

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

██████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 19-16

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SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART
OF CHAIRMAN MICHAEL KATOR

The Department of Fire and Rescue Services (DFRS, MCFRS, or Department) removed Appellant ██████████ from his Firefighter/Rescuer II position on the basis of Appellant’s alleged assault on his domestic partner at their home in Northern Virginia, as well as allegations that Appellant subsequently violated a protective order and failed to fully cooperate with a DFRS investigation by providing false and misleading statements to investigators. I join my colleagues in their disposition of the allegations concerning Appellant’s failure to fully cooperate with DFRS investigators and I have no quarrel with their resolution of the various factual disputes presented in this case.

My disagreement principally centers around their disposition of the allegations surrounding the off-duty misconduct, and in particular, their conclusion that there is a nexus between this misconduct and Appellant’s performance of his job. Most particularly, I would find there is no nexus concerning the violation of the court order charge. Because DFRS’s record of disciplinary actions against other firefighters makes clear that failing to cooperate in an investigation alone (or even in conjunction with a charge of domestic violence) is not a sufficient basis to remove a firefighter, I would not sustain Appellant’s removal.

The Need to Establish Nexus

In cases involving off-duty misconduct, the County must establish a nexus between the alleged misconduct and the employee’s ability to perform his duties. This obligation flows directly

from the County Charter, which mandates the establishment of a merit system that “shall provide the means to . . . maintain an effective, non-partisan, and responsive work force *with personnel actions based on demonstrated merit and fitness.*” Montgomery County, Maryland, Code § 401 (emphasis added). See also MCPR § 33-5 (allowing discipline for violation of “any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, . . . if such violation *is related to, or has a nexus with, County employment.*”) (emphasis added).

Thus it was in MSPB Case No. 16-08 (2016), for example, that the Board sustained the removal of a firefighter who had been convicted of reckless endangerment. The particular conduct that underlaid the conviction was the employee’s failure to inform the 911 operator (whom he had called to report an assault on him) that he had left his alleged assailant lying in a pool of blood after he had struck her in the head with a metal object. As the Board observed there, the employee’s “private conduct mocks the mission of the agency that employs him.” *Id.* at 10 (internal quotation omitted).

This Board does not sit generally to judge a County employee’s off-duty behavior. Rather, this Board sits to protect the merit system. Its mandate is to ensure that personnel actions are taken on the basis of *demonstrated merit and fitness.* Thus, in the context of off-duty misconduct, the Board must require that the County demonstrate—not articulate or speculate—that the identified off-duty misconduct actually impacts the employee’s ability to get his job done.

The DFRS Failed to Establish a Nexus between Appellant’s Off-duty Misconduct and His Job

It cannot be gainsaid that Appellant’s off-duty misconduct was serious. Domestic violence is a societal bane with impacts that scar families for life. There is no excuse for it and there is no excusing it. So too, defiance of a court order is serious misconduct. It may be that Appellant’s abuse was not as severe as others or that he had reason to defy the court order.¹ But at least for the first part of DFRS’s burden—to prove that Appellant violated the law—there can be no dispute.

But in my view DFRS has failed to link this misconduct to Appellant’s ability to perform his duties as a firefighter. The Department’s witnesses testified, with respect to the domestic violence incident, that the putative link was an issue of “public trust.” *See e.g.,* Tr. Day 1 at 258-59. While it may be inarguable that there must be a high degree of trust between the public and public safety officials, simply mouthing the words like some magical incantation does not establish the link between private conduct—no matter how egregious—and the employee’s ability to do his job. Indeed, the fact that DFRS routinely imposed discipline less severe than removal on firefighters who engaged in domestic violence seriously challenges the assertion that domestic violence raises issues of public trust: if in fact these firefighters have violated a public trust then why are they still employed?

The link between a firefighter’s domestic violence and the performance of his duties may exist, but it is the County’s obligation to prove it and I do not think it has done so here.² Where

¹ Appellant testified that he originally contacted his domestic partner to check on the welfare of his daughter, whose supervision was uncertain while he was in custody. The Department’s witness acknowledged that this violation of the protective order standing alone would not have been the predicate for discipline. *See* Tr. Day 1 at 234.

² This Board has never adopted the doctrine of “presumed nexus,” a theory predicated on the notion that some off-duty misconduct is so egregious a nexus to employment can be presumed. *See e.g., Williams v. General Services*

nexus exists, it generally is easily proven. *See e.g.*, MSPB No. 14-17 (2014) (finding nexus to discipline a correctional officer for off-duty heroin use.). Conversely, where the County struggles to identify a nexus and finds itself relying instead on platitudes, nexus almost certainly is absent.

In my view, however, the Department's greatest shortcoming is in failing to prove a nexus to the charge of violating the court order. This failure is critical because the court order charge is the only thing that separates Appellant's case from other DRFS cases involving domestic violence and dishonesty where the firefighter was not terminated. *See* Appellant's Ex. 8 and 28 (firefighters disciplined, but not removed for conduct involving domestic violence and dishonesty). That is, but for this charge, Appellant would not have been removed.

The Department's witnesses testified that because of his failure to comply with the court order they could not trust Appellant to carry out their orders. *See e.g.*, Tr. Day 1 at 269, 14-19. To me this explanation borders on the facetious.

Perhaps this explanation might carry some force if it came from Appellant's direct supervisor. But it did not. Rather, it came from the highest echelons of the Department, from individuals as far divorced from having to trust Appellant to carry out orders as possibly could be. Compounding this is the fact that his most direct supervisor testified that he had no such concerns. I find Appellant's direct supervisor's view far more compelling and probative.

Moreover, the Department's lack of trust argument is too facile. The same argument could be made for a firefighter who received a traffic ticket for running a red light or a penalty from the IRS for late payment of estimated taxes. But does it really make sense to say that a firefighter who breaks the law by filing his tax returns late cannot be trusted to carry out orders to put out fires?

That is not to say that an employee could never be disciplined for such off-duty misconduct—perhaps a Ride-On bus driver could be disciplined for off-duty traffic violations or a Finance Department employee for irregularities in their tax returns. Perhaps even a law enforcement officer or an attorney could be disciplined for failing to follow a court order. But in those cases there is at least arguably a specific link between their off-duty violations and their jobs. That is what is lacking here. Under the Department's rationale, any employee in any job performing any function could be disciplined for any off-duty misconduct so long as the Department head testified that they lost faith in the employee's ability to follow orders. This would turn the concept of nexus into an empty rhetorical exercise—not can the County demonstrate that there is a direct and obvious link between the employee's job performance and misconduct that is private in nature but instead can it simply say that it no longer can trust the employee to follow orders. Such a test would not be true to the County's Charter to “maintain an effective, non-partisan, and responsive work force *with personnel actions based on demonstrated merit and fitness.*”

Administration, 22 M.S.P.R. 476 (1984) (presuming nexus where the employee pled guilty to sexual assault of a minor). I see no reason for the Board to adopt this theory in the future, for if the conduct is egregious then proving nexus should not be difficult. Arguing about the egregiousness of any particular act of misconduct rather than the effect of the misconduct on job performance is a sure tell of a tenuous connection to the job.

Conclusion

By all accounts, Appellant had proven himself to be a valuable and reliable employee. *See e.g.*, Tr. Day 2 at 247:9-24 (testimony of direct supervisor attesting to Appellant's performance record). In his private life he committed serious transgressions—ones that could have subjected him to criminal and civil liability. Other forums have jurisdiction over those transgressions, but we have neither the competence nor expertise to opine whether Appellant should have been held to account there. Our role is to determine whether these transgressions bear on his ability to perform his job—more precisely, to determine whether the Department has proven that these transgressions bear on his ability to perform his job.

Because I believe the Department has failed to carry that burden I cannot join my colleagues in sustaining Appellant's removal.



Michael J. Kator
Chair
Merit System Protection Board