BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
████████,	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 19-23**
	*	
MONTGOMERY COUNTY GOVERNMENT,	*	
	*	
EMPLOYER	*	
	*	

==

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of ████████ (Appellant). On March 19, 2019, Appellant filed an appeal with the Board challenging the decision of the Department of Corrections and Rehabilitation (DOCR) to suspend her for two (2) days from her position as a Correctional Supervisor - Sergeant. The discipline was based on the County's allegation that on October 10, 2018, Appellant conducted an improper and unauthorized search of a subordinate Correctional Officer of a different gender at the Montgomery County Correctional Facility (MCCF).

BACKGROUND

A hearing on the merits of the Appeal was held on September 25th and 26th, 2019. The County was represented at the hearing by Associate County Attorney ████████, while Appellant was represented by attorney ████████. The hearing was conducted before Board Vice Chair Harriet E. Davidson and Board Member Angela Franco, and they considered and decided the Appeal. The Board's former Chair, Michael J. Kator, did not participate in the hearing or consideration of this Appeal.[1]

[1] Board Member Sonya Chiles, who took office on January 1, 2020, did not participate in the hearing or consideration of this Appeal.

FINDINGS OF FACT

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

1. Corporal [redacted] (LT)
2. Corporal [redacted] (LV)
3. Lieutenant [redacted] (AM)
4. Corporal [redacted] (SJ)
5. Warden [redacted] (SM)
6. Sergeant [redacted] (TB or Appellant)
7. Acting Deputy Warden [redacted] (MW)[2]

After hearing testimony and reviewing the exhibits[3] and stipulations of the parties,[4] the Board made the following factual findings.

It is undisputed that Appellant has been employed as a Correctional Officer by DOCR since August 23, 2004, and that effective September 4, 2016, Appellant was promoted to Correctional

---

[2] At the time of the incident and subsequent investigation MW was a Captain and the Professional Standards and Compliance Manger of DOCR.

[3] Appellant Exhibits (AX) 1 through 5 were admitted into the record. Appellant's exhibits are as follows:
AX 1 - Incident Report completed by Appellant dated November 18, 2018
AX 2 - Incident Report completed by Appellant dated January 18, 2019
AX 3 - Employment related e-mails, to and from Sgt. TB
AX 4 - DOCR Policy and Procedure 3000-19, Searches
AX 5 - Montgomery County Code, Chapter 33 Personnel and Human Resources, Article II, Merit System

[4] Prior to the hearing the parties agreed to and the Board accepted the following stipulations of fact. Tr. 8.
1. County Exhibit (CX) 12 is a fair and accurate representation of the schematics of MCCF.
2. Sgt. TB has been employed with DOCR since August 23, 2004.
3. On October 10, 2018, Sgt. TB was assigned to work at the West-Two Cluster support post during the #3 shift.
4. On October 10, 2018, Cpl. LT was assigned to work at the West-Two-Five post during the #3 shift.
5. Sgt. TB is higher in rank than Cpl. LT.
6. Lt. AM was one of two Lieutenants assigned to work during the #3 shift on October 10, 2018.
7. Sgt. TB was served with CX 1 (Statement of Charges) on January 13, 2019.
8. On January 18, 2019, Sgt. TB waived her right to go through the ADR process.
9. On March 15, 2019, Sgt. TB was served with CX 2 (Notice of Disciplinary Action).

Subsequent to the hearing the Board accepted the following additional stipulations:

10. Sgt. TB was temporarily promoted to the position of Acting Sergeant effective May 3, 2015, through April 30, 2016.
11. Sgt. TB received "on-the-job Sergeant training" on May 5-9, 2015 (4 days), while she was in the position of Acting Sergeant.
12. Sgt. TB was permanently promoted to the position of Sergeant effective September 4, 2016.
13. Sgt. TB received First Line Supervisor Training through the Maryland Correctional Training Commission. This was a 70-hour course which was completed on January 20, 2017. Sgt. TB received a 100% pass rate.
14. After being permanently promoted to the position of Sergeant, Sgt. TB did not receive further "on-the-job Sergeant training" within the Department.
15. The Department's on-the-job training for a Sergeant is supposed to last two weeks.

Supervisor - Sergeant, a front-line supervisory position. Appellant was working at MCCF in that capacity on October 10, 2018 and was assigned to the West-Two Cluster support post during the third shift. Captain [redacted] (MM) was the ranking member on the shift. However, since he was not on duty that day, Lieutenant AM was the shift supervisor. Tr. 117-18.

During roll call, just prior to the start of the 2:30 p.m. to 11:00 p.m. or #3 shift, Appellant observed Corporal LT using a non-DOCR issued cellphone. Hearing Transcript (Tr.) 206. Corporal LT admits that he had the cellphone in the roll call room. Tr. 27. There is no DOCR policy that forbids correctional officers from having their cell phones in the room during roll call. Tr. 70, 159, 161, 238.

As was her typical practice during roll call, Appellant stood by the doors that connect the roll call room to the main lobby of MCCF. Tr. 26, 75, 208, 229; County Exhibit (CX) 12.[5] From that vantage point Appellant could not see the mail room, the key watch, and did not have a complete view of the door to enter the secure portion of MCCF. Tr. 92-93, 237-38.

Corporal LT was permitted to leave roll call early to report to his post in the W-2-5 pod. Tr. 26-27. Appellant observed Corporal LT place the cell phone in his pants pocket. Tr. 206, 248. Appellant did not see Corporal LT enter the mail room or obtain his keys from the key watch prior to entering the facility. Tr. 237-38. Appellant did not see Corporal LT place the cell phone in his mailbox prior to entering the secure portion of MCCF. Tr. 28, 248, 253-54. Thus, Appellant believed that Corporal LT had his cell phone on his person. DOCR policy forbids correctional officers from having personal cell phones in a secure area of the correctional facility.

When Appellant arrived at her assigned post, the W-2 Cluster desk, she called Corporal LT and told him that she would be sending Corporal LV to relieve him so that he could take his cell phone to his locker. Tr. 32. DOCR policy regarding searches provides that cell phones must be stored in a locker on the non-secure side of the facility. Corporal LT protested that he did not need to be relieved since he did not have his cell phone in the secure portion of the facility. Tr. 32, 77.

When Corporal LV went to the W-2-5 pod, Corporal LT said that he did not have his cell phone and thus did not need to be relieved. Tr. 32, 78; CX 6. Corporal LV then returned to the W-2 Cluster desk and informed Appellant about his conversation with Corporal LT. Tr. 78.

---

[5] County Exhibits 1 through 12 were admitted into the record. The County Exhibits are as follows:

CX 1 - Statement of Charges, January 3, 2019
CX 2 - Notice of Disciplinary Action (NODA), March 11, 2019
CX 3 - Investigative report, December 5, 2018
CX 4 - CD-ROM Containing Video of October 10, 2018 incident
CX 5 - Shift Administrator's Investigative Report, October 30, 2018
CX 6 - Incident Report of Cpl. LT, October 16, 2018
CX 7 - Incident Report completed by Appellant, November 18, 2018
CX 8 - Montgomery County Maryland Personnel Regulations (MCPR), § 33
CX 9 - DOCR Policy and Procedure 3000-7, Standard of Conduct/Code of Ethics
CX 10 - DOCR Policy and Procedure 3000-19, Searches
CX 11 – NODA - Written Reprimand, December 11, 2014
CX 12 - Montgomery County Correctional Facility (MCCF) Floor Plans

Appellant then went to the W-2-5 pod and confronted Corporal LT. Tr. 33. The County introduced a video recording of the entire incident which the Board carefully reviewed. CX 4.

Corporal LT again told Appellant that he did not have his cell phone. Tr. 33. Appellant came around the desk where Corporal LT was standing and reached towards his left pants pocket. Tr. 35, 50; CX 4, at 2:57:37. Appellant touched Corporal LT's pocket in an attempt to determine whether he had his cell phone on his person in the secure area of MCCF. Tr. 214, 241-42; CX 3. From touching Corporal LT's pants pocket Appellant was able to determine that there was no cell phone. Tr. 242. Appellant did not call for guidance or assistance prior to initiating the search of Corporal LT. Tr. 40, 96, 240-42; CX. At the time of this "search" there was at least one inmate outside of his cell. Tr. 36-37, 215; CX 4, at 2:57:11.

Corporal LT recoiled from Appellant and no further search was conducted. Tr. 35; CX 4, at 2:57:38. Appellant had not told Corporal LT that she was about to touch or search him, nor did she obtain consent to do so. Tr. 35. An argument ensued between Appellant and Corporal LT and Appellant then called Lieutenant AM and asked him to come to W-2-5. Tr. 35.

When Lieutenant AM arrived, Appellant and Corporal LT were arguing. Tr. 40, 96. Lieutenant AM had them move into an office located behind the desk to continue the conversation. Tr. 40, 97. During the conversation Appellant admitted that she had touched Corporal LT. Tr. 71, 99, 242. When Lieutenant AM asked whether she had conducted a pat-down search of Corporal LT, Appellant responded, "I'll be the first one to admit that I was wrong." Tr. 99, 103. Appellant apologized to Corporal LT for touching him. Tr. 201-02, 215, 217, 221; CX 7. After Appellant left the office, Lieutenant AM attempted to calm down Corporal LT and recommended that he accept Appellant's apology, which he apparently did. Tr. 126.

While they were in the office Corporal LT suggested several times that they verify that his cellphone was in his mailbox in the unsecured area of the facility. Tr. 41, 127-28; CX 3; CE 6. Neither Appellant nor Lieutenant AM confirmed that the cell phone was in Corporal LT's mailbox. Tr. 99, 246. Lieutenant AM testified that he was convinced that Corporal LT did not have his cell phone in the secure area of MCCF and did not feel that it was necessary to check his mailbox. Tr. 129.

Appellant never saw Corporal LT with his cell phone inside the secure portion of MCCF. Tr. 132, 248. Appellant did not locate the cell phone when she touched the pocket of his pants. Corporal LT did not have the cell phone on his person when he entered the secure portion of MCCF. Tr. 28.

Lieutenant AM did not issue an oral admonishment to Appellant. Tr. 134-35, 190-91,198-199.

On October 16, Corporal LT gave Lieutenant AM an incident report, in which he alleged that Appellant had sexually assaulted him. Lieutenant AM gave the report to Captain MM, who initiated an investigation.

Warden SM received an undated anonymous note under her door indicating that Appellant had done a pat down of Corporal LT. In addition, on October 28, 2019, the Warden received a letter from a law firm informing her that the firm had been retained by Corporal LT regarding an

inappropriate search by Appellant, stating that no action had been taken to address the incident and apprising her that Lieutenant LT had filed a report of sexual harassment with the "authorities."

On November 6, 2018, the Warden requested that the Director of DOCR initiate an investigation by DOCR's Internal Affairs Investigator, which was approved on November 7, 2018. The Investigator issued his report on December 5, 2018 recommending disciplinary action.

In 2014, Appellant was issued a written reprimand for refusing to conduct a search on an inmate. Tr. 182, CX 11.

In a memorandum dated January 3, 2019, the Warden issued to Appellant a Statement of Charges (SOC) in support of a proposed two (2) day suspension. On March 11, 2019, the Director of DOCR issued a Notice of Disciplinary Action (NODA) suspending Appellant for two (2) days. CX 2.

APPLICABLE LAW AND POLICIES

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

§ 33-1. Definition.

> ***Disciplinary action:*** One of the following adverse personnel actions taken by a supervisor against an employee: . . . (e) suspension; . . . .

§ 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.
> >
> > 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.

(e) **Suspension**.

(1) A suspension is an action that places an employee in a LWOP status for a specified period for a violation of a policy or procedure or other specific act of misconduct.

§ 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: . . .

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: 3000-19, Searches, effective December 30, 2016, (replacing policy of April 5, 2015), which provides, in applicable part:

I. DEFINITIONS

A. Pat Down/Frisk Search: A manual pat down of an individual's body through the clothing including the use of a metal detector, if applicable, passed over the body. As deemed appropriate by the Officer, the inmate is required to remove shoes and socks for these items to be searched. The metal detector should only be used in cases of opposite gender searches.

IV. SEARCH OF STAFF AND VISITORS

A. General Policy

The Visiting Officer is responsible for conducting a search of all persons entering the **MCCF/MCDC** lobby area by utilizing the walk through metal detector, hand held metal detector, or ultimately performing a frisk search on persons not satisfying a metal detector scan. All persons will remove their coats, jackets, sweaters, and all objects from the pockets of their clothing and place them in the article tray prior to walking through the metal detector. The Visiting Officer will visually check the article tray to ensure it does not contain contraband. Items considered contraband are cigarettes, gum, matches, lighters, pagers, cell phones, knives, glass objects, radios, cameras or any other items that would jeopardize security. These items are not permitted in the facility. Coats, jackets, and sweaters will be scanned with a hand held metal detector first. If not cleared by the metal detector, Officers are to conduct a more thorough search of these items. After the individual has walked through the metal detector without activation and all articles

have been searched and cleared, the articles are returned to them. Persons who cause an activation of either the walkthrough metal detector or hand held metal detector will not be granted entry into the lobby area. The scanning process is repeated until the object causing the activation is discovered. If the repeated process still causes activation, the individual may submit to a frisk search before entry is allowed. *A frisk search is not performed without prior notification and presence of the Shift Administrator, a Shift Manager, or an Assistant Unit Manager. The Visiting Officer must perform the frisk search in a private area, with a supervisor observing. Staff will only frisk search individuals of the same gender. [emphasis added]* The supervisor present will then determine the person's entry status. The incident will be documented on an Incident Report (DCA-36). In an effort to enhance staff, visitor, inmate and public safety, the Montgomery County Detention Center (**MCDC**) and the Montgomery County Correctional Facility (**MCCF**) have implemented a process that will limit the size and type of carrying devices that may be brought into the facility.

> ***Note -*** *Carrying Devices: Items designed for the sole purpose of transporting articles associated with* ***work functions*** *in and out of the facility.*

B. Staff:

1. All **MCDOCR** staff must adhere to the General Policy concerning staff and visitor searches.

2. There is a ban on all carrying devices that are not completely clear and see through (this includes the bottom portion of the device as well) into the secure portion of the facility. Anyone carrying devices which do not meet the criteria will not be granted access to these facilities. There are limited courtesy carrying devices available at the visiting desks.

3. Purses, gym bags, cell phones, personal keys or other non-business related items must be stored in a locker on the non-secure side and may not be brought into the secure areas of the facility. Staff Lockers have been installed at **MCDC** in the Administrative area to store items not permitted into the secure portion of the facility but that are not appropriate to be left in a vehicle. Issued clear meal bags may be brought into the secure area.

ISSUE

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

ANALYSIS AND CONCLUSIONS

It is undisputed that Appellant placed her hand, or at least her fingers, on the pants pocket of Corporal LT, a male subordinate, in an attempt to ascertain whether he had a cell phone on his person in a secure area of a correctional facility. DOCR policies require that prior to any type of

search of a person, the person to be searched must be informed, consent obtained, and a Lieutenant or Captain must be present. Moreover, the search must be conducted in a location outside the view of others. Tr. 172-74; CX 10.

It is also undisputed that she did so without prior notice, without Corporal LT's consent, and without the presence of a Lieutenant or Captain.

The factual findings detailed *supra* leave no doubt that Appellant behaved in an inappropriate manner inconsistent with Department policy. A correctional officer is not allowed to conduct a body search of an opposite gender person, unless it is an emergency and the person is an inmate. Tr. 82, 100, 173, 175, 198. Searches of opposite gender correctional officers are not permitted. Tr. 246; CX 10. Such behavior merits some discipline, especially because, as a Correctional Supervisor - Sergeant, Appellant is in a correctional supervisory position of substantial trust and responsibility.

This Board has previously found that correctional supervisors are given a high degree of trust and must be held to a high standard of conduct. MSPB Case No. 18-06 (2019); MSPB Case No. 15-27 (2016); MSPB Case No. 07-13 (2007).

In our view there is little question that Appellant violated established policy and procedure when she searched a staff member of the opposite sex without prior notice and consent and without notifying a Shift Supervisor. Appellant's behavior constitutes conduct unbecoming. In the absence of any urgent circumstances or justification Appellant searched a subordinate officer of a different gender in front of inmates. Disrespecting and humiliating another correctional officer in the presence of inmates is clearly conduct unbecoming as it is "conduct. . . which tends to undermine the good order, efficiency, or discipline of the Department." CX 9, § VII(E)(9); Tr. 179.

The County further established that Appellant failed to perform her duties in an acceptable manner when she searched a staff member of the opposite sex in the presence of inmates without the proper notification, consent and approval of a superior officer.

We also find that Appellant was guilty of neglect of duty when she failed to notify her supervisors that she suspected Corporal LT of having a cell phone on his person in a secure portion of the facility and instead improperly began to conduct an improper search of his person. By doing so, she failed to "take appropriate action in a situation deserving attention," and failed to "conform to work standards established for [her] rank, grade, and position." CX 9, § VII(E)(l0). Appellant admitted that at the time Appellant attempted to conduct the search she knew that doing so was inappropriate. Tr. 242.

Because we conclude that the County proved by a preponderance of the evidence that Appellant violated established policy or procedure, failed to perform her duties in a competent or acceptable manner, and was negligent or careless in performing her duties when she conducted an improper search of another correctional officer of a different gender, the Board will address whether the penalty of a two (2) day suspension is appropriate.

The Board recognizes that Appellant admits that she erred and has expressed appropriate remorse. Appellant's primary argument is with the level of discipline. As Appellant testified:

> I'm human. I made a mistake, and I apologized for it. It was not a two-day suspension mistake.

Tr. 221.

MCPR § 33-2(d) states that in addition to progressive discipline the County "should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be: (1) the relationship of the misconduct to the employee's assigned duties and responsibilities; (2) the employee's work record; (3) the discipline given to other employees in comparable positions . . . for similar behavior; (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and (5) any other relevant factors."

The Warden testified that she and the Deputy Warden made recommendations concerning Appellant's discipline; however, [redacted], then Director of DOCR, imposed the discipline at issue in this case. As Director [redacted], the deciding official, did not appear at the hearing due to employment elsewhere, we have no testimony regarding the factors he considered in determining the level of discipline. Thus, we are limited to the testimony provided by the Warden.

Turning to the specific discipline imposed in this case, Warden SM testified that she took the following factors into consideration when determining the appropriate level of discipline: the seriousness of the offense; Appellant's prior discipline; and the impact on the victim. She also explained her general rationale for the imposition of discipline.

The Warden testified that Appellant's conduct disrespected and humiliated a subordinate in front of the very inmates he was required to supervise.

As an experienced correctional officer and a supervisor Appellant knew or should have known that her actions were a serious breach of DOCR policy.

The Warden indicated that past discipline is generally considered a factor in determining the level of discipline. The Warden stated that she was aware that Appellant had a reprimand in 2014 for failing to search an inmate but did not address the weight she gave this penalty in selecting the appropriate level of discipline for Appellant. We note that Appellant's reprimand was issued four years prior to the incident in question.[6] Subsequent to that time, the County promoted Appellant to the position of Sergeant. Thus, we will not give any weight to the reprimand in our evaluation of the appropriateness of Appellant's discipline.

Regarding comparable discipline, Warden SM testified that there have been no instances of a correctional supervisor conducting an improper search or touching another correctional officer. Tr. 180, 202-03.

In her analysis of the impact on the victim, the Warden indicated that Appellant had disrespected and humiliated a subordinate staff member in the presence of inmates whom he then

---

[6] While MCPR § 33-3(b) does not provide a time frame for the expunction of a written reprimand, § 28.2 of the Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), states that "[a]ll reprimands contained in central personnel files shall become null and void after a period of one year. A reprimand can be removed from the file at any time."

needed to supervise. We acknowledge the seriousness of Appellant's conduct and the potential it had for undermining Corporal LT's authority with inmates. However, Appellant thought that Corporal LT was being insubordinate and undermining her authority in the facility. While this may have prompted her actions, the appropriate response under DOCR policy would have been to contact the shift supervisor, prior to touching Corporal LT's pocket. Tr. 105,137, 241.

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

Although we do not condone Appellant's misconduct, there are mitigating factors that deserve consideration.

While inappropriate and ill-advised, Appellant's search involved minimal physical contact. It was not egregious, and did not appear to be aggressive, provocative, or otherwise unduly offensive. It certainly did not rise to the level of sexual assault as alleged by Corporal LT and management did not treat it as such.

Having observed Appellant's demeanor at the hearing, the Board concludes that Appellant sincerely believed that she was acting to protect the security of the institution. When Appellant saw Corporal LT put his cell phone into his pocket, she reasonably believed that he had brought it into the secure area. She did not see him place it in the mailbox, as had occurred.

Both the Warden and Lieutenant AM testified that one of Appellant's job responsibilities was to ensure that DOCR personnel did not bring their personal cell phones into the secure areas of the correctional facility. However, there is no question that they took issue with the means that Appellant employed to guard against contraband. Appellant never should have searched Corporal LT in a public area without obtaining his consent and without the presence of a supervisor, but she nonetheless recognizes that her actions were inappropriate and regrets her behavior.[7]

The Warden testified that she considered Appellant's apology but then added "I have a lot of officers who admit when they're -- when the wrongdoing is discovered. That does not mean that we do not follow through with the appropriate level of discipline." Tr. 202. Thus, it appears that she gave it little weight.

The facts in this case are different from the situation described by the Warden. Here Appellant apologized to Corporal LT soon after she touched his pants packet. She apologized again when both Corporal LT and Lieutenant AM were in the office. Both apologies were of Appellant's own volition and made prior to the creation of any incident report, the initiation of an investigation, or the commencement of any disciplinary action. She also admitted what she did was "wrong."

[7] Appellant attempted to argue that she was not properly trained as a sergeant. Even if true that would not justify her actions in this case as she has admitted her error and that she was aware at the time of her actions that her behavior was inappropriate. Tr. 221, 227-28, 242. In any event, the stipulations of the parties strongly suggest that Appellant has received adequate training.

Lieutenant AM, who had the opportunity to assess the sincerity of Appellant's statements after the incident, told Corporal LT to accept Appellant's apology because she was remorseful.

We find that Appellant's admission of misconduct, expression of remorse and statements of apology to the "victim" are evidence of rehabilitative potential. They should have been considered as a relevant mitigating factor considering the timing of these acts of contrition and the fact that they were freely initiated by Appellant. *See Casarez v. Department of the Army*, 70 M.S.P.R. 131, 134 (1996).

We also consider the Warden's own articulation of the purpose of discipline; namely, to reduce the impact of the conduct on DOCR operations, to convey to the employee the inappropriateness of the behavior, to communicate that it is not condoned by management, to ensure that the employee who committed the act understands that it was wrong, to ensure that the conduct will not reoccur in the future, and to "get the individual's attention." Appellant already acknowledged the inappropriateness of her behavior on the day it occurred. She clearly stated that she knew it was wrong. She understood that it would not be condoned by management and there is no indication that it will reoccur in the future. Thus, based on the totality of the circumstances, we feel that a lesser penalty is justified.

Accordingly, weighing the nature and seriousness of Appellant's misconduct together with the mitigating factors and Appellant's strong potential for rehabilitation, the Board has determined that in accord with the concept of progressive discipline the appropriate penalty for Appellant's misconduct is a one (1) day suspension.

ORDER

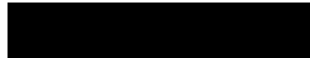
For the foregoing reasons, the Board **ORDERS** that:

1. The County reduce Appellant's suspension from two (2) days to one (1) day;
2. Appellant be made whole for lost wages and benefits;
3. That within 45 days of this decision the County provide the Board with written certification that the suspension has been reduced, that all County records reflect that change, and that Appellant has been made whole; and
4. Because the Board has mitigated the penalty, the County must pay reasonable attorney fees and costs. Under Maryland law and Board precedent when an appellant partially prevails the Board will only award a portion of the fees sought. MSPB Case No. 15-27 (2017); MSPB Case No. 13-02 (2013). Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have ten (10) calendar days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, § 33-14(c)(9).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order 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
May 6, 2020



Harriet E. Davidson
Chair