BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
[redacted]	*	
APPELLANT,	*	
AND	*	**CASE NO. 17-15**
MONTGOMERY COUNTY GOVERNMENT,	*	
EMPLOYER	*	

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FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on the appeal of [redacted], (Appellant) from the determination of Director [redacted] (AR) of the Department of Transportation (DOT or Department) to dismiss Appellant from employment effective January 20, 2017. *See* Notice of Disciplinary Action (NODA), January 5, 2017, County Exhibit (CX) 1. The NODA charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) arising out of Appellant's inappropriate behavior towards passengers while on duty as a Montgomery County Bus Operator on July 13, 2016.[1] This Appeal was filed on January 26, 2017.

On April 24, 2017, the parties appeared before the Board for a prehearing conference, where the Board reviewed the proposed witnesses and exhibits, sought to resolve any outstanding motions or issues, and set the date for the hearing. At the prehearing conference Appellant orally requested that the hearing be open to the public. Pursuant to MCPR §35-10(g), the Board asked Appellant to submit his request in writing by May 1, when he was required to file any proposed

[1] The NODA (CX 1) and Statement of Charges (CX 2) charged Appellant with violations of the Montgomery County Personnel Regulations (MCPR) on Equal Employment Opportunity, § 5-1(d) and § 5-2(e)(2), (CX 15); and the Disciplinary Regulations, MCPR § 33-5(c), (e), and (h), (CX 16).

changes to his witness and exhibit lists *See* Summary of Prehearing Conference and Order. April 25, 2017.[2]

A hearing was held on June 20, 2017. The County indicated that it had no objection to the hearing being open to the public, and Appellant represented that he would not attempt to elicit testimony concerning confidential personnel information about other County employees. Hearing Transcript, June 20, 2017, (Tr.) 8. With those assurances, the Board granted Appellant's request that the hearing be open to the public. *Id.* Several people were in attendance in support of Appellant. Tr. 7.

The County provided the Board with its post-hearing submission on August 28, 2017. *See* Post-Hearing Brief of Montgomery County, Maryland (County Brief). Appellant submitted his Final Argument and Post-Hearing Brief on September 5, 2017. (Appellant's Post-Hearing Brief). On September 6, 2017, Appellant submitted an email supplementing and correcting an omission in his post-hearing submission. (Appellant's Supplemental Brief).

FINDINGS OF FACT

Appellant has been a County Ride On bus driver since July, 2010. Tr. 29. Appellant testified that for the first 4 ½ years of his employment he had no incidents with bus passengers. Appellant Exhibit (AX) 2 at (timestamp) 28:49-53; Tr. 182 ("You know -- I shouldn't say this -- but they didn't have a problem out of me for about four years"). The County agrees that Appellant "was a good driver for many years." Tr. 34. However, after an incident that he said involved a male passenger taking advantage of an older woman passenger, Appellant decided to alter his approach and insist that passengers always pay the correct fare and otherwise comply with his instructions. Tr. 182-83; AX 2 at 28:56-59.

After Appellant's change in attitude and approach, and before July 13, 2016, he was disciplined on four occasions in less than a year for his inappropriate behavior towards bus passengers. Appellant received an oral admonishment on November 12, 2015, after bus passengers complained about the way he handled fare disputes. CX 6, p. 3; CX 10, p. 2. On November 18, 2015, Appellant received a written reprimand for his inappropriate and argumentative behavior towards bus passengers. CX 6, p. 3. On June 15, 2016, Appellant was disciplined by the forfeiture of eight-hours of his annual leave for disruptive, disrespectful, and unprofessional behavior towards bus passengers. CX 10. Finally, on June 20, 2016, Appellant received a five-day suspension for disruptive, unsafe, and unprofessional behavior towards passengers. CX 6.

The instant disciplinary action involves a July 13, 2016, incident in which three young passengers engaged in several verbal exchanges with Appellant. The County introduced a video that contains footage from several cameras on the bus and provides what appears to be a complete record of the July 13, 2016, incident between Appellant and the young passengers. CX 4.[3] The Board reviewed the entire video during the hearing, and the parties directed the Board's attention

[2] MCPR §35-10(g) provides: "A hearing must not be open to the public unless the appellant requests it in writing at the time of the prehearing submissions."
[3] CX 4 is composed of two electronic files.

to various parts of the video for repeated viewing. The video contains audio from microphones on the bus.[4]

The incident began when two young women and a male child boarded Appellant's bus. As one young woman was paying her fare Appellant gestured to the other young woman and said "Hold it, hold it, hold it. Who you got here? Didn't you cuss me out a while back? . . . You're not riding." CX 4 at (timestamp) 16:49:44-54. The young passengers nevertheless went down the aisle and took seats. Appellant admits, and the video confirms, that the young passengers were not unruly. Tr. 134.

The bus remains parked at the curb while Appellant closes the door, initiates a call to the central dispatch unit, and waits for a response. CX 4 at 16:49:55-16:50:29. Upon receiving a call from the dispatch center Appellant begins explaining that he has "a young lady here with a little boy who cussed me out a while back. I turned in a report." CX 4 at 16:50:32-39. One young woman returns to the front and stands by Appellant while he is on the phone. She tells Appellant, "We're just going down the street," and then adds, "we're sitting down peacefully, drive us." CX 4 at 16:50:43-45, 56-57.[5] Appellant then requests a police officer. CX 4 at 16:51:31. Appellant eventually hangs up the phone and, in response to her statement that "we're just going down the hill," he tells the young woman that she can either get off the bus or wait for the police to arrive. CX 4 at 16:52:20-22. The young woman then turns to the other two members of her party and says, "come on, we have to get off." CX 4 at 16:52:24-27. A back and forth exchange ensues in which Appellant opens and closes the door several times and the young passengers discuss whether they have to get off the bus. Appellant repeatedly says that he cannot force them off the bus but that the police are coming and that they can take the young passengers off the bus.

The young women finally decide that they will stay on the bus even if the police are coming, and return to their seats. CX 4 at 16:55:07. During the entire time Appellant and the passengers are arguing, the older of the two young women has her cell phone in her hand, either talking on it or texting. Additionally, Appellant keeps the bus parked at the curb while several other passengers wait quietly in their seats. CX 4, camera 2. Appellant then calls central dispatch again and receives a call back a few seconds later. CX 4 at 16:55:34 – 44. He tells dispatch that he has not moved the bus and asks what they want him to do. CX 4 at 16:55:58 – 56:04. Appellant then hangs up and resumes driving. CX 4 at 16:56:31-36.

After the bus continued its route, picking up and discharging passengers for five to six minutes, it approached a bus stop and one of the young women stood up and approached the front of the bus to disembark with the male child. CX 4, camera 2, at 17:03:54-58. The other young woman passenger remained seated, apparently taking pictures of Appellant on her cell phone. CX 4, camera 2, at 17:04:05. The male child exits the bus first, followed by the young woman, who is holding up her cell phone. CX 4 at 17:04:08-09.

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[4] Camera 1 records from above and behind the driver. Camera 2 records the interior, showing the passenger seats and the center aisle. Camera 4 is focused on the rear door and seating. Cameras 3, 5, and 6 are exterior views.

[5] It is not entirely clear whether the young woman said, "drive us" or "drive the bus." The uncertainty is immaterial.

After carefully viewing the video and its audio, it is clear beyond any dispute that Appellant struck one of the young female passengers, knocking a cell phone out of her hands. CX 4 at 17:04:10. Indeed, Appellant readily admits that he did so. Tr. 181; CX 5. The video also reveals that prior to striking the young woman Appellant stopped the bus, opened the door, and threatened that "this time I'm bringing somebody," presumably referring again to the police. CX 4 at 17:04:03-06; Tr. 152. Just after the young woman finishes saying, "we can get off right now," Appellant strikes the phone out of her hand. CX 4 at 17:04:08-10; Tr. 152. After striking the passenger, Appellant unbuckled his seatbelt and stood up, moving towards the young women and loudly ordering "don't take no pictures. You get off this bus." CX 4 at 17:04:12-15; Tr. 147. After the young women are off the bus Appellant turns back towards the driver's seat and makes a phone call, presumably to the central dispatch unit. CX 4 at 17:04:20-22. He then tells dispatch "Hey listen, I need a police officer and a road coordinator at this stop, they're taking pictures of me and everything." CX 4 at 17:04:21-27.

Appellant claims that he did not realize that the passenger was holding a cell phone, and that he felt threatened. Tr. 181. Appellant does not claim that he ever saw a threatening object, such as a weapon. Tr. 133. Appellant also admitted that after he knocked the cell phone out of the passenger's hand he told her not to take pictures of him. Tr. 147. At one point during his testimony Appellant said that he only told her not to take pictures of him after he saw that she had been holding a cell phone. Tr. 147. However, Appellant later admitted, and it is clear on the video, that prior to knocking the cell phone out of the passenger's hand, he turned to the young woman, pointed at her, and said, "Listen, listen, listen. You're going to get the hell out of here with that camera." CX 4, at 17:03:58 – 04:00; Tr. 150; Tr. 153.

Shortly after the incident, the mother of the young woman Appellant struck called in a complaint concerning Appellant's behavior. CX 3 ("Driver physically hit 21 year old passenger after passenger try [*sic*] to take a picture of him. Mother would like to press charges. . ."). Not long after that complaint the County police interviewed the young woman, and then Appellant. Joint Exhibit (JX) 1. The police report states, in part:

> At some point [Appellant] notified Central again because [the young woman] started taking pictures of him. He said that [the young woman] kept taking pictures of him and due to this he became uncomfortable so he pulled the bus over. [Appellant] then advised that [the young woman] started approaching him and that he "felt threatened when they approached me." [Appellant] said he thought she had a weapon so he slapped her hand and saw something fall to the floor. It was then that he saw it was a cell phone. Additionally, [Appellant] advised that the girls yelled at him saying, "that's why they hurt people like you, we're black we need to stick together." JX 1.

Appellant testified that one of the young women said to him "that's why we shoot bus drivers." Tr. 133; Tr. 173. Although Appellant testified that the remark was on the bus video and heard by [redacted] (GO), Appellant's Transit Operations Supervisor, and Appellant's witness, [redacted] (AC), Appellant was unable to locate the portion of the video allegedly containing that statement. Tr. 137-39. The Board has also reviewed the video many times and did

not hear the remark. Appellant did not ask AC to testify about the remark on direct examination. Nor did Appellant ask GO about the remark during cross examination. Tr. 139.

Although Appellant told the police that the young woman had said "that's why they hurt people like you, we're black we need to stick together," JX 1, he did not tell the police or anyone in DOT that the passengers had made any comment about shooting bus drivers. Tr. 163-65. The day after the incident Appellant filed a signed Operator Incident report. CX 5.[6] In the report, Appellant says, in part: "the young lady approached me and I thought she had a weapon and I knocked it out of her hand. Once it hit the floor I saw it was a cell phone." Appellant's incident report makes no mention of any verbal threat. CX 5.

[redacted] (DF), a Transit Operations Supervisor, testified that it is County policy that bus drivers lack the authority to physically touch anybody or to evict a passenger from a bus. Tr. 101. DF further testified that there is no County policy prohibiting bus passengers from using cell phones. Tr. 102.

GO testified that all Ride On busses, including Appellant's, have a "panic button" by the driver's left hand which permits a driver to discretely summon assistance in an emergency or if he or she feels unsafe. Tr. 69; Tr. 95. Engaging the panic button automatically opens the microphones on the bus, allowing the DOT Transit Division's central dispatch or operations center and the Montgomery County police to hear what is being said and other sounds on the bus. Tr. 70. Engaging the panic button results in immediate attention to the situation on the bus and may result in Transit Division supervisors and police responding to the vehicle. Tr. 70. Drivers are encouraged to engage the panic button rather than engage in physical or verbal altercations with passengers, and suffer no adverse consequences for choosing to call for assistance that way. Tr. 70.

Although Appellant made several calls to central dispatch during the incident on July 13, 2016, he admitted that he did not at any time engage the panic button. Tr. 70; Tr. 95; Tr. 180. Appellant questioned whether the panic buttons always worked properly. Tr. 179. Appellant initially stated that the one time he engaged the panic button it did not work, but then admitted that he really was not sure and that assistance arrived. Tr. 180 ("I don't -- I can't really tell you if the panic button worked or not. What I saw was police officers . . ."). County witness DF testified that the panic button systems are periodically tested and that he was unaware of any instance of malfunction when a bus driver has intentionally pressed the button. Tr. 103.

On March 22, 2017, subsequent to the filing of the Appeal in this matter, an administrative hearing was conducted by telephone before a Hearing Examiner of the Maryland Department of Labor, Licensing, and Regulation (DLLR) Unemployment Insurance (UI) Lower Appeals division. On April 6, 2017, a decision was issued concluding that there was insufficient evidence to support a finding that Appellant was discharged for misconduct under the UI law. AX 1.

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[6] The incident report is dated July 13, 2016, but was apparently filed by Appellant the next day. Tr. 50.

The parties submitted a Montgomery County Police Department incident report, dated July 13, 2016, as Joint Exhibit 1.[7] The County submitted 23 exhibits, as follows:

1. Notice of Disciplinary Action (NODA) – Dismissal, January 5, 2017
2. Statement of Charges (SOC) – Dismissal, November 16, 2016
3. MC311 Complaint #1298099133
4. Bus Video (disk), July 13, 2016
5. Incident Report, July 13, 2016
6. NODA – 5-Day Suspension, June 20, 2016
7. SOC – 10-Day Suspension, April 19, 2016
8. MC311 Complaint #1285806079
9. MC311 Complaint #1285815637
10. NODA - 8 Hour Forfeiture of Annual Leave, June 15, 2016
11. SOC - One Day Suspension, March 2, 2016
12. MC311 Complaint #1282134429
13. MC311 Complaint #1282573668
14. MC311 Complaint #1283648732
15. MCPR Chapter 5
16. MCPR Chapter 33
17. OP0007 Division of Transit Services Standard Operating Procedure
18. Article 10 of MCGEO CBA
19. Employee Acknowledgement for Participation in ADR Process, May 5, 2016
20. Employee Acknowledgement for Participation in the ADR Process, June 15, 2016
21. MC Time Card Correction
22. MC Time Correction Request, 1/31/17
23. MC Time Card Audit Edit

The Board admitted into evidence County Exhibits 1, 3-6, 10, 15-16, and 21-23.

Appellant introduced the following exhibits, which were all admitted into evidence:

1. Unemployment Insurance Appeals Decision, April 6, 2017
2. DLLR teleconference audio tape
3. MCPD incident report, July 13, 2016
4. ADR acknowledgement, December 21, 2016.

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 21, 2008 and June 30, 2015), § 5, *Equal Employment Opportunity*, which provides in relevant part:

§ 5-1. Definitions.

[7] JX 1 is an unredacted version of the redacted police report admitted as Appellant Exhibit 3.

(d) **Harassment:** Inappropriate written, verbal, or physical conduct, including the dissemination or display of written or graphic material, based on one's race, color, religion, national origin, ancestry, sex, sexual orientation, marital status, age, disability, or genetic status, that unreasonably interferes with one's work performance or creates an intimidating, hostile, or offensive working environment. . . .

§ 5-2. Policy on equal employment opportunity.

(e) An employee must not:

(1) discriminate against or harass another employee on the basis of race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status;
(2) subject another employee, contractor, consultant, citizen, applicant, customer, or client to harassment on the basis of any of the causes listed in (1) above; . . .

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

§ 33-1. Definition.

Disciplinary action: One of the following adverse personnel actions taken by a supervisor against an employee:

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

§ 33-2. Policy on disciplinary actions.

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

(b) ***Prompt discipline***.

(1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.

(2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

(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.

(a) ***Oral admonishment.*** An oral admonishment is:

(1) the least severe disciplinary action;
(2) a spoken warning or indication of disapproval about a specific act of misconduct or violation of a policy or procedure; and
(3) usually given by the immediate supervisor.

(b) ***Written reprimand.*** A written reprimand is:

(1) the second least severe disciplinary action;
(2) a written statement about a specific act of misconduct or violation of a policy or procedure; and
(3) included in the employee's official personnel record.

(c) ***Forfeiture of annual leave or compensatory time.***

(1) A forfeiture of annual leave or compensatory time:
(A) is the removal of a specified number of hours from the annual leave or compensatory time balance of an employee;
(B) must be at least one day but not more than 10 days.
(2) The FLSA prohibits a department director from taking compensatory time from a non-exempt employee for disciplinary purposes.

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(e) ***Suspension.***

(1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct.
(2) A department director may not:
(A) suspend an employee for more than 10 days without the approval of the CAO; or
(B) suspend an employee for more than 30 days, unless:
(i) a longer suspension is imposed by a court or quasi-judicial body; or
(ii) the employee agrees to the longer suspension as part of a settlement agreement.

* * *

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

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

(c) violates any established policy or procedure; . . .

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

(h) is negligent or careless in performing duties; . . .

ISSUE

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

ANALYSIS AND CONCLUSIONS

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

Collateral Estoppel

A threshold legal issue to be addressed is the doctrine of collateral estoppel. Appellant has pointed to the State Department of Labor, Licensing, and Regulation administrative decision regarding his application for Unemployment Insurance benefits and argues that under the doctrine of collateral estoppel the Board must honor the DLLR factual findings for purposes of this appeal. AX 1; Appellant's Post-Hearing Brief, pp. 1-2; Appellant's Brief, May 31, 2017, pp. 1-3; Appellant's Addendum, May 1, 2017, pp. 7-10.

After conducting a hearing by telephone, a DLLR Hearing Examiner found that the County had not proven that Appellant was discharged for misconduct: "The claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises." AX 1. As a result, Appellant did not receive a disqualification from receipt of full UI benefits.

Garrity v. Maryland State Bd. of Plumbing, 447 Md. 359 (2016), holds that when an issue is litigated and decided by an administrative agency, and the determination was essential to that decision, the determination may be conclusive in a subsequent administrative action between the parties, whether on the same or a different claim. *Garrity* holds that if the answers to the following four questions are in the affirmative, collateral estoppel may be applied:

1. Was the issue decided in the prior adjudication identical with the one presented in the current case?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

447 Md. at 369. The Board must therefore conduct an analysis of the answers to these questions.

1. Are the issues identical?

The County argues that the unemployment insurance issues before DLLR were different from the issues now before the MSPB, in part because the purposes of the UI law are different. County Response, May 31, 2017, p. 2. However, it is not necessary that the purposes of the UI law be identical to those of the Montgomery County Merit System law, only that the issue to be decided be the same. *Cosby v. Department of Human Resources*, 425 Md. 629, 642 (2012), *quoting Montgomery County Dep't of Health & Human Services v. Tamara A.*, 178 Md. App. 686, 701, *rev'd on other grounds*, 407 Md. 180 (2009) ("Collateral estoppel does not require that the prior and present proceedings have the same purpose, nor does it mandate that the statutes upon which the proceedings are based have the same goals. The relevant question is whether the fact or issue was actually litigated and decided in a prior proceeding, regardless of the cause of action or claim."). The factual issue in the UI benefits appeal was whether Appellant's actions while driving a bus on July 13, 2016, constituted misconduct for which he could be terminated and denied unemployment benefits. Labor and Employment Article (LE), §§ 8-1002 and 8-1003 (defining gross misconduct and misconduct as grounds for disqualifying an applicant from receiving unemployment benefits).[8] The factual issue in this MSPB proceeding is whether Appellant's

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[8] Those provisions of the Labor and Employment Article provide:

§8–1002.
(a) In this section, "gross misconduct":
(1) means conduct of an employee that is:
(i) deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit; or
(ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations; and
(2) does not include:
(i) aggravated misconduct, as defined under § 8–1002.1 of this subtitle; or
(ii) other misconduct, as defined under § 8–1003 of this subtitle.
(b) An individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is gross misconduct in connection with employment.
(c) A disqualification under this section shall:
(1) begin with the first week for which unemployment is caused by discharge or suspension for gross misconduct as determined under this section; and
(2) continue until the individual is reemployed and has earned wages in covered employment that equal at least 25 times the weekly benefit amount of the individual.

§8–1003.
(a) An individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
(1) aggravated misconduct, under § 8–1002.1 of this subtitle; or
(2) gross misconduct under § 8–1002 of this subtitle.

actions provided cause justifying his dismissal from County employment for misconduct. MCPR § 33-2(c) ("misconduct"); § 33-3(h) ("for cause"); § 33-5 (lists the various causes for disciplinary action). Indeed, it appears that the County removed Appellant from duty and placed him on administrative leave pending charges pursuant to MCPR § 33-7. That personnel regulation permits such action when it is determined that an employee should be relieved from duty for "serious misconduct or if the presence of the employee will cause or continue a disruption in the workplace."

We conclude that both the UI law and the merit system law address discipline based on "misconduct."

2. Was there a final judgment on the merits?

The County concedes that the decision of the Hearing Examiner was a "final judgment" on the issue of unemployment insurance benefits. County Response, p. 3. The County did not appeal the UI decision to the DLLR Board of Appeals or seek judicial review. Accordingly, the decision of the DLLR Hearing Examiner is a final administrative decision on the merits. *Montgomery County v. Lake*, 68 Md. App. 269, 279 (1986) ("decisions of the [Workers Compensation] Commission when unappealed and unreviewed are final.").

3. Are the parties the same or in privity?

The County concedes that the parties to this proceeding are the same as those in the DLLR UI proceeding. County Response, p. 3.

4. Was the party against whom collateral estoppel is asserted given a fair opportunity to be heard on the issue?

The County asserts that it was not given a full and fair opportunity to be heard on the issue of whether Appellant violated the MCPR, and whether the level of discipline was appropriate. County Response, p. 3. The County argues that a Lower Appeals division UI telephone conference hearing is "not akin to full adjudicatory hearings on the merits," and that the "DLLR proceedings only satisfy the minimum requirements of procedural due process due in part to the informal and expedited nature of the proceedings. . .". *Id.*

Although DLLR UI hearings are not required to be heard by the State Office of Administrative Hearings, State Government Article (SG) § 9-1601(a)(11), the DLLR hearing procedures do provide an administrative adjudicatory process. The DLLR Lower Appeals Division has adopted procedural regulations that are consistent with the contested case procedures of the

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(b) A disqualification under this section shall:
(1) begin with the first week for which unemployment is caused by discharge or suspension for misconduct; and
(2) continue for a total of at least 10 but not more than 15 weeks, as determined by the Secretary, based on the seriousness of the misconduct.

State Administrative Procedure Act (APA). LE § 8-504.[9] Hearing Examiners are specifically granted the ability to administer oaths, and to subpoena witnesses and documents or other records, LE § 8-505, and must admit and evaluate evidence in accordance with the standards of the State APA. LE § 8-506(a)(2). A record of the hearing is maintained, and parties are entitled to have counsel present. LE § 8-506(d) and § 8-507.

The procedural regulations for UI Lower Appeal cases are set forth in Code of Maryland Regulations (COMAR) Title 9, Subtitle 32, Chapter 11. Witnesses testify under oath, COMAR 09.32.11.02.I(1), and the rules of evidence are to apply in accordance with SG § 10–213 of the State APA. However, as opposed to the MSPB administrative process, the UI Lower Appeals procedural regulations do not allow prehearing discovery.[10]

While the UI procedural regulations allow the introduction and use of electronic records such as the video of the July 13, 2016, incident, it is significant that unlike MSPB hearings, in order for the video to have been introduced and utilized the County would have had to "produce at the hearing the equipment necessary to allow review of the contents of the records." COMAR 09.32.11.02.I(2). This requirement creates a significant burden on litigants, a burden that is not present in litigation before this Board.

The County suggests that telephone conference hearings do not provide adequate administrative due process. Although the State APA specifically provides that contested case hearings may be conducted "by telephone, video conferencing, or other electronic means," SG § 10–211, proceedings before this Board are in-person. While the County did have the right "to appear at the hearing and present evidence in person," COMAR 09.32.11.02.S(2), it apparently could not have compelled Appellant to appear in person so that the Hearing Examiner could evaluate his demeanor and credibility.

We find most persuasive the County's argument that it did not have an incentive to defend the UI case vigorously because the stakes were so low. We agree that the consequences of an adverse Unemployment Insurance decision are substantially less significant to the County than the outcome of an MSPB dismissal hearing. While the stakes in a UI hearing may be significant to a terminated employee, and the potential saving or expenditure of thousands of taxpayer dollars is not inconsequential to the County, the primary interest of the County is in the safe and efficient operation of its workforce in delivering public services. In the context of this case, an important way to effectuate that interest is to ensure through the personnel disciplinary process that only responsible and reliable bus drivers are permitted to operate County busses and interact with the public. The gravity of a decision by the MSPB on the issue of whether it is necessary and appropriate to dismiss a bus driver who assaults passengers overwhelmingly outweighs the importance of a determination by a UI Hearing Examiner whether the County will be liable for some additional UI benefit payments.

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[9] The State APA does not apply to unemployment insurance hearings "except as specifically provided" by the Labor and Employment Article. SG § 10-203(a)(5).

[10] The procedures do permit a party to obtain a subpoena for the production of documentary evidence at the hearing. COMAR 09.32.11.02J.

We are aware that in an unreported decision the Court of Special Appeals concluded that the collateral estoppel doctrine precluded a State employee from relitigating facts established in a UI hearing. *Greene v. Dep't of Labor, Licensing, & Regulation*, 2017 WL 394516 (Md. Ct. Spec. App.), *cert. denied*, 453 Md. 365 (2017). As an initial matter, Maryland Rule 1-104 provides that an unreported opinion of the Court of Special Appeals may not be considered as authority:

> **(a) Not Authority.** An unreported opinion of the . . . Court of Special Appeals is neither precedent within the rule of *stare decisis* nor persuasive authority.

Thus, we are not bound by the decision in *Greene*, and do not consider it as precedent or persuasive authority.

Moreover, we find that decision readily distinguishable from this case. In *Greene,* because the employee worked for the DLLR UI division, the benefits determination hearing was delegated to the State Office of Administrative Hearings (OAH). *Id.*, at footnote 1. Not only are the hearing procedures at the OAH more extensive than those normally provided at UI hearings, the exact same OAH procedural rules were used when the OAH also conducted the State employee termination hearing. *See* COMAR 28.02.01. The UI hearing in this case was instead conducted under the more limited procedures of COMAR 09.32.11. These are critical procedural differences that distinguish *Greene* from the circumstances of this case.

Furthermore, what is at stake for the terminated employee is considerably different from that of the employer. The *Greene* court found that the terminated employee had every incentive to vigorously defend herself at the UI hearing because a finding of misconduct would disqualify her from receiving benefits for a period of time. That loss of income is unquestionably critical to an out-of-work individual. The same cannot be said for the impact of a few thousand dollars of UI benefits payments on the incentive of a County with a $5.5 Billion budget, and nearly 13,000 employees, to vigorously defend itself in every UI hearing.

We conclude that the expedited, informal, and limited procedures afforded at the UI Lower Appeals division hearing did not provide the County with a fair opportunity to present its case, and that due to the small stakes involved, the County lacked a sufficient incentive to vigorously defend itself. *See Rue v. K-Mart Corp.*, 552 Pa. 13, 713 A.2d 82 (1998); Restatement (Second) of Judgments, § 28. Application of the doctrine of collateral estoppel might be appropriate when a fact or issue is determined by an adjudication that provides procedural protections equal or superior to those provided by this Board. *See e.g. Graybill v. United States Postal Service,* 782 F.2d 1567, 1573 (Fed Cir. 1986) (employee collaterally estopped from asserting innocence in administrative proceeding after a guilty plea). That is not the case here. Accordingly, we find that the doctrine of collateral estoppel does not apply and that the decision of the DLLR UI Hearing Examiner therefore carries no preclusive effect.

Appellant's testimony was not credible and his behavior was unacceptable

Appellant does not, as he cannot, deny that he struck a passenger and knocked her cell phone out of her hand. Rather, he claims that he was justified in striking the passenger as he feared for his safety and was acting to defend himself.

We conclude that Appellant's claims that he was verbally and physically threatened are contrary to the visual and audio evidence, uncorroborated, self-serving, and ultimately not credible. *See* MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010). Based on Appellant's demeanor, behavior, and inconsistent testimony, the Board concludes that Appellant was not a credible witness.

The video, Appellant's own testimony, and his failure to use the "panic button" all suggest that his claim of fear for his safety is not worthy of belief. At no time during any of the calls to central dispatch does Appellant claim that the passengers have threatened to shoot him, that he felt threatened in any way, or that he had struck one of them. Tr. 162. Indeed, his behavior throughout the bus video is argumentative, hostile, and aggressive towards the young bus passengers. The audio from the bus video and Appellant's testimony make clear that Appellant was upset that the young female passengers were recording him with their cell phones. While Appellant may have found that behavior offensive or uncomfortable, it did not constitute a physical threat.

Appellant's assertion that he felt physically threatened by a young woman holding a cell phone in plain view is simply not worthy of credence. It is more probable that he constructed his implausible "self defense" claim after the young woman's mother filed a complaint and the police were called to investigate. Appellant was simply trying to avoid administrative and possibly criminal sanctions by blaming the victim.

The County takes the reasonable position that bus drivers should not assault bus passengers. We agree. The County Ride On bus service owes its passengers the highest standard of care to provide a safe means and method of transportation. *Todd v. Mass Transit Administration*, 373 Md. 149, 156 (2003). This public policy requiring the safe and secure transportation of the public includes protecting the public, especially the vulnerable or young, from ill-treatment by those responsible for and in charge of their transportation. *Cf., Henson v. Greyhound Lines, Inc.*, 257 S.W.3d 627, 629 (Mo. Ct. App. 2008) ("a carrier owes passengers protection against insults and indignities."). As this Board has previously found:

> In determining whether the discipline of dismissal is consistent with law and regulation, and otherwise appropriate . . . it must be judged against the particular content of the Appellant's position, a bus driver. *This is a position where service to the user public is direct, and one in which a concern for the public's safety is paramount.*

MSPB Case No. 04-09 (2004) (emphasis added). *See* MSPB Case No. 84-80 (1984). *Cf.,* MSPB Case No. 15-03 (2014) (because of public safety concerns, County need not risk hiring a bus operator with a history of assault).

The County has proven by a preponderance of the evidence that Appellant's behavior has been unacceptable, offensive, and in violation of County policies and regulations. The County need not tolerate a bus operator abusing his direct contact with passengers to engage in assaultive

and harassing behavior. MCPR § 5-2(e) ("An employee must not: (2) subject another . . . citizen, . . . customer, or client to harassment. . ."). [11]

We are aware that for over four years Appellant was apparently an exemplary employee. However, Appellant's conscious decision to become more assertive with passengers, including those who might not have the correct fare, was unwise and has had dire consequences. Appellant has engaged in a pattern of unacceptable behavior towards bus passengers. Appellant has previously received an oral admonishment, a written reprimand, the forfeiture of leave, and a five-day suspension for his rude, confrontational, and unprofessional behavior. CX 6; CX 10; Tr. 44, 54. It is within the Board's authority to consider Appellant's pattern of behavior, and to conclude that it warrants discipline. *See* MSPB Case No. 07-14 & 07-15 (2007); MSPB Case No. 96-12 (1996); MSPB Case No. 87-42 (1987).

Appellant's previous discipline constitutes progressive discipline under MCPR § 33-2(c), and suggests that Appellant is unlikely to alter his unacceptable behavior. Persistent misconduct despite being disciplined justifies his dismissal. MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case Nos. 07-14 & 07-15 (2007).

ORDER

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

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

For the Board
December 18, 2017

[redacted]
Charlotte Crutchfield
Chair

[11] Inexplicably, the NODA did not cite to MCPR § 33-5(t) ("The following, while not all-inclusive, may be cause for a disciplinary action . . . against an employee who: . . . (t) engages in a physical altercation or assaults another while on duty, on County government property, or in a County vehicle. . ."). Nevertheless, the NODA and the Statement of Charges provide detail concerning the factual and legal basis for the charges and do explicitly use the term "assault." CX 1 & 2. The proper standard to assess the adequacy of charges is whether the County has given adequate notice so as to enable the employee to make an informed response. MSPB Case No. 17-12 (2017); MSPB Case No. 07-10 (2007), MSPB Case No. 07-13 (2007), and MSPB Case No. 08-09 (2008). Whether one considers the NODA to be inartfully drafted, there was sufficient specificity and clarity concerning the nature of the charges to enable Appellant to mount an adequate defense to the charge of assault on a passenger. We thus conclude that the SOC and NODA gave detail sufficient to provide Appellant with adequate notice under MCPR §33-6. *See Regan v. Board of Chiropractic Examiners*, 120 Md. App. 494, 519-20 (1998), *aff'd* 355 Md. 397 (1999).