BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
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████████████████,	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 20-17**
	*	
MONTGOMERY COUNTY GOVERNMENT,	*	
	*	
EMPLOYER	*	
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FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of ████████████ (Appellant).

PROCEDURAL BACKGROUND

On March 11, 2020, the Montgomery County Department of Health and Human Services (DHHS or Department) issued a Notice of Disciplinary Action -- Dismissal (NODA) to Appellant. County Exhibit (CX) 1.[1] The NODA charged Appellant with various offenses, including violation of policies concerning the retention of medical records. The NODA charged Appellant with: (1) Montgomery County Personnel Regulation (MCPR) § 33-5(c) (violation of established policy or

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

CX 1 - Notice of Disciplinary Action
CX 2 - November 17-20 Emails between LK and Appellant
CX 3 - Incident Report Submitted by LK
CX 4 - DM's Investigation Report
CX 5 - DHHS Safeguarding Policy
CX 6 - DHHS Permission Form to Take Records Home
CX 7 - Record Retention policy for Healthcare for the Homeless
CX 8 - Training dates email
CX 9 - Login dates Email
CX 10 - NextGen/EHR Email Chain (w/redactions for attorney client privilege)
CX 11 - EHR Onsite Support Email Chain (w/redactions for attorney client privilege)
CX 12 - Appointments & Admin Day Email (w/redactions for attorney client privilege)

procedure); (2) MCPR § 33-5(d) (violation of the County Charter, statutes, ordinances, regulations, State or Federal laws); and (3) MCPR § 33-5(h) (negligent or careless in the performance of job duties). The policy she is alleged to have violated is the DHHS policy on Safeguarding Confidential Personally Identifiable Information, § 5.0 and § 5.6. CX 5. *See* 45 CFR § 164.316 and Maryland Annotated Code, Health General Article, § 4-403.

On March 16, 2020, Appellant filed this appeal challenging the decision of the Department to dismiss her from her position as a Community Health Nurse II.

The County filed its Prehearing Submission on May 18, 2020, and Appellant filed her Prehearing Submission on June 18, 2020. A prehearing conference was held on July 15, 2020, and a Prehearing Order was issued by the Board on July 16, 2020. A hearing on the merits was held over the course of two days, August 18 and September 2, 2020. At the close of the hearing, the Board asked for the "Information Privacy and Security Sanction" policy referenced on page 9 of CX 4. In response the County submitted a document entitled "Sanctions Assessment Tool," which was admitted as Board Exhibit 1. The parties filed post-hearing briefs on October 30, 2020.

Board members Harriet E. Davidson and Sonya E. Chiles considered and decided the appeal.[2]

FINDINGS OF FACT

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

1. [redacted], Employee and Labor Relations, HHS (JF)
2. [redacted], Program Manager, Health Care for the Homeless, HHS (LK)
3. [redacted], Deputy Privacy Official, HHS (DM)
4. [redacted], Special Assistant to the COO, HHS (MH)
5. [redacted], IT Training Manager, HHS (GM)
6. [redacted] - Behavioral Health Therapist, HHS (PC)
7. [redacted] - Registered Nurse (KM)
8. [redacted], Appellant

After hearing testimony and reviewing the exhibits[3] the Board made the following factual findings.

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[2]Former Board Member Angela Franco, who resigned effective December 31, 2020, did not participate in the consideration of this decision. Member C. Scott Maravilla, who was appointed by the County Council effective February 9, 2021, and resigned March 16, 2021, also did not participate in the consideration of this decision.

[3] Appellant Exhibits (AX) 1 through 10 were admitted into the record. Appellant's exhibits are as follows:

AX 1 - Healthcare for the Homeless (HCH) Hospital Discharge Planning Policy & Procedure
AX 2 - Protocol for Shelter Referral for HCH Adults Discharged from Hospitals (2009)
AX 3 - Discharge Protocol for Hospitals (In Patient Hospitalization) in 2016
AX 4 - Photograph of Purple Bag used for transport of documents
AX 5 - Performance Review, July 1, 2015 - June 30, 2016
AX 6 - January 11, 2020 Email
AX 7 - Work in progress documents from IT
AX 8 - Community Services Aide III Job Description

In August 2013, Appellant began working with DHHS as a nurse employed by a contractor, Athena Consulting. Hearing Transcript, Day 1 (Tr. (Day 1)) 67; Hearing Transcript, Day 2 (Tr. (Day 2)) 8; CX 1. Appellant was hired in March 2015 as a County employee by DHHS and served as a Community Health Nurse II. CX 1; Tr. (Day 1) 67; Tr. (Day 2) 20. Appellant was assigned to the Healthcare for the Homeless (HCH) program and supervised by Ms. LK from January 2015 until the date of her dismissal in March 2020. Tr. (Day 1) 67.

Ms. LK is the Program Manager for HCH. Tr. (Day 1) 64. HCH is a program that provides nurse case management services to homeless clients who are in the hospital, preparing to transition out of the hospital, or who become homeless while in the hospital. Tr. (Day 1) 64. The program also provides nurse case management for homeless clients who are in shelters, permanent supportive housing, or in apartments throughout the County. Tr. (Day 1) 64-65. The program provides nursing services to homeless clients living on the street. Tr. (Day 1) 65. Often, the clients receiving services from HCH have severe illnesses, such as cancer, diabetes, kidney or heart disease, and mental health disorders. Tr. (Day 1) 235-36. As Program Manager, Ms. LK supervises employees, manages contracts for primary and dental care, provides support for complex cases transitioning out of the hospital, and oversees the process to start a medical respite program. Tr. (Day 1) 65-66.

Appellant was responsible for doing nursing assessments of homeless clients who were transferring into or out of the hospital to shelters or permanent supportive housing programs. Tr. (Day 1) 67. The purpose of a nursing assessment is to determine whether an individual is appropriate to transfer from a hospital to the shelter. Tr. (Day 1) 71. A nursing assessment is initiated when HCH receives a referral by telephone or facsimile. Tr. (Day 1) 69. When making a referral a hospital is asked to provide health and physical documentation, lab work and psychosocial information. *Id*. The hospital is also asked to provide any occupational and physical therapy assessments, and a discharge summary. *Id*. According to Ms. LK, after HCH received a referral, she often placed the faxed referral on Appellant's desk or scanned it and sent it to her over encrypted email. It was Appellant's job to contact the individual making the referral and then conduct an in-person assessment of the patient, as needed. Tr. (Day 1) 71.

Appellant made notes concerning her clients. Tr. (Day 2) 16, 24, 32, 34-36. The notes might include current medications or changes in medication, presenting symptoms on a particular day, and vital signs, such as blood pressure readings. Tr. (Day 1) 74; Tr. (Day 2) 37. According to Ms. LK, the program generally keeps both a physical copy of the client's records, as well as an electronic copy in NextGen, the County's electronic records system. Tr. (Day 1) 73-74. Each client has their own file where this medical information is kept. Tr. (Day 1) 70. Appellant's notes were to be kept with the client's file. Tr. (Day 1) 73-74. HCH keeps a record of an assessment even if it declines to take an individual into a shelter. Tr. (Day 1) 72. Mr. MH testified that certain records, such as vital sign logs, may be kept on site at the homeless shelters in case a client needed to be transported directly from the shelter to a hospital. Tr. (Day 1) 184.

HCH stores the files with client information in a locked storage room at the program office. Tr. (Day 1) 70. Sometimes, the files were kept in boxes at the HCH offices. Tr. (Day 1) 75, 80. Each employee, including Appellant, also has a locking file cabinet at their desk. Tr. (Day 1) 70.

AX 9 - Protocols for Community Health Nurse and Community Service Aide
AX 10 - January 2017 Email

According to the testimony of Ms. LK the keys to the file cabinet containing the files on Appellant's clients were kept in Appellant's desk and only members of her team knew where they were. Tr. (Day 1) 119. However, if someone did know where the keys were kept they would be accessible. Tr. (Day 1) 120.

Appellant also provided oversight for clients in medical beds at the various shelters. Tr. (Day 1) 68. That oversight for clients in medical beds required Appellant to visit clients on a daily basis, provide assistance scheduling medical appointments, provide medication management, and assist clients in accessing healthcare. *Id*.

During Appellant's orientation in the HCH program she was given procedures and policies pertinent to her job. Tr. (Day 2) 12-16. *See* Appellant's Exhibit (AX) l, *Health Care for Homeless (HCH) Hospital Discharge Planning Policy and Procedure*; AX 2, *Protocol for Shelter Referral for Homeless Adults Discharged from the Hospital* (2009).

When Ms. LK became the HCH program manager in January 2015, these procedures were in use. Tr. (Day 2) 15-16. In 2016, Ms. LK issued a procedure for hospital discharge planners to follow. AX 3, *Discharge Protocol for Hospitals (Inpatient Hospitalizations)*. Tr. (Day 2) 16. The policy, which was effective in 2017, does not address the internal DHHS medical records documentation process. Tr. (Day 2) 17. None of the three policies (AX 1-3) purports to be a record retention policy. Appellant testified that the protocol issued by Ms. LK, AX 3, did not change the way she maintained medical records. Tr. (Day 2) 17. Appellant suggested that although there were discussions concerning the agency's goal to eventually keep all records electronically, in the meantime she understood that she was to maintain the status quo. *Id*.

Because Appellant was required to carry medical records when traveling between the HCH offices and the various shelters where her clients might be located, she was supplied by her DHHS supervisor with a messenger bag or briefcase for that purpose. Tr. (Day 2) 17-18. After Ms. LK joined the DHHS, she replaced the bag Appellant initially received with a purple bag that had a lock. Tr. (Day 2) 18; AX 4.

On November 17, 2019, Ms. LK asked Appellant to provide her "with the written documentation you have been keeping for the clients you have worked with during the reporting period July 1, 2019 - September 27, 2019 along with current clients." CX 2; Tr. (Day 1) 78. Ms. LK testified that she made this request in order to see what challenges her staff was experiencing entering information into NextGen. Tr. (Day 1) 78. Ms. LK also stated that she wanted cases documented in NextGen so as to allow her to efficiently obtain electronic data on hundreds of cases while developing and implementing a medical respite program. *Id.*

Appellant acknowledged that Ms. LK gave her a specific date range and asked for all of her files. Tr. (Day 2) 56. Appellant responded to the request by asking Ms. LK, "What specifically are you requesting?" CX 2. Appellant testified that she asked because to obtain the records she would have to go to eight shelters throughout the County and she wanted to be sure and perhaps shorten the process. *Id.* 58-59. Appellant testified that client medical records were kept at the shelters in the medication room or with the case managers. *Id.* 65-66.

It is undisputed that Appellant never provided any files or records in response to Ms. LK's request. Tr. (Day 2) 58-59; Tr. (Day 1) 83. Appellant told Ms. LK that she could look for the files in the usual places they were kept, but Ms. LK was only able to find 10 to 15 files in the file

cabinet. Tr. (Day 1) 86. Ms. LK stated there should have been more files in the filing cabinet, and that when she had previously checked the filing cabinet it did have many more files. Tr. (Day 1) 86-87.

As a result, Ms. LK contacted DM, the DHHS Privacy Officer. Tr. (Day 1) 87. Mr. DM requested, and Ms. LK completed, an incident report on November 28, 2019. Tr. (Day 1) 89; CX 3. In the description of the incident section of the report Ms. LK wrote:

> Our program is transitioning from paper charts to the Nextgen electronic health record system. As a part of the process to assure client paper charts records are scanned into the Nextgen system and to help me with data gather statistics, I requested for [Appellant] to have all files from June 1, 2019 to present available for my review by COB Friday, November 22, 2019. Once I realized none of the charts were in the locked cabinet areas discussed, I requested for the paper charts of clients where [Appellant] documented services from January 1, 2019 to present by COB, Friday, November 22, 2019. After checking the three disclosed locked secured areas and no charts were available for my review, I requested assistance on next steps to locate the charts due to [Appellant] resistance to provide me with charts for review. In addition to documented charts not being in the located cabinets, the denials were not present also for the dates requested. The denials are kept also for a record of program referrals and supporting statistical data gathering. Files from previous years were located in the cabinet and boxes in the storage room which is a locked secured area. I also noticed that one of the locations where previous referrals were kept that the referrals are no longer there and have been moved. I am uncertain where the referrals were moved. Currently, I am uncertain where the requested client referrals and documented files are located.

CX 3, p. 2.

As the Privacy Officer, DM's duties consist of making sure the agency and its employees comply with state and federal laws, including the Health Insurance Portability and Accountability Act (HIPAA). Tr. (Day 1) 133-34.

Mr. DM testified that he was contacted by Ms. LK on November 25, 2019, regarding missing files and asked whether the missing files amounted to a privacy incident. Tr. (Day 1) 135. Mr. DM began his investigation of the incident by asking Ms. LK for an incident report and visiting the HCH offices to look at the filing cabinet where the records were to be kept. Tr. (Day 1) 136. Mr. DM testified that the filing cabinet, as well as Appellant's desk area, were "largely empty" of files. Tr. (Day 1) 136-37.

Mr. DM also asked Appellant for an incident report via email, but she did not respond to his request. Tr. (Day 1) 137. Mr. DM then sent a Notice of Investigation to Appellant and scheduled an interview for December 9, 2019. Tr. (Day 1) 137-38, CX 4.

Appellant requested that her MCGEO union representative, Mr. [redacted] (RC), attend the interview with Mr. DM. However, Mr. RC was delayed and could not attend the meeting. Tr. (Day 2) 30. After waiting 10-15 minutes the meeting was held, notwithstanding Appellant asking

if they could wait a bit longer. *Id*.[4] Despite several requests, Appellant was never apprised of the accusations against her. Tr. (Day 2) 39.

According to Appellant, during the interview with Mr. DM she told him that, after she finished working with a client and had written and submitted her medical report, she always disposed of her personal notes in the County's shredder, as these notes contained private client information. Tr. (Day 2) 32-38. Appellant said that she did not destroy any medical records or even her notes before all pertinent medical information had been recorded in the patient's medical file or had been communicated to the necessary individuals or entities, such as Mobile Med. *Id*. 36-37. Appellant suggested that her notes were not themselves medical records. *Id*. at 36.

Mr. DM testified that, to the contrary, during the interview Appellant told him:

> that she destroys – she told me she destroys the record. When she sees a referral, she goes to see the client, she creates a file, and once the client is medically stabilized, that could take from a couple of days to a couple of months, once the client is medically stabilized she would put the record in the destruction bins that we have at the department and destroy the record.

Tr. (Day 1) 138. Mr. DM further stated that when he asked Appellant why she was following that practice she provided three specific justifications:

> So the first one was that her supervisor had never really clearly told her what to do with the files. That said -- oh, and the second one was also that there was a director, apparently a director for – [MH], who he's -- he works in the COO's office, and [MH] had apparently said that no records were to be kept on premises. So I actually rooted this out a little bit. I talked to [Appellant's] coworkers and asked them, Did you know about this? Did [MH] say anything about it? None of them seemed to be aware of it. And I asked [MH] himself and he was completely unaware. He said that it's possible that someone prior to him said that you shouldn't keep files at the homeless shelters, but that's very different from not keeping files on the premises. . . The third reason was [Appellant] said that her colleague, [PC], was keeping a parallel record. And I actually asked her about this, if she was sure that the parallel record could actually account for her own work and she admitted that she could not be sure if that had been so.

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[4] The collective bargaining agreement between the County and United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), § 28.6, provides bargaining unit employees with the right to request union representation at any investigative examination by a representative of the County that the employee reasonably believes may result in disciplinary action. According to Mr. DM's investigatory report, the Notice of Investigation Interview letter advised Appellant of her right to have a union representative. CX 4. The MCGEO agreement, § 28.6(b), provides that the County may delay the interview a reasonable time while waiting for a union representative, but that the interview shall not be unreasonably delayed. While Appellant testified that she lacked union representation at her interview with Mr. DM, Tr. (Day 2) 30, she does not argue that the interview was thus improper and should be considered by the Board in determining whether the charges should be upheld or in mitigation of any penalty. While Appellant does not strongly argue the point, we note that Appellant requested that DM wait for the union representative and DM chose to proceed without him after only waiting a short period of time. This was extremely detrimental to Appellant as the County relied heavily on DM's report and recommended penalty. Thus, we expect that employees' rights to union representation be heeded in all future investigation unless waived or presented with extenuating circumstances.

Id. at 138-40.

Mr. DM summarized his interview with Appellant in his Privacy Incident Investigatory Report. CX 4. The investigatory report indicates that Appellant admitted to keeping client files in her custody from the time she receives a referral until the time she closes a case, keeping files locked in the trunk of her car, and to disposing of client files once a client is medically stabilized. CX 4, p. 3.

Under the County's Safeguarding Policy, files are not to be removed from the worksite unless the employee has agreed to certain safeguards and completed the approved permission form. CX 5, *Safeguarding Policy* (November 30, 2018), §5.6.6 and Appendix C; CX 4, p. 4. *See* CX 6, *Permission Form for Removing PII from the Worksite or Saving PII to a Portable Device*. A permission form remains in effect as long as an employee continues to perform the same job functions that require the removal of personally identifiable information (PII). CX 5, §5.6.6.3; Tr. (Day 1) 148-49. Although Appellant never completed a permission form, Tr. (Day 1) 149, the fact that the program provided her with a bag for carrying documents indicates that her supervisor was aware that she was taking documents containing PII to and from the HCH offices while visiting patients at shelters and for other program purposes and tacitly approved. Indeed, there is no evidence in the record that either Appellant or Ms. LK were aware of the written procedure for taking files from the office or the existence and use of the requisite approval form.

Ms. JF is a Program Manager II within the DHHS Employee and Labor Relations Office. Tr. (Day 1) 23. Ms. JF is responsible for the management and oversight of departmental labor and employee relations issues, including the investigation of complaints or concerns. Tr. (Day 1) 24. She is also responsible for drafting disciplinary memoranda and representing the department at disciplinary hearings. *Id.* Ms. JF testified that she was notified by Mr. DM of a privacy issue concerning Appellant. *Id*, 24-25. Ms. JF testified that DM's investigative report was submitted to her and the Director of DHHS. *Id*. Based upon the dismissal recommendation in Mr. DM's report Ms. JF was required to investigate potential violations of either the union contract or the personnel regulations and recommend what level of discipline, if any, was appropriate. *Id*.

Ms. JF interviewed the Appellant on January 16, 2020. Tr. (Day 1) 24. Also present were Appellant's union representative and Mr. DM. *Id*. at 26. Ms. JF testified that she asked Appellant "whether or not there was actual destruction of records, to which [Appellant] stated that she would not call it destruction but rather she disposed of the files." *Id*. at 28. Ms. JF stated that Appellant explained that by "disposed" she meant that "once she was finished with the client the files were placed into the white shred bins." *Id*. Ms. JF indicated that Appellant admitted to Ms. JF that "she did not document anything into NextGen concerning the files." *Id*. It was Ms. JF's assumption that the files Appellant was referencing included "her notes or any recommendations, her diagnosis, those – the client notes related to that client's specific reason for coming into the shelter or being seen by [Appellant]." *Id*. 28-29.

Two witnesses called by Appellant testified favorably concerning Appellant's professionalism as a nurse. Mr. PC, a County employee and case manager for clients in medical beds at the shelters, testified that he regularly worked with Appellant. Tr. (Day 1) 219-20. He further testified that he had no personal knowledge as to what types of records Appellant kept at her HCH office. *Id*. at 229. Mr. PC also testified that Appellant would have medical records at the

shelter when Appellant would get the records from the hospital and provide them to Mobile Med, an outside medical provider. *Id*. 223.

Appellant denied that she admitted to disposing of medical records. Tr. (Day 2) 53. In contrast, Mr. DM's report alleges that Appellant did admit to disposing of records and recounts the specific context in which she did so. CX 4, pp. 6-9. DM's report states:

> [Appellant] claimed that her previous supervisor had told her which records to retain in the program's files. According to [Appellant], LK had not issued such a directive. Therefore, [Appellant] reasoned, there was no reason to keep any record that she created. . . .

CX 4, p. 6. Both Ms. JF and Mr. DM credibly testified that in their interviews with Appellant she told them that she would place client files in the shred bin after a client was medically stabilized. Tr. (Day 1) 28, 138, 163. However, Ms. JF had the same understanding as Appellant that files included client notes.

Appellant does not dispute that she disposed of her notes and told Mr. DM that she had done so. Tr. (Day 2) 32-33, 36-38. *See* Appellant's Opening Statement, *Id*. 17-18 ("And all these interviews, whether it was with Mr. [DM] or with Ms. [JF], she admitted that she destroyed those notes, but those notes were not medical records."). Appellant testified that she disposed of her notes after the information contained in the notes was communicated to the people caring for the client. *Id*. 37. Appellant denied violating HIPAA or any other record retention law and asserted that she never removed any medical record from patient files or destroyed or shredded such records. *Id*. 54.

Appellant's performance evaluations were favorable. Tr. (Day 1) 51; Tr. (Day 2) 20-21; AX 5. Prior to her dismissal, Appellant had not been the subject of any disciplinary actions. Tr. (Day 1) 51.

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: . . . (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;

(d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws. . .

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

Maryland Annotated Code, Health General Article, § 4-403

(a) (1) In this section, a "health care provider" means: . . .

(x) A nurse; . . .

(b) Except for a minor patient, unless a patient is notified, a health care provider may not destroy a medical record or laboratory or X–ray report about a patient for 5 years after the record or report is made.

Code of Federal Regulations, Title 45 - Public Welfare, Subtitle A - Department of Health and Human Services, Subchapter C - Administrative Data Standards and Related

Requirements, Part 164 - Security and Privacy, Subpart C - Security Standards for the Protection of Electronic Protected Health Information, 45 CFR § 164.316 - Policies and procedures and documentation requirements.

§ 164.316 Policies and procedures and documentation requirements.

A covered entity or business associate must, in accordance with § 164.306:

(a) Standard: Policies and procedures. Implement reasonable and appropriate policies and procedures to comply with the standards, implementation specifications, or other requirements of this subpart, taking into account those factors specified in § 164.306(b)(2)(i), (ii), (iii), and (iv). This standard is not to be construed to permit or excuse an action that violates any other standard, implementation specification, or other requirements of this subpart. A covered entity or business associate may change its policies and procedures at any time, provided that the changes are documented and are implemented in accordance with this subpart.

(b) (1) Standard: Documentation.

(i) Maintain the policies and procedures implemented to comply with this subpart in written (which may be electronic) form; and

(ii) If an action, activity or assessment is required by this subpart to be documented, maintain a written (which may be electronic) record of the action, activity, or assessment.

(2) Implementation specifications:

(i) Time limit (Required). Retain the documentation required by paragraph (b)(1) of this section for 6 years from the date of its creation or the date when it last was in effect, whichever is later.

(ii) Availability (Required). Make documentation available to those persons responsible for implementing the procedures to which the documentation pertains.

(iii) Updates (Required). Review documentation periodically, and update as needed, in response to environmental or operational changes affecting the security of the electronic protected health information.

Department of Health and Human Services, *Safeguards to Protect Personally Identifiable Information ("Safeguarding Policy")* (November 30, 2018):

5.6 Safeguarding PII in Paper Format

5.6.1 Storage of PII

5.6.1.1 Client files and other PII must be stored in a secure environment.

5.6.1.2 Staff that have PII (including files, notes, memos, etc.) at their workstations must secure the information upon departing.

5.6.1.3 Staff should not accumulate large amounts of PII at their workstations.

*   *   *

5.6.6 Removal of PII in paper format from the worksite

5.6.6.1 In general, PII in paper format must not be removed from the worksite.

5.6.6.2 When there is a work-related need, a program manager may grant permission for specified staff to remove PII from the worksite, provided that the staff person agrees to follow certain safeguards. Permission Form, Appendix C must be used for this purpose.

5.6.6.3 The Permission Form remains in effect for as long as the staff person continues to perform the same program job responsibilities that necessitate the removal of PII, or until the Program Manager notifies the staff person in writing that permission to remove PII from the worksite has been revoked. Revocation Form, Appendix D, may be used to revoke permission.

5.6.6.4 Permission to remove PII and revocations of permission must be filed in the program area and reviewed by supervisors with staff at regular intervals.

5.6.7 Accounting for client files.

5.6.7.1 Each program must have a system in place that accounts for the location of client files. The system must record:

5.6.7.1.1 The location where program files are stored;

5.6.7.1.2 The client files that have been removed from the location where they are stored;

5.6.7.1.3 The name of the staff member who has possession of the file;

5.6.7.1.4 The date the file was removed; and

5.6.7.1.5 The date the file was returned.

5.6.8 Disposal of client information

5.6.8.1 When disposing of documents containing PII, staff must shred the documents or place them in the locked disposal bin at their worksite that has been designated for shredding.

ISSUE

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

ANALYSIS AND CONCLUSIONS

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-8(d), § 2A-10(b). 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. 17-20 (2018); 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").

Disposal of Client Medical Records

At the heart of this case is the question of whether or not Appellant destroyed or disposed of files containing medical information on agency clients.

Ms. LK credibly testified that a significant number of Appellant's files were missing, and that those files contained medical information. When she discovered that the files were missing, she immediately notified the appropriate DHHS official and filed a contemporaneous written report. Significantly, Appellant does not directly dispute that the client files were missing. Her argument seems to be that because no specific records have been identified the County has not carried its burden of proof that the files were missing. The Board is not persuaded by this argument. We find it more likely than not that some patient files were missing.

There is no direct evidence that Appellant improperly destroyed medical records. There is no evidence in the record identifying any specific medical record that Appellant allegedly destroyed. Tr. (Day 1) 50; Tr. (Day 1) 109-10; Tr. (Day 1) 161. The evidence of Appellant's disposal of files consists of testimony about an unusually small number of files in the file cabinet, Appellant's failure to post client medical information on NextGen, and Appellant's statements to DM and JF concerning her practice of disposing of files once she was finished with them.

We find that there is sufficient evidence in the record to draw the inference that some files were missing. Ms. LK testified that she recalled seeing and using the files weeks before she noticed their absence. Tr. (Day 1) 87. The volume of referrals would justify a significantly larger number of files than were present at the offices of HCH. A file cabinet that was normally full was now virtually empty. And, while Appellant expressed no knowledge as to what had happened to her locked files, she did not dispute that some files were absent.

We have been presented with no explanation as to why Ms. LK would be mistaken on this point. While other members of the HCH team may have had access to Appellant's keys to her file cabinet, we have not heard a plausible theory concerning why or how someone other than Appellant would have moved or disposed of her files.

There has been much testimony concerning the nature of the documentation Appellant had destroyed. Appellant claims that the discarded documents were patient notes and not official medical records. Ms. JF understood that the files that Appellant mentioned in her interview included client notes. DM testified that Appellant said she destroyed "the record" whereas he wrote in his report that Appellant admitted to disposing of client files. Ms. LK claimed that client files were missing. Based on this testimony, we find that it is more likely than not that Appellant disposed of some medical documentation on patients. The nature and extent of the destruction of patient information is unknown. However, this was unauthorized and contrary to County policy.

Failure to Maintain Medical Records or Document in NextGen

As a medical professional Appellant was required to comply with County policies, State law, and the Health Insurance Portability and Accountability Act (HIPAA) in terms of the confidentiality and security of client medical information. Appellant contends that her notes were

not medical records. However, a health care provider's notes may contain protected health information and be personally identifiable. For example, a nurse's notes may include a patient's name along with their vital signs, diagnosis, or medical history.

Appellant suggests that there was a change in policy under Ms. LK and that the requirements to document and maintain client records were either superseded or eliminated. We find that argument to be without merit. No health care professional could reasonably believe that there were no records retention requirements for client medical files. Further, nothing in the hospital discharge policy issued by Ms. LK spoke to HCH recordkeeping requirements. The policy is clearly aimed at the responsibilities of hospital discharge planners. The earlier protocols still applied, as did County, State and Federal records retention laws.

Appellant's argument concerning the inability of the County to specifically identify the missing records does not excuse Appellant's behavior but does expose a critical shortcoming in County procedures. Ms. LK testified that Appellant would be given copies of medical referrals sent by facsimile by having them scanned and emailed to her or by simply placing the document in a folder at her desk. Tr. (Day 1) 71. Ms. LK further testified as to the large number of medical referrals HCH would receive by facsimile, but she did not provide clarification as to how those documents were required to be maintained or preserved by Appellant. Tr. (Day 1) 86. MH testified that he recalled "having conversations around keeping vital signs logs on site at the homeless shelters, diabetes, blood sugars. Blood pressures, that sort of thing in case they needed to be transported to the hospital." Tr. (Day 1) 184. Medical documentation was also provided to Mobile Med and other third parties. Thus, there certainly was a lack of clarity concerning the precise recordkeeping process Appellant was expected to follow, and the extent to which it was acceptable to maintain files in locations other than the HCH offices. Notwithstanding Appellant's recordkeeping shortcomings, we find that DHHS and HCH are responsible for inadequate, if not haphazard, recordkeeping procedures. We find it astounding that no log or list is kept of client referrals. Tr. (Day 1) 174-78. We strongly urge the County to take immediate steps to rectify this astonishing lapse in standard operating procedures.

It is clear from the record that Appellant had difficulty using the NextGen electronic record system and that she was lax in documenting client information in NextGen. Although Appellant made a few attempts to use NextGen, the County produced reliable evidence that she had failed to log in from July 15, 2019, to November 5, 2019. Tr. (Day 1) 189; CX 9. Notwithstanding the difficulties with using NextGen in the field Appellant's failure to even attempt to use NextGen for that period of time reflects a negligent approach to her documentation responsibilities. Appellant's behavior contrasts with that of her own witness, Mr. PC, who on a daily basis entered information into NextGen and only disposed of his notes after the information was entered into NextGen. Tr. (Day 1) 224, 239.

The NextGen platform may be insufficiently user friendly and intuitive, and its launch may have been delayed, but glitches are not unexpected with the implementation of such systems. What should also be expected by management is that employees will have differing levels of ability to adapt to a new system.[5] While efforts were made to provide Appellant with training and assistance,

[5] "[R]ather than thrusting new technologies upon employees, organizations should provide them with the right training and support to better use and adopt those tools." Frank-Jürgen Richter and Gunjan Sinha, *Why Do Your Employees*

including on a one to one basis, Appellant did make it known that she was still having difficulty. In addition, there were difficulties documenting prior dates of service which could only be rectified by IT support. Management paid insufficient attention to Appellant's struggles with NextGen as evidenced by the fact that Appellant had not successfully logged in to NextGen for four months. Tr. (Day 1) 189; CX 9. While the County introduced this evidence to demonstrate that Appellant was not transferring her notes from paper to NextGen during that time period, it also suggests that management's attention to Appellant's continued difficulties with NextGen should have been more robust. In our view, both Appellant and DHHS management share responsibility for Appellant's inability to fully utilize the NextGen system.

We find that the County has sustained its burden and proven certain of the charges by a preponderance of the evidence. Appellant's unauthorized disposal of client medical records constituted a violation of established policies and procedures as well as State law concerning medical records. MCPR § 33-5(c) & (d). The Maryland Annotated Code, Health General Article, § 4-403(b) provides that a health care provider, including a nurse, must retain patient medical records for five years. By disposing of client medical files Appellant violated Health General, § 4-403(b). Her failure to properly maintain and secure medical records, or to record client information in NextGen, was negligent and careless. MCPR § 33-5(h).

We have also reviewed the HIPAA regulations cited by the County and find that Appellant has not violated 45 CFR § 164.316. Contrary to the testimony of Mr. DM and the arguments in the County's post-hearing brief, HIPAA regulations do not contain a six year medical record retention requirement. What 45 CFR § 164.316(b)(2)(i) requires the County to retain for six years is documentation of its retention policies and procedures, not the actual medical records. Moreover, that regulation does not apply to the paper files Appellant is alleged to have destroyed. *See* 78 Federal Register 5566, 5567 (January 25, 2013) ("The HIPAA Security Rule, 45 CFR Part 160 and Subparts A and C of Part 164, applies only to protected health information in electronic form and requires covered entities to implement certain administrative, physical, and technical safeguards to protect this electronic information."). Rather, only State law governs how long medical records must be retained.

The County also contends that the *Safeguarding Confidential Personally Identifiable Information* policy was also violated by Appellant's failure to store medical records in a secure location. *See* § 5.6.1.1 "Client files and other PII must be stored in a secure environment."). The safeguarding policy's primary focus is on preventing the disclosure of protected health information consistent with HIPAA. However, the County has failed to prove that Appellant removed the great number of files it says were removed from the DHHS offices and kept them in an unsecure location. Rather, the evidence of record indicates that Appellant admitted to disposing of medical records by using the shred bins at the DHHS offices. It appears to us that although Appellant disposed of records that should have been maintained under Maryland law, her method of disposal was suitable had the records been appropriate for destruction, and no disclosure was likely. While Appellant committed a violation of the safeguarding policy by disposing of and not storing the missing files, the severity of her offense is lessened because she did not violate HIPAA or imperil protected health information.

Resist New Tech? Harvard Business Review, August 21, 2020, https://hbr.org/2020/08/why-do-your-employees-resist-new-tech#.

The County also demonstrated that Appellant violated the DHHS policy on *Safeguarding Confidential Personally Identifiable Information*, § 5.6.6, by failing to complete and submit the appropriate forms or obtain the required permissions. *See* CX 5, Appendix C; CX 6. Appellant admits that she took client records to shelters and other off-site locations as a routine part of her job. It is also undisputed that Ms. LK provided Appellant with a bag to carry confidential papers when out of the office. Thus, Appellant's supervisor was aware that Appellant was carrying medical documents to and from the HCH offices. Furthermore, it is clear that neither Appellant nor her supervisor were aware of any DHHS protocol to document the removal of patient files from the office. Thus, we view this violation of the safeguarding policy to be relatively minor.

Appropriate Level of Discipline

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 improperly failed to maintain and document client medical information, the Board must now address whether the penalty of dismissal is appropriate.

The County personnel regulations vest the DHHS Director with the discretion to eschew progressive discipline and move directly to dismissal 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. . ."). In addition to progressive discipline, MCPR § 33-2(d) states that 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."

Appellant's violations of County policies and State law concerning medical records went directly to her assigned duties and responsibilities as an RN responsible for the protection and security of protected health information. Moreover, her violations exposed DHHS to possible legal consequences should the information in the missing files be necessary to properly serve clients in the future.

We disagree, however, with the analysis DHHS used to reach the conclusion that dismissal was the appropriate sanction for Appellant's misconduct. The Department relied heavily on a recommendation of Mr. DM who, in our view, used an opaque penalty matrix and flawed reasoning. Mr. DM testified that the matrix was developed by his predecessor and that he was not sure if it was based on County, State or Federal law or policy. Tr. (Day 1) 155, 169. Mr. DM's investigative report provided no details on how the penalty matrix was applied to achieve the score that resulted in a recommendation of dismissal. CX 4. His explanation of how he arrived at the score was vague and imprecise. Tr. (Day 1) 154, 170. Although there is a document that contains the details of the matrix and how it is to be used that document was not introduced by the County for inclusion in the record. Tr. (Day 1) 171. Further, Mr. DM erroneously gave significant weight to what he believed to be Appellant's violation of HIPAA by intentionally destroying medical records. Tr. (Day 1) 154. As discussed above, the HIPAA regulations relied on by the County do

not support its argument that HIPAA requires the preservation of medical records. Rather, HIPAA is concerned with preventing the improper disclosure of such records and the use of appropriate methods of disposal to reduce the risk of inadvertent disclosure of confidential information.

We did not hear testimony from the ultimate decisionmaker, the Director of the Department, explaining his reasoning for choosing to dismiss Appellant. We have warned the County before that "while the Board is not bound by the County's choice of penalty, and does not defer to that choice in any significant way, it is much more likely to sustain a County-imposed penalty if it is clear on the record that these factors have been considered and the individuals who in fact made those considerations are called to testify." MSPB Case No. 19-20 (2019).

Appellant's skill and dedication as a nurse and in the evaluation and treatment of clients is not in dispute. With the exception of her recordkeeping failures, record evidence indicates that Appellant was a valuable employee with good performance evaluations and no prior discipline.

The County was only able to identify one case that it suggested was somewhat comparable. Tr. (Day 1) 33-35. In that instance an employee improperly took confidential files home without permission and kept the records in the trunk of her car when she went on FMLA leave. When asked about the files the employee found and returned the records and was ultimately punished with a two-day suspension. Although Appellant's offenses were similar in that she improperly removed records without written permission, we agree with the County that Appellant's improper disposal of records was a more serious violation that warrants more severe discipline.

We find that while Appellant clearly understood the need to safeguard client health information, she did not fully appreciate the potential harm in her approach to record maintenance or that premature disposal of that information was contrary to DHHS policy and law. The guidance she received from her supervisor at HCH does not appear to have been a model of clarity and the recordkeeping approach used by that office was less than ideal. Appellant's confusion concerning record retention requirements was understandable and weighs in favor of mitigation of the penalty.

The Montgomery County Code, § 33-14(c), grants the Board substantial latitude in determining the appropriate remedy 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).

We find that the sustained charges were extremely serious considering Appellant's duties and her knowledge of the need to safeguard client health information. Although we do not condone Appellant's misconduct, there are mitigating factors that deserve consideration in determining the appropriate level of discipline. Despite the seriousness of Appellant's negative behavior, the Board is of the opinion that based on the totality of circumstances, mitigation of the penalty is warranted.

In prior cases where the Board has sustained fewer than all of the agency's charges, the Board has mitigated the agency's discipline to the maximum reasonable penalty. MSPB Case No. 18-02 (2017); MSPB Case No. 13-04 (2013). *Cf., LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). 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 consistent with the concept of progressive discipline the maximum appropriate level of discipline for Appellant's misconduct is a forty-five (45) day suspension. In accord with the principles of progressive discipline, any future transgressions by Appellant may justify her dismissal.

In recognition of the serious charges that the County has proven, Appellant shall be reinstated to her position, or to a comparable position of equal pay, status and responsibility, without backpay. Montgomery County Code, § 33-14(c)(4).

We also find that upon her reinstatement DHHS must develop and implement an effective strategy to provide Appellant with the training necessary for her to succeed in her position. The County shall provide remedial training on record retention policies and documentation protocols.

The County shall also provide additional remedial training on the use of the NextGen recordkeeping system and provide ongoing feedback to Appellant as she attempts to enhance her skills. We strongly recommend that the County assign Appellant a mentor with the responsibility to monitor and follow up on Appellant's progress.

ORDER

For the foregoing reasons, the Board **GRANTS** Appellant's appeal of her dismissal and **ORDERS** that:

1. Appellant's dismissal be rescinded, and the discipline converted to a forty-five (45) day suspension;
2. Any reference to Appellant's discipline as a dismissal shall be removed or redacted from County administrative and personnel records;
3. Appellant be reinstated to her previous position or to a comparable position of equal pay, status and responsibility, without backpay;
4. Within 45 days of this decision the County provide the Board with written certification that the dismissal has been reduced to a suspension, Appellant has been reinstated, and that all County records reflect that change;
5. Upon Appellant's reinstatement, she promptly will be provided with appropriate training and skill development on all aspects of record retention and medical documentation, including privacy standards, and that training on NextGen be provided until she has achieved proficiency; and
6. 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 a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 23, 2021

Harriet Davidson
Chair