BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 22-15**
	*	
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 [redacted] (Appellant). On October 18, 2021, Appellant filed this appeal with the Board challenging the decision of the Montgomery County Department of Corrections and Rehabilitation (DOCR or Department) to suspend her for one (1) day from her Management Leadership Service (MLS) III position assigned to be the Records Manager.[1] The discipline was based on the County's allegations that Appellant had improperly approved certain Field Training Officer (FTO) compensation for employees who were ineligible to receive such pay, failed to investigate the legitimacy of the DOCR records office's FTO compensation practices in a timely manner and review the matter with her supervisor, and engaged in disagreements with and threatened disciplinary action against an employee under her supervision in the presence of another employee.

On March 23, 2022, the parties appeared by video before the Board for the merits hearing in MSPB Case No. 22-15. Representing DOCR was Assistant County Attorney [redacted]. Appellant was present and represented herself *pro se*.

The Board has considered and decided the appeal.

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[1] The appeal was filed by electronic mail on Thursday, October 14, 2021, at 5:29 p.m., after MSPB office hours. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

FINDINGS OF FACT

On October 5, 2021, DOCR issued a Notice of Disciplinary Action (NODA) - One (1) Day Suspension to Appellant. County Exhibit (CX) 1.[2] The NODA charged that Appellant had violated the following provisions of the Montgomery County Personnel Regulations (MCPR): §33-5(c) ("…violates an 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). Appellant was also charged with violating the following provisions of the Department of Correction and Rehabilitation Policy and Procedures (DOCR Policy) 3000-7, Standard of Conduct/ Code of Ethics: §VII(E)(9) (conduct unbecoming) and §VII(E)(10) (neglect of duty/unsatisfactory performance). CX 1.

The Board heard testimony from seven witnesses, including Appellant. The following witnesses testified and are identified elsewhere in this decision as indicated below:

1. [redacted] (Director or AT)
2. [redacted] (BS)
3. [redacted] (KS)
4. [redacted] (Warden or SM)
5. [redacted] (IG)
6. [redacted] (Appellant)
7. [redacted] (RB)

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 DOCR employee for 22 years, and since 2013 she has been in the Management Leadership Service. Hearing Transcript (Tr.) 35. Prior to the discipline being appealed in this case, Appellant had not received any formal discipline during her entire career with DOCR. Tr. 37, 69-70.

Appellant was appointed to the position of Records Manager on June 8, 2020. Joint Stipulation 1, (March 15, 2022); Tr. 211. As Records Manager Appellant was responsible for oversight of intakes booked into the jail, monitoring inmate court dates, approving transports to

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[2] Seven County Exhibits were admitted into the record. The County Exhibits are as follows:
CX 1 – Notice of Disciplinary Action, October 5, 2021
CX 2 – Montgomery County Personnel Regulations, Section 33
CX 3 -- Montgomery County Department of Correction and Rehabilitation, Departmental Policy and Procedure 3000-7
CX 4 – MCGEO Collective Bargaining Agreement Article 5
CX 5 – Montgomery County Payroll Records for DOCR Employee [redacted], January 1, 2018 - February 27, 2021
CX 6 – Montgomery County Payroll Records for DOCR Employee [redacted], January 1, 2018 - February 27, 2021
CX 7 – Montgomery County Payroll Records for DOCR Employee [redacted], January 1, 2018 – February 27, 2021

[3] Appellant Exhibits (AX) 1 through 3 were admitted into the record. Appellant's exhibits are as follows:
AX 1 – Amended Statement of Charges (SOC), September 3, 2021
AX 2 – Appellant's Response to SOC with supplemental documents, September 23, 2021
AX 3 – MSPB Appeal Form, October 15, 2021

the court, computing sentences, release dates, transfers to other facilities and supervision of the employees assigned to the records section. Tr. 29.

At the hearing the parties stipulated that employees [redacted] (GB), [redacted] (BC), and [redacted] (RJ) received Field Training Officer compensation to which they were not eligible, and that they were receiving the FTO pay before Appellant became Records Manager. Prior to Appellant becoming the Records Manager the employees were told that they were entitled to the FTO pay. Tr. 22-25. The County stipulated that GB, BC, and RJ all received FTO pay, thought that they should receive FTO pay, were receiving FTO pay before June 2020 when Appellant was appointed Records Manager, and were promised the FTO pay by previous managers. Tr. 127, 129-32.

In July or August 2020 Appellant became aware that certain employees might be improperly receiving FTO pay and began discussing the issue with the assistant records managers under her supervision. Tr. 200. One of the assistant mangers, [redacted] (MC), had previously served as the Acting Records Manager from May 2018 to May 2019. Tr. 200; JX 2, p. 5. Because the FTO pay for records division employees had been ongoing and after talking to the assistant mangers, one of whom had been the Acting Manager, Appellant believed that the practice may have been approved at a higher level. Tr. 202, 205, 208-9.

Appellant testified that she then immediately raised the matter with her supervisor, Warden SM, in July or August 2020. Tr. 200, 202. According to Appellant, Warden SM said that the erroneous application of the FTO pay policy should be changed before the records office hired new employees that would be undergoing training, but the Warden was not interested in seeking backpay from employees that had erroneously received FTO pay in the past. Tr. 192. Appellant testified that while she raised the issue with Warden SM in the summer of 2020, Appellant did not treat it as a priority because the issue was not a priority for the Warden. Tr. 204-05.

It was not until March 2021 that new employees who were going to undergo field training were hired and the issue of FTO pay would again arise. Tr. 192. The County stipulated that Appellant brought the fact that employees GB, BC, and RJ had previously received FTO pay to the County's attention in March 2021. Tr. 22-25. Appellant informed MCTime Manager [redacted] (LP) of the FTO issue by email on March 9, 2021, and asked for timecard records for the three employees. The County also stipulated that contacting the MCTime Manager was something that Appellant should do as part of her investigation, and that it was appropriate for her to ask LP for that information. Tr. 73, 76-77. The County did not agree to stipulate that Appellant brought the FTO issue to the County's attention prior to March 2021. Tr. 22-25.

Although Warden SM testified that she did not recall Appellant raising the FTO pay issue with her in July or August of 2020, she admitted that it was possible the topic came up during a conversation. Tr. 138 ("[I]n the course of our conversation, because we did discuss numerous topics, okay, so I think I could probably safely say it's possible that that topic came up. . . I honestly do not recall that being a part of our conversation, but I honestly can't also say that that didn't get inserted in amongst the other concerns that we were working on."). A former coworker of Appellant's, RB, testified that he recalled that in the summer of 2020 Appellant told him that she had brought the FTO pay issue up with Warden SM. Tr. 225. Warden SM acknowledged that Appellant was the first manager to raise the improper FTO pay issue. Tr. 149.

Director AT became aware that FTO pay had been authorized for ineligible employees on March 9, 2021, when she was notified by the DOCR information technology head that Appellant was asking for access to MCTime payroll records as part of an inquiry concerning FTO pay for ineligible employees in her division. Tr. 30, 32. Director AT testified that she immediately knew that records division employees were not eligible for FTO pay under the collective bargaining agreement. Tr. 32-33. She then instructed that Warden SM be made aware of the matter. Tr. 33.

BS, the Chief of the Community Correction Division, was charged with investigating the FTO compensation practices transpiring in Appellant's unit and hostile work environment allegations in the records section against Appellant. Tr. 84. After conducting the investigation BS submitted a report to Director AT. Tr. 110. At the request of the Board, the parties introduced two versions of the investigative report. Joint Exhibit (JX) 1 (June 11, 2021) and JX 2 (July 8, 2021). The June 11 version was submitted to Director AT and was revised after BS and the Director met and discussed the report. Tr. 168-69. Subsequently, the July 8 revised report was submitted. JX 2. At the Board's request, subsequent to the hearing BS provided a markup of the report indicating the changes between the June 11 and July 8 reports. Neither report was given to Appellant before the hearing in this case.

In his investigative report BS concluded that FTO compensation was paid to employees that were not eligible to receive such pay under the Collective Bargaining Agreement, and that Appellant could have done more to resolve the situation before March of 2021. JX 2, pp. 14, 16; Tr. 85.

The investigation revealed that a previous Records Manager, [redacted] (BW), and two assistant records managers, KS and MC, had improperly approved FTO pay for records division employees. JX 2, pp. 3, 9, 17; Tr. 86-88, 122. The investigation confirmed that records division employees were granted FTO pay as long ago as 2011. JX 2, pp. 5, 9-10, 15; Tr. 88.

BS testified that he did not address the credibility of the Warden versus Appellant as he did not think it necessary to resolve the question of when Appellant notified the Warden of the FTO issue. Tr. 96-97. However, he explained that he assumes that when he is interviewing a senior manager, that individual is reporting what transpired. Tr. 96. Thus, his investigative report concluded that Appellant did not notify the Warden prior to March 2021. JX 2, p. 16.

The investigative report recommended "the appropriate level of progressive discipline" for Appellant, KS, and MC. JX 2, p. 19.[4]

Director AT testified that although Appellant said she had notified Warden SM of the FTO pay issue in 2020, soon after she became Records Manager in June 2020, the subsequent investigation did not establish that Appellant had done so before March 2021. Tr. 33. The Director then decided to impose a one-day suspension on Appellant. Tr. 34.

Explaining the reasons for the level of discipline, Director AT stated that Appellant should have known the rules concerning FTO pay and immediately stopped the improper payments in 2020 due to her prior exposure to labor issues and extensive experience as a supervisor and an MLS manager. Tr. 34-35. The Director considered that Appellant's lack of action for eight months

[4] KS received a written reprimand even though she testified that she was told by a Deputy Warden to authorize the FTO. Tr. 118. MC did not receive discipline because she retired before it could be imposed. Tr. 51.

required the Department to recoup money from the ineligible employees who were paid. Tr. 36. She also noted that Appellant could have made the same inquiries about the FTO pay in 2020 instead of waiting until March 2021. Tr. 37.

Director AT also testified that not only should Appellant have reported the issue in 2020, but also that her signature on timesheets in 2020 was her certification that the FTO payments were proper when she should have known better. Tr. 40-41. On cross examination the Director said that even if Appellant had notified Warden SM in 2020 it would not have made a difference in the level of discipline because she had improperly approved timecards 42 times. Tr. 48, 62.

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:

§ 33-1. Definition.

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

§ 33-2. Policy on disciplinary actions.

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

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

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

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

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

(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.

(e) **Suspension**.

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

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

(c) violates any established policy or procedure; . . .

(e) fails to perform duties in a competent or acceptable manner; . . .

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

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

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules: . . .

9. Conduct Unbecoming:

a. No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming includes, but is not limited to any breach of the peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or stated in other Departmental policies, shall be considered conduct unbecoming an employee of this Department, and will subject the employee to disciplinary action by the Department.

b. Examples of conduct unbecoming include but are not limited to falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, retaliation,

misuse of a county owned radio, and the failure to cooperate with an internal investigation.

10. Neglect of Duty/Unsatisfactory Performance:

Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee's rank, grade, or position.

ISSUE

The following issue was heard and decided by the Board:

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

ANALYSIS AND CONCLUSIONS

Appellant was disciplined for approving Field Training Officer pay for employees not entitled to FTO pay, and for not promptly reporting and investigating that improper practice. CX 1. At the beginning of the hearing, counsel for the County announced that the conduct unbecoming charges in the NODA relating to a hostile work environment would not be pursued against Appellant. Tr. 10-11. Because the County withdrew charges related to the alleged harassment or hostile work environment, and did not present evidence on that point, the Board does not sustain those charges.

There is no dispute that in 2020 Appellant approved timesheets and FTO pay for employees who were not entitled to receive it. The record shows that the practice of giving FTO pay to ineligible employees predated Appellant's appointment as Records Manager. There is no dispute that Appellant brought the issue to the attention of her superiors; however, the date on which she did so is contested by the Department. There is also no dispute that Appellant did not approve subsequent FTO pay for any employee who was assigned FTO duties for new employees. In addition, the issue of the improper pay that had apparently been authorized for several years before the Appellant was placed in the position was rectified because of her intervention. After a full investigation, the County recouped the improper recent overpayments from the employees in question.

The County's position is that the Appellant did not bring the FTO matter to the attention of upper management until March 2021. Thus, as an experienced Management Leadership Service employee, Appellant should have acted immediately to investigate and resolve the FTO pay issue in the summer of 2020. In the County's view, by waiting eight months Appellant allowed an improper practice to continue. Further, the County contends that in 2020 Appellant certified timesheets approving the FTO pay when she knew or should have known that the employees were ineligible for such pay.

Appellant credibly testified that she raised the FTO pay matter with the Warden in July or August of 2020, and Warden SM admitted in her testimony that a conversation with Appellant

concerning the FTO issue may have taken place in the summer of 2020. This testimony under oath does not refute Appellant's contentions. Further, witness RB convincingly testified that in 2020 Appellant spoke with him about the FTO issue and told him that she had raised it with Warden SM. Based on their demeanor while testifying the Board finds Appellant and RB to be credible witnesses and concludes that Appellant did specifically question the propriety of the FTO pay with her direct supervisor, the Warden in the summer of 2020.

Appellant's timely notification of the FTO problem to her superior in 2020, and the Warden's lack of urgent concern, leads us to conclude that the charges based on Appellant's failure to act more decisively in 2020 should not be sustained.

Appellant testified that that even though she had questions about whether the FTO pay was proper, she was aware that the pay had been approved by her predecessors. Therefore, before unilaterally changing the practice it was important for her to make sure that there had not been a decision at a higher level of DOCR to authorize the payments. Appellant also noted that it was incumbent on her to be cautious before making a change to a benefit to which union employees had been told they were entitled. Appellant also suggests that as a new Records Manager transferred during the pandemic, her hesitation to take immediate action was understandable. In fact, the only authorizations for this type of payment which she signed were for employees whose FTO pay was authorized by the previous manager.

While it is true that certifying inaccurate timecards may merit discipline, under these circumstances none is justified. The record reflects that the FTO pay had been approved for years prior to Appellant's transfer to the records division. Given that the practice of granting the FTO pay to records division employees had been approved by Appellant's predecessors, including by one of her assistant managers who had served as the Acting Records Manager, Appellant's hesitation before rescinding the FTO pay was understandable. Nevertheless, Appellant promptly notified her supervisor that she was concerned that the practice may not be appropriate and understood that immediate investigation and resolution was not a priority. Significantly, it was Appellant's actions that resulted in the eventual correction of the impropriety. Under these facts we cannot sustain the charges against Appellant alleging improper delay in reporting, investigating, and resolving the FTO problem, or those concerning approval of timesheets.

Even were the charges concerning approval of timecards upheld, we could not uphold the level of discipline. Appellant had an unblemished disciplinary record over 22 years of increasingly responsible DOCR employment. Based on Appellant's recognition that the practice might be flawed and her efforts to address the issue through the chain of command, this was not a circumstance involving "serious misconduct or a serious violation of policy or procedure" that would warrant bypassing progressive discipline. MCPR §33-2(c)(2).

Even though we conclude that the charges against Appellant are not sustained, we feel compelled to address our concerns about the County's approach to examining the facts and determining an appropriate level of discipline in this case. Government employees have a due process right when action is taken against them. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1972). When action is taken against an employee it cannot be based upon something to which an employee did not have an opportunity to respond. *Lamour, et al v. Department of Justice*, 106 MSPR 366 (MSPB 2007). In this case the County did not give the Appellant significant information on which the disciplinary decision was based. Nor was a copy

of either version of the investigation of the charges against the Appellant given to the Appellant before the onset of the hearing in this matter.

In addition, even though the County's attorney indicated that the hostile work environment charges in the NODA had been dropped, Director AT acknowledged that she considered those withdrawn charges in determining the proper level of discipline against Appellant. Tr. 65. The Director asserted that the hostile work environment charge was only a minor consideration, and that the discipline would still have been a one-day suspension if the conduct unbecoming had not occurred. Tr. 65-66, 68. In our view, when a significant charge against an employee is dropped a serious reevaluation of the level of discipline is recommended.[5]

Further, while Director AT said she considered a similar case in which a suspension was imposed, the County did not provide sufficient detail concerning the allegedly comparable case, did not include the case in the record, nor was it mentioned in the Statement of Charges or the NODA.

Director AT also raised prior incidents which the Director felt reflected poorly on Appellant's judgment. *See, e.g.*, Tr. 71-72. However, none of those incidents resulted in disciplinary action, nor were they raised in the Statement of Charges or the NODA. Considering those incidents in making a disciplinary decision was thus improper. We agree with the U.S. Merit Systems Protection Board and the Federal courts that "it is improper for a deciding official to rely on an employee's alleged negative past work record in determining the penalty when the employee was not disciplined for the purported misconduct and where the incidents are mentioned as an aggravating factor for the first time in a Board proceeding." *Lopes v. Dept. of Navy*, 116 MSPR 470 (2011), *citing Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

In the future, if the County intends to rely on comparable discipline of another employee or prior discipline of an appellant as the basis for a penalty, or has a document outlining the evidence or reasons provided to the official charged with making a decision on discipline, those factors must be included in the Statement of Charges and NODA in sufficient detail and any other information on which the deciding official relied should be provided to the employee so that the employee has a fair opportunity to respond. MCPR §33-6(b)(1)(B) and (c)(1)(C). *See Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011).

ORDER

Based upon the foregoing analysis, the Board **GRANTS** the appeal. Accordingly, the Board **ORDERS** that:

1. The County rescind the discipline imposed on Appellant;
2. Appellant be made whole for lost wages and benefits;
3. That within 45 days of this decision the County provide the Board with written certification that the discipline has been rescinded, that all County records reflect that change, and that Appellant has been made whole.

[5] We note that the Board may mitigate a penalty when fewer than all charges are sustained. MSPB Case No. 13-04 (2013).

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 9, 2022

[redacted]

Harriet E. Davidson
Chair