

MEMORANDUM

January 20, 2011

TO: Government Operations and Fiscal Policy Committee

FROM: Justina J. Ferber,  Legislative Analyst

SUBJECT: Executive Regulation No. 13-10, Amendments to Montgomery County Personnel Regulations, Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government

The Government Operations and Fiscal Policy (GO) Committee will consider the Executive's proposed amendments to the Montgomery County Personnel Regulations (MCPR) to amend Section 35 and other sections of the 2001 Personnel Regulations to provide a right of appeal to the Merit System Protection Board (MSPB) for County employees who allege retaliation for disclosure of illegal or improper actions in County government. This regulation implements Bill 2-10, Personnel, Contracts – Retaliation, enacted by the Council on March 16, 2010. The regulation adds language to:

- 1) make it unlawful for any person to retaliate against, penalize, or threaten with retaliation or penalty, an employee for providing information to, cooperating with, or in any way assisting the Inspector General;
- 2) provide the right to appeal to the MSPB alleging a personnel action in retaliation for refusing to obey an instruction involving an illegal or improper action; or disclosing to a Federal, State, or County official or employee, information concerning illegal or improper action in County government with a reasonable good-faith belief that the information disclosed is accurate;
- 3) prohibit a person to retaliate against or penalize, or threaten an employee with retaliation or penalty because of an employee's; a) refusal to obey an instruction involving an illegal or improper action; b) disclosure of information to a Federal, State, or County official or employee concerning illegal or improper action in County government; or c) providing information to, cooperating with, or in any way assisting the Inspector General; and
- 4) clarify if the MSPB determines that an investigation pursuant to Section 35-20 of these Regulations is warranted, the MSPB must prepare a memorandum before the start of an investigation stating the legal authority, scope, and beginning date of the investigation.

Section 1-52 of the personnel regulations is also amended to define personnel action. Section 3-2 of the regulations is amended to make it unlawful to retaliate against an employee for providing information to the Inspector General. Sections that were deleted in the amended regulations were deleted in Bill 2-10.

The Executive's transmittal memorandum notes that the regulation was advertised in the August 2010 issue of the *Montgomery County Register* and the MSPB reviewed the regulation and provided comments. All of the MSPB requested changes were incorporated into the final proposed regulation. A fiscal impact statement indicating indeterminate fiscal impact is also included at ©4.

Staff recommends the following changes at ©13 under Section 35-21 (a) (2) to: 1) more closely follow the legislation; 2) make the regulation read more clearly; and 3) add the Office of Legislative Oversight as provided in County Code §29A-7. Additions by Council staff are in Double Underlined and deletions are Double Bracketed.

35-21. Prohibited practices; protections for employees.

(a)

* * *

(2) retaliate [or attempt to retaliate by taking, threatening to take, or withholding a personnel action] against or penalize an employee, or threaten an employee with retaliation or penalty [[or subject to a personnel action]] because of that employee's:

(A) refusal to obey an [illegal or improper] instruction involving an illegal or improper action; [or]

(B) disclosure of information [related to an illegal or improper instruction.] to a Federal, State, or County official or employee concerning illegal or improper action in County government with a good faith belief that the information disclosed is accurate; or

(C) providing information to, cooperating with, or in any way assisting the Inspector General or the Office of Legislative Oversight.

Staff also recommends at ©10 that the Office of Legislative Oversight be added to the new language in Section 3-2 (5). Again, to match language in County Code §29A-7.

(c)

* * *

- (5) It is unlawful for any person to retaliate against, penalize, or threaten with retaliation or penalty, an employee for providing information to, cooperating with, or in any way assisting the Inspector General and the Office of Legislative Oversight.

Staff Recommendation: Staff recommends the GO Committee ask Executive staff to submit an amended regulation with the above changes.

This packet contains:

	<u>circle #</u>
Transmittal Memorandum	1
Memo from MSPB	2
Fiscal Impact Statement	4
Regulation 13-10, bracketed and underlined	6
Regulation 13-10, clean copy	20
Section 29A-7, County Code	29

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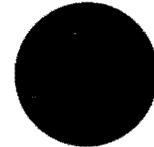
Isiah Leggett
County Executive

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

059046

MEMORANDUM

October 14, 2010



2010 OCT 14 AM 9:21

RECEIVED
MONTGOMERY COUNTY
COUNCIL

TO: Nancy Floreen, President
Montgomery County Council

FROM: Isiah Leggett, County Executive

SUBJECT: Executive Regulation 13-10, Retaliation Against County Employees for
Disclosing Illegal or Improper Actions in County Government METHOD 1

I am submitting Executive Regulation 13-10 for the Council's review and approval. This regulation implements Bill No. 2-10 enacted by the Council earlier this year. This regulation amends Section 35 of the 2001 Montgomery County Personnel Regulations to provide a right of appeal to the Merit System Protection Board (Board) for County employees who allege retaliation for disclosure of illegal or improper actions in County government.

Executive Regulation 13-10 was advertised in the September 2010 issue of the *Montgomery County Register*. The Board reviewed the proposed regulation and provided written comments. All of the Board requested changes have been incorporated into the final proposed regulation. I am attaching a copy of the Board's comments.

①



MERIT SYSTEM PROTECTION BOARD
M E M O R A N D U M

August 31, 2010

TO: Joseph Adler, Director
Office of Human Resources

FROM: Rodella E. Berry, Chairperson
Merit System Protection Board

SUBJECT: Executive Regulation 13-10, Retaliation Against County Employees for
Disclosing Illegal or Improper Actions in County Government

This is in response to your memorandum, dated August 17, 2010, subject as above. The Board has carefully reviewed the proposed amendments to Sections 1, 3, and 35 of the Montgomery County Personnel Regulations. The following changes¹ should be made to the proposed regulation:

1. Section 35-20(b) should be changed to read:

County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate action *as set forth in Section 3-2 of these Regulations.*

This change would ensure that employees do not mistakenly make a report to the MSPB in lieu of the individuals set forth in statute.

2. Section 35-22(a) should be changed to read:

If the MSPB determines that an investigation pursuant to Section 35-20 of these Regulations is warranted, the MSPB must prepare a memorandum before the start of the investigation stating the legal authority, scope, and beginning date of the investigation.

This change would make clear under what authority the MSPB is conducting the investigation and the fact that the initiation of an investigation is solely up to the MSPB.

¹ All word changes are set forth in italics for ease of reference.

3. Section 35-23, Penalties, should be deleted in its entirety. Section 35-23 is the renumbered Section 35-25 of the current Personnel Regulations. The penalties in this Section are derived from Section 33-10(f) of the County Code. Bill No. 2-10, enacted by the County Council on March 16, 2010, eliminated the penalties set forth in Section 33-10(f). See Bill No. 2-10, lines 125-134, at page 6 available at <http://www.montgomerycountymd.gov/cshtml.asp?url=/content/council/leg/bill/2010.asp>.

4. Section 35-24, Appeals, should be deleted in its entirety. Section 35-24 is the renumbered Section 35-26 of the current Personnel Regulations. The authority to appeal found in this Section is derived from Section 33-10(g) of the County Code. Bill No. 2-10 eliminated the appeal authority set forth in Section 33-10(g). See Bill No. 2-10, lines 135-137, at pages 6-7.

Should you have any questions concerning these changes, please feel free to contact the Board's Executive Director, Kathleen J. Taylor, at x76620.



OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

October 4, 2010

TO: Joseph F. Beach, Director, Office of Management and Budget

VIA: ^{AE}Alex Espinosa, Management and Budget Manager

VIA: ^{JC}John Cuff, Management and Budget Specialist

FROM: ^{LOB}Lori O'Brien, Management and Budget Specialist

SUBJECT: Executive Regulation 13-10, Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government

REGULATION SUMMARY

The proposed regulation implements part of Bill No. 2-10 enacted by the Council on March 16, 2010. The regulation amends Section 35 of the 2001 Montgomery County Personnel Regulations to provide an appeal to the Merit System Protection Board (MSPB) for County employees who allege retaliation for disclosure of illegal or improper actions in County government.

FISCAL AND ECONOMIC SUMMARY

In its Fiscal Impact Statement for Bill 2-10, the Office of Management and Budget concluded that the fiscal impact of the entire bill is indeterminate, as is the fiscal impact of the proposed regulation. To the extent the changes in the law and this proposed regulation implementing the law serve as a deterrent, the impact would be minimal; to the extent the law and these proposed regulatory changes provide an avenue for action, there would be a more significant impact. Greater impact would result from increased administrative processes to address retaliation claims, which could include the need to hire additional staff. While the bill and implementing regulation is likely to result in additional appeals to the MSPB, the absolute number of such retaliation appeals is indeterminate. Overall, the bill and the regulation should increase the likelihood that the County will detect illegal or improper actions that may result in wasteful spending.

The proposed regulation has no significant economic impact; any cost or savings resulting from the bill or the implementing regulation would be small relative to the Montgomery County economy as a whole.

The following contributed to and concurred with this analysis: Lori O'Brien, Office of Management and Budget, Stuart Weisberg, Office of Human Resources, and Michael Coveyou, Department of Finance.

Office of the Director

101 Monroe Street, 14th Floor • Rockville, Maryland 20850 • 240-777-2800

www.montgomerycountymd.gov

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Joseph F. Beach
October 4, 2010
Page 2

LOB:df

- c: Kathleen Boucher, Assistant Chief Administrative Officer
Lynn Frost, Offices of the County Executive
Joseph Adler, Director, Office of Human Resources
Jennifer Barrett, Director, Department of Finance
Michael Coveyou, Department of Finance
Stuart Weisberg, Office of Human Resources
Lori O'Brien, Office of Management and Budget
John Cuff, Office of Management and Budget

OMB REVIEW



Fiscal Impact Statement approved

A handwritten signature in black ink, appearing to read "Joseph Adler", is written over the line.

OMB Director

Fiscal Impact Statement not approved, OMB will contact department to remedy.



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government	Number 13-10
Originating Department Office of Human Resources	Effective Date

Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government

Executive Regulation No. 13-10

Issued by: County Executive

Supersedes: Executive Regulation No. 12-00AM II, in part

Authority: Montgomery County Code, 2004, §33-7(b)

Council review: Method 1

Montgomery County Register Volume 27, Issue 9

Comment deadline: September 30, 2010

Effective date: _____

Summary: This regulation implements Bill No. 2-10 enacted by the Council on March 16, 2010. The regulation amends Section 35 of the 2001 Montgomery County Personnel Regulations to provide an appeal to the Merit System Protection Board for County employees who allege retaliation for disclosure of illegal or improper actions in County government.

Address for comments Office of Human Resources, Executive Office Building, 7th Floor
101 Monroe Street, Rockville, Maryland 20850

Staff contact: Stuart Weisberg, 240-777-5154, or stuart.weisberg@montgomerycountymd.gov

Please use the key below when reading this regulation:

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing regulation by proposed regulation.</i>
[Single boldface brackets]	<i>Deleted from existing regulation by proposed regulation.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing or proposed regulation by amendment.</i>
* * *	<i>Existing language unchanged by executive regulation.</i>



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Subject Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government	Number 13-10
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SECTION 1. DEFINITIONS

* * *

✓ 1-52. Personnel action: An act or omission by a supervisor which has a significant adverse impact on the employee, or a change in the employee's duties or responsibilities which is inconsistent with the employee's grade and salary. It does not include an act or omission by a supervisor that is not subject to review by the Merit System Protection Board under Section 33-12 of the Montgomery County Code.

[1-52]

1-53. Position: * * *

[1-53]

1-54. Position description: * * *

[1-54]

1-55. Priority consideration: * * *

[1-55]

1-56. Priority eligible list: * * *

[1-56]

1-57. Probationary employee: * * *

[1-57]

1-58. Probationary period: * * *

[1-58]

1-59. Professional improvement leave or PIL: * * *

[1-59]

1-60. Promotion: * * *

[1-60]

1-61. Promotional probationary period * * *



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[1-61]			
<u>1-62.</u> Rating categories:	*	*	*
[1-62]			
<u>1-63.</u> Reduction-in-force or RIF:	*	*	*
[1-63]			
<u>1-64.</u> Regular hourly salary:	*	*	*
[1-64]			
<u>1-65.</u> Relative:	*	*	*
[1-65]			
<u>1-66.</u> Review period:	*	*	*
[1-66]			
<u>1-67.</u> Salary schedule:	*	*	*
[1-67]	*	*	*
<u>1-68.</u> Seasonal position:			
[1-68]			
<u>1-69.</u> Step salary schedule:	*	*	*
[1-69]			
<u>1-70.</u> Supervisor:	*	*	*
[1-70]			
<u>1-71.</u> Temporary employee:	*	*	*
[1-71]			
<u>1-72.</u> Temporary position:	*	*	*
[1-72]			
<u>1-73.</u> Temporary promotion:	*	*	*
[1-73]			
<u>1-74.</u> Term employee:	*	*	*



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[1-74]

1-75. Term position: * * *

[1-75]

1-76. Transfer: * * *

[1-76]

1-77. Uniformed fire/rescue employee: * * *

[1-77]

1-78. Unrepresented employee: An employee whose position is not included in any bargaining unit.

[1-78]

1-79. USERRA: * * *

[1-79]

1-80. Volunteer Firefighter or Rescuer: * * *

[1-80]

1-81. Workday: * * *

[1-81]

1-82. Working days: * * *

[1-82]

1-83. Workweek or work period: * * *

* * *

SECTION 3. ETHICS, DISCLOSURE OF ILLEGAL OR IMPROPER ACTS, EMPLOYMENT OF RELATIVES, DISCRIMINATION ON THE BASIS OF POLITICAL AFFILIATION, OUTSIDE EMPLOYMENT, AND SEXUAL OR ROMANTIC RELATIONSHIPS IN THE WORKPLACE

* * *



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3-2. Disclosure of illegal or improper acts in County government.

- (a) An employee should report an illegal or improper act in County government.
- (b) An employee should report an illegal or improper act to the individual responsible for investigating the act or taking corrective action, such as:
 - (1) the employee's immediate supervisor or higher level supervisor;
 - (2) the employee's department director;
 - (3) the CAO or County Executive for executive branch employees;
 - (4) the County Council for legislative branch employees; or
 - (5) the Inspector General, in matters of fraud, waste, or abuse.; or
 - (6) the MSPB or Ethics Commission, when an employee believes this is appropriate, such as in cases involving coercion or retaliation.]
- (c) * * *
 - (5) It is unlawful for any person to retaliate against, penalize, or threaten with retaliation or penalty, an employee for providing information to, cooperating with, or in any way assisting the Inspector General.
- [(d) An individual to whom an employee reports an illegal or improper act must not reveal the identity of the employee who filed the report or a County employee or official who is the subject of the report, unless:
 - (1) each party waives confidentiality in writing; or
 - (2) Section 19A-10 of the County Code expressly authorizes revealing a party's identity.]



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[(e) The MSPB, Ethics Commission, or Inspector General must refer the report to the government agency, including the MSPB, Ethics Commission, or Inspector General, that is responsible for investigating or addressing the inappropriate or unlawful conduct alleged in the report. The government agency must then investigate the conduct alleged in the report.]

[(f) The role of the MSPB in investigating allegations of illegal or improper acts is described in Sections 35-20 through 35-26 of these Regulations]

* * *

SECTION 35. MERIT SYSTEM PROTECTION BOARD APPEALS, HEARINGS, AND INVESTIGATIONS

* * *

35-2. Right of appeal to MSPB.

* * *

(g) An employee with merit status may file an appeal with the MSPB alleging a personnel action in retaliation for:

- (1) refusing to obey an instruction involving an illegal or improper action; or
- (2) disclosing to a Federal, State, or County official or employee, information concerning illegal or improper action in County government with a reasonable good-faith belief that the information disclosed is accurate.



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35-3. Appeal period.

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:
 - (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal;
 - (2) receives a notice of termination;
 - (3) receives a written final decision on a grievance; [or]
 - (4) resigns involuntarily[.]; or
 - (5) knows or should have known of a personnel action.

* * *

35-20. MSPB audits, investigations, and inquiries.

- (a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.
- (b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate [corrective] action as set forth in Section 3-2 of these Regulations. [, or report the matter to:
 - (1) the MSPB, if the individual involved in the alleged illegal or improper action is a merit system employee; or



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- (2) the Ethics Commission, if the individual involved in the alleged illegal or improper action is not a merit system employee or is an appointed or elected official or a volunteer].

35-21. Prohibited practices; protections for employees.

(a) *Prohibited practices.* It is unlawful for any person to:

- (1) coerce or attempt to coerce any merit system employee into taking an illegal or improper action; [or]
- (2) retaliate [or attempt to retaliate by taking, threatening to take, or withholding a personnel action] against or penalize, or threaten with retaliation or penalty or subject to a personnel action because of that employee's:

- (A) refusal to obey an [illegal or improper] instruction involving an illegal or improper action; [or]
- (B) disclosure of information [related to an illegal or improper instruction.] to a Federal, State, or County official or employee concerning illegal or improper action in County government; or
- (C) providing information to, cooperating with, or in any way assisting the Inspector General.

(b) *Protection for employee.*

- (1) The MSPB[, Ethics Commission, or Inspector General, as appropriate,] must protect a merit system employee from any retaliatory or coercive action for:



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- (A) refusing to obey an instruction involving an illegal or improper action; or
- (B) disclosing information to a Federal, State, or County official or employee concerning illegal or improper action in County government that the employee [reasonably believed] had a reasonable good-faith belief:
 - (i) was [true and] accurate; and
 - (ii) concerned an illegal or improper action.

(2) The MSPB[, Ethics Commission, or Inspector General, as appropriate,] must not protect the employee if it is determined that:

- (A) the employee's actions were frivolous, unreasonable, and without foundation, even [if made in good] though not brought in bad faith;
- (B) the employee [failed], without good cause, did not comply with [laws or] applicable regulations concerning the making of such disclosures; or
- (C) the employee was the subject of an otherwise proper personnel action [taken for disciplinary reasons and not for retaliatory purposes.]that would have been taken regardless of the employee's disclosure of information concerning illegal or improper action in County Government.

[35-22. Filing of complaints.

- (a) If an employee believes a retaliatory action or coercion has taken place or been attempted because the employee refused to obey, or disclosed, an illegal or improper instruction, the employee may file a written complaint with the MSPB.



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The employee must file the complaint within 60 days after the alleged violation or action and must include:

- (1) the employee's name, signature, home address, and telephone number;
 - (2) name of the individual who allegedly took the action; and
 - (3) a concise description of the action and why the employee believes the action was coercive or retaliatory.
- (b) The identity of all parties must be kept confidential unless:
- (1) the MSPB finds probable cause to believe that the action was coercive or retaliatory; or
 - (2) all parties waive confidentiality in writing.
- (c) The MSPB may initiate an inquiry of any person suspected of taking retaliatory or coercive action, with or without a written complaint from an employee.]

[35-23. Investigation of complaint.

- (a) MSPB investigative proceedings are confidential. The MSPB may disclose information about the proceeding only as necessary to complete the investigation.
- (b) The MSPB may use a special personnel investigator who is independent of the County government to conduct an investigation to determine if there is probable cause to believe a retaliatory or coercive action has occurred or was attempted.
- (c) The MSPB or special investigator must complete the investigation within 30 working days after the MSPB received the complaint and must take one of the actions described in (d), (e), or (f) below.



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- (d) If the MSPB determines that the subject matter of the complaint involved allegations properly covered by the grievance process or other laws or regulations, the MSPB must advise the employee in writing and may dismiss the complaint.
- (e) If the MSPB determines that no probable cause exists, the MSPB must dismiss the complaint and notify the employee in writing of the reasons for the finding and that the dismissal is final, unless the employee files a request for reconsideration.
- (f) If the MSPB determines that probable cause does exist, the MSPB must:
 - (1) notify the employee in writing;
 - (2) prepare and serve on the person believed to have violated County Code Section 33-10(c) a statement of charges fairly describing the alleged violation and the sanctions sought for the violation; and
 - (3) conduct a hearing on the charges under Section 35 of these Regulations, with MSPB staff acting as the charging party.]

[35-24.]

35-22. Due process protections.

- (a) If the MSPB determines that an investigation pursuant to Section 35-20 of these Regulations is warranted, [T]he MSPB must prepare a memorandum before the start of the [an] investigation stating the legal authority, scope, and beginning date of the investigation.
- (b) At least 5 working days before an employee is expected to participate as a witness, custodian of records, or possible subject, the MSPB or a special personnel investigator appointed by the MSPB must give the employee a written request to participate that includes the following:



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- (1) date of the request;
- (2) name of the employee whose participation is requested;
- (3) whether the employee is requested to participate as a witness, custodian of records, or possible subject of the investigation;
- (4) name of the investigative authority;
- (5) name of the individual conducting the investigation;
- (6) law or regulation authorizing the investigation and the request for participation;
- (7) subject areas to be covered in the investigation;
- (8) if the employee is a possible subject, a clear and detailed statement of all allegations of misconduct;
- (9) notice that the employee has the right to be assisted by legal counsel; and
- (10) signature of the chairperson of the MSPB certifying that the MSPB has officially initiated an investigation and requested the employee's participation.

(c) Within 30 days after the employee's participation, the MSPB or a special personnel investigator appointed by the MSPB must provide the employee with a copy of:

- (1) a transcript or recording of all questions asked to the employee and the employee's responses;
- (2) a complete set of notes of all questions asked to the employee and the employee's responses, if there is no verbatim transcript or recording; and



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- (3) all documents that the employee has been asked to identify or review.
- (d) Within 90 days after the employee's participation, the MSPB must, if applicable, serve the employee with written notice of intent to take an action that may adversely affect the employee's terms and conditions of employment. The written notice must include a statement of appeal rights and the time limit for filing an appeal.
- (e) After the investigation is finished, the MSPB must deliver to each employee requested to participate:
 - (1) a statement that the investigation is finished; and
 - (2) a complete description of all actions taken or planned that may adversely affect the employee's employment.

[35-25. Penalties.

- (a) If a County employee is found guilty of coercion, harassment, or retaliation, under Section 33-10 of the County Code and this section of the Personnel Regulations, the MSPB may order one or more of the following penalties:
 - (1) any disciplinary action provided for in these Personnel Regulations up to and including dismissal;
 - (2) a monetary fine of up to \$1,000;
 - (3) reimbursement of expenses incurred by all parties; or
 - (4) other penalties that the MSPB considers appropriate and consistent with the County Charter and law.
- (b) The MSPB must give an employee subject to a penalty a written notice that includes:



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- (1) a statement of the employee's appeal rights; and
- (2) the time limit for filing an appeal.]

[35-26. Appeals. An employee subject to a penalty based on the MSPB's findings and decision may appeal the decision to a court.]

Approved: Isiah Leggett
Isiah Leggett, County Executive

10/13/10
Date

Approved as to form and legality:
Bernadette Saunders
Office of the County Attorney Date 10/11/2010



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Subject Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government	Number 13-10
Originating Department Office of Human Resources	Effective Date

Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government

Executive Regulation No. 13-10

Issued by: County Executive

Supersedes: Executive Regulation No. 12-00AM II, in part

Authority: Montgomery County Code, 2004, §33-7(b)

Council review: Method 1

Montgomery County Register Volume 27, Issue 9

Comment deadline: September 30, 2010

Effective date: _____

Summary: This regulation implements Bill No. 2-10 enacted by the Council on March 16, 2010. The regulation amends Section 35 of the 2001 Montgomery County Personnel Regulations to provide an appeal to the Merit System Protection Board for County employees who allege retaliation for disclosure of illegal or improper actions in County government.

Address for comments Office of Human Resources, Executive Office Building, 7th Floor
101 Monroe Street, Rockville, Maryland 20850

Staff contact: Stuart Weisberg, 240-777-5154, or stuart.weisberg@montgomerycountymd.gov

Please use the key below when reading this regulation:

Boldface

* * *

Heading or defined term.

Existing language unchanged by executive regulation.



MONTGOMERY COUNTY EXECUTIVE REGULATION

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Subject Retaliation Against County Employees for Disclosing Illegal or Improper Actions in County Government	Number 13-10
Originating Department Office of Human Resources	Effective Date

SECTION 1. DEFINITIONS

* * *

1-52. **Personnel action:** An act or omission by a supervisor which has a significant adverse impact on the employee, or a change in the employee's duties or responsibilities which is inconsistent with the employee's grade and salary. It does not include an act or omission by a supervisor that is not subject to review by the Merit System Protection Board under Section 33-12 of the Montgomery County Code.

1-53. **Position:** * * *

1-54. **Position description:** * * *

1-55. **Priority consideration:** * * *

1-56. **Priority eligible list:** * * *

1-57. **Probationary employee:** * * *

1-58. **Probationary period:** * * *

1-59. **Professional improvement leave or PIL:** * * *

1-60. **Promotion:** * * *

1-61. **Promotional probationary period** * * *

1-62. **Rating categories:** * * *

1-63. **Reduction-in-force or RIF:** * * *

1-64. **Regular hourly salary:** * * *

1-65. **Relative:** * * *



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1-66. Review period:	*	*	*
1-67. Salary schedule:	*	*	*
1-68. Seasonal position:	*	*	*
1-69. Step salary schedule:	*	*	*
1-70. Supervisor:	*	*	*
1-71. Temporary employee:	*	*	*
1-72. Temporary position:	*	*	*
1-73. Temporary promotion:	*	*	*
1-74. Term employee:	*	*	*
1-75. Term position:	*	*	*
1-76. Transfer:	*	*	*
1-77. Uniformed fire/rescue employee: *	*	*	*
1-78. Unrepresented employee: An employee whose position is not included in any bargaining unit.			
1-79. USERRA:	*	*	*
1-80. Volunteer Firefighter or Rescuer: *	*	*	*
1-81. Workday:	*	*	*
1-82. Working days:	*	*	*
1-83. Workweek or work period:	*	*	*
	*	*	*



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SECTION 3. ETHICS, DISCLOSURE OF ILLEGAL OR IMPROPER ACTS, EMPLOYMENT OF RELATIVES, DISCRIMINATION ON THE BASIS OF POLITICAL AFFILIATION, OUTSIDE EMPLOYMENT, AND SEXUAL OR ROMANTIC RELATIONSHIPS IN THE WORKPLACE

* * *

3-2. Disclosure of illegal or improper acts in County government.

- (a) An employee should report an illegal or improper act in County government.
- (b) An employee should report an illegal or improper act to the individual responsible for investigating the act or taking corrective action, such as:
 - (1) the employee's immediate supervisor or higher level supervisor;
 - (2) the employee's department director;
 - (3) the CAO or County Executive for executive branch employees;
 - (4) the County Council for legislative branch employees; or
 - (5) the Inspector General, in matters of fraud, waste, or abuse.
- (c)
 - (5) It is unlawful for any person to retaliate against, penalize, or threaten with retaliation or penalty, an employee for providing information to, cooperating with, or in any way assisting the Inspector General.

* * *



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SECTION 35. MERIT SYSTEM PROTECTION BOARD APPEALS, HEARINGS, AND INVESTIGATIONS

* * *

35-2. Right of appeal to MSPB.

* * *

(g) An employee with merit status may file an appeal with the MSPB alleging a personnel action in retaliation for:

- (1) refusing to obey an instruction involving an illegal or improper action; or
- (2) disclosing to a Federal, State, or County official or employee, information concerning illegal or improper action in County government with a reasonable good-faith belief that the information disclosed is accurate.

35-3. Appeal period.

(a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:

- (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal;
- (2) receives a notice of termination;
- (3) receives a written final decision on a grievance;
- (4) resigns involuntarily; or
- (5) knows or should have known of a personnel action.

* * *

35-20. MSPB audits, investigations, and inquiries.



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- (a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.
- (b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate action as set forth in Section 3-2 of these Regulations.

35-21. Prohibited practices; protections for employees.

- (a) *Prohibited practices.* It is unlawful for any person to:
 - (1) coerce or attempt to coerce any merit system employee into taking an illegal or improper action;
 - (2) retaliate against or penalize, or threaten with retaliation or penalty or subject to a personnel action because of that employee's:
 - (A) refusal to obey an instruction involving an illegal or improper action;
 - (B) disclosure of information to a Federal, State, or County official or employee concerning illegal or improper action in County government; or
 - (C) providing information to, cooperating with, or in any way assisting the Inspector General.
- (b) *Protection for employee.*



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- (1) The MSPB must protect a merit system employee from any retaliatory or coercive action for:
 - (A) refusing to obey an instruction involving an illegal or improper action; or
 - (B) disclosing information to a Federal, State, or County official or employee concerning illegal or improper action in County government that the employee had a reasonable good-faith belief:
 - (i) was accurate; and
 - (ii) concerned an illegal or improper action.
- (2) The MSPB must not protect the employee if it is determined that:
 - (A) the employee's actions were frivolous, unreasonable, and without foundation, even though not brought in bad faith;
 - (B) the employee, without good cause, did not comply with applicable regulations concerning the making of such disclosures; or
 - (C) the employee was the subject of an otherwise proper personnel action that would have been taken regardless of the employee's disclosure of information concerning illegal or improper action in County Government.

35-22. Due process protections.

- (a) If the MSPB determines that an investigation pursuant to Section 35-20 of these Regulations is warranted, the MSPB must prepare a memorandum before the start of the investigation stating the legal authority, scope, and beginning date of the investigation.



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(b) At least 5 working days before an employee is expected to participate as a witness, custodian of records, or possible subject, the MSPB or a special personnel investigator appointed by the MSPB must give the employee a written request to participate that includes the following:

- (1) date of the request;
- (2) name of the employee whose participation is requested;
- (3) whether the employee is requested to participate as a witness, custodian of records, or possible subject of the investigation;
- (4) name of the investigative authority;
- (5) name of the individual conducting the investigation;
- (6) law or regulation authorizing the investigation and the request for participation;
- (7) subject areas to be covered in the investigation;
- (8) if the employee is a possible subject, a clear and detailed statement of all allegations of misconduct;
- (9) notice that the employee has the right to be assisted by legal counsel; and
- (10) signature of the chairperson of the MSPB certifying that the MSPB has officially initiated an investigation and requested the employee's participation.

(c) Within 30 days after the employee's participation, the MSPB or a special personnel investigator appointed by the MSPB must provide the employee with a copy of:

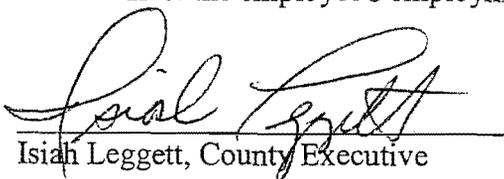


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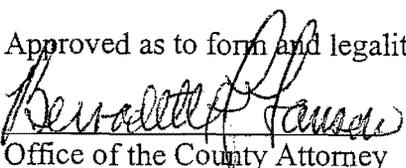
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- (1) a transcript or recording of all questions asked to the employee and the employee's responses;
- (2) a complete set of notes of all questions asked to the employee and the employee's responses, if there is no verbatim transcript or recording; and
- (3) all documents that the employee has been asked to identify or review.
- (d) Within 90 days after the employee's participation, the MSPB must, if applicable, serve the employee with written notice of intent to take an action that may adversely affect the employee's terms and conditions of employment. The written notice must include a statement of appeal rights and the time limit for filing an appeal.
- (e) After the investigation is finished, the MSPB must deliver to each employee requested to participate:
 - (1) a statement that the investigation is finished; and
 - (2) a complete description of all actions taken or planned that may adversely affect the employee's employment.

Approved: 
Isiah Leggett, County Executive

10/12/10
Date

Approved as to form and legality:

Office of the County Attorney

10/11/2010
Date

MONTGOMERY COUNTY CODE

Sec. 29A-7. Access to records and information; retaliation prohibited.

(a) The office of legislative oversight shall have access to, and the right to examine, any pertinent books, documents, papers or records of any department, agency or instrumentality or any contractor with the county or its instrumentalities necessary to carry out the responsibilities assigned hereunder.

(b) Included within the scope of this section shall be such information as is necessary to determine powers, duties, activities, organization, financial transactions and methods of operation, management and accountability.

(c) No employee of the county government or any instrumentality of the county and no employee of any contractor with the county or any of its instrumentalities shall be retaliated against or penalized, or threatened with retaliation or penalty, for providing information to, cooperating with, or in any way assisting the office of legislative oversight in connection with any activity of that office carried out pursuant to the provisions of this chapter. (1976 L.M.C., ch. 18, § 1.)