPS OF THE GRIEVANCE PROCEDURE</b>		
<b>Step</b>	<b>Individual</b>	<b>Responsibility of individual*</b>
<b>1</b>	<b>Employee</b>	Present job-related problem informally to immediate supervisor. If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor within 30 calendar days. If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.
	<b>Department Director</b>	Give the employee a written response within 15 working days after the written grievance is received.
<b>2</b>	<b>Employee</b>	If not satisfied with the department director’s response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department’s response.
	<b>CAO’s Designee</b>	Must meet with the employee, employee’s representative, and department director’s designee within 30 calendar days to attempt to resolve the grievance.
	<b>Employee and Dept. Director</b>	Present information, arguments, and documents to the CAO’s designee to support their positions
	<b>CAO’s Designee</b>	If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	<b>CAO</b>	Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting.
<b>3</b>	<b>Employee</b>	If not satisfied with the CAO’s response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO’s decision is received.
	<b>MSPB</b>	Must review the employee’s appeal under Section 35 of these Regulations
<b>* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.</b>		

**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.**

- (b) 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 CAO. . . .

**ANALYSIS AND CONCLUSIONS**

***Lack of Jurisdiction***

In this appeal Appellant is asking the Board to review the failure of the CAO to respond to his request for an interpretation of a regulation within 60 days. While MCPR § 2-3(c)(1) does say that the CAO must issue an interpretation of a regulation within 60 days, subsection (c)(2) provides:

An employee may not grieve or appeal a written CAO interpretation issued under (1) above. An employee may, however, file a grievance under Section 34 of these Regulations or file an appeal with the MSPB under Section 35 over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action.

Unlike the County grievance procedure MCPR § 2-3(c) does not provide that a failure to respond within the time limit may be treated as a denial and be appealed to the next step. Indeed, there is no next step as the regulation specifically states that there is no right to “grieve or appeal” the CAO’s interpretation. An employee may only grieve and appeal an action taken on the basis of a CAO interpretation. Appellant cannot be heard to argue that a grievable action has been taken on the basis of the CAO’s failure to provide an interpretation.

The Board can see no basis for us to assert jurisdiction over a matter that cannot be appealed to us under the regulations. Therefore, the Appeal must be dismissed for lack of jurisdiction.<sup>4</sup>

***Failure to Exhaust Administrative Remedies***

The basis for the Appeal is that the CAO did not issue an interpretation of the promotion regulations within 60 days. Appellant did not file a grievance contesting that failure and instead appealed directly to the Board.

To the extent the Appeal is really an objection to the promotional process for the 2020 IAPS III vacancy there has been a failure to exhaust administrative remedies by filing and pursuing a grievance. The promotional process involved the creation of an eligible list and the selection of 11 applicants from that list in mid-2019. Appellant believes that there was a failure to adequately notify all eligible employees that the list would be used for multiple vacancies over a six-month

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<sup>4</sup> The union (MCGEO) filed two grievances concerning the IAPS III promotional process on behalf of County employees eligible for promotion to IAPS III, which includes Appellant. The first grievance was apparently denied in September 2019 and not appealed further. The second grievance was filed by the union on March 18, 2020, and dealt more specifically with the promotion of Ms. M. The grievance claims that the County violated the Collective Bargaining Agreement’s (CBA) provisions regarding vacancy announcements and the more general policy on promotions. Those grievances may not be considered by the Board. MCPR § 34-2(c) provides that an employee “may not file a grievance under this section [MCPR § 34] over a matter covered in the collective bargaining agreement, but may file a grievance under the grievance procedure in the appropriate collective bargaining agreement.” The Board has held that it has no jurisdiction over grievances concerning the CBA. *See* MSPB Case No. 16-05 (2015); MSPB Case No. 14-07 (2013).

period from June 12, 2019 until December 12, 2019. He also objects to the selection of Ms. M off the list in February 2020, when he asserts the list had expired.

The County Response argues that the Appeal should be dismissed for failure to exhaust administrative remedies because he did not raise the matter with his supervisor or submit a written grievance as required by Step 1 of the grievance procedure, and because he also did not comply with Step 2 by submitting the grievance to OHR Labor Relations.

Appellant is not directly challenging what he has suggested to be the County's improper promotional process because, as far as we can tell, he has not filed a grievance, appealed it to the CAO at Step 2 of the grievance procedure, and then filed an appeal of the CAO's decision to the Board.

The County grievance procedure is designed to promote dispute resolution "at the lowest level" under "specific and reasonable time limits for each level or step." MCPR § 34-3(a). The time within which to file a grievance is 30 calendar days after the date on which an employee knew or should have known of the occurrence or action on which the grievance is based, or the date on which he received a notice specifically required by the County regulations. MCPR § 34-9(a)(1). Step 1 of the grievance procedure provides that an employee shall initially file a grievance with the employee's immediate supervisor. Step 2 requires that "within 10 calendar days after receiving the department's response" an employee may file the grievance with the CAO. MCPR §34-3(e). A grievance appeal to the MSPB may be filed within 10 working days after the CAO's step two decision is received by the employee. MCPR §34-3(e); §35-3(a)(3).

We agree that Appellant's failure to file a grievance and to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust his administrative remedies that must result in the dismissal of this appeal. MSPB Case No. 15-28 (2015). *See Public Service Commission v. Wilson*, 389 Md. 27, 89 (2005). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies. We do not know, and will not speculate, whether any grievance Appellant files or has filed would be timely.

At each step of this Appeal the Board made a point of explaining Appellant's options and rights to due process and encouraged him to consider filing a grievance. Because the Appeal concerns a matter outside the Board's jurisdiction and Appellant did not file a grievance and exhaust his administrative remedies, we must dismiss the Appeal.

### **ORDER**

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-14 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  
September 8, 2020

# **CASE NO. 21-04**

## **ORDER OF DISMISSAL**

On August 20, 2020, Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on behalf of himself and fourteen (14) other Division of Highway supervisors in the Montgomery County Department of Transportation. On August 25, 2020, the Board's Executive Director acknowledged receiving the appeal and advised Appellant that for the Board to process his apparent grievance appeal "you must provide a copy of the Chief Administrative Officer's decision regarding your grievance and other documentation of your grievance. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2) ("a copy of the CAO's decision must be provided to the MSPB")." Appellants' appeal was docketed, but the Board stayed its processing of the appeal until receipt of the appropriate documentation.<sup>1</sup>

The next morning, August 26, 2020, Appellant sent an email to the Board's Executive Director stating that he needed "clarification on my next step, as it seems that I have missed a step." Appellant then asked if his proper course of action was: "1. We must send a letter to the CAO for decision" and "2. If not pleased with their/his decision, submit that decision and our letter to you ([MSPB.Mailbox@montgomerycountymd.gov](mailto:MSPB.Mailbox@montgomerycountymd.gov))." Later that morning the Board's Executive Director responded as follows, in part:

Without knowing what you have already done I am not in a position to give you more specific information about your options. I suggest that you read the [County personnel regulations](#) to make sure you are complying with the grievance procedure. The link provided is to the full grievance regulations, but you should carefully review §34-9, which deals with the grievance procedures and contains a helpful chart explaining the various steps to follow.

Appellant responded a few minutes later, stating: "Thanks. I haven't done anything besides send you all the letter. I will review the personnel regs."

The County grievance procedure is designed to promote dispute resolution "at the lowest level." MCPR § 34-3(a). Step one of the grievance procedure provides that an employee shall initially file a grievance with the employee's immediate supervisor, while step two provides that an employee may file the grievance with the CAO. MCPR §34-9(e). A grievance appeal to the MSPB must be filed within 10 working days after the CAO's step two decision is received by the employee. MCPR §34-9(e); §35-3(a)(3).

Having received nothing further from Appellants since August 26, on October 26, 2020, the Board issued a Show Cause Order requiring Appellants to provide a statement of such good cause as exists for why the appeal should not be dismissed for lack of jurisdiction and failure to comply with the Board's appeal procedures. The Show Cause Order stated that a "Chief Administrative Officer's decision or statement of good cause shall be filed on or before close of business November 5, 2020. . .". To date no statement of good cause or CAO's decision has been filed, and Appellants have not communicated in any way with the Board since August.

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<sup>1</sup> Appellants' grievance concerns the lack of Covid-19 front facing pay for Division of Highway Services supervisors. Front facing work is that which involves physical interaction with the public and cannot be performed with appropriate social distancing. Employees eligible for front facing differential pay receive an additional \$10 per hour.

Appellants were advised in the Show Cause Order that a failure to exhaust their administrative remedies may result in a dismissal of this appeal. MSPB Case No. 20-13 (2020); MSPB Case No. 15-28 (2015).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 21-04 be and hereby is **DISMISSED** for failure to comply with the Board's appeal procedures and for failure to exhaust administrative remedies. MCPR § 35-7(b) & (e).<sup>2</sup>

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  
November 19, 2020

## **CASE NO. 21-05**

### **ORDER OF DISMISSAL**

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 24, 2020, appealing an August 20, 2020, decision of the County Chief Administrative Officer upholding a determination by the Benefits Administration Division of the Employee Retirement Plans to offset Appellant's service related disability benefits.<sup>1</sup>

On October 13, 2020, the County Chief Administrative Officer issued a letter stating that "After re-examining your employment information, I am granting your request that the County cease offsetting your service-connected disability retirement benefit and you will receive a refund of the amounts withheld." On October 14, 2020, Appellant emailed the Board and asked that her appeal be withdrawn in light of the County's decision to provide the relief she requested.

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. 21-02 (2020); MSPB Case No. 17-18 (2017). *See* MCPR §35-7(b) (Board may dismiss an appeal if the appellant fails to prosecute the appeal).

Accordingly, for the above reasons, 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

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<sup>2</sup> Board Member Angela Franco did not participate in the consideration, preparation, or adoption of this decision.

<sup>1</sup> On February 11, 2020, the Benefits Administration Division advised Appellant that because her income exceeded the salary of her prior position, her disability retirement benefits would be totally offset until after she had reached normal retirement age. *See* Montgomery County Code, § 33-43(j)(2).

for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board  
October 21, 2020

## **CASE NO. 21-10**

### **ORDER OF DISMISSAL**

Appellant, a Safety and Training Instructor with the Montgomery County Department of Transportation (MCDOT), filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on October 15, 2020. Appellant's appeal seeks COVID-19 front facing differential pay.<sup>1</sup>

On October 15, the Board's Executive Director acknowledged receiving the appeal and advised Appellant that for the Board to process his grievance appeal he must file a grievance, appeal the Step 1 decision to the Chief Administrative Officer (CAO), and submit a copy of the CAO's Step 2 decision to the Board. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2) ("a copy of the CAO's decision must be provided to the MSPB"). Appellant's appeal was docketed, but the Board stayed its processing of the appeal until receipt of the documentation necessary to show that he had exhausted his administrative remedies.

When the Board received no response it issued a November 19, 2020, Show Cause Order requiring Appellant to provide a CAO's decision or other explanation by November 30. The Order advised that "absent the filing of the required documents . . . the Board will dismiss this appeal." Appellant did not respond to the Show Cause Order even though it advised Appellant that a failure to exhaust administrative remedies may result in a dismissal of this appeal. MCPR § 35-7(e). *See* MSPB Case No. 20-13 (2020); MSPB Case No. 15-28 (2015).

On January 13, 2021, Appellant was copied on a memorandum to the Office of Labor Relations (OLR) and the Office of Human Resources (OHR) asking for a status report on COVID-19 grievances appealed to the CAO. Appellant was also copied on a February 2, 2021, Order requesting that the CAO issue written decisions in a number of COVID-19 front pay appeals, including the above captioned appeal. When OLR provided the Board with CAO decisions on March 4, 2021, they specifically stated that "After a careful search of our records, [OLR] has no record of having received a grievance from [Appellant]."

On March 11, 2021, the Board's Executive Director sent Appellant another letter advising him that the "Board is prepared to dismiss your appeal if it does not hear from you by March 17, 2021, with an explanation of why your appeal should not be dismissed for failure to prosecute, failure to comply with Board procedures, or failure to exhaust administrative remedies." The Board has not received any response from Appellant to date.

Despite repeated requests for required documents and information the Board has received nothing from Appellant since October 15, 2020.

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<sup>1</sup> Front facing work is that which involves physical interaction with the public and cannot be performed with appropriate social distancing. Employees eligible for front facing differential pay receive an additional \$10 per hour.

Thus, because Appellant has not provided the copy of a CAO's decision or an explanation for that failure, 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, failure to exhaust administrative remedies, and because the Board lacks jurisdiction. MCPR § 35-7(b), (c) & (e); MSPB Case No. 19-10 (2019); MSPB Case No. 17-17 (2017); MSPB Case No. 17-06 (2017).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 21-10 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*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board  
March 22, 2021



# 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) and Montgomery County Personnel Regulation (MCPR) § 35-11(a)(5). A request to reconsider a ruling on a preliminary matter must be filed within five (5) calendar days from the date of the ruling.

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 2021 the Board issued the following decision on a request for reconsideration of a preliminary matter.

# **CASE NO. 21-109**

## **ORDER DENYING RECONSIDERATION**

Appellants in this consolidated grievance appeal are employees of the Montgomery County Department of General Services (DGS). They have filed appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County's Chief Administrative Officer denying them COVID-19 differential pay. On March 22, 2021, the Board issued an Order of Consolidation for all COVID-19 differential pay grievance appeals from DGS employees. Certain appellants assigned to the Heavy Equipment Shop have requested that the Board reconsider the March 22 order and that their appeals be consolidated with their colleagues in the Heavy Equipment shop, but not with the appeals of other DGS Appellants. The County opposes the request for reconsideration and argues that the Board's consolidation order was appropriate.

The Board's March 22 order considered the question of whether there should be consolidation among supervisory employees in the Heavy Equipment Shop, and a separate consolidated appeal among supervisory employees responsible for the maintenance of transit vehicles. The Board found that all the DGS COVID-19 differential pay grievance appeals: involve employees who are classified as either Equipment Maintenance Crew Chief (Grade 22) or Equipment Services Coordinator (Grade 24); concern the same subject; have related issues of fact and law; request similar relief; and are in a similar procedural posture. The Board also found that there was no indication that handling the appeals together would be prejudicial to the interests of any party.

The Board sees no reason for it to reconsider and alter its March 22 order. No error of law or fact has been brought to our attention and it remains our view that it would be in the interests of judicial economy to address the merits of all the DGS COVID-19 differential pay grievance appeals together. As we noted in the Order of Consolidation, although the Board will process the appeals together, if there are material distinctions between appellants in the Heavy Equipment Shop and those assigned elsewhere our decision will address the specific circumstances. If warranted, the Board may also issue separate decisions for some or all the appeals.

Accordingly, the Board hereby **DENIES** the reconsideration request.

For the Board  
March 29, 2021

# 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 for summary decision may also be filed before a hearing. § 2A-7(d). The opposing party is typically given ten (10) calendar days to respond to a motion on a preliminary matter. Montgomery County Personnel Regulations (MCPR) § 35-11(a)(4). The Board may issue a written decision or may, at the Prehearing Conference or at the merits hearing, rule on a motion.

Motions may be filed at any time during a proceeding to decide offers of proof, rule on the admission of evidence, and to address issues of privilege. Motions may also include procedural requests, including those for continuance, to amend a pre-hearing statement, or to obtain reopened or consolidated hearings or rehearings § 2A-8(h); MCPR § 35-10(f) and § 35-11(c).

During fiscal year 2021 the Board issued the following decisions on motions filed during an appeal proceeding.

# MOTION TO ADMIT SUPPLEMENTAL EVIDENCE

## CASE NO. 18-27

### ORDER DENYING SUPPLEMENTAL EVIDENCE

The Merit System Protection Board (Board or MSPB) held a hearing in the above captioned matter on July 7, 2020. The full day hearing convened at 9:16 a.m. and concluded at 5:38 p.m. The Board heard testimony from seven (7) witnesses, including the Appellant. The testimony of Appellant, which lasted approximately two (2) hours, had intermittent technical issues that disrupted her testimony. During the hearing, neither Appellant nor her attorney objected or otherwise suggested that Appellant was unable to fully provide her testimony.

Through their respective attorneys, the parties electronically filed post-hearing briefs the afternoon of August 17, 2020. *Email from BL*, August 17, 2020, 2:34 p.m.; *Email from SK*, August 17, 2020, 4:53 p.m. Appellant's post-hearing brief did not mention technical issues with Appellant's testimony or argue that any of Appellant's testimony was incomplete. Appellant's Post-Hearing Brief, August 17, 2020.

In addition to and separate from the post-hearing brief filed by her attorney, Appellant submitted an email with an attached document titled "Victim Impact Statement." *Email from Appellant*, August 17, 2020, 3:44 p.m. In that document, submitted an hour before the post-hearing brief filed by her attorney, Appellant stated that "Due to internet interruptions beyond my control, I was unable to complete my MSPB Case 18-27 hearing testimony." Appellant's email transmitting the document was sent to the Board and counsel for the County. Noting that Appellant had not copied her own attorney, the Board's Executive Director emailed Appellant's attorney asking: "Were you aware that [Appellant] submitted the attached email and document this afternoon?" *Email from MSPB*, August 17, 2020, 5:17 p.m. Appellant's attorney promptly responded: "Mr. L [Assistant County Attorney] forwarded me the email and attachment." *Email from SK*, August 17, 2020, 5:24 p.m.

The County immediately objected to Appellant's supplemental document being accepted into the record, arguing that the submission was "testimony . . . not under oath, or subject to any penalty for dishonesty, nor was it subject to cross examination." *Email from BL*, August 17, 2020, 5:34 p.m.

Having heard nothing further from Appellant or her attorney, on September 2, 2020, the Board requested that Appellant's attorney provide a response to the County's objection. The next day Appellant's attorney responded as follows:

[Appellant] submitted the document for two reasons: First, while she was testifying, her internet cut out and we did not hear her continuing to speak. When Ms. Davidson asked if I was done (Tr. at 293), I did not know that [Appellant] had not finished testifying. Second, [Appellant] views the document as part of the closing argument.

If the County wants to cross examine [Appellant] regarding her submission, we could reopen the hearing for that purpose.

*Email from SK*, September 3, 2020. The County responded the next morning:

This Board “may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence . . .” See County Code 2A8(e).

The hearing was July 7, 2020. It ended after the County raised an objection to a particular question and Chair Davidson “directed Ms. K to be very, very brief with this line of inquiry.” Tr. 292 Ms. K then rested.

The transcript of the hearing was transmitted on July 16, 2020. On August 17, 2020, [Appellant] submitted her post hearing brief. [Appellant] raises the issue of not being able to complete her testimony due to internet connection issues for the first time here, on September 3, 2020.

[Appellant] had the opportunity to submit any evidence she chose at the hearing, and to make any argument she chose in her post-hearing brief.

[Appellant] has not alleged, much less established, any reason to grant the extraordinary relief of reopening the hearing to allow her to submit new evidence.

*Email from BL*, September 4, 2020.

Because the document submitted by Appellant was unclear as to precisely what testimony Appellant believed she was unable to provide due to technical problems, the Board provided Appellant with the opportunity to submit a written proffer of the testimony she alleged she was prevented from providing during the hearing. *Email to counsel from MSPB*, September 10, 2020.<sup>1</sup> The Board required that the proffer be strictly limited to the specific testimony that was disrupted by technical problems. The Board also asked both parties to address their positions on whether the proffered testimony may be submitted by way of an affidavit or written interrogatories under oath.

Appellant submitted a proffer of her additional testimony on September 17. *Email from SK*, September 17, 2020. The County objected to additional testimony. *Email from BL*, September 18, 2020. The County argued that Appellant did not raise any issues concerning her ability to

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<sup>1</sup> The email stated, in part:

The Board is aware that there were certain technical issues during [Appellant’s] testimony. Occasional difficulties are to be expected while the Board and the parties are attempting to become conversant with unfamiliar video hearing technology. Although the Board is puzzled as to why Appellant’s concerns were not raised at the hearing or subsequently in a more timely manner, the Board takes seriously its obligation to provide due process consistent with the rules. *See, e.g.*, MCPR §35-12(a)(2) (“Each party must have a reasonable amount of time to examine and cross-examine witnesses and to submit evidence.”).

Therefore, because the document submitted by Appellant on August 17 is unclear as to precisely what testimony Appellant believes she was unable to provide due to technical problems, the Board has decided to provide Appellant with the opportunity to submit a written proffer of the testimony she claims to have been unable to provide during the hearing. MCPR §35-10(f)(4). The proffer shall be strictly limited to the specific testimony that was disrupted by technical problems. *See* Hearing Transcript, pp. 227, 256, 264-65, 268, 270-71, 290. The Board would also appreciate both parties providing their positions on whether the proffered testimony may be submitted by way of an affidavit or written interrogatories under oath.

provide testimony at or subsequent to the hearing until the post-hearing briefs were filed a month and a half after the hearing.<sup>2</sup> Aside from the procedural concern, the County asserted that:

[Appellant] has not supplied any reason that she would be prejudiced by the proffered evidence being excluded. Further its admission could lead to the County to seek to admit rebuttal evidence, and Appellant seeking to respond. Nor is the preferred evidence relevant to the ultimate inquiry.

We have carefully reviewed Appellant's proffer and scrutinized the hearing transcript. We conclude that although there were technical issues, Appellant and her attorney were given ample opportunity and wide latitude to fully present her testimony. Whenever Appellant's testimony was disrupted by technical issues, the problems were remedied, and her testimony continued. The proffered testimony adds little that is relevant and material to Appellant's case. For the most part it merely emphasizes, elaborates, and focuses testimony provided at the hearing. In some instances, the proffers included matters not the subject of inquiry or questions by Appellant's counsel or the County on cross examination.

With regard to Appellant's testimony regarding her conversations with a County Equal Employment Opportunity (EEO) Investigator, Hearing Transcript (Tr.) 226-27, there were technical issues during Appellant's answer to the question: "So, [Appellant], I'm sorry, who makes the decision about whether you get priority consideration?" Appellant's answer began "[the Occupational Medical Services (OMS) Program Manager] told me that [the EEO Investigator]" before her audio broke up. After the audio connection was restored her attorney again asked: "-- who you said told you -- who you said was responsible for getting you priority consideration." Appellant then provided a lengthy answer that began on Tr. 227 and went on uninterrupted for 35 lines and ended on Tr. 229. There is no indication that Appellant lacked the ability to fully answer the question or of any technical problems with her continued testimony. Moreover, the proffer is for additional testimony, not responsive to any question asked at the hearing, concerning the EEO Investigator, including unreliable hearsay from the owner of the Rockville Deli and Appellant's speculation about what his comments suggested about the EEO investigation. In addition, the proffered testimony is not material to Appellant's case.

Appellant's testimony regarding a request by Dr. SS, the lead physician for OMS, for two years of medical records was not disrupted by a technical issue. Rather, while Appellant was looking for a document she turned away from the microphone and was difficult to hear. Tr. 256. Appellant nevertheless provided extended testimony about the request for medical records and her displeasure with that request. Appellant's attorney asked her to stop looking for the document, Tr. 257, lines 4-7, and suggested that she could find the document later. Appellant's proffer merely states what specific records the OMS physician was seeking and alleges that the request was in a Health Status Report. Appellant's proffer does not concern a technical disruption in her testimony and provides no new or material evidence.

There were technical issues during Appellant's testimony about why she felt that the County's attempt to accommodate her by providing a standing desk was insufficient. Tr. 263-65. Appellant's attorney asked her to continue her testimony and explain the problem with using a

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<sup>2</sup> The County argued that it was not until September 3, two weeks after the post-hearing briefs, that Appellant first claimed that technical issues prevented her presenting her complete testimony. It may be true that September 3 was the first time Appellant's attorney raised the issue, but the Victim Impact Statement submitted by Appellant herself on August 17 did raise the concern.

standing desk and Appellant did so. Tr. 264-65. There was another brief technical issue, Tr. 265, line 1, followed by her attorney again asking her about issues related or in addition to the standing desk, such as the condition of a cushioned mat for her to stand on. The proffer, however, concerns an IT employee offering to move the standing desk to provide Appellant with more room, and Appellant's supervisor allegedly being rude to him and saying that he could not take up another cubicle with the standing desk. There is no indication that Appellant was prevented from addressing this matter in her hearing testimony. In any event, the proffered testimony is not material.

Appellant proffered testimony concerning her medical condition and the problems associated with the limited break times she was given. During the hearing, after some technical issues, a break in the hearing was called. When the hearing reconvened Appellant's attorney had Appellant continue testifying about the standing mat and then move on to concerns about break times. Tr. 266-68. During Appellant's testimony concerning the breaks there were problems with her audio. The Board's Chair elicited her testimony on the topic. Tr. 268-69. Appellant's attorney then asked Appellant if "in addition to the standing desk, the mat, the ten-minute breaks" was there any other issue concerning accommodations. Appellant then talked about being near a vent and the effect of the lower temperature on her before saying that the standing desk, mat, and ten-minute breaks were the only accommodations. Tr. 270. There is no indication that Appellant was prevented from fully addressing these matters in her hearing testimony.

After additional testimony, Appellant's attorney asked Appellant about the wireless headphones she was given as an attempt at accommodation. Tr. 271. Appellant testified that she had always used headphones but since new ones were wireless, she had problems. Tr. 271-72. Although there were technical difficulties, Appellant was permitted to provide the testimony she wished. Once again, the Board Chair asked a question which Appellant was able to answer. The proffer on this issue does not add anything of significance to Appellant's hearing testimony.

Appellant's testimony about priority placement and her conversations with the Program Manager for the County's OMS and the lead physician was marred by technical problems, but those issues were resolved, and she was able to testify at length. Tr. 273-86. There is no indication that Appellant was prevented from fully addressing these matters in her hearing testimony.

The final proffer concerned Appellant's allegations of emotional distress she suffered. Once again, there were technical difficulties with Appellant's audio, but her attorney was ultimately able to obtain Appellant's testimony. Tr. 290.

Finally, at the end of Appellant's testimony the Chair asked Appellant's attorney "are you done?" Appellant's attorney responded "I -- I -- I think so. Thank you, [Appellant]." Appellant then said, "Thank you all." Tr. 293. As discussed above, there was absolutely no indication by Appellant or her attorney suggesting that any testimony had been prevented or omitted.

In her Victim Impact Statement Appellant included a statement from the union representative who participated in some of the discussions with management on Appellant's behalf. Appellant had ample opportunity to have the representative testify at the hearing. In fact, she was on Appellant's witness list, but a decision was made not to have her testify at the hearing. In addition, there was no request to have the representative present evidence by any other means. Thus, we will not include the witness's unsworn statement in the record.

At no time during the hearing or for six weeks afterwards did Appellant or her attorney object or suggest that there was a need for additional testimony. Nor does Appellant's post-hearing brief argue that there was such a need for supplemental testimony. The Board concludes that Appellant had a full and fair opportunity to testify at the hearing, and that there is no justification for admitting additional testimony or other supplemental evidence.

For the above stated reasons, the Board **DENIES** Appellants request to introduce her Victim Impact Statement and the proffered testimony as supplemental evidence for the record.

For the Board  
October 7, 2020

*Appellant's petition for judicial review of the December 29, 2020, final decision in this appeal was dismissed by the Circuit Court for Montgomery County on August 19, 2021 (Civil Action No. 484612-V).*



# MOTION TO DISMISS

## CASE NO. 21-09

### ORDER DENYING MOTION TO DISMISS

Appellant, a Liquor Store Clerk I, filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on October 7, 2020, concerning a September 22, 2020, Notice of Termination issued by the Alcohol Beverage Services (ABS).

On November 2, 2020, ABS issued a memorandum to Appellant which had as the subject line “Rescind Notice of Termination.” The memorandum stated that “You are hereby notified that the Notice of Termination, dated September 22, 2020, is rescinded and will be removed from your file.” On November 9, the County filed a Motion to Dismiss the appeal as moot. Attached as exhibits to the Motion to Dismiss were a November 6 Amended Notice of Proposed Termination from the Director of ABS and the November 2 “Rescind Notice of Termination” memorandum.<sup>1</sup>

Under Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where an agency completely rescinds the action appealed. MSPB Case No. 17-27 (2017). *See* MSPB Case No. 10-12 (2010).

However, the County’s Motion to Dismiss did not represent or provide certification that it had fully rescinded the September 22 Notice of Termination by making Appellant whole through reinstatement with full back pay and benefits. For that reason, on November 19, 2020, the Board issued a Show Cause Order asking “the County to show good cause as to why the Board should not deny its Motion to Dismiss for failure to fully rescind the Notice of Termination and make Appellant whole by reinstating her with full back pay and benefits.”

The County’s response to the Show Cause Order states:

Counsel has been authorized by ABS to represent that that Appellant has been receiving salary, and it intends to make her whole through reinstatement with full back pay and benefits. However, ABS must further engage with other departments regarding her payroll, retirement, and health benefits to ensure Appellant receives the correct adjustments.

The County concluded by asking for dismissal “or, in the alternative, . . . additional time to finalize the processing of Appellant’s correction.”

Appellant’s reply expressed concern that the County may not fully rescind the termination and make her whole. Her reply requests “that my accumulated leave be returned to me without

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<sup>1</sup> The Notice of Proposed Termination provided that: “Prior to final action being taken in this matter, you may respond to this notice, orally, in person, or in writing, to RD, Director, Alcohol Beverage Services [R.D.]@montgomerycountymd.gov by the close of business on the tenth (10th) working day following the date you receive this notice.” However, when Appellant emailed the Director of ABS on November 12 she received an automatic reply indicating that he would be out of the office until November 30.

Penalty as this termination should not have taken place, as I was notably working and was needed even on the day of my termination 9/11/2020.’<sup>2</sup>

Because the County has failed to show with certainty and particularity that Appellant has or will be made completely whole, the Board has an insufficient basis to conclude that the appeal is moot.

Accordingly, the Motion to Dismiss is **DENIED**. The County may file a motion to dismiss or motion for summary decision based on mootness by January 6, 2021, if it can provide satisfactory certification that the termination was completely rescinded, and that Appellant was made whole.

For the Board  
December 7, 2020

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<sup>2</sup> Appellant also asks that she have the opportunity to speak with the Director of ABS: “I am awaiting the return of The Director, Mr. [D] to return, and to respond to my email requesting a time for us to verbally discuss this Proposed termination letter as it stated to do so. Once I speak with him, and come to an agreement or not, I will then decide to terminate, my appeal or not.” It is the Board’s expectation that the Director of ABS will give Appellant a full and fair opportunity to respond to the pending notice of termination prior to a Notice of Termination being issued.

# **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 FY21, two agreements were entered into the record.

# CASE NO. 21-109

## ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellants in the above captioned consolidated grievance appeals are employees of the Montgomery County Department of General Services (DGS). Their appeals to the Merit System Protection Board (Board or MSPB) challenge decisions of the County's Chief Administrative Officer denying them COVID-19 differential pay.<sup>1</sup>

On April 28, 2021, the parties notified the Board that they had reached a tentative settlement in the above captioned matter. On May 11, 2021, the parties filed a fully executed settlement agreement with the Board resolving the appeal.<sup>2</sup>

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). 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 has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 45 calendar days of this Order the County shall provide the Board with written certification, copied to appellants, that it has fully implemented the terms of the settlement agreement with respect to all appellants;
3. That the appeals consolidated in MSPB Case No. 21-109 be and hereby are **DISMISSED** 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  
May 13, 2021

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<sup>1</sup> By order dated March 22, 2021, the Board consolidated MSPB Case Nos. 21-06, 21-07, 21-08, 21-37, 21-46, 21-55, 21-73, 21-78, 21-79, 21-81, 21-82, 21-85, 21-90, 21-107 and 21-108. The consolidated case was docketed and ordered referenced in all future pleadings as MSPB Case No. 21-109. This Order acts to dismiss all the consolidated appeals.

<sup>2</sup> The signatures of the appellants were provided in counterparts.

# CASE NO. 21-112

## ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellant in the above captioned grievance appeal is an employee of the Montgomery County Department of General Services (DGS). He appealed to the Merit System Protection Board (Board or MSPB) challenging the decision of the County's Chief Administrative Officer denying him COVID-19 differential pay.

On May 6, 2021, the County notified the Board that a tentative settlement agreement had been reached in the above captioned matter. On May 11, 2021, the parties filed a fully executed settlement agreement with the Board resolving the appeal.

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). 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 has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 45 calendar days of this Order the County shall provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement;
3. That the appeal in MSPB Case No. 21-112 be and hereby is **DISMISSED** 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  
May 13, 2021

# 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.

There were no stay orders issued in fiscal year 2021.

# 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 2021.

# **CASE NO. 21-09**

## **SHOW CAUSE ORDER**

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on October 7, 2020, seeking to appeal a September 22, 2020, decision of Alcohol Beverage Services (ABS) to terminate her from her Liquor Store Clerk I position.<sup>1</sup> The September 22 Notice of Termination indicated that Appellant was “being terminated from your position as a Liquor Store Clerk I effective September 11, 2020.”

On October 7, 2020, the Board sent a letter by electronic mail to both parties acknowledging receipt of the appeal and setting prehearing submission deadlines. On November 5, 2020, Appellant called and spoke with the Board’s Executive Director concerning a memorandum dated November 2, 2020, she had received rescinding her termination. The Executive Director asked for a copy of the memorandum and suggested that she contact ABS and the County Attorney to clarify her status. Appellant then sent an email to the Board attaching the November 2 memorandum, which had as the subject line “Rescind Notice of Termination,” and copied the County. Later that day the County sent an email requesting an extension of the prehearing submission deadline, which was granted. The County’s email suggested that it intended to file a formal motion to dismiss the appeal on Monday, November 9, 2020, and further stated:

The County has rescinded that Notice of Termination in order to send her a Notice of Proposed Termination and allow her the opportunity to respond and for the director to consider her response before determining whether to finalize the termination.

On November 9, the County filed a Motion to Dismiss the appeal as moot. Attached as exhibits to the Motion to Dismiss were a November 6 Amended Notice of Proposed Termination from the Director of ABS and the November 2 “Rescind Notice of Termination” memorandum. The Notice of Proposed Termination provided that: “Prior to final action being taken in this matter, you may respond to this notice, orally, in person, or in writing, to [RMD], Director, Alcohol Beverage Services [R.D]@montgomerycountymd.gov by the close of business on the tenth (10th) working day following the date you receive this notice.”

On November 12, 2020, Appellant emailed the Board and the County Attorneys requesting additional time to respond to the November 6 Amended Notice of Proposed Termination because when she emailed the Director of ABS she received an automatic reply indicating that he would be out of the office until November 30. On November 16, 2020, the Assistant County Attorney handling the appeal emailed Appellant to acknowledge her request and suggest that she would soon be contacted.

Under Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where an agency completely rescinds the action appealed. MSPB Case No. 17-27 (2017). *See* MSPB Case No. 10-12 (2010). The County’s Motion to Dismiss does not

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<sup>1</sup> Appellant submitted her online appeal October 6, 2020 at 6:31 p.m., after MSPB business hours. Accordingly, the appeal was considered to have been officially received the Board’s next business day.



represent or provide documents certifying that it has fully rescinded the September 22 Notice of Termination by making Appellant whole through reinstatement with full back pay and benefits.

The Board hereby **ORDERS** the County to show good cause as to why the Board should not deny its Motion to Dismiss for failure to fully rescind the Notice of Termination and make Appellant whole by reinstating her with full back pay and benefits. The County's submission is due by close of business **November 30, 2020**. Appellant's Reply is due by **December 8, 2020**.

The deadlines for prehearing submissions are hereby suspended pending receipt of submissions pursuant to this Order and will be reset as necessary.

For the Board  
November 19, 2020

# ATTORNEY'S 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 attorney’s fee decisions during fiscal year 2021.

# OVERSIGHT

The Board is required to perform certain oversight functions.

**Personnel Regulation Review.** Pursuant to the County Charter, § 404, and the Montgomery County Code, § 33-7(a), the MSPB has long engaged in the prior review of proposed personnel regulations. In fiscal year 2021 the Board reviewed and commented on the following proposed personnel regulations:

- 1) Executive Regulation 26-19 - Employee Compensation - Pay Equity Act
- 2) Executive Regulation 17-20 - Administrative Leave Amendments
- 3) Executive Regulation 16-20 - Unofficial Holiday Amendments
- 4) Executive Regulation XX-20 - ABS Part Time Hours; Compensation Timing; Technical Changes

**Classification Creation.** The Montgomery County Code, § 33-11, provides in applicable part that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service . . . .

Based on the above-referenced provision of the Code, § 9-3(b)(3) of the Montgomery County Personnel Regulations provides that the Office of Human Resources Director shall notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class.

During fiscal year 2021, the Office of Human Resources brought no class creations to the Board for review.

**Temporary Promotions.** The Montgomery County Personnel Regulations require that County agencies obtain the approval of the MSPB for noncompetitive temporary promotions of longer than 12 calendar months. MCPR § 27-2(c)(1)(B). The County Code, § 1A-105(c) and (g) also requires the Merit System Protection Board to approve a merit employee serving as an acting director beyond 12 months. The MSPB reviews such requests to determine if they are supported by “exigent or compelling circumstances.” MCPR § 27-2(c)(3).

In fiscal year 2021 the MSPB reviewed one request for an extension of a temporary promotion.