BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 18-07**
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MONTGOMERY COUNTY GOVERNMENT,	*	
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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 October 10, 2017, Appellant filed this appeal with the Board challenging his dismissal from a Correctional Officer III position with the Montgomery County Department of Correction and Rehabilitation (DOCR of Department).

BACKGROUND

The discipline in this matter relates to an April 27, 2017, incident involving the use of force against an inmate at the Montgomery County Correctional Facility (MCCF).[1] On October 3, 2017, DOCR issued a Notice of Disciplinary Action (NODA) dismissing Appellant. County Exhibit (CX) 15. The NODA found that Appellant violated the following provisions of the Montgomery County Personnel Regulations (MCPR): § 33-5(c) (violates any established policy or procedure); § 33-5(e) (fails to perform duties in a competent or acceptable manner); § 33-5(h) (negligent or careless in performing duties), CX 7.

In addition, Appellant was found to have violated multiple DOCR policies, as follows. DOCR Policy Number 1300-10: § III(D) (force is not authorized as a means of punishment); §

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

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

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

On March 6, 2018, the parties appeared before the Board for a prehearing conference. The prehearing conference in Case No. 18-06 immediately preceded the prehearing conference in this case. The Board asked the appellant in Case No. 18-06 if he was willing to remain in the conference room so that the Board could discuss the consolidation issue with all parties at the same time. Appellant agreed to this approach, as did the appellant in Case No. 18-06 (Sergeant CR).

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

The joint hearing was held over the course of three days, July 16, 17, and 18, 2018. During the hearing the Board heard testimony from ten witnesses, including the appellants in both MSPB Case Nos. 18-06 and 18-07.[2] County Exhibits 1 through 7, 12 through 16, and 20-21 were admitted

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

1. Corporal [redacted] (KM)
2. Corporal [redacted] (JB)
3. Lieutenant [redacted] (AM)
4. Lieutenant [redacted] (DL)
5. Deputy Warden [redacted] (SG)
6. Captain [redacted] (DW)
7. Director [redacted] (RG)
8. Sergeant [redacted] (GS)
9. Sergeant [redacted] (CR)

into evidence in MSPB Case No. 18-07. Appellant's Exhibit (AX) 1 was also admitted into evidence in MSPB Case No. 18-07.[3]

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

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

FACTUAL POSITIONS OF THE PARTIES

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

Appellant's Factual Position

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

A. *Appellant's Employment Record and Performance*

1. Appellant was employed as a Correctional Officer by DOCR at MCCF since on or about August 1, 2011. CX 14.
2. Appellant was promoted to Corporal on or about November 17, 2013. CX 14.
3. Prior to the incident in question, Appellant had been a stellar Correctional Officer. Tr. 345-46, 594-95.
4. Lieutenant DL testified that he evaluated Appellant's performance as "above expectations."

10. Corporal [redacted] (RS or Appellant)

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

5. DOCR Director RG testified that Appellant's work record was "very good," he was a "trusted instructor," and that he did not have "other issues that sometimes plague an individual in corrections." Tr. 594-95.
6. Appellant never previously received discipline for using excessive force on an inmate.
7. Sergeant CR, Appellant's supervisor for approximately two-and-a-half years, never witnessed Appellant use excessive force on an inmate. Tr. 848.
8. Corporal JB never witnessed Appellant use excessive force on an inmate. Tr. 195.
9. Lieutenant AM, who had been Appellant's supervisor for approximately 6-7 years never witnessed Appellant use excessive force on an inmate. Tr. 244.
10. Lieutenant DL never witnessed Appellant use excessive force on an inmate. Tr. 403.
11. At the time of the incident, Appellant primarily worked in the Crisis Intervention Unit ("CIU"). CX 14; Tr. 931.
12. The inmates housed in the CIU are often suicidal and/or have severe emotional issues and, thus, are generally more difficult, unruly and/or disruptive. Tr. 931 (Appellant); Tr. 190 (Corporal JB confirming that CIU inmates are generally "more volatile"); Tr. 404 (Lt. DL).
13. Appellant had received specialized training on how to deal with the type of inmates typically housed in CIU. Tr. 931.
14. Appellant was primarily assigned to the CIU because he did a good job dealing with such difficult inmates. Tr. 931.
15. In an apparent attempt to get himself removed from MCCF and sent to an outside hospital, Inmate SG falsely reported to staff that he had ingested a bottle of deodorant. CX 2, p. 3.

16. Inmate SG admitted that he lied about ingesting deodorant for such purpose. CX 2, p. 3; Tr. 842 (Sgt. CR).
17. Inmate SG was assessed by a nurse and cleared to be housed in the CIU, subject to a 15-minute suicide watch until he could be assessed by a CIU therapist the next day. CX 14; Tr. 833 (Sgt. CR).
18. Inmate SG was escorted to his CIU cell (B-l) by Sgt. CR, Corporal JB, and Corporal JG. Tr. 153 (Cpl. JB); Tr. 833-34 (Sgt. CR).
19. During that time, the Inmate SG made statements about doing whatever he needed to do to get removed to medical. Tr. 837 (Sgt. CR).
20. Once inside the cell, Inmate SG was instructed to remove his clothing so that he could be placed in a suicide gown, however, Inmate SG initially refused to comply, was angry, and had to be calmed down by Sgt. CR. Tr. 858-59 (Sgt. CR).
21. Inmate SG was generally a very disruptive and noncompliant inmate who had initiated altercations with other officers on multiple occasions and had a reputation in MCCF. Tr. 920 (Sgt. CR); Tr. 189-90 (Cpl. JB confirming that Inmate SG was in fights in the facility and in and out of CIU "quite a bit").
22. As noted by Corporal JB, it was his belief that the Inmate was going to do whatever he thought he had to do to get transferred to outside medical. Tr. 185-86.
23. After Inmate SG was placed in his suicide gown and the other officers had left, Inmate SG began banging some part of his body, possibly his head, against the cell door. Tr. 936 (Appellant testifying that he told the Inmate to stop banging his head and the Inmate replied "F you"); Tr. 157 (Cpl. JB testifying that he heard Appellant say that the Inmate was

banging his head); Tr. 833, 837 (Sgt. CR testifying that he heard Appellant say that the inmate was "banging his head" and that Sgt. CR believed the inmate was banging his head when they entered the cell and only after the Incident was over did Sgt. CR believe the Inmate may have been using his shower shoes to bang the cell).

24. Appellant did not know with 100% certainty which part of his body Inmate SG was banging against the cell door, however, Appellant believed at the time of the Incident that it was the Inmate's head. CX 2, p. 10 (Officer JG confirming that Appellant stated Inmate SG was "banging his head"); Tr. 306, 972, 990 (Appellant).
25. Under such circumstances where an inmate presents a threat of injury to himself (including possibly banging his head against the cell), a correctional officer is permitted to enter the cell to intervene without calling a supervisor since it is an emergency situation. CX4; Tr. 776, 817-19, 827 (Sgt. GS testifying that officers should/will respond when an inmate kicks or bangs on the cell, that if there is a risk of damage to property and/or the inmate then use of force can be used to quell the disturbance, and that officers can enter cell without first contacting supervisor if inmate is banging his body against the cell since that is an emergency situation); Tr. 300, 993-94 (Appellant testifying that he entered the cell because he believed the Inmate was injuring himself by banging his head against the cell and that the Inmate was in imminent danger); Tr. 164, 194-95 (Cpl. JB testifying that entering the cell was appropriate under the circumstances since they entered the Inmate's cell because "*we were all under the impression that [the Inmate] was hurting himself*") (emphasis supplied); Tr. 236 (Lt. AM testifying that if officers believe that an inmate is in imminent danger then officers may enter the cell); Tr. 343, 383-85 (Lt. DL acknowledging that if the

inmate "is causing imminent harm to himself" then the shift commander does not need to be called and present before the officers enter the cell and testifying that entering cell and use of force would be appropriate if inmate is "causing self-injurious harm").

26. If the Shift Commander had been notified so that a planned use of force could be initiated rather than the officers entering the cell immediately, it might take 45 minutes for the Emergency Response Team (ERT) to respond. Tr. 307 (Appellant).
27. Appellant believed that waiting that long to take action would have made the situation worse for the inmate, not better. Tr. 307.
28. Allegations that Appellant improperly entered the cell are beyond the scope of the charges brought against him and which formed the basis for his dismissal. CX 14 & 15; Tr. 226-27.
29. Appellant instructed the Inmate to come to the door and attempted to handcuff the Inmate (through the food slot from outside the door) in order to calm him down, maintain order, and/or restrict the Inmate's movements/banging. Tr. 936 (Appellant).
30. Appellant had a hold of the Inmate's suicide jumper but once he attempted to cuff the Inmate, the Inmate pulled away before Appellant could cuff the Inmate, resulting in the suicide jumper coming off the Inmate. Tr. 937-38.
31. Sgt. CR was the most senior supervisor on the floor at the time of the Incident. Tr. 857 (Sgt. CR testifying that he was the cluster sergeant and senior floor officer at the time of the Incident and, therefore, that he was the highest ranking officer on the CIU floor).
32. Upon hearing the commotion Sgt. CR ordered Inmate SG's cell door to be opened. Tr. 833.

33. Corporal KM was stationed at the Control Panel and opened the door to Inmate SG's cell remotely. Tr. 835-36 (Sgt. CR); Tr. 157 (Cpl. JB).
34. The Control Panel is located on the other side of the hall from Inmate SG's cell but on a diagonal and, moreover, there is a stairwell that runs between the line of sight from the Control Panel to Inmate SG's cell (B-l). CX 12, 20; Tr. 95-96 (Cpl. KM).
35. None of the Officers (other than Corporal KM himself) testified to seeing Corporal KM in or around the cell at any time during the Incident. Tr. 835-36, 843, 915-16 (Sgt. CR testifying that Corporal KM was at the control panel/station and was not in/at cell B-l at any time during the Incident); Tr. 176 (Cpl. JB testifying that he never saw KM in the cell area during the Incident).
36. Furthermore, since inmates were free in the day room, if KM left the Control Panel that would have been a breach of safety protocol. Tr. 87-88 (KM).
37. Appellant and officers JB and JG entered Inmate SG's cell, with Sgt. CR standing in the doorway of the cell. Tr. 835-36, 844, 870 (Sgt. CR); Tr. 158, 163-64 (JB confirming that Sgt. CR was standing in the doorway to the cell).
38. Inmate SG was resisting so Sgt. CR ordered the Inmate to get down on the ground but he did not comply and had to be forcibly placed on the ground. Tr. 836-37, 871-72 (Sgt. CR); Tr. 938-39 (Appellant); Tr. 161-62.
39. Appellant grabbed a suicide gown and placed it on the Inmate so that he was not naked. Tr. 940-43 (Appellant).
40. Inmate SG was then placed in handcuffs in order to restrain him. Tr. 836 (Sgt. CR).

41. However, even though the Inmate was placed in handcuffs, he was still resisting the Officers. Tr. 836 (Sgt. CR testifying that he ordered the officers to handcuff the inmate, which they did, but that the Inmate was still "resistive"); Tr. 161-62 (Cpl. JB confirming that Inmate was resisting the Officers both before and after the handcuffs were placed on the Inmate).
42. Although Inmate SG was placed in handcuffs, he still had the ability to injure the Officers present in the cell, whether by kicking, biting, grabbing with hands, etc. Tr. 358 (Lt. DL); Tr. 951 (Appellant testifying that he has had his genitals grabbed by a cuffed inmate); Tr. 191 (Cpl. JB confirming that a handcuffed inmate can still cause harm/injury to officers).
43. Moreover, officers are not required to wait until such injury takes place before applying use of force to a non-compliant inmate. Tr. 809 (Sgt. GS).
44. After Inmate SG was placed in handcuffs and placed on the ground, the Officers released the Inmate and began to leave the cell, at which time Inmate SG got up from the ground and quickly approached the Officers and/or Appellant. CX 2, p. 13; Tr. 837 (Sgt. CR testifying that the Inmate "gets up pretty fast and comes toward" Appellant); Tr. 873 (Sgt. CR testifying that the Inmate "got up and approached [Appellant] quickly"); Tr. 315 (Appellant).
45. Appellant then grabbed Inmate SG by the collar with his left hand, placed Inmate SG against the wall (so that Inmate SG was located between Appellant and the wall), reached his right arm around the front of Inmate SG and placed his right hand/knuckle under Inmate SG's chin in order to apply a pressure point for pain compliance. Tr. 837-40, 879-82 (Sgt. CR); Tr. 281, 948-51 (Appellant).

46. Such pain compliance (including pressure points) is authorized under County policy and is used, as its name suggests, in order to make a non-compliant inmate compliant. CX 4; Tr. 856 (Sgt. CR testifying that the County - Lt. DL - taught him pressure points as authorized pain compliance technique).
47. As testified to by the County's own use of force instructor (Sgt. GS), pressure points can be used for pain compliance purposes on an inmate who is already handcuffed/restrained until the inmate is under full control. Tr. 775.
48. Appellant then released the pressure point and re-applied it since it did not appear to be working. Tr. 839-41 (Sgt. CR).
49. Upon applying it the second time, Inmate SG appears to have stated words to the effect that "it hurts" and/or that he "couldn't breathe." Tr. 948 (Appellant).
50. An inmate yelling "it hurts" is consistent with the application of a pressure point. Tr. 350 (Lt. DL).
51. Furthermore, if Inmate SG truly could not breathe, then he would not be able to say he "couldn't breathe," as confirmed by the County's own use of force instructors. Tr. 351 (Lt. DL testifying that if an inmate is able to speak, then he is able to breathe); Tr. 754-55 (Sgt. GS, based on his CPR training/knowledge, testifying that if an inmate is able to speak then they are able to breathe).
52. Similarly, if an inmate is being choked, then the inmate cannot speak and/or yell because the inmate's airway would be cut off. Tr. 755 (Sgt. GS).
53. Furthermore, inmates often lie about being in pain and/or being injured in order to avoid and/or be released from such pain compliance techniques. Tr. 403 (Lt. DL testifying that

he has personal knowledge of inmates doing that "numerous times," possibly dozens of times).

54. Accordingly, Appellant had every reason to believe the Inmate was lying about not being able to breathe and there is a high probability (if not certainty) that the Inmate was in fact lying about not being able to breathe since it is impossible for a pressure point to the chin to cause an inmate to stop breathing. Tr. 949 (Appellant confirming his belief that Inmate SG was lying about not being able to breathe).
55. Upon confirming that Inmate SG would stop resisting the Officers and behave properly, Appellant released the pressure point. Tr. 950, 999 (Appellant).
56. As testified to by the County's own use of force instructor (Sgt. GS), asking an Inmate if he is done acting out and/or misbehaving is not improper. Tr. 811.
57. Only after Appellant applied the pressure point(s) did the Inmate finally and fully cease resisting and/or become compliant. Tr. 841 (Sgt. CR testifying that the Inmate finally "calmed down" only after Appellant applied the second pressure point), Tr. 844 (Sgt. CR testifying that he gave the Inmate "several orders to calm down because he was argumentative," that the Inmate did not obey any of those orders "until after [Appellant] had applied the pressure point the second time" since the first time was ineffective); Tr. 166, 178, 190 (Cpl. JB confirming that the Inmate was acting "very agitated" during the entire Incident and only became fully compliant after Appellant placed the Inmate against the wall); Tr. 309-10 (Appellant).
58. The entire Incident from beginning to end was very brief, perhaps a matter of less than a minute. Tr. 950 (Appellant).

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

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

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

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

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

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

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

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

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

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

incident without any resulting injuries), and it has been acknowledged by Appellant and Sgt. CR that a report should have been prepared under the County's guidelines. Tr. 910 (Sgt. CR); Tr. 958 (Appellant); Tr. 503 (Deputy Warden SG testifying that there is no evidence of a "cover up," *i.e*., an affirmative effort or conspiracy to hide the Incident, other than the fact that the Officers did not in fact write up a report).

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

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

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

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

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

87. Appellant was clearly in control of his emotions and/or conduct during the Incident, as he immediately obeyed his commanding officer (Sgt. CR) and ceased arguing with the Inmate as soon as he was ordered to do so by Sgt. CR. Tr. 841-43, 849-50 (Sgt. CR testifying that Appellant immediately obeyed his command and was in control of his actions); Tr. 956 (Appellant).
88. As explained by Appellant, sometimes you have to yell or raise your voice when dealing with CIU inmates in order to get through to them. Tr. 955-56.
89. Although Appellant had threatened to spray the Inmate with pepper spray, that was a ploy and Appellant did not spray the Inmate because he did not want to cause the Inmate unnecessary harm/injury (which also demonstrates that Appellant was in control of himself and his emotions). Tr. 309, 938, 952 (Appellant).
90. Appellant also refrained from taking the Inmate "down to the floor" because he did not want to cause the Inmate unnecessary harm/injury. Tr. 953.
91. Appellant has not and would not place an inmate in a "choke hold" because it could cause death to an inmate. Tr. 954.
92. Appellant used one of the lowest levels of force permitted under the County's use of force policy specifically because he did not want to cause any unnecessary harm to the Inmate. Tr. 955.
93. Correctional officers are not expected to be experts in use of force techniques and should perform such techniques as best as they are able to in any given situation. Tr. 755-56, 773 (Sgt. GS); Tr. 349 (Lt. DL).

94. "Pressure points, joint locks, restraints, [and] handcuffs are the most minimum level of force that a staff member can employ." Tr. 766 (Sgt. GS).
95. Such techniques have a minimal probability of causing injury/danger to the inmate. CX 4; Tr. 773, 776.
96. A pressure point cannot cause an inmate to stop breathing. Tr. 651 (Director RG).
97. Thus, pressure points and/or restraints are a lower level of force than the use of pepper spray and/or take down. CX 4; Tr. 242 (Lt. AM); Tr. 400-01 (Lt. DL).
98. Lt. AM testified that he would have sprayed the Inmate with pepper spray rather than enter the cell of an inmate banging their head (unless they were bleeding "profusely") and that he has done so "many times," which is a greater use of force than what Appellant used. Tr. 246-47.
99. Similarly, Lt. DL testified that he would have sprayed the Inmate with pepper spray under the circumstances, claiming it is a lesser use of force, despite the fact that it is actually a greater use of force under the County's own written policy. Tr. 342, 373-75 (Lt. DL); CX 4.
100. The harmful/painful effects of pepper spray can last about 45 minutes. Tr. 250 (Lt. AM); Tr. 375 (Lt. DL).
101. The pain from a pressure point ceases immediately as soon as the pressure point is released. Tr. 375 (Lt. DL).
102. "Pain compliance" are techniques used to cause pain in order to gain an inmate's compliance. Tr. 774 (Sgt. GS).

103. A pressure point is a form of pain compliance that causes temporary pain but does not cause injury to the inmate. Tr. 774 (Sgt. GS); Tr. 390 (Lt. DL admitting to using pressure points for pain compliance over an inmate).

104. A headlock cannot be applied incorrectly. Tr. 337 (Lt. DL).

105. It is used for control of the head, while a choke hold is used to do harm or render someone unconscious. Tr. 347-48.

106. However, an officer who is not properly trained or educated in such matters could confuse the two holds/techniques as being one and the same. Tr. 350.

107. A headlock can be appropriate in a less than deadly force situation. Tr. 192 (Cpl. JB).

108. The County's own use of force witness was unaware of a headlock ever causing serious injury to any County inmate. Tr. 393 (Lt. DL).

109. Even assuming (arguendo) that Appellant put the inmate in a headlock, such a technique is permissible, unlike a choke hold which cuts off the flow of oxygen. Tr. 770-71 (Sgt. GS); Tr. 192 (Cpl. JB confirming that head locks are an approved use of force technique).

110. A headlock is on the low end of the use of force continuum as a soft empty-hand technique along with pressure points, restraints and/or handcuffs. Tr. 771 (Sgt. GS).

111. Furthermore, there is no technique which an Officer is "barred" from using and an Officer should use whatever force/means is necessary in the situation as viewed from the perspective of a reasonable Officer (not using 20/20 hindsight). Tr. 751 (Sgt. GS); Tr. 309, 954 (Appellant); Tr. 342, 375-76 (Lt. DL acknowledging that no technique is barred under the County's written use of force policy).

112. Although Lt. DL also testified that officers are taught not to employ choke holds in defensive training class, Appellant was never scheduled for such defensive training classes by the County and/or never received such training. Tr. 341-44 (Lt. DL); Tr. 929 (Appellant).
113. It is the administrative lieutenant's duty to register officers like Appellant for such training classes and ensure that officers receive the required training. Tr. 367 (Lt. DL).

The County's Factual Position

The County's factual position is as follows:

1. Appellant was employed with DOCR for approximately five (5) years from 2012 until his dismissal in 2017. Tr. 928.
2. Prior to his employment with the County, Appellant was employed as a correctional officer with Franklin County Jail in Franklin County, Pennsylvania from 2008 through 2012. Tr. 929.
3. Appellant admits that his responsibilities as a correctional officer included being responsible for the safety and security of inmates. Tr. 928.
4. The Crisis Intervention Unit ("CIU") is a housing unit for inmates who have mental issues or who need to be monitored for suicidal ideations. Tr. 52.
5. Within the CIU is the B unit where individuals are placed who have serious mental health issues. Tr. 223.
6. Cell Bl, a suicide cell, is located in the B unit. Tr. 153.
7. Appellant contended that he was assigned to the CIU the majority of the time. Tr. 931.

8. Bl has a mattress but no bed frame. Tr. 153.
9. The cell is otherwise empty but for a sink and toilet. *See* Montgomery County's Prehearing Submission "MC" No. 20.
10. The door to cell Bl has a window at both the top of the door and the bottom of the door, and there is a food slot in between the two windows. Tr. 154, 268; CX 20.
11. If an individual were to stand outside the door to cell Bl and look through either window, they would be able to see the entirety of the cell. Tr. 62, 99, 165.
12. On April 27, 2017, Appellant and Corporal KM were assigned as correctional officers to the CIU. Tr. 52.
13. Sergeant CR was their supervisor for that shift. Tr. 52.
14. Corporal KM was assigned to the control panel from which he could open and close doors within CIU. Tr. 56-57.
15. The control panel is located in the center of the unit and there are windows at the control unit that look into the B unit. Tr. 56.
16. The proper protocol when entering into an occupied cell on the B unit is to handcuff the inmate through the food slot prior to entry and uncuff the inmate through the food slot after exiting the cell. Tr. 230.
17. Inmate SG was brought to the CIU on April 27, 2017, after a report that he had tried to drink deodorant and therefore was deemed to have possible suicidal ideation. Tr. 53-54, 153.
18. After Inmate SG was brought to CIU, he changed into a suicide gown without incident and the door to his cell was closed. Tr. 57.

19. Inmate SG was placed in cell Bl. Tr. 55,153.
20. After Inmate SG changed into the suicide gown and the door was closed, a banging noise could be heard coming from that cell. Tr. 58.
21. After the banging began, Appellant ordered Corporal KM to open the door to Inmate SG's cell. Tr. 58, 157.
22. Corporal KM opened the door to cell Bl and then ran into the B unit to observe what was happening inside the cell. Tr. 58.
23. Appellant entered the cell, followed by Corporals JB and JG, while Sgt. CR remained outside of the cell in the doorway of the cell. Tr. 158.
24. At no time prior to entry into the cell did Appellant visually confirm that Inmate SG was banging his head or otherwise harming himself. Tr. 973-74, 977-78.
25. When Appellant came to the cell, Inmate SG was not actively banging his head. Tr. 268.
26. No one present was able to visually confirm that Inmate SG was actively harming himself before they entered the cell. Tr. 58, 157, 195, 864, 973-74.
27. At the time of entry into the cell, when Inmate SG was standing in the back of the cell screaming, there was not a confirmed on-going emergency that justified entry into the cell. Tr. 274.
28. Each officer is equipped with a radio, which they carry on their person, and the component used to speak into the radio is located on the shoulder of each officer. In order to place a call on the radio, including to a Lieutenant, one needs to press a button on the side of the device located on the shoulder and speak. That transmission would be heard throughout

the facility on each officer's radio. In addition to the radio, there is a phone at the control station that can be used to make a call to a Lieutenant. Tr. 220-22, 419-20.

29. Once inside the cell, Appellant, Corporal JB, and Corporal JG handcuffed Inmate SG. Tr. 59.
30. Corporals JB and JG then assisted Inmate SG to stand up and faced him towards the wall by the sink. Tr. 65, 296; *see also* CX 20 for visual reference.
31. At the time that Inmate SG was handcuffed and standing by the wall, he was under control. Tr. 69-70, 121, 167.
32. Appellant further agrees that after Inmate SG was handcuffed, he was cooperative. Tr. 944.
33. After Inmate SG was handcuffed, Appellant used a maneuver on Inmate SG that caused Inmate SG to utter "I can't breathe." Tr. 66, 256-57, 891, 948.
34. Inmate SG also said that the action caused him pain. Tr. 256-57, 882, 889, 948.
35. Appellant admits that Inmate SG said that Appellant was choking him. Tr. 259, 987.
36. After Inmate SG made those statements, Appellant released his grip on Inmate SG and then did the maneuver again. Tr. 67, 259, 987.
37. The second time Appellant placed his hands on Inmate SG, he did it "really hard, hard and fast so it would hurt very much." Tr. 282, 987.
38. At that point, Appellant had an exchange with Inmate SG asking him effectively, if he was going to behave. Tr. 67, 999.
39. During this time, Inmate SG was still handcuffed behind his back. Tr. 168, 296, 302.

40. Appellant contends Inmate SG's actions led him to believe he was going to do something to harm himself, but admits that he did not actually see Inmate SG bang his head or any other part of his body. Tr. 977-78.
41. Inmate SG did not make any threat to or engage in spitting, kicking, or biting. Tr. 121-22, 166.
42. Appellant was not an Emergency Response Team (ERT) member and admits that when he tried the pressure point techniques previously, they did not work. Tr. 981-82.
43. Appellant admits that once the incident was over, he did not write or submit a report. Tr. 995-97.
44. At no time prior to, during, or after the incident did Appellant contact the Lieutenant on duty to report the incident. Tr. 223, 893.
45. Appellant was required to report the incident. Tr. 204, 206; *see also* the Use of Force Policy at CX 4.
46. Appellant admits that he knew he should write a report and did not. Tr. 995-96.
47. Appellant further admits that all five involved officers failed to write a report. *Id*.
48. At no time during or after the incident did Appellant contact the medical unit to have Inmate SG evaluated for injuries. Tr. 290.
49. Inmate SG should have been seen by the medical unit as a result of this incident. Tr. 291.
50. It is a requirement that when there is a use of force, outside normal or routine procedures, the medical unit must be called to evaluate the inmate. Tr. 401-02.
51. After the incident on April 27, 2017, Appellant checked on Inmate SG multiple times throughout his shift. Tr. 954.

52. As a result of being told not to write a report after having witnessed an excessive and unjustified use of force, several officers spoke with the Office of the Inspector General (OIG). *See* OIG Memorandum, CX 1.
53. The OIG conducted an investigation of the incident and submitted a written report to Director RG on June 5, 2017. Tr. 574-75; CX 1.
54. Upon receipt of the report, Director RG ordered an internal investigation of the incident, which was completed by Captain MW. Tr. 576; *see* Internal Investigation at CX 2.
55. When a Use of Force report (DCA 36) is written by an officer, it gets submitted to the Sergeant and then to the Lieutenant. Tr. 133.
56. The Lieutenant then conducts an investigation, including a use of force checklist, gathers all reports, reviews video surveillance, and then forwards the information to the Deputy Warden with a recommendation on whether the use of force was justified. Tr. 219, 421. That did not occur in this case because this incident was not reported.
57. The Use of Force Policy of the DOCR is available, at all times, on a shared drive accessible to all correctional officers. Tr. 120-21, 521, 587.
58. Officers are told to review the policy. Tr. 120-21.
59. Additionally, officers receive use of force training during pre-shift training. Tr. 525.
60. Use of force training does not include training on the use of pressure points or defensive tactics techniques. Tr. 332.
61. Appellant received Use of Force training and report training during his time at DOCR. *See* CX 18.

62. Appellant has never taken a Defensive Tactics training while employed by DOCR. Tr. 316, 344.
63. Appellant never requested to take a Defensive Tactics course while employed by DOCR. Tr. 284.
64. According to the Appellant, it simply did not interest him to take the class. Tr. 286-87.
65. The Defensive Tactics course is offered monthly by DOCR. Tr. 523.
66. It is not a State law requirement to take the class every year; rather, it is a departmental goal for all officers to take yearly defensive tactics training. Tr. 522.
67. Defensive Tactics is taught by Lieutenant DL, who is also the instructor for the ERT. Tr. 324.
68. Defensive Tactics is a hands-on class. Tr. 332.
69. Only five pressure point techniques are taught in the Defensive Tactics course, to include the mandibular angle. Tr. 333.
70. The course does not teach officers to place inmates in headlocks or chokeholds. Tr. 336, 340.
71. The pressure point known as the mandibular angle is effectuated by applying pressure to the soft spot behind the earlobe with a part of the thumb while having counter pressure against the head. Tr. 333.
72. At the time of the incident, there were no surveillance cameras filming inside the Bl cell or even the B unit. Tr. 493. There was, however, a surveillance camera filming the CIU unit. Tr. 493.

73. By the time DOCR had notice that the incident occurred, the video footage was no longer available due to the system recording over video more than two to four weeks old depending on movement in the area being recorded. Tr. 492, 632.
74. Prior to this incident Corporal KM did not have any prior disagreements with Appellant. Tr. 112.
75. At the conclusion of the incident, Inmate SG looked at Appellant and asked why he was doing this to him, and the Appellant responded back something to the effect of that's what you get for not listening. Tr. 67.
76. Appellant admitted that he responded back to Inmate SG that he wanted him to behave. Tr. 999.
77. Both Lieutenant AM and Lieutenant DL testified that without visual confirmation that Inmate SG was causing himself harm, there was no reason to enter his cell. Tr. 223, 343, 417.
78. The Use of Force policy is clear that only if this had been an "extreme emergency" would Appellant have been permitted to take action including entering the cell. Tr. 223-24; CX 4.
79. Deputy Warden SG testified that "an emergency would be something that would seriously harm the inmate or something that the inmate was trying to kill himself or do something to seriously hurt himself." Tr. 467.
80. Both Corporals JB and KM observed Appellant's interactions with Inmate SG and testified that once Inmate SG was handcuffed inside the cell, he was under control and compliant. Tr. 69-70.

81. In fact, the last time anyone had to tell Inmate SG to calm down was when he was being handcuffed. Tr. pg. 188.
82. Despite Inmate SG being under control and in handcuffs, Appellant inexplicably came from behind Inmate SG and applied what was described as a headlock/choke hold on Inmate SG. Tr. 66, 165.
83. At that point, there was no justification to become physical with Inmate SG. Officers are not supposed to go hands-on with an inmate if they are handcuffed and not kicking, biting, etc. Tr. 131.
84. Both Corporal KM and Corporal JB testified that when Inmate SG was handcuffed, he was not biting, kicking, spitting, or threatening to do any of those acts. Tr. 121-22, 166.
85. Sgt. CR testified that the only "resistance" Inmate SG displayed was a "passive aggressive stiffening," not actual combativeness. Tr. 845. This was corroborated by Appellant. Tr. 939.
86. Both Corporal KM and Corporal JB state they were not touching Inmate SG when Appellant placed him on the wall and applied a headlock. Tr. 69, 202.
87. If Inmate SG had truly attacked Appellant, it is likely that the four other officers present would have come to his aid. Tr. 567.
88. The hold used by Appellant on Inmate SG was not an authorized pressure point. Lieutenant DL is the expert on defensive tactics and pressure points. Lieutenant DL described the mandibular pressure point as a "soft spot behind the earlobe." Tr. 333.
89. Appellant described a maneuver underneath the jaw/chin. Tr. 838, 948.

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

98. Sergeant GS admitted that he framed his opinion that the force used was appropriate before reviewing any reports, which means he formed his opinion only after having spoken to Appellant and Sgt. CR. Tr. 785, 823.

99. Sergeant GS conceded that he believed his friends' version of the events without doing his own independent investigation. Tr. 786.

100. Sergeant GS admitted that once the inmate was compliant, all maneuvers should stop (Tr. 793), that it is improper to initiate force when it is not needed (Tr. 793), that officers should be trained in any maneuvers they may want to use on an inmate (Tr. 799-800), and that he has never personally seen a use of force where the inmate was not later seen by medical, and if an inmate declines to go to medical, it still needs to be documented (Tr. 807).

FINDINGS OF FACT

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

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

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

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

SG to stop banging his head and Inmate SG replied, "F you." Tr. 936. In response, Appellant ordered Inmate SG to come to the door so that he could apply handcuffs. Tr. 936. Appellant attempted to handcuff Inmate SG through the food slot of the closed cell door, but SG refused to cooperate and retreated to the back of the cell. Tr. 936-38.[4]

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

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

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

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

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

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

testimony of Sergeant GS was based on his review of the investigative report and conversations with Appellant and Sergeant CR.

The record evidence, however, does not support Appellant's claim that such a situation existed prior to his demand that Inmate SG's cell door be opened. Upon hearing the loud noise coming from SG's cell Appellant had an ample opportunity to accurately assess the situation by looking into the cell. When he did so he saw no indication that Inmate SG was attempting to cause harm to himself or that an emergency existed. The opinions expressed in the testimony of Sergeant GS concerning the need to enter Inmate SG's cell are thus not based on the factual circumstances faced by Appellant.

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

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

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

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

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

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

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

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

KM's decision to report the incident despite instructions to the contrary, and his frank acknowledgement of his regrets about previously failing to report certain unspecified incidents while serving in military detention facilities overseas, add credence to his testimony. Tr. 136-37.[5] For the reasons discussed above, because his version of events is plausible, and based on his straightforward, consistent, and believable demeanor while testifying, we find Corporal KM to be a credible witness and give weight to his testimony.

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

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

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

Appellant told investigators that as he started to leave the cell Inmate SG "stood up quickly (from a laying-down position while handcuffed in the back) and approached him and the other officers." CX 2, p. 13; Tr. 315, 944-45. Appellant repeatedly testified that Inmate SG "jumped up" from the mattress. Tr. 941-42, 945-46, 948. Similarly, Sergeant CR testified that Inmate SG suddenly rose from a face down position to his knees, "flips himself up," jumped off the mattress, and went towards Appellant. Tr. 837-38, 875, 880. When asked how from a position face down on a mattress with arms handcuffed behind his back SG could quickly rise to his knees without rolling over, jump to his feet, and lunge at Appellant Sergeant CR responded that SG was "young" and "pretty flexible." Tr. 880.

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

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

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

After Inmate SG claimed that he was choking, Appellant released his grip, and then immediately endeavored to apply the maneuver more effectively. Tr. 67, 259, 987. Appellant admits that the second time he applied the pressure point to Inmate SG he did so "really hard, hard and fast so it would hurt very much." Tr. 282, 987. Appellant was successful in his second attempt and Inmate SG exclaimed that he was in pain. Tr. 256-58, 841, 882, 889, 948. Appellant testified

that the application of the hold and use of the pressure point on Inmate SG, who was handcuffed behind his back and did not represent a threat to Appellant or the other officers, was for "pain compliance." Tr. 296, 302.

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

DOCR policy mandates that each correctional officer involved in a use of physical force incident must file a report using form DCA 36 before the end of their shift. CX 4, DOCR Policy 1300-10, § V(D); Tr. 204, 206. It is undisputed that, contrary to DOCR policy, the use of force incident was not reported in writing by Appellant by way of a DCA 36 or otherwise. Tr. 291, 295-97. Although Sergeant CR told Officers KM and JB that they should not file a report, eventually Officers KM and JB reported the use of force to the OIG. CX 1; Tr. 73-74, 79, 86, 137, 171-72. Appellant, however, admitted that it was his decision not to submit a report, and that he was not ordered by Sergeant CR not to file a report. Tr. 295. Appellant's explanation for his failure to report, which he concedes was improper, is that the use of force was minor and did not result in any injury. Tr. 297; Appellant's Brief, p. 12. Appellant admits that his failure to file a report was a violation of DOCR policy. Tr. 291.

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

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

APPLICABLE LAW

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

§ 33-1. Definition.

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

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

§ 33-2. Policy on disciplinary actions.

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

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

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

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

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

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

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

(1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
(2) the employee's work record;
(3) the discipline given to other employees in comparable positions in the department for similar behavior;

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

§ 33-3. Types of disciplinary actions.

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

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

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

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

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

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

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

3. Use of Force:

Employees shall use force only in accordance with the law and departmental policy and procedures and shall not use more force than is necessary to control the situation or protect themselves and/or others from harm. No employee shall use force in a discriminatory manner.

4. Integrity of the Reporting System:

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

9. Conduct Unbecoming:

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

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

10. Neglect of Duty/Unsatisfactory Performance:

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

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

III. POLICY

It is the policy of the MCDOCR that:

A. Use of force against an inmate is authorized when the acting staff member reasonably believes such force is necessary to accomplish any of the following objectives:

1. protection of self or others;

2. protection of property from damage or destruction;

3. prevention of an escape;

4. recapture of an escapee;

5. prevention of a criminal act;

6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or

7. the prevention of the individual from self-inflicted harm.

B. When force is used, the least amount of force reasonably necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved.

C. Use of force shall be applied in accordance with the force continuum, as defined in Section II of this policy, unless the acting staff member reasonably believes the situation requires immediate escalation to a greater degree of force to accomplish any of the objectives identified in this policy.

D. Force is not authorized as a means of punishment.

* * *

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

V. USE OF PHYSICAL FORCE - GUIDELINES

The following guidelines must be strictly followed whenever it becomes necessary to use physical force on an inmate:

A. Except in cases of extreme emergency, ONLY the Shift Administrator/Shift Manager/Assistant Unit Manager shall authorize the use of physical force to either move or restrain an unruly or uncooperative inmate. Whenever an officer believes that the use of physical force may be necessary, he/she must immediately contact the Shift Administrator/Shift Manager/Assistant Unit Manager.

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

VIII. INSTRUMENTS OF RESTRAINT

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

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

D. Use of Force:

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

ISSUE

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

ANALYSIS AND CONCLUSIONS

Timeliness of Discipline

As previously noted, Appellant incorporates by reference the timeliness argument made in his Motion to Dismiss Charges and/or to Bifurcate Issue of Timeliness, asserting that the charges against him were brought too late. Appellant's Brief, p. 25. On February 27, 2018, the Board issued

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

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

Burden of Proof

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

Appellant's Testimony Lacked Credibility

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

As discussed above, it was Appellant's testimony that, after being handcuffed behind his back and placed face down on a mattress on the floor, Inmate SG quickly jumped to his feet and

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

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

We find that Appellant's behavior strongly suggests that his testimony was unreliable because, with the assistance of Sergeant CR, he sought to conceal a serious use of force incident from appropriate review. We conclude that on certain key points Appellant's testimony was contradictory, inconsistent, inherently improbable, self-serving, and ultimately not credible. MSPB Case Nos. 15-12 & 15-13 (2016); MSPB Case No. 14-19 (2014); MSPB Case No. 10-15 (2010). *See* MSPB Case No. 13-03 (2013) (appellant's implausible story and delay in relating his version of events seriously undermines his credibility).

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

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

After the officers left cell B1 they and Appellant heard a loud banging coming from the cell. Lieutenant AM testified that if a correctional officer is concerned that an inmate with mental health issues may be banging his head in a cell and causing himself harm, the officer should first "look at what's exactly happening." Tr. 223. While Appellant went to the cell when he heard the banging, he admitted that he did not see Inmate SG banging his head and was unsure how he was

making the noise. The noise could have been caused by Inmate SG banging his sandals against the cell bars, as Sergeant CR conceded. Tr. 837, 920, 923.

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

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

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

Appellant Used Excessive Force

Once officers entered Inmate SG's cell the use of force was significantly more likely because of DOCR protocols designed to protect the safety of the officers. Thus, even though

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

Inmate SG was standing in the back of his cell, was not exhibiting any threatening or aggressive behavior, and the banging had ceased, Sergeant CR ordered Appellant, JB, and JG to handcuff Inmate SG and lay him down on the mattress. Tr. 268-69, 836, 936-37.[7]

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

Appellant came up behind Inmate SG and wrapped his right arm around Inmate SG in an attempt to apply a pressure point to him. It is undisputed that Inmate SG pleaded that he could not breathe and said that the hold applied by Corporal RS hurt. Tr. 66, 256-57, 259, 891, 948. Yet Appellant immediately put Inmate SG in the hold for a second time, rotated his thumb into Inmate SG's jaw "really hard, hard and fast so that it would hurt very much," Tr. 281-82, 987, and only released Inmate SG after asking if he was ready to behave. Tr. 67, 999.

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

We conclude that Appellant was motivated by a desire to discipline Inmate SG for being loud and difficult, and perhaps to physically impress upon him that future transgressions were intolerable and would be punished. The actions of Appellant were not justified by the need for him

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

to protect himself from an assault or to protect the inmate or another officer from serious bodily injury. Correctional officers have no right or authority to impose their personal attitudes concerning proper behavior on inmates through physical intimidation and harm.

Even were there a justification for using force against Inmate SG, which we do not agree existed, Corporal RS applied a headlock or similar maneuver and a pressure point after the risk that he claims justified the use of force had passed. A correctional officer may not use retaliatory physical force against an inmate for making noise, complaining, or for cursing at an officer. DOCR policies permit the use of force and restraints only to protect an inmate or others from harm and to maintain order within the facility. The use of force or restraints to punish inmates is prohibited. The use of a headlock or similar hold and application of a pressure point to obtain "pain compliance" did not constitute a good faith effort to maintain or restore discipline, but instead involved the use of force to maliciously and sadistically cause unnecessary pain to an inmate. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . whether or not significant injury is evident.").

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

Appellant gratuitously inflicted pain on Inmate SG in order to punish past conduct, deter future conduct, and intimidate. We conclude that Appellant's conduct was completely unacceptable, contrary to DOCR policies on the use of force, and in violation of MCPR § 33-5(c) (violates any established policy or procedure); § 33-5(e) (fails to perform duties in a competent or acceptable manner); § 33-5(h) (negligent or careless in performing duties); DOCR Policy 1300-10, § III(D) (force is not authorized as a means of punishment); DOCR Policy 3000-7, § VII(E)(3) (use of force); § VII(E)(9)(b) (conduct unbecoming); § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance); and MCCF Post Order No. 5(D) (Use of Force).

Failure to Report the Use of Force

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

Duty/Unsatisfactory Performance); MCCF Post Order No. 5(D) ("All Use of Force instances must be properly documented").

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

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

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

Failure to Refer Inmate SG for Medical Evaluation

In addition to Appellant's failure to report and document the use of force, DOCR policy requires that the medical unit be called after a use of force involving restraints. CX 4; Tr. 291. The policy is undoubtedly designed to determine if an individual subjected to the use of force had any injuries requiring medical attention, including those not evident to a lay person.[10]

Appellant argues that Sergeant GS testified that the only time inmates are checked by medical after being placed in restraints is when they are placed in a restraint chair, and that if he were the sergeant on duty during the April 27 incident he probably would not have called the

[8] Because of Appellant's failure to refer Inmate SG to the medical unit it is not possible to say with certainty whether there were any injuries.
[9] Based on the reaction of the other officers who felt the need to go to the OIG to report the incident we trust that the use of force like that utilized by Appellant is not generally considered "minor" in County facilities. On the other hand, it would be troubling indeed if such behavior was considered minor and occurred with frequency in DOCR facilities.
[10] Presumably the policy is also intended to provide documentation necessary for the County to defend itself in tort or civil rights lawsuits concerning allegations of injury.

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

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

The Appropriate Level of Discipline is Dismissal

Appellant, as a correctional officer, was responsible for maintaining institutional security and for the custody and care of inmates. As detailed above, the County has proven by a preponderance of the evidence the charges against Appellant of improperly entering Inmate SG's cell, using unnecessary and excessive force against Inmate SG as punishment, failing to report the use of force incident, and neglecting to refer Inmate SG for medical evaluation. Having determined that the County proved its case by a preponderance of the evidence, the remaining question is the appropriate level of discipline.

The Director testified that he considered Appellant's offense serious enough that progressive discipline was not required. Rather, Appellant's behavior was so egregious that it "shocks the conscience" and warranted the most severe level of discipline. Tr. 592-93; CX 15, p. 8. Director RG also considered the fact that Appellant and Sergeant CR endeavored to cover up the improper use of force by failing to document and report the incident. Tr. 585, 648, 650.

The County personnel regulations vest the DOCR Director with the discretion to eschew progressive discipline and move directly to termination given the serious nature of Appellant's misbehavior. MCPR § 33-2(c)(2) ("In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee. . .").

When the state takes individuals into custody it also takes on the responsibility to protect them from harm. Appellant had a fundamental responsibility to protect the health and safety of Inmate SG. He had no authority to impose *ad hoc* punishment or to cover up a serious use of force

incident. Those actions violated DOCR policies and had the potential to encourage a dangerous culture of silence within a correctional facility.

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

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

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

Appellant references the cases in CX 13, the charge in AX 1, and those introduced by the appellant in Case No. 18-06. *See* Appellant Exhibits 12 and 13 in Case No. 18-06.[11] He suggests that rather than being comparable to the dismissal charges in CX 13, this matter is akin to the suspension charges in AX 1 and AX 12 and 13 (18-06), and therefore the principles of progressive discipline warranted a penalty less than dismissal. Appellant's Brief, pp. 21-23.

The case provided by Appellant as his only exhibit involved a Correctional Officer III who was suspended for improperly entering a cell and engaging in a verbal and physical confrontation with an inmate. AX 1. Unlike Appellant's use of force against the helpless Inmate SG, the inmate in AX 1 was not handcuffed behind his back and assaulted the correctional officer, punching him repeatedly, including in the face. The use of force that followed was determined to be in self-defense, the officer submitted the required reports, and there was no attempt at a cover up. Tr. 607.

Another case involved the five-day suspension of a Correctional Officer III for pushing a teenaged citizen out the front door of a facility, not the use of force against an inmate in custody.

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

AX 13. Again, unlike this matter, the mandatory report was written and submitted and there was no attempt to cover up. We find the facts of those two cases to be readily distinguishable from this matter and not valid comparators regarding discipline. MSPB Case No. 10-04 (2010).

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

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

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

Tr. 616. An agency may legitimately contend that a penalty in a previous case was too lenient and that, as Director RG testified, it need not make the same mistake again. *Davis v. U.S. Postal Service*, 120 MSPR at 457, 465 (2013); *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, 651 (2012).

Second, the level of discipline was the result of a settlement.[12] In that circumstance, DOCR need not even explain the difference in treatment. *Davis v. U.S. Postal Service*, 120 MSPR at 463-64 ("The Board has held that if another employee receives a lesser penalty, despite apparent similarities in circumstances, as the result of a settlement agreement, the agency is not required to explain the difference in treatment. *See Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013)."); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325 (agency not required to explain lesser penalties imposed against other employees whose charges were resolved by settlement), *aff'd,* 975 F.2d 869 (Fed. Cir.1992).[13]

The record does not reflect that there have been any other cases sufficiently similar to the circumstances in this one. Director RG testified that he was not aware of other DOCR cases involving excessive use of force and a conscious effort to cover up the incident. Tr. 585. He also testified that he had never encountered a case where a handcuffed inmate was grabbed from behind

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

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

in a headlock, possibly choked to the point where he exclaimed "I can't breathe," and asked after the use of force "are you going to behave now?" Tr. 695.

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

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

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

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

Finding that the County has proven by a preponderance of the evidence that Appellant's behavior was unacceptable and in violation of County policies and regulations, we have upheld all charges against him. We do not see how the County could tolerate a correctional officer abusing his official authority by engaging in the unnecessary use of force against a vulnerable inmate, failing to report the use of force, or neglecting to have the inmate evaluated by medical personnel.

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

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

ORDER

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

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

For the Board
June 24, 2019

Michael J. Kator
Chair