BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 17-20**
	*	
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 (MSPB or Board) on the appeal of [redacted] (Appellant). On March 13, 2017, Appellant filed this appeal with the Board, challenging his dismissal from a Correctional Officer III position with the Department of Correction and Rehabilitation (DOCR).

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

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

FINDINGS OF FACT

Appellant was hired as a Correctional Officer with DOCR on April 17, 2006. County Exhibits (CX) 13 and 14.[1] On September 27, 2015, Appellant was assigned to work the first shift from 10:30 p.m. until 7:00 a.m. on September 28. Appellant then worked overtime on the September 28 second shift, from 7 a.m. to 3 p.m., as a Pre-Trial officer responsible for facilitating and coordinating new inmate movements through the Pre-Trial process. *Id*.

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

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

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[1] The Board admitted into evidence the following County Exhibits:
CX 1 - Montgomery County Police Department Incident Report 15049216
CX 12 - Memorandum prohibiting Appellant from DOCR facilities, April 12, 2016
CX 13 - Statement of Charges – Dismissal, January 27, 2017
CX 14 - Notice of Disciplinary Action – Dismissal, February 22, 2017
CX 15 - Agreement Between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, and Montgomery County, July 1, 2013 through June 30, 2016
CX 16 - MCDOCR Policy and Procedure 3000-7
CX 17 - Section 33 of Montgomery County Personnel Regulations
CX 18 - Certified record of the Docket Entries in State v. [redacted], Circuit Court Case No. 129815C
CX 19 - Recording of plea hearing in State v. [redacted], Case No. 129815C, November 27, 2017
CX 20 - Notice of Disciplinary Action, October 19, 2012
CX 21 - Notice of Disciplinary Action, December 31, 2012
CX 22 - Notice of Disciplinary Action, October 25, 2013
CX 23 - Notice of Disciplinary Action, June 20, 2014
CX 24 - Notice of Disciplinary Action, May 27, 2015
CX 25 - Notice of Disciplinary Action, May 29, 2016
CX 26 - Notice of Disciplinary Action, January 27, 2017
CX 27 - Notice of Disciplinary Action, February 22, 2017
CX 28 - Prison Rape Elimination Act, various sections
CX 29 – Code of Maryland Regulations (COMAR) 12.10.01.03
CX 30 – COMAR 12.10.01.04

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

On April 12, 2016, Appellant was banned from all DOCR facilities and placed on Administrative Leave with pay. CX 12 & 13; Tr. 26, 67. On April 20th or 25th, 2016, Appellant was issued a Statement of Charges (SOC) and placed on leave without pay status pending the outcome of criminal charges or trial. CX 25.[2] Appellant participated in Alternative Dispute Resolution where the parties agreed to leave Appellant on leave without pay status, and a Notice of Disciplinary Action (NODA) for the suspension was issued on May 29, 2016. CX 25; Tr. 30-31, 63.

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

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

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

The Director testified that it is the policy of DOCR to fully comply with federally mandated Prison Rape Elimination Act (PREA) standards, and that DOCR is able to maintain its accreditation from the American Correctional Association for that reason. Tr. 55-56; CX 28. The PREA standards require a zero-tolerance policy regarding sexual abuse. Tr. 56; CX 28, pp. 10 and

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

29. The Director further testified that in all other cases of sexual assault against an inmate the correctional officer who committed the offense was dismissed by DOCR. Tr. 50. The Director emphasized that Appellant's behavior shocked the conscience and represented one of the most severe violations a correctional officer could commit. Tr. 41.

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

After further continuances of the Circuit Court trial date, on November 27, 2017, a hearing in the criminal case was held on the record in the Circuit Court for Montgomery County before Judge [redacted]. CX 18, DE #105. At the hearing, Appellant orally entered a plea of guilty to the charge of malfeasance in office. CX 18, DE #107. The basis for the plea was the September 28, 2015, sexual offense against inmate, E.L. According to the proffer of facts presented at the hearing, Appellant entered E.L.'s cell and sexually assaulted her by touching her breast with his hand, placing her breast in his mouth, and touching her genital area. CX 19, Recording of Plea Hearing, Circuit Court Criminal Case No. 129815, November 27, 2017, at 10:59:20 – 11:00:30. The State further proffered that test results confirmed with 95% accuracy that saliva found on E.L.'s breast matched Appellant's DNA.

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

In his argument urging a more lenient sentence, Appellant's attorney told the Court that Appellant had already been held accountable since he "can no longer work in the jail system or be part of the jail system," CX 19, at 11:19:19-23, and that he "has accepted responsibility." CX 19, at 11:21:42 – 44. The judge reviewed the factors upon which he would determine the sentence, weighing the fact that Appellant had violated the "enormous trust . . . and power" Appellant had over the lives of inmates as a correctional officer against the consideration that Appellant had no prior convictions, had not been charged with another offense in the two years since the incident, and that he had been held accountable by losing his job as a correctional officer. CX 19, at 11:26:48 – 11:27:55. The judge concluded that when a correctional officer violates the great trust and

responsibility he has over vulnerable inmates, he must be held accountable, and that merely losing his correctional officer job was insufficient accountability. CX 19, at 11:27:50 – 11:28:36. Appellant was sentenced to two (2) years of incarceration, which was suspended, and one (1) year of supervised probation. CX 19, at 11:27:52 – 11:30:10; DE # 110.

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

APPLICABLE LAW AND POLICY

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

§ 33-1. Definition.

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

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

§ 33-2. Policy on disciplinary actions.

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

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

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

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

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

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

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

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

§ 33-3. Types of disciplinary actions.

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

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

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

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

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

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

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

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

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

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

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

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

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

V. RELATIONSHIP OF DEPARTMENTAL PERSONNEL WITH VISITORS/ DEFENDANTS/ INMATES/ RESIDENTS/ PARTICIPANTS:

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

* * *

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

1. Conformance to Law:

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

* * *

9. Conduct Unbecoming:

a. No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming includes, but is not limited to any breach of the peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or stated in other Departmental policies, shall be considered conduct unbecoming an employee of this Department, and will subject the employee to disciplinary action by the Department.[3]

b. Examples of conduct unbecoming include but are not limited to falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, retaliation, misuse of a county owned radio, and the failure to cooperate with an internal investigation.

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

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

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

§ 115.76 Disciplinary sanctions for staff

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

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

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

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

> **28.1 Policy**
>
> A disciplinary action against an employee must be initiated promptly when it is evident that the action is necessary to maintain an orderly and productive work environment. Except in cases of theft or serious violations of policy or procedure that create a health or safety risk, disciplinary actions must be progressive in severity. However, the Employer reserves the right to impose discipline at any level based on cause. The severity of the action should be determined after consideration of the nature and gravity of the offense, its relationship to the employee's assigned duties and responsibilities, the employee's work record, and other relevant factors.
>
> **28.2 Types of Disciplinary Actions**
>
> Disciplinary actions shall include but are not limited to:
>
> (f) Suspension-Pending Investigation of Charges or Trial
>
> (1) The department director may place an employee in a leave without pay status during investigation as follows:
>
> (A) if the employee is being investigated by a law enforcement agency for an offense that is job-related, the employee shall be placed in a leave without pay status for a period not to exceed 90 days;
>
> (B) if the department is conducting the investigation for misconduct, the employee shall be placed in a leave without pay status for a period not to exceed 60 days; and
>
> (C) while the employee is waiting to be tried for a civil or criminal offense, the suspension may be indefinite.

ISSUE

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

ANALYSIS AND CONCLUSIONS

Timeliness of the Charges

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

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

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

Appellant cannot reasonably assert that he has suffered any prejudice by a charging delay. He was aware of the allegations against him and the identity of his accuser from the day of the incident. His suspension pending his criminal trial was imposed promptly upon the conclusion of the investigation and his arrest. Finally, the lack of prejudice is further demonstrated by the fact

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

that Appellant understandably asked for the proceedings in this Appeal to be stayed pending final resolution of the criminal charges.

Burden of Proof

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

Estoppel

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

Application of the doctrine of collateral estoppel is appropriate when a fact or issue is determined by an adjudication that provides procedural protections equal or superior to those provided by this Board. MSPB Case No. 17-15 (2017). Appellant's criminal conviction has preclusive effect in this forum against his attempt to question whether the sexual assault occurred. *See* MSPB Case No. 16-08 (2016). The conviction has preclusive effect whether Appellant was found guilty by a jury after a full trial or after a guilty plea. *See Graybill v. United States Postal Service*, 782 F.2d 1567, 1573 (Fed Cir.) *cert. denied*, 479 U.S. 963 (1986) (employee collaterally estopped from asserting innocence in federal Merit Systems Protection Board proceeding after a guilty plea to criminal charges in Maryland state court). Appellant is collaterally estopped from arguing that he did not engage in the conduct underlying the crime to which he pleaded guilty.

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

At sentencing, Appellant acknowledged that he understood the elements of the offense to which he was pleading guilty. CX 19, at 10:55:44 – 51. Appellant's attorney also acknowledged

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

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

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

Appellant's Behavior Warrants Dismissal

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

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

While the Director testified that he considered Appellant's prior disciplinary history, he concluded that this offense was serious enough that progressive discipline was not required. Rather, the egregious behavior warranted the most severe level of discipline. Tr. 49, 69; CX 20-24. Given the egregious nature of Appellant's action, the Director's position is well supported by

the personnel regulations. MCPR § 33-2(c)(2) ("In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee. . ."). Furthermore, the record reflects that DOCR has consistently applied this standard and dismissed all other staff who have engaged in similar behavior, another factor listed in MCPR § 33-2(b) and one of the *Douglas* factors.

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

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

For his betrayal of the trust and responsibility vested in him as a correctional officer Appellant was convicted of a serious crime. The offense for which Appellant was found guilty was malfeasance in office, often referred to as misconduct in office.[5] It is a common law offense involving "corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office." *Duncan v. State*, 282 Md. 385, 387 (1978). The common law punishment for the offense is "imprisonment or fine to which may be added removal from office and disqualification to hold office." 282 Md. at 388 (*citing* 4 W. Blackstone, *Commentaries* 141). As discussed above, in an effort to mitigate the criminal sanctions facing Appellant, his attorney acknowledged on his behalf in court that he "can no longer work in the jail system or be part of the jail system," CX 19, at 11:19:19-23. We agree. In sentencing Appellant, the Court found that he must be held accountable for violating the great trust and responsibility he had over vulnerable

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

inmates and that losing his correctional officer job was a critical aspect of that accountability. CX 19, at 11:27:50 – 11:28:36. A correctional officer who has actually engaged in the sexual abuse of an inmate has disqualified himself from continuing to serve in that job.

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

ORDER

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

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and 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
September 17, 2018

Angela Franco
Chair