

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

IN THE MATTER OF

[REDACTED],

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 21-11

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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 [REDACTED] (Appellant).

BACKGROUND

On November 30, 2020, the Montgomery County Department of Correction and Rehabilitation (DOCR or Department) issued an amended Notice of Disciplinary Action (NODA) – Fifteen (15) Day Suspension and Six (6) Month Rank Demotion to Appellant that was dated November 24, 2020. County Exhibit (CX) 3.¹ The NODA found that Appellant violated the

¹ Thirty-six County Exhibits were admitted into the record. The County Exhibits are as follows:

- CX 1 - Statement of Charges, September 3, 2020
- CX 2 - Notice of Disciplinary Action, November 19, 2020
- CX 3- Amended Notice of Disciplinary Action, November 24, 2020
- CX 4 - Notice of Non-Inmate Contact Memorandum, May 26, 2020
- CX 5 - Notice of Return to Normal Duty (Name Correction), September 14, 2020
- CX 6 - Investigative Report, completed August 5, 2020
- CX 7 - Video of incident, May 20, 2020
- CX 7A - Video of incident, screen shot
- CX 7B - Video of incident, screen shot
- CX 7C - Video of incident, screen shot
- CX 7D - Video of incident, screen shot
- CX 7E - Video of incident, screen shot
- CX 7F - Video of incident, screen shot

following provisions of the Department of Correction and Rehabilitation Policy and Procedures (DOCR Policy) 3000-7, Standard of Conduct/ Code of Ethics, §V(C) (Only such force as is necessary); §V(D) (personnel shall not strike or lay hands on an inmate except under limited circumstances); §VII(E)(14) (employees shall not make untruthful statements); DOCR Policy 1300-10, Use of Force, §V(A) (only supervisors may authorize use of force except in extreme emergencies); §III(F) (use of force shall be reported and documented). CX 20 & 21.

On November 30, 2020, Appellant filed this appeal with the Board challenging the decision of the Department to suspend and demote her.

On February 17, 2021, the parties appeared by video before the Board for a prehearing conference. Representing DOCR were Associate County Attorneys [REDACTED] and [REDACTED]. Appellant was present and represented by her attorney, [REDACTED]. The purpose of the prehearing conference was to discuss settlement, identify the issues to be decided, identify any stipulations of fact to which the parties could agree, rule on proposed witnesses and exhibits, and establish dates for the merits hearing.

On Tuesday, April 13, 2021, less than a week before the scheduled merits hearing, Appellant's attorney filed a Notice of Withdrawal and advised that Appellant would be representing herself. The County emailed a request for confirmation that Appellant would be prepared to go forward with the hearing, and Appellant's attorney responded that Appellant "is ready to proceed on Monday."

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- CX 8 - Photos of Inmate CM's injuries
 - CX 9 - Inmate Medical & Dental Health Request Slip, May 20, 2020
 - CX 10 - Departmental Daily Log for May 20, 2020
 - CX 11 - Incident Report, DCA 36 by Appellant.
 - CX 12 - Incident Report, DCA 36 by Ofc. KK
 - CX 13 - Incident Report, DCA 36, by Ofc. KPM
 - CX 14 - Incident Report, DCA 36, by Lt. WR
 - CX 15 - Incident Report, DCA 36, by Sgt. DR
 - CX 16 - Report, DCA 36, by Ofc. JC
 - CX 17 - Incident Report, DCA 36, by Ofc. OV
 - CX 18 - Written Statement by Ofc. AA
 - CX 19 - Montgomery County Maryland Personnel Regulations, §33
 - CX 20 - Department of Correction and Rehabilitation Policy and Procedure 3000-7, Standard of Conduct/ Code of Ethics
 - CX 21 - Department of Correction and Rehabilitation Policy and Procedure 1300-10 Use of Force, Chemical Agents, and Restraints
 - CX 22 - Statement of Charges-Dismissal, May 29, 2018 and Alternative Dispute Resolution Conference Settlement with Last Chance Agreement
 - CX 23 - Notice of Disciplinary Action—Fifteen (15) Day Suspension and Three (3) Month Rank Demotion with a One (1) Year Last Chance Agreement, October 23, 2019
 - CX 24 - Statement of Charges-Dismissal, January 13, 2016
 - CX 25 - Notice of Disciplinary Action – Thirty (30) Day Suspension, Six (6) Month Rank Demotion, and Administrative Removal from ERT, September 11, 2020
 - CX 26 - Notice of Disciplinary Action-Dismissal, October 3, 2017
 - CX 27 - Inmate CM Grievance
 - CX 28 - Injured Arrestee Report, DOCR, CPU, May 10, 2021
 - CX 29 - Initial Medical Screening Form, DCA-201, May 11, 2021
 - CX 30 - Video of incident, May 20, 2020, with viewing software

The merits hearing was held on April 19 and 21, 2021, before Board Chair Harriet E. Davidson and Vice Chair Sonya E. Chiles. At the beginning of the first hearing day the Board confirmed that Appellant was able to proceed on her own without legal representation. Hearing Transcript (Tr.) 9. The Board has considered and decided the Appeal.²

FINDINGS OF FACT

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

1. Officer ██████████ (JC)
2. Officer ██████████ (OV)
3. Sergeant ██████████ (KK)
4. Sergeant ██████████ (DR)
5. Lieutenant ██████████ (AM)
6. Director ██████████ (AT or Director)
7. Sergeant ██████████ (RL)
8. Lieutenant ██████████ (KH)
9. Sergeant ██████████ (MM)
10. Sergeant ██████████ (CH)
11. Warden ██████████ (SM)
12. ██████████ (Appellant)

After hearing testimony, reviewing the exhibits of each party,³ and considering the stipulations of fact agreed to by the parties, the Board made the following factual findings.

Appellant has been a correctional officer with DOCR since January 9, 2017, and at the time of the May 20, 2020, incident was serving at the rank of Corporal. Tr. 383-84. Although she was temporarily reduced in rank, her rank was restored in June of this year. Tr. 384. At all times relevant this matter Appellant was assigned to work at the Montgomery County Correctional Facility (MCCF). CX 3.

² Board Member Barbara S. Fredericks, who was appointed April 20, 2021, did not participate in the consideration of this decision.

³ Appellant Exhibits (AX) 1 through 5 and 7 through 12 were admitted into the record. Appellant’s exhibits are as follows:

- AX 1 - Annual Performance
- AX 2 - Character References
- AX 3 - Policies
- AX 4 - Promotional File
- AX 5 - Return to Duty
- AX 7 - Incident Reports
- AX 8 - Statement of Charges (2017)
- AX 9 - MCPD Police Report, undated, as supplemented
- AX 10 - Email from CG, February 3, 2021
- AX 11 - Letter from AB, January 28, 2021
- AX 12 - Statement of Charges, July 22, 2020; Statement of Charges, April 1, 2021

On May 22 and 23, 2020, Inmate CM told correctional officers at MCCF that on May 20th she had been assaulted in her cell on the North 2-1 D pod by Appellant and Corporal AA. Tr. 37-39; CX 6, CX 16.

Sergeant KK testified that when Inmate CM arrived late in the evening of May 10, 2020 he noticed bruises on her inner left biceps and made a note of them in an Incident Report he filed. Tr. 85; CX 12. Sergeant KK said if he had seen other bruises, he would have included a mention of them. Tr. 85. An Injured Arrestee Report prepared during the intake process on May 10, 2020, contains notes made by a nurse in the medical unit, and those notes do not mention any other bruising. Tr. 86; CX 28. Similarly, the Initial Medical Screening report prepared on May 11, 2020, contains no indication of bruising on Inmate CM. CX 29. Sergeant RL testified that she “stripped out” Inmate CM the day of her admission and only recalled seeing bruises on her arms. Tr. 231.

On May 22, 2020, Officer JC noticed “a rather large, dark colored bruise” on Inmate CM’s left arm and asked how it had happened. Tr. 37; CX 16. Inmate CM told Officer JC that two female officers had assaulted her in her cell, that she had written a grievance, but was afraid to give it to anyone. Tr. 37-38; CX 16. The inmate later provided a copy of the grievance, dated May 21, 2020, to Officer JC. Tr. 38. The grievance states that Appellant “+ (1) other African American female with black pony hair entered my cell for ‘garbage’, only to harass me, take away my food while I was eating, physically assaulted + battered me several times without any provocation + I did not fight back in self-defense.” CX 27.

The next day, May 23rd, Inmate CM told a similar story to Officer OV and showed her the bruises. Tr. 65-66; CX 17. Although Inmate CM named Corporal AA as having assaulted her, she did not mention Appellant to Officer OV. Tr. 71, 77. Officer OV acknowledged that if Appellant had witnessed an assault by another officer, she would be obligated to file a report. Tr. 77 - 78. Sergeant DR, the immediate supervisor of Appellant on May 20th, also testified that if Appellant or Corporal AA had “put hands on” Inmate CM they should have reported the incident to him and filed a report. Tr. 104-05, 119. Appellant’s witnesses Sergeant CH and Sergeant MM also testified that the May 20th incident with Inmate CM involved “hands on” an inmate, was a use of force, and should have been reported to supervisors and documented in an incident report. Tr. 307-08; Tr. 280-81.

Lieutenant AM testified that Inmate CM told him that she was assaulted by the officers during dinner, and that dinner occurs during the 3:00 to 11:00 pm shift. Tr. 130-31. Inmate CM showed Lieutenant AM the grievance she had written and the bruises on her arm. Lieutenant AM told Inmate CM not to worry, he would identify the officers involved. Tr. 131. Lieutenant AM ordered a female correctional officer to take photos of the bruises on Inmate CM. Tr. 131, 135; CX 8.

Lieutenant AM checked the video surveillance tape and the log for the date and time the inmate said the incident occurred and was able to identify the officers involved as Appellant and Corporal AA. Tr. 132, 152. Based on what he saw on the video, Lieutenant AM determined that the officers were engaged in a use of force when Inmate CM was “dragged off her bed onto the floor.” Tr. 133. Lieutenant AM further testified that the officers should have notified him of the use of force the day it happened and documented the episode in an Incident Report. Tr. 133, 136.

Appellant did not notify her supervisor that an incident with Inmate CM had occurred or enter a notation in the logbook. Tr. 129; CX 10. Nor did she write a report of the incident until May 26, 2020, after she was requested to do so by Lieutenant AM as a result of Inmate CM's grievance. Tr. 135-36, 396-97; CX 6, CX 11.

The County introduced the video of the North 2-1 pod where Inmate CM's cell was located and where the May 20, 2020, incident occurred. CX 7, CX 30.⁴ The video surveillance clearly shows that Appellant and Corporal AA entered inmate CM's cell on May 20, 2020 and pulled Inmate CM off her bed and onto the floor. CX 7, CX 30, 5:14:55 to 5:15:11.⁵

On the video Corporal AA, wearing a white mask, proceeds up the stairs followed by Appellant, who was wearing a black mask. CX 7, CX 30, 5:14:47-55; Tr. 160-61; Tr. 277; Tr. 388. When Appellant and Corporal AA open the cell door Inmate CM is visible sitting cross-legged on her bed, with a food tray in her lap, still eating. Corporal AA enters the cell first, with Appellant initially standing by the door. CX 7, CX 30, 5:14:57 - 59.

Although the video does not have audio, it is evident that there is a discussion taking place between the officers and the inmate, with the inmate gesturing. CX 7, CX 30, 5:15:02. Suddenly, Corporal AA pulls the food tray out of the inmate's hands. CX 7, CX 30, 5:15:03.

Appellant had begun to leave the cell, but then turned around and came back inside. CX 7, CX 30, 5:15:06. Corporal AA then grabbed Inmate CM's wrist and began to pull the left arm of the inmate, who was still sitting on the bed cross-legged. CX 7, CX 30, 5:15:08. Appellant placed her left hand on the inmate's upper right arm. CX 7, CX 30, 5:15:09; Tr. 162. Appellant and Corporal AA then pulled the inmate forward off the bed. CX 7, CX 30, 5:15:09 – 10; Tr. 161-62. While sitting cross legged with her legs and feet still on the bed the inmate's upper body was suddenly pulled forward and onto the floor by the actions of Appellant and Corporal AA.

An investigation was conducted by Captain AN and she prepared an investigative report. CX 6; Tr. 328. The parties jointly stipulated that the report "is a fair and accurate representation of the conversations and observations [Captain AN] made during the course of the investigation." Stipulations, April 18, 2021. After conducting interviews, reviewing video, photographs, incident reports, and other pertinent information Captain AN concluded that Appellant had violated DOCR policy by failing to report the May 20 incident involving Inmate CM to her immediate supervisor and to document her actions. CX 6.

Director AT testified that she reviewed the investigative report, CX 6, and all related documentation, including the surveillance video. Tr. 158-60. Director AT stated that after reviewing the video and other evidence she disagreed with the investigator's findings regarding Appellant. Tr. 163. Specifically, Director AT believed that the investigator had missed the use of force by and untruthful statements of Appellant. Tr. 163.

Director AT also disagreed with level of discipline recommended by Warden SM and the Deputy Warden, a five-day suspension, and asked to meet with them to review the matter. Tr. 347, 404-05. In particular, the Director wanted an explanation of the differences from a similar case where two officers who engaged in an unauthorized use of force and failed to report it were

⁴ CX 7 and CX 30 are the same video of the May 20, 2020, incident but CX 30 was submitted with software that contains the tools needed to more effectively view the content. See Tr. 321-22.

⁵ The video counter shows the time of day on May 20, 2020. The video runs from 5:13:59 pm to 5:17:53 pm.

dismissed. Tr. 405. In the end, based on Director AT's review of comparable cases, the discipline imposed on Appellant was different than that initially recommended by Warden SM. Tr. 408-09.

APPLICABLE LAWS 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:

§ 33-2. Policy on disciplinary actions.

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

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

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

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

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

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

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

(1) the relationship of the misconduct to the employee's assigned duties and responsibilities;

(2) the employee's work record;

(3) the discipline given to other employees in comparable positions in the department for similar behavior;

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

(5) any other relevant factors.

§ 33-5. 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; . . .

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:

V. RELATIONSHIP OF DEPARTMENTAL PERSONNEL WITH VISITORS/DEFENDANTS/INMATES/RESIDENTS/PARTICIPANTS:

- C. Only such force as is necessary should be used to control an unruly visitor/defendant/inmate/resident/participant. (See Policy and Procedures on Use of Force.)
- D. Personnel shall not strike or lay hands on a visitor/defendant/inmate/resident/participant except to defend themselves, to prevent an escape, to prevent serious injury or damage to person or property, to quell a disturbance, to search a visitor/defendant/inmate/resident/participant or to move an unruly or uncooperative inmate/resident/visitor.

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

14. Untruthful Statements:

Employees shall not make untruthful statements, either verbal or written.

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

III. POLICY

It is the policy of the MCDOCR that:

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

V. USE OF PHYSICAL FORCE - GUIDELINES

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

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

ISSUE

Was Appellant's suspension and six month rank demotion 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). *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 conflicts with the statements of Inmate CM, the testimony of the investigating officers, and the video evidence. 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).

In the Incident Report Appellant filed on May 26 she stated that due to the inmate “reaching forward to take back the trash [Inmate CM] ended up sitting on the floor . . .”. CX 11. Appellant also told the investigator that she had not put her hands on the inmate and that because she was reaching for the food tray the inmate just “ended up on the floor.” Tr. 398; CX 6. When she testified at the hearing Appellant claimed that Inmate CM lunged forward while reaching for the food tray and fell to the floor. Tr. 372, 393. Appellant reiterated that claim during cross examination and admitted that her official report did not mention that the officers had touched the inmate. Tr. 397. Indeed, Appellant denies that she put hands on Inmate CM. Tr. 375, 402.

However, video evidence belies Appellant's claim that Inmate CM “ended up sitting on the floor” because she was reaching for her tray. CX 7, CX 30, 5:15:09 - 10. It is obvious that Inmate CM did not fall off the bed and end up on the floor because she was reaching for her tray. Considering the clear video evidence, we cannot accept Appellant's version of events. MSPB Case No. 21-01 (2021), *citing Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (where reliable video evidence is available, an interpretation promoted by a party that is not supported, or is contradicted, by the video should not be adopted). Moreover, contrary to Appellant's testimony, the version of events reflected in the grievance filed by Inmate CM and her statements to various officers is consistent with the video evidence. CX 27.⁶

⁶While it is true that Inmate CM's statements are hearsay, reliable hearsay is admissible in an administrative proceeding. Montgomery County Code, § 2A-8(e). *See* MSPB Case No. 17-13 (2017) (documents and video evidence support the reliability of hearsay statements).

Considering the contrary credible evidence, Appellant's visible behavior on the video, and Appellant's demeanor at the hearing, we find Appellant's testimony that she did not help pull Inmate CM off the bed and onto the floor unworthy of credence. We further find that Inmate CM was pulled off the bed and onto the floor by Corporal AA and Appellant.

Because we find Appellant's description of events contradicted by the video evidence and inconsistent with the testimony of a disinterested witness we conclude that Appellant's testimony is not worthy of credence. *See* MSPB Case No. 17-13. Moreover, the Board had ample opportunity to directly observe the demeanor of Appellant during her testimony and to assess her credibility. The Board concludes that Appellant's testimony was self-serving and not credible. For these reasons, we also view her testimony on other points with skepticism.

Appellant's Use of Force Against an Inmate was Unnecessary, Unjustified, and Unauthorized

There is no doubt that the May 20, 2020, incident constituted a use of force by Appellant and Corporal AA. The video evidence shows that both officers put hands on Inmate CM and forcefully pulled her off the bed and onto the floor. Appellant's efforts to suggest that Inmate CM somehow "ended up on the floor" after reaching out for her food tray are unpersuasive, contrary to the video evidence, and implausible. Indeed, even Appellant's own witnesses, Sergeant CH and Sergeant MM, testified that the May 20th incident with Inmate CM involved "hands on" an inmate, was a use of force, and should have been reported to supervisors and documented in an incident report. Tr. 307-08; Tr. 280-81. MSPB Case Nos. 15-12 & 15-13 (2016) ("a party is normally bound by the testimony of its own witness.").

DOCR strictly limits the use of force to circumstances where a correctional officer "reasonably believes such force is necessary to accomplish any of the following objectives:

1. protection of self or others;
2. protection of property from damage or destruction;
3. prevention of an escape;
4. recapture of an escapee;
5. prevention of a criminal act;
6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or
7. the prevention of the individual from self-inflicted harm."

DOCR Policy 1300-10 §III(A).

Under DOCR Policy 3000-7 §V(C), only such force as is necessary "to control an unruly" inmate may be used. DOCR Policy 3000-7 §V(D) provides that correctional officers "shall not strike or lay hands on" an inmate "except to defend themselves, to prevent an escape, to prevent serious injury or damage to person or property, to quell a disturbance, to search" an inmate "or to move an unruly or uncooperative inmate. . . ."

None of the circumstances listed in these policies were present during the incident of May 20, 2020. There was certainly no extreme emergency obviating the need for supervisory authorization. In the absence of an emergency, there was no valid reason for Appellant's failure to comply with the mandate in DOCR Policy 1300-10 §V(A) that she contact the Lieutenant supervising the shift in order to obtain authorization for "the use of physical force to either move or restrain an unruly or uncooperative inmate."

Inmate CM was locked in a cell eating dinner and not presenting a threat to others. There is no evidence in the record that she was engaged in self harm or was otherwise a danger to herself, that she was damaging or destroying property, or that she was trying to escape. Inmate CM's only misbehavior may have been her reluctance to hand over her dinner tray before she was finished eating and, perhaps, arguing with the correctional officers. Furthermore, it is clear from the video evidence that Inmate CM was not engaged in "unruly" behavior that might justify a correctional officer laying hands on her or the use of force.

We find that Appellant directly participated in the use of force to roughly pull Inmate CM off the bed and onto the floor, without justification or supervisory authorization. The County has proven by a preponderance of the evidence the charges against Appellant under DOCR Policy 3000-7, §V(C) (only such force as is necessary); §V(D) (personnel shall not strike or lay hands on an inmate except under limited circumstances); DOCR Policy 1300-10, Use of Force, §V(A) (only supervisors may authorize use of force except in extreme emergencies). CX 20 & 21. The County has thus shown that Appellant was in violation of MCPR §33-5(c) (violates any established policy or procedure). CX 19.⁷

Appellant Failed to Report the Use of Force

The video evidence leaves no doubt that Appellant and Corporal AA used force on Inmate CM when they pulled her off the bed. CX 7, CX 30. After participating in the use of force incident involving Inmate CM, Appellant failed to file the mandatory report or to advise either her supervising Sergeant or Lieutenant. Appellant only wrote a report of the incident after she was ordered to do so as a result of Inmate CM's allegations that she had been assaulted in her cell by Appellant and Corporal AA. Tr. 396-97; CX 11.

Appellant's failure to submit a report that is mandated by DOCR policy after participating in a use of force incident demonstrates a lack of candor and falls short of the integrity expected of a correctional officer charged with protecting the health and safety of inmates in County custody.

We find that the County has proven by a preponderance of the evidence that Appellant violated DOCR Policy 1300-10, §III(F) (use of force shall be reported, documented) and §V(D) (staff involved in a use of force incident must submit a written report). CX 21. The County has thus shown that Appellant was in violation of MCPR §33-5(c) (violates any established policy or procedure). CX 19.

Appellant Made Untruthful Statements

When Appellant was instructed to file a report what she filed was untruthful. Appellant's report says that due to the inmate "reaching forward to take back the trash [Inmate CM] ended up sitting on the floor . . .". CX 11. Appellant reiterated that claim during cross examination and admitted that her official report did not mention that the officers had touched the inmate. Tr. 397.

⁷ While there was testimony and documentary evidence concerning the issue of whether Appellant was responsible for causing the bruises on Inmate CM that were visible in the photographs admitted as CX 8, the video evidence is ambiguous. Also, there is documentary evidence that CM arrived at the facility with bruises on her arm. There is no direct video evidence to support a conclusion that Appellant may have been involved in striking Inmate CM while she was on the floor. In any event, it is unnecessary for the Board to make a finding concerning the bruises. The County presented sufficient evidence to prove by a preponderance that Appellant participated in the unnecessary, unjustified, and unauthorized use of force that propelled Inmate CM from her bed and onto the floor.

Appellant also told the investigator that she had not put her hands on the inmate and that after reaching for the food tray Inmate CM “ended up on the floor.” Tr. 398; CX 6.

As discussed above, the video shows that Inmate CM did not fall to the floor or mysteriously end up there. She was grabbed by Appellant and Corporal AA and yanked off the bed onto the floor. Appellant’s effort to characterize the inmate as having fallen off the bed onto the floor in her official report and statements to the investigator was false and misleading. We find that the County has proven by a preponderance of the evidence that Appellant made untruthful statements in violation of DOCR Policy 3000-7, §VII(E)(14) (employees shall not make untruthful statements, either verbal or written). CX 20. The County has thus shown that Appellant was in violation of MCPR §33-5(c) (violates any established policy or procedure). CX 19.

Appellant Received the Appropriate Level of Discipline

Appellant, as a correctional officer, is responsible for maintaining institutional security and for the custody and care of inmates. The County has proven by a preponderance of the evidence the charges against Appellant of using unjustified and unauthorized force against Inmate CM, failure to report the use of force, and making false statements during the investigation. 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, who was the final decisionmaker and responsible for determining the appropriate level of discipline, testified that she disagreed with the findings in the investigative report because the investigator had missed Appellant’s participation in the use of force and Appellant’s untruthful statements. Tr. 163; CX 6. She then testified as to the reasons she decided to suspend Appellant and demote her in rank for six months. The Director detailed the factors she took into account when determining the proper level of discipline, including the nature and gravity of the offense, the relationship of the misconduct to the Appellant’s assigned duties and responsibilities, Appellant’s work record, whether Appellant should have been aware of the applicable rules and procedures, and comparable discipline. The Board found the Director to be thoughtful in her analysis of the relevant factors she considered to reach her decision.

The Director took into account the relationship of the misconduct to Appellant’s duties and responsibilities, explaining that correctional officers are charged with the care and custody of inmates and thus expected to control situations involving inmates in a way that reduces the prospect of escalation. Tr. 168-69. On May 20, 2020, there was no urgency to recover the food trays and no emergency necessitating the actions taken. Tr. 169.

Director AT acknowledged Appellant’s good work record, absence of prior discipline, and that she is reliable, dependable, and well-liked by her colleagues. Tr. 182, 410. Those factors were weighed against the seriousness and gravity of her misconduct and caused the Director to consider discipline short of dismissal. Tr. 411-12.

The Director explained that because Appellant’s violations were grave and serious, she did not apply progressive discipline and even contemplated dismissal. Tr. 182, 405-11. In such cases, the County personnel regulations vest the DOCR Director with the discretion 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. . .”). After considering comparable

cases, including those that resulted in dismissal, the Director decided that discipline short of dismissal was warranted, and Appellant was suspended for 15 days and demoted in rank for six months.

We consider whether DOCR has consistently applied similar discipline to other staff who have engaged in comparable behavior, a factor listed in MCPR § 33-2(d)(3). To challenge the level of her discipline Appellant must show that she was treated more harshly than comparison employees engaged in similar misconduct without differentiating or mitigating circumstances so as to warrant distinguishing the misconduct or the appropriate discipline. MSPB Case No. 18-07 (2019); MSPB Case No. 10-04 (2010), *citing Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009).

The Director testified about the comparable case that involved a sergeant who was dismissed for authorizing entry into a cell and the unnecessary, unjustified, and unauthorized use of force against an inmate, failed to report or document the use of force, and made untruthful statements to investigators, as in this matter. CX 26; Tr. 173-74. The Director considered the differences from this case in applying a lesser discipline, noting that the comparator case involved a sergeant, the use of handcuffs, and holding the inmate against the wall. Tr. 410.

The Director discussed the other comparable cases that she considered. One involved a May 29, 2018 Statement of Charges for dismissal that was resolved through a settlement agreement. CX 22.⁸ In that case a correctional officer was justified in a use of force but then unjustifiably assaulted the inmate by punching him four times in the face. The officer then failed to properly document the use of force. After Alternative Dispute Resolution (ADR) the penalty was reduced to a 15-day suspension, removal from assignment to the Emergency Response Team (ERT), and a Last Chance Agreement.

A 2019 case in which a correctional officer struck an inmate four or five times by closing a food slot on his arm was also viewed as similar by the Director. CX 23. In that case, the officer did not notify a supervisor when the inmate refused to obey an order and did not accurately report the use of force. Tr. 177-78; CX 23. The original proposed discipline was a 30-day suspension and a six-month demotion, but the ADR process resulted in a settlement in which the parties agreed to a 15-day suspension, three-month rank demotion, and a Last Chance Agreement.

The Director also relied on a January 13, 2016, case that involved an unprovoked assault on an inmate being processed into the facility and resulted in the officer's dismissal. CX 24. The officer's use of force was unnecessary and aggressive, and the officer made untruthful statements and attempts to get other officers to be untruthful in their reports. Tr. 178-79; CX 24.

The Director testified that she reviewed a September 11, 2020, NODA issued to an officer who used excessive force when they punched an inmate in the head and upper torso, along with kneeling the inmate in the upper torso while the inmate was in a holding cell. CX 25. After an agreement was reached during the ADR process the officer received a 30-day suspension, six-month rank demotion, and removal from the ERT. Tr. 180-81; CX 25.

⁸ We have previously held that DOCR need not explain a difference in treatment when there is a settlement. MSPB Case No. 18-06 (2019).

We conclude that the Director properly considered these comparable cases in her analysis of the appropriate level of discipline for Appellant.

The Director also discussed two cases that Appellant suggested as comparable. Tr. 191-94. The July 22, 2020, Statement of Charges in the first case was for a two-day suspension for a correctional officer who unnecessarily was involved in a physical confrontation with an inmate due to the inmate refusing to leave his cell. AX 12. Unlike this case, the officer was not disciplined for assaulting the inmate. Rather, the discipline was for not backing off and avoiding a confrontation by leaving the cell and closing the cell door. Tr. 193. The Director noted that unlike the circumstances in this case, where the inmate was calmly sitting on her bed eating, the purpose of the interaction in the comparator case was to move the inmate from the cell. In this case the inmate made no violent or aggressive moves, whereas in the comparator case the officer merely put a hand on the shoulder of the inmate and the inmate escalated the situation. In this case Appellant and Corporal AA called their sergeant for backup when the inmate was uncooperative but did not wait for the sergeant to arrive before going hands on with the inmate. Moreover, in this case Appellant did not report the incident, which raised integrity questions. Tr. 204-07.

Finally, the Director testified that the second case Appellant raised was not comparable. Tr. 193. That case involved a Statement of Charges for a five-day suspension dated April 1, 2021. AX 12. In that case, the officer used force on a handcuffed inmate, took the inmate to the floor, and failed to render aid to the inmate. The discipline was not for the use of force, which was determined to be justified, but instead for not rendering aid to an inmate injured as a result of the use of force. Tr. 193-94. We find both cases Appellant proposed as comparable to be readily distinguishable from the instant case.

Finding that the County has proven by a preponderance of the evidence that Appellant's behavior was unacceptable and in violation of DOCR policies, and that the Director properly evaluated the factors set out in MCPR § 33-2(d), we uphold all charges against her and conclude that the discipline imposed was appropriate and consistent with law.

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 28, 2021

████████████████████

Harriet E. Davidson
Chair