

**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. 21-03

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FINAL DECISION

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

BACKGROUND

The discipline in this matter relates to an April 14, 2020, incident at the Montgomery County Detention Center (MCDC) in which Appellant allegedly lost his temper during a conversation with his supervisor and behaved in an insubordinate, hostile, and unprofessional manner. As a result of the settlement of a prior disciplinary matter, Appellant was subject to a Last Chance Settlement Agreement which prohibited him from engaging “in any behavior that involves yelling, harassing, or speaking in an aggressive, combative, or disrespectful tone with co-workers.”

The Department of Correction and Rehabilitation (DOCR or Department) issued a Statement of Charges for Dismissal dated August 12, 2020. County Exhibit (CX) 1. On August 18, 2020, Appellant prematurely filed this appeal with the Board challenging the decision of the Department to dismiss him from his position as a Correctional Officer. The Board held Appellant’s appeal in abeyance pending his submission of a Notice of Disciplinary Action (NODA).

On September 21, 2020, DOCR issued a Notice of Disciplinary Action - Dismissal to Appellant. CX 2. On September 24, 2020, DOCR issued an amended Notice of Disciplinary Action - Dismissal to Appellant, which was served on Appellant on September 25, 2020. CX 3. The NODA found that Appellant violated the following provisions of the Montgomery County Personnel Regulations (MCPR): §33-5(c) (violates any established policy or procedure); §33-5(e)

(fails to perform duties in a competent or acceptable manner); and §33-5(h) (negligent or careless in performing duties). CX 4.

In addition, Appellant was found to have violated DOCR Policy Number 3000-7 §VII(E)(2)(a) (compliance with orders); §VII(E)(9) (conduct unbecoming); and §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance). CX 5.

A hearing on the merits of the appeal was held on March 2nd and 3rd, 2021. The County was represented at the hearing by Associate County Attorney [REDACTED], while Appellant was represented by attorney [REDACTED]. On May 10, 2021, the parties submitted post hearing briefs containing proposed findings of fact and conclusions of law.

The hearing was conducted before Board Chair Harriet E. Davidson and Vice Chair Sonya Chiles, and they considered and decided the Appeal.¹ After hearing testimony and reviewing the exhibits and stipulations of the parties, the Board made the following factual findings.

FINDINGS OF FACT

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

1. Lieutenant [REDACTED] (DS)
2. Corporal [REDACTED] (SN)
3. Lieutenant [REDACTED] (DJ)
4. Director [REDACTED] (Director or AT)
5. Corporal [REDACTED] (Appellant or MS)
6. Sergeant [REDACTED] (SA)

Appellant Exhibits² (AX) 1 through 5 and County Exhibits³ (CX) 1 through 20 were admitted into the record.

¹ Former Board Member C. Scott Maravilla, who was appointed by the County Council effective February 9, 2021, and resigned March 16, 2021, and current Board Member Barbara S. Fredericks, who was appointed April 20, 2021, did not participate in the consideration of this decision.

² Appellant’s exhibits are as follows:

AX 1 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics, effective December 30, 2016.

AX 2 - Email from Appellant to AT, dated May 26, 2020.

AX 3 - Email from Appellant to MW, May 19, 2020

AX 4 - Letter from Appellant to AT, undated.

AX 5 - Video Surveillance of CPU Hallway, April 14, 2020.

³ The County Exhibits are as follows:

CX 1 - Statement of Charges - Dismissal, August 12, 2020.

CX 2 - Notice of Disciplinary Action - Dismissal, September 21, 2020.

CX 3 - Amended Notice of Disciplinary Action - Dismissal, September 24, 2020.

CX 4 - Montgomery County Personnel Regulation, § 33.

CX 5 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics.

CX 6 - MCGEO Collective Bargaining Agreement, Article 28 - Disciplinary Actions.

The parties filed joint stipulations on February 17, 2021, which are set out in their entirety in a footnote.⁴ The Board accepted the stipulations into the record. Hearing Transcript (Tr.) 7.

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- CX 7 - Shift Administrator's Investigative Report, June 25, 2020.
 - CX 8 - Video Surveillance of CPU Hallway, April 14, 2020.
 - CX 9 - Incident Report written by Lt. DJ, dated May 5, 2020.
 - CX 10 - Incident Report written by Ofc.SN, dated May 19, 2020.
 - CX 11 - Email from Appellant to Director AT, May 26, 2020
 - CX 12 - Email from Appellant to Deputy Warden MW, May 19, 2020
 - CX 13 - Ten-Day response from Appellant to Director AT, undated
 - CX 14 - Employee Training Schedule Report for Appellant.
 - CX 15 - Email Chain regarding Appellant's referral to the County's Employee Assistance Program ("EAP").
 - CX 16 - Last Chance Agreement, finalized January 8, 2019.
 - CX 17 - Statement of Charges - Ten (10) Day Suspension, January 5, 2018, Amended Notice of Disciplinary Action - Five (5) Day Suspension taken as Forfeiture of Leave and Last Chance Agreement, February 4, 2019, and Order Accepting Settlement Agreement, January 28, 2019.
 - CX 18 - Notice of Disciplinary Action - Five (5) Day Suspension, July 20, 2016, Alternative Dispute Resolution Settlement Conference Intake Form, and work status change documents, Statement of Charges June 14, 2016.
 - CX 19 - Statement of Charges - Dismissal dated July 22, 2020, Notice of Disciplinary Action dated September 21, 2020 and Amended Notice of Disciplinary Action September 24, 2020.
 - CX 20 - Notice of Administrative Leave with Pay, May 19, 2020.

⁴ The parties agreed to the following stipulations of fact:

Director [REDACTED] (background information only)

- Director [REDACTED] has been with DOCR for 28.5 years.
- Current Position: Director. Dir. [REDACTED] has been in this role since August 2019, she was Acting Director from May 2019 to August 2019.
- Prior positions held in DOCR: Division Chief Community Corrections (PRC and Pre-Trial Divisions), Division Chief Pre-Trial Services, Unit Manager Pre-Release and Reentry Services, Work Release Coordinator (PRRS), Case Manager (PRRS) and Resident Supervisor (PRRS).
- As Director, she has complete oversight and decision-making authority for the Department of Correction and Rehabilitation and its complement of 541 employees.
- Disciplinary process:
 - The Warden usually assigns a Lieutenant or Captain to investigate a matter, though sometimes the Director may do so.
 - Once the investigation is complete, the investigative report is turned into the Deputy Warden ("DW") for review and recommendation for disciplinary action. The DW will then forward it to the Warden for review with recommendations from the DW. The Warden can ask additional questions. The Warden either agrees or disagrees with DW's recommendation then forwards the investigation and recommendations to the Director for review. The Director can then ask the investigator to conduct additional investigation. The Director either agrees with or disagrees with Warden's and DW's recommendations for disciplinary action.
 - The Director is the final decision maker on the level of discipline to be issued.
 - Once the level of discipline is determined, a Statement of Charges ("SOC") is written and served on the employee.
 - If the employee does not request Alternative Dispute Resolution ("ADR") and the employee does not provide a response within ten days that justifies a reduction in the discipline imposed, a Notice of Disciplinary Action ("NODA") is issued and served upon the employee.
 - These steps were followed in this matter.
- When determining the level of discipline, the Director takes the following factors into consideration:

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- Nature and gravity of the offense
 - Relationship of the misconduct to the employee's assigned duties and responsibilities
 - The employee's work record
 - Comparable discipline
 - Whether the employee should have been aware of the rules/procedures
 - Other relevant factors

Deputy Warden [REDACTED] (background information only)

- Current title: Deputy Warden of Custody and Security for MCDC. DW [MW] has been in this position for the past 5 months and was the Acting Deputy Warden for one year prior to that.
- Has been with DOCR for over 27 years.
- Prior Positions held:
 - Captain/Professional Standards and Compliance Manager (included being DOCR's Internal Affairs Investigator) - 2 years;
 - Admin. Captain for MCDC - 2 years;
 - Shift Manager (Captain) for MCCF's #1 Shift - 1 year;
 - Shift Commander (Lieutenant) assigned to both MCCF and MCDC from 2009 - 2015;
 - Honor Guard Commander (additional position during my tenure as Lieutenant and Captain).
 - Correctional Officer
- DW [MW]'s duties include being responsible for the day-to-day management, leadership, and coordination of all criminal justice agencies and programs at the MCDC. MCDC is primarily responsible for the intake and processing of adult male and female offenders arrested within the County and has a facility capacity to accommodate approximately 200 inmates. Major program elements at the MCDC include the Central Processing Unit (processing over 15,000 offenders per year), Intake, Booking and Release, Pre-Trial Assessment, Records Management, Behavioral Health Screening and Assessment, Correctional Health Screening, Public Defender Interviews, interfacing with numerous law enforcement agencies, and critical daily support of all District Court Commissioner operations. This position leads in both on-the-floor management of line operation and public policy planning and development at every level of correctional operations in Montgomery County, MD.
- Responsibilities include:
 - Basic budget development and management;
 - Staff mentoring and supervision;
 - Security operations;
 - Managing program elements critical for the constitutional practice of correctional operation in the county/local correctional setting; and
 - Participating in the disciplinary process of employees assigned to MCDC.
- Training and Education: HS Diploma, United States Marine Corps ('88-'92), AA Degree from Frederick Community College (General Studies), Correctional Entrance-Level Training Program (State Academy) - 1993, Accelerated Police Academy with MCP - 1997 (trained in law, criminal investigation, crime scene preservation, evidence collection, criminal charging offenders, etc.), First Line Supervisor Training - 2006, First Line Administrator's Training-2015, Internal Affairs Investigation Training-2018. In addition, DW [MW] received countless correctional officer training hours during his tenure as a correctional officer.
- Responsibilities in the Disciplinary Process: DW [MW]'s role in the disciplinary process is to review all reports of the incident, to include incident reports (DCA-36), adjustment reports (DCA-71), Use of Force Check Lists, Shift Administrator's Investigative Reports (SAIR), and Security Rounds reports. He will also review all evidence related to the incident, to include photographs, video surveillance footage, and physical evidence (*i.e.* clothing, weapons, etc.). Once he has reviewed all components of the incident, and all appear complete, he will write a recommendation as to the findings and forward his recommendations to the Warden for review. For the instant matter, DW followed this protocol.
- The Chain of Command between DW [MW] and Cpl. [MS]: Cpl. [MS] reports to his Lieutenant who reports to the Administrative Captain, who reports to Deputy Warden [MW]. There are Sergeants on Cpl. [MS]'s shift, but he does not directly report to them.

Appellant has been employed as a Correctional Officer with DOCR since October 15, 2007. At the time of his dismissal he was serving as a Correctional Officer III, Corporal. On April 14, 2020, Appellant was assigned to the CPU Hallway post on the Third Shift at MCDC. Tr. 18.

While on duty at his CPU Hallway post Appellant received a personal phone call from his son and remained on the phone with members of his family for approximately 20 minutes. Tr. 163-64, 191-92. While Appellant was on the phone, Lieutenant DS came by the Hallway post while conducting his rounds. Tr. 18. Lieutenant DS uses rounds to convey information to the officers on a post and to receive a brief status report on conditions at that post. Tr. 19-20.

Appellant was on the phone when Lieutenant DS first came by the Hallway Post on his rounds of April 14, 2020. Tr. 19; Tr. 80. On the video surveillance of the CPU Hallway Post Appellant looks towards the door at the end of the hallway when Lieutenant DS enters, then turns to look straight ahead at the desk or wall. CX 8, 15:18:23.⁵ Appellant did not get off the phone to acknowledge Lieutenant DS. Tr. 20; Tr. 81. Corporal SN and Lieutenant DS did, however, acknowledge each other. Tr. 19; Tr. 81; CX 8, 15:18:31-33. Appellant was still on the telephone facing forward when Lieutenant DS came back through the hallway and left. Tr. 81; CX 8, 15:20:50.

After Lieutenant DS completed his rounds he asked Appellant to come to his office. Tr. 24-25. Lieutenant DS testified that he wanted to find out if Appellant had been on a personal or work related call. Tr. 25. Lieutenant DS also wished to address Appellant's failure to acknowledge him during rounds. Lieutenant DS had advised during roll calls that officers on personal phone calls were expected to put the call on hold, or hang up, and acknowledge a Lieutenant doing rounds. Tr. 21-22; Tr. 59-61; Tr. 96. This is a standard procedure. Tr. 81; Tr. 86-87; Tr. 89; Tr. 96.

When Appellant came to his office, Lieutenant DS closed the door so that they could have a conversation in private. Tr. 26; Tr. 29; Tr. 75; Tr. 97. Appellant told Lieutenant DS that he had been on a personal call with his family. Tr. 26-27. Appellant then asked if he was forbidden to talk to his family. Tr. 27. Lieutenant DS told Appellant that if an officer needed to talk to a family member about something sensitive, they would be provided with an office so that they could have a private conversation. Tr. 27.

As Lieutenant DS tried to address the issue of personal calls at work Appellant became irritated and began raising his voice. Tr. 29-30. Due to Appellant's anger and refusal to engage in a civil conversation, Lieutenant DS sought to end the conversation and order Appellant to return

Capt. [REDACTED]

- Captain [BW] is the Custodian of Records for the video surveillance system at MCDC and if called to testify, he would verify to the authenticity of the video surveillance footage found on CE 10 [CX 10].

Other Facts

- Cpl. [MS] was served in this matter with a Statement of Charges for Dismissal (CE 1) [CX 1], dated August 12, 2020 on August 13, 2020.
- Cpl. [MS] was served in this matter with an Amended Notice of Disciplinary Action for Dismissal (CE 4) [CX 4], dated September 24, 2020 on September 25, 2020.
- Cpl. [MS] has been employed with DOCR since October 15, 2007. He was most recently assigned to the Third Shift at MCDC.

⁵ The video reflects both the military time of day and the elapsed time of the recording. We reference the time of day in this decision.

to his post. Tr. 30-32. Appellant ignored several orders from Lieutenant DS to return to his post. Tr. 30-32; Tr. 100-01.

Lieutenant DJ was in her office across the hallway from the office of Lieutenant DS while he was meeting with Appellant. Tr. 97. Lieutenant DJ testified that shortly after Appellant began meeting with Lieutenant DS she heard Appellant's raised voice through the closed door. Tr. 98. She could hear Appellant say "I can talk to my family, you can't tell me I can't." Tr. 98.

Lieutenant DS opened the door to his office and told Appellant to return to his post. Tr. 31. Appellant did not immediately return to his post but instead continued to yell at Lieutenant DS, stating that he did not have to listen to Lieutenant DS. Tr. 100.

During this confrontation, Appellant pointed his finger in Lieutenant DS's face while yelling at him. Tr. 32; Tr. 100-01. Lieutenant DJ testified that she heard Appellant say to Lieutenant DS: "I don't have to listen to you," "you don't like me anyway," "who do you think you are," and "write me up." Tr. 100-01.

Lieutenant DJ came out of her office, placed her hand on Appellant's shoulder, and tried to get Appellant to leave by directing him towards the main hallway. Tr. 32-33; Tr. 101-02. Appellant stiffened up and Lieutenant DJ had to physically push him towards the exit. Tr. 67; Tr. 101-02. While doing so, Lieutenant DJ kept telling Appellant to calm down and return to his post. Tr. 33; Tr. 102-03. Appellant refused to obey her orders. Tr. 103. Finally, after multiple commands from both Lieutenants, Appellant returned to his post, yelling and speaking loudly as he went. Tr. 104.

When Appellant arrived at his post in the Hallway CPU he was still angry and yelling about not being able to talk to his family on the phone. Tr. 82; Tr. 224; Tr. 229. He told Sergeant SA what had just occurred. Corporal SN told Appellant and Sergeant SA to go into the police room to have their discussion in private. Tr. 82; CX 10. Appellant and Sergeant SA went to the police room to have a private discussion. Tr. 227.

After Appellant and Sergeant SA spoke, Sergeant SA attempted to reduce the tension and resolve the conflict between Lieutenant DS and Appellant. Tr. 35-36. Lieutenant DS told Sergeant SA that he would have to write up Appellant. Tr. 36.

While Lieutenant DS and Sergeant SA were speaking, Lieutenant DJ called Appellant and asked him why he was not trying to speak to Lieutenant DS himself rather than having Sergeant SA do his bidding for him. Tr. 106-07. Lieutenant DS did not know Lieutenant DJ had called Appellant nor did he ask her to call Appellant. Tr. 108. Appellant went to Lieutenant DS and asked if he had called for him. Lieutenant DS said no, and Appellant left. Tr. 36.

Appellant was subsequently disciplined for his behavior during his encounters with Lieutenant DS and Lieutenant DJ and not due to his use of the telephone for personal reasons or for failing to acknowledge Lieutenant DS while on the phone. Tr. 64; Tr. 74; Tr. 156-57.

On January 10, 2019, Appellant and the County filed a settlement agreement with the Board resolving his appeal of a previous disciplinary suspension in MSPB Case No. 18-18. CX 16. As part of the agreement Appellant acknowledged that he would not engage in behavior that constituted "yelling, harassing, or speaking in an aggressive, combative, or disrespectful tone with co-workers," and that doing so would constitute cause for dismissal. CX 16. Appellant explicitly

acknowledged that if the County issued a Notice of Disciplinary Action and proved that behavior in violation of the agreement occurred, he would be subject to dismissal. The Board found that the agreement was comprehensive, knowingly and freely made, fair, and that there was no evidence of bad faith or duress. *See* Order Accepting Settlement Agreement, MSPB Case No. 18-18 (January 28, 2019).⁶

APPLICABLE LAW

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

§ 33-1. Definition.

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

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.

⁶ Because Appellant was not represented by counsel in MSPB Case No. 18-18, the Board reviewed the agreement to determine not only whether it was lawful on its face and freely entered into by the parties, but also whether it was fair, and that there was no evidence of agency bad faith or duress. The Board met with the parties on January 24, 2019, in order to obtain clarification as to the meaning of certain terms of the agreement, to ascertain whether both parties had the same understanding of the terms, and to verify that Appellant's agreement was knowing and voluntary. The Board reviewed the agreement with the parties and verified that Appellant understood all the operative terms. Although the Board urged the County to consider limiting the term of future Last Chance Agreements to one year, the order explicitly acknowledged that the term of this agreement was for three years. CX 17.

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

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

§ 33-3. Types of disciplinary actions.

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

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

- (c) violates any established policy or procedure; . . .
- (e) fails to perform duties in a competent or acceptable manner; . . .
- (h) is negligent or careless in performing duties; . . .

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

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

2. Compliance with Orders:

- a. Employees shall obey a superior's lawful order. . . .

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. . . .

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-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 18-07 (2019); MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) ("the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability").

Appellant's Testimony Lacked Credibility

Appellant's testimony and that of other witnesses differ on certain key points, most notably the issue of whether Appellant was yelling or speaking in an aggressive, combative, or

disrespectful tone with Lieutenant DS. Accordingly, the Board is obligated to consider and resolve the issue of credibility. As the Board has discussed in previous decisions, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 18-07 (2019); MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013), *citing Haebe v. Department of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002).

Appellant testified that he never raised his voice during his conversation with Lieutenant DS and that during the conversation he used hand gestures such as pointing that, although common in his [REDACTED] culture, may be misinterpreted in the United States as disrespectful, aggressive, or intrusive. Tr. 174-75, 180, 196-98. Appellant specifically denied pointing at the face of Lieutenant DS. Tr. 197.

Lieutenant DS testified that Appellant was upset and raised his voice. Tr. 29-30. *See* Board Exhibit 1. Lieutenant DJ also testified that Appellant was yelling at Lieutenant DS in a voice so loud that she could clearly hear what he was saying through a closed door. Tr. 98. Both Lieutenant DS and Lieutenant DJ testified that Appellant pointed his finger in Lieutenant DS's face while yelling at him. Tr. 32; Tr. 100-01. Lieutenant DJ also testified that when Appellant finally started to return to his post he was yelling and speaking loudly as he went. Tr. 104.

Consistent with the testimony of the two Lieutenants, Corporal SN testified that Appellant was angry and yelling when he returned from his meeting with Lieutenant DS. Tr. 82. In a May 19, 2020, incident report Corporal SN wrote not long after the events at issue he also stated that "Upon his return to CPU [Appellant] appeared to be very upset yelling and screaming. . .". CX 10.⁷

There is no record evidence suggesting that Lieutenants DS and DJ, or Corporal SN, had any reason to be untruthful. The testimony of all three witnesses was consistent as to the material facts at issue. Further, they appeared sincere, and none of them displayed any indicia of deception or dishonesty. For these reasons, and based on their demeanor, we find that Lieutenant DS was more credible than Appellant, as were Lieutenant DJ and Corporal SN.

Appellant's denial that he got angry, raised his voice, and pointed his finger at the face of his supervisor was contradicted by the credible testimony of several disinterested witnesses. Moreover, the Board had ample opportunity to directly observe the demeanor of Appellant during his testimony and to assess his credibility. The Board concludes that Appellant was defensive, defiant, evasive, and that his testimony was self-serving. For these reasons, we find that Appellant was not credible and view his testimony with considerable skepticism. MSPB Case No. 17-13 (2017); MSPB Case No. 10-04 (2010).⁸

⁷ Appellant's own witnesses, Sergeant SA, acknowledged that Appellant was upset and angry when he returned from his meeting with Lieutenant DS. Tr. 224, 227-29.

⁸ Appellant's credibility is also called into question by his suggestion that he was misled about the contents of the Last Chance Agreement that resolved MSPB Case No. 18-18 in January 2019. On cross examination Appellant claimed that he was orally told that the agreement only had a one-year duration. Tr. 207. However, both the agreement and the Order Accepting Settlement Agreement explicitly say that the agreement had a three-year duration. CX 16, CX 17. Indeed, as noted previously, the Board met with Appellant and the County on January 24, 2019, specifically to ensure that Appellant understood the agreement and to confirm that his agreement was knowing and voluntary. CX 17. Appellant's credibility was further damaged when he began questioning the legitimacy of the Last Chance Agreement

The County Has Proven the Charges Against Appellant

The County charged that Appellant violated MCPR §33-5(c) (violates established policy or procedure); §33-5(e) (fails to perform duties in a competent or acceptable manner); and §33-5(h) (negligent or careless in performing duties). CX 4. In addition, Appellant was charged with violating DOCR Policy Number 3000-7 §VII(E)(2)(a) (compliance with orders); §VII(E)(9) (conduct unbecoming) and §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance). CX 5.

On April 14, 2020, Lieutenant DS called Appellant to his office, asked about the personal telephone call Appellant was on while Lieutenant DS was doing rounds, and attempted to counsel Appellant on appropriate telephone protocol. Tr. 30. During the conversation Appellant became upset, loud, and angry. Tr. 31. Appellant began yelling and aggressively pointing his finger at the face of Lieutenant DS. Tr. 32. When Lieutenant DS and Lieutenant DJ attempted to deescalate the situation and repeatedly ordered Appellant to restrain his emotions, quiet down, and return to his assigned post Appellant failed to immediately and fully comply with their orders. Tr. 31-32; Tr. 100-03.

Appellant's angry and argumentative behavior with his supervisor was inappropriate and unprofessional. It was well within the authority of Lieutenant DS to discuss work-related behavior with a subordinate, advise him when the meeting was over, and to instruct Appellant to return to his duty post. Tr. 138. It was also appropriate for Lieutenant DJ to instruct Appellant to curtail his anger and return to his post.

The orders to calm down and return to his post were lawful and Appellant was required to comply. Instead of immediately complying with the orders to calm down and return to his post Appellant refused and continued to scream, argue, and be insubordinate to the two Lieutenants. Tr. 125.

We do not credit Appellant's denials that he raised his voice and became angry. We find it telling that Appellant admitted that after he received multiple commands to return to his post he continued to argue and explain himself. Tr. 178-79, Tr. 198 ("I did not leave immediately because I was trying to explain something to him.").

We find that the County has proven by preponderant evidence that Appellant failed to comply with lawful orders in violation of DOCR Policy Number 3000-7 §VII(E)(2)(a), and thus is subject to discipline under MCPR §33-5(c) (violates any established policy or procedure).

When Appellant failed to control his anger as Lieutenant DS was trying to counsel him about personal telephone calls while on duty, and was loud, aggressive, and insubordinate, Appellant engaged in conduct unbecoming a correctional officer. DOCR Policy Number 3000-7, §VII(E)(9) ("Conduct unbecoming includes . . . 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...").⁹

document entered into evidence, even though his attorney had acknowledged prior to, and again during the hearing, that the document was authentic. Tr. 209-10.

⁹ Generalized terms such as "conduct unbecoming" are common public employee discipline provisions. *See e.g.* COMAR 17.04.05.04B(3) (conduct that "would bring the State into disrepute"). In determining whether specific

Director AT testified that correctional officers have a duty to behave in a professional manner and to model appropriate behavior. Tr. 137. *See* DOCR Policy Number 3000-7 §IX (“An employee’s attitude toward . . . supervisors . . . has a profound impact on the morale of the staff and the visitors/defendants/inmates/residents/participants. . . Professionalism demands tact, courtesy, mutual respect, understanding and a willingness to make the effort to get along and work well with others.”) We agree that the Director’s interpretation of “conduct unbecoming” is in harmony with the DOCR policies and that Appellant’s behavior constituted conduct unbecoming a correctional officer. Discourteous and unprofessional behavior on the job violates accepted standards of conduct and may be the subject of discipline.

Appellant’s behavior also constituted neglect of duty and unsatisfactory performance of his duties. DOCR Policy Number 3000-7 §VII(E)(10) (“Unsatisfactory performance is demonstrated by. . . the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee’s . . . position.”). Appellant did not obey a lawful order to calm down and return to his post when told to do so, and it required two superior officers to coax him into finally obeying. Appellant was not adhering to work standards which require correctional officers to follow lawful orders from a superior, exhibit professionalism, and handle conflict in a manner other than by expressing anger and aggressive, argumentative behavior. Tr. 138.

We find that the County has proven by preponderant evidence that Appellant engaged in conduct unbecoming a correctional officer in violation of DOCR Policy Number 3000-7, §VII(E)(9), and neglect of duty and unsatisfactory performance of his duties in violation of DOCR Policy Number 3000-7 §VII(E)(10). Appellant is thus subject to discipline under MCPR §33-5(e) (fails to perform duties in a competent or acceptable manner) and §33-5(h) (negligent or careless in performing duties).

The Appropriate Level of Discipline is Dismissal

As detailed above, the County has proven by a preponderance of the evidence the charges against Appellant. Having determined that the County proved its case by a preponderance of the evidence, the remaining question is the appropriate level of discipline.

The Director of DOCR was responsible for determining the appropriate level of discipline and testified as to the reasons she decided to dismiss Appellant. The Board found the Director to be familiar with the facts of the case and thoughtful in her analysis of the relevant factors she considered to reach her decision.

The record reflects that Appellant’s disciplinary history is significant and relevant to these charges.¹⁰ In 2014 he received a one-day suspension for yelling at a female co-worker. Tr. 204. Appellant also received a three-day suspension for arguing with a female officer in 2014. Tr. 205.

behavior constitutes “conduct unbecoming” we rely upon the term’s ordinary meaning. *See Miles v. Department of the Army*, 55 M.S.P.R. 633, 637-38 (1992) (unbecoming conduct is “unattractive; unsuitable . . . detracting from one’s . . . character, or reputation; [or] creating an unfavorable impression.”).

¹⁰ Even without considering Appellant’s significant prior discipline the County personnel regulations would allow the DOCR Director to eschew progressive discipline and move directly to dismissal. 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 July 2016, Appellant was given a five-day disciplinary suspension for using excessive force when he pushed a teenaged member of the community out the front door of MCDC. CX 18; Tr. 205. Pursuant to the January 2019 Last Chance Agreement Appellant received a ten-day suspension for an incident in which he behaved in an aggressive and intimidating manner towards a DOCR nurse. CX 16, CX 17; Tr. 205-06.

While the Director testified that she focused on the two most recent suspensions in making her decision, Tr. 140, we note that the four disciplinary suspensions Appellant received were applied progressively, going from a one-day suspension to suspensions of three, five, and finally ten days. Just as importantly, all the prior disciplinary actions against Appellant were for incidents where he was unable to control his emotions and either acted in an aggressive and intimidating verbal manner or, in the 2016 case where he shoved a juvenile community member out of the door to the lobby of MCDC, where he used unjustified force. Tr. 140; CX 18.

The Director also considered a February 2020 incident in which Appellant lost his temper and deployed pepper spray against an inmate locked in a medical unit cell. Tr. 134; CX 19. That unauthorized and unnecessary use of force further demonstrated Appellant's inability to control his emotions while on the job. MSPB Case No. 21-01 (2021). We find that the Director appropriately considered the progressive discipline Appellant has received and properly concluded that dismissal was warranted.

In addition to the progressive discipline against Appellant, the evidence of record shows that Appellant was yelling at and speaking in an aggressive, combative, and disrespectful tone with Lieutenant DS. That behavior was in direct violation of the 2019 Last Chance Agreement. CX 16, ¶3. In the Last Chance Agreement Appellant expressly agreed that if he engaged in such behavior it would "constitute cause for dismissal under Section 33-5(c) of the Montgomery County Personnel Regulations." CX 16, ¶4. For this reason alone, Appellant is subject to dismissal.

We consider whether DOCR has consistently applied its disciplinary policies and dismissed other staff who have engaged in similar behavior. MCPR § 33-2(d)(3). To support an assertion that the Director failed to properly take into account comparable DOCR cases before making the decision to dismiss him from County employment Appellant must show that he and any comparison employees engaged in similar misconduct without differentiating or mitigating circumstances that would warrant distinguishing the misconduct or the appropriate discipline. MSPB Case No. 10-04 (2010), *citing* *Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009). Appellant made no such showing and Director AT testified that she could not identify any other comparable cases. Tr. 139.

We also consider whether Appellant has potential for rehabilitation and conclude that he does not. It is significant that Appellant has previously been subject to discipline for angry outbursts and threatening behavior. The numerous prior suspensions and the dismissal charges in MSPB Case No. 20-01 suggest that Appellant is unlikely to alter his unacceptable behavior. "Persistent misconduct despite being disciplined . . . justifies dismissal." MSPB Case No. 17-13 (2017).

Appellant has repeatedly demonstrated anger and self-control issues that would make him subject to discipline in any workplace, and especially ill-suited for a position involving the care

and custody of individuals in a DOCR facility. For these reasons we conclude that Appellant lacks the potential for rehabilitation.¹¹

Finding that the County has proven by a preponderance of the evidence that Appellant's behavior was unacceptable and in violation of County policies and regulations, we uphold all charges against him.

ORDER

For the foregoing reasons, the Board **DENIES** the appeal.

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

July 13, 2021

████████████████████

Harriet E. Davidson
Chair

¹¹ Appellant's claim that he was misled concerning the 2019 Last Chance Agreement when great care was taken to ensure that he fully understood and agreed to the terms of the agreement provides additional evidence of his inability to take personal responsibility for his actions.