

Merit System Protection Board Annual Report FY2023

Members:

Harriet E. Davidson, *Chair*
Barbara S. Fredericks, *Vice Chair (July 1 – December 31, 2023)*
Sonya E. Chiles, *Vice Chair (January 1 – June 30, 2023)*

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Executive Director

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Merit System Protection Board
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FY 2023
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (Board or MSPB) is composed of three members who are appointed by the County Council pursuant to Article 4, § 403, of the Charter of Montgomery County, Maryland. Board members must be County residents and may not be employed by the County in any other capacity. No member may hold political office or participate in any campaign for any political or public office during the member’s term of office. One member is appointed each calendar year to serve a term of three years. Members of the Board conduct work sessions and hearings during the workday and in the evenings, as required, and are compensated as prescribed by law. The Board is supported by a part-time Executive Director and a part-time Office Services Coordinator.

The Board members in Fiscal Year 2023 were:

Harriet E. Davidson	Chair
Sonya E. Chiles	Vice Chair
Barbara S. Fredericks	Associate Member

DUTIES AND RESPONSIBILITIES
OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in the Charter of Montgomery County, Maryland, Article 4, “Merit System and Conflicts of Interest,” § 404, *Duties of the Merit System Protection Board*; the Montgomery County Code, Article II, Merit System, Chapter 33; and the Montgomery County Personnel Regulations, § 35, Merit System Protection Board Appeals, Hearings, and Investigations. Below are excerpts from some of those provisions.

1. Section 404 of the Charter establishes the following duties for the Board:

Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the

investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

2. Section 33-7 of the Montgomery County Code sets out the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the Board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the Board granted herein must be exercised by the Board as needed to rectify personnel actions found to be improper. The Board must comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The Board, subject to the appropriation process, must establish its staffing requirements and define the duties of its staff.

* * *

(c) *Classification standards.* With respect to classification matters, the County Executive must provide by personnel regulation, adopted under Method (1), standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

- (1) The necessary components of class specifications;
- (2) Criteria for the establishment of new classes, modification or elimination of existing classes;
- (3) Criteria for the assignment of positions to classes;
- (4) Kinds of data required to substantiate allocation of positions;
- (5) Guidelines for comparing levels of job difficulty and complexity; and
- (6) Criteria for the establishment or abolishment of positions.

The Board must conduct or authorize periodic audits of classification assignments made by the Chief Administrative Officer and of the general structure and internal consistency of the classification plan, and must submit audit findings and recommendations to the County Executive and County Council.

* * *

(f) *Personnel regulation review.* The Merit System Protection Board must meet and confer with the Chief Administrative Officer and employees and their organizations from time to time to review the need to amend these regulations.

(g) *Adjudication.* The Board must hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(h) *Retirement.* The Board may from time to time prepare and recommend to the Council modifications to the County's system of retirement pay.

(i) *Personnel management oversight.* The Board must review and study the administration of the county classification and retirement plans and other aspects of the merit system and transmit to the Chief Administrative Officer, County Executive and County Council its findings and recommendations. The Board must conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the County Council. All County agencies, departments and offices and County employees and organizations must cooperate with the Board and have adequate notice and an opportunity to participate in any such review initiated under this section.

(j) *Publication.* Consistent with the requirements of State law, confidentiality and other provisions of law, the Board must publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

3. Section 35-20(a) of the Montgomery County Personnel Regulations states:

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.

DISCIPLINARY ACTION OR TERMINATION

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. To initiate the appeal process, the employee must file in writing or by completing the [Appeal Form](#) on the Board's website. Montgomery County Personnel Regulations (MCPR), § 35-4. Under MCPR § 35-3, the employee must file the appeal within ten (10) working days after the employee has received a Notice of Disciplinary Action involving a demotion, suspension or removal, resigns involuntarily, or receives a Notice of Termination. The appeal must include a copy of the Notice of Disciplinary Action. MCPR § 35-4(d)(1). Employees are encouraged to complete the on-line [Appeal Form](#), which permits the uploading of documents.

In accordance with § 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final disciplinary action of the Fire Chief or a local fire and rescue department, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within thirty (30) days after receiving a final notice of disciplinary action, unless another law or regulation requires that an appeal be filed sooner.

After receipt of the Appeal Form, the Board's staff notifies the Office of the County Attorney, Office of Labor Relations, Office of Human Resources, and, if applicable, the Fire Chief or local fire and rescue department, of the appeal. MCPR § 35-8. The notice to the parties requires each side to file a prehearing submission, including a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which potential witnesses and exhibits are discussed. Typically, a merits hearing date is set by the Board in consultation with the parties at the Prehearing Conference. The Board requires all parties to comply with its [Hearing Procedures](#) and [Remote Hearing Procedures](#). After the hearing, the Board prepares and issues a written decision.

During fiscal year 2023 the Board did not issue any decisions on appeals concerning disciplinary actions or termination.

DENIAL OF EMPLOYMENT

Montgomery County Code, § 33-9(c), permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with § 6-14 of the Montgomery County Personnel Regulations (MCPR), an employee or an applicant may file an appeal directly with the Board alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Section 35-3 of the MCPR specifies that an employee or applicant has ten (10) working days after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position to file an appeal with the Board. The appeal must be filed in writing or by completing the Merit System Protection Board [Appeal Form](#) on the Board's website. The appeal must include a copy of the notification of nonselection or nonpromotion. MCPR § 35-4(d)(3). Copies of such documents may be uploaded with the online [Appeal Form](#).

Upon receipt of the completed [Appeal Form](#), the Board's staff notifies the Office of the County Attorney, Office of Labor Relations, and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

During fiscal year 2023 the Board issued the following decisions on appeals concerning the denial of employment.

CASE NO. 22-39

FINAL DECISION

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of Montgomery County's Board of Elections (BOE) that Appellant did not meet screening criteria. The Appeal was officially filed May 16, 2022.¹ The County filed its response to the appeal (County Response) on June 14, 2022. Appellant filed her reply (Appellant's Reply) on July 18, 2022. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant, a current County employee, is a School Health Room Technician. On May 5, 2022, she applied for a Grade 16 Office Services Coordinator position with the Board of Elections (IRC54076). County Exhibit (CX) 1. Appellant received notice that she did "not meet screening criteria" for the position. Status Change Notice, May 13, 2022.

According to the County, Appellant did not meet the minimum qualifications for the job because she lacked the required "Four (4) years of progressively responsible office support experience." CX 2, Affidavit of [CC] (June 8, 2022). Appellant's application indicates that she only has two years and three months of such experience as an Election Aide II. CX 1; CX 2. Because Appellant's resume lists the Election Aide II position as part time/temporary she likely has less than two years of experience. CX 1, p. 22. Moreover, because Appellant did not list any education beyond her High School degree (a minimum requirement for the position), there is no basis to allow any education to be substituted for work experience. CX 1, pp. 4, 10-11.

Appellant admits that she failed to include her full employment history in the Work Experience section of the electronic job application. Appellant's Reply, ("I'm not going to deny that I didn't put my other employment information in the work experience section"). *See also* Appellant Email, July 5, 2022. ("I didn't put my full work experience and honestly the process is very confusing especially when you have uploaded your Resume. I also noted that in the preferred criteria part I did put School Health Room Technician along with my work as an Election Judge Trainer or II.").

The electronic job application instructs applicants how they must enter Work Experience into the electronic job application:

Please enter the specific jobs from your resume and the duration of time you worked performing any of the indicated job responsibilities. Select the responsibilities or work areas in which you have experience and that are clearly indicated on your resume during the time period entered. The Start and End Date for your job experience must be completed. If you are currently working in the job and performing any of the indicated job responsibilities, please use today's date for the End Date. The system will not accept "Present" or any other text.

CX 1, p. 12.

¹The appeal was filed by electronic mail on Friday, May 13, 2022, a date when the Merit System Protection Board offices are not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

From our review of Appellant’s resume, it does not appear that her work experience other than as an Election Aide qualifies as “office support experience.” The work experience on Appellant’s resume includes School Health Room Technician, Realtor, Jiffy Lube Service Technician, Library Page (part time), and Bus Operator. CX 1, pp. 21-23.

The relief sought by Appellant is limited to receiving an explanation for her nonselection. The MSPB appeal form asks the question: “What action would you like the Board to take in this case (*i.e.*, what is the relief/remedy you are requesting)?” Appellant answered: “Specific reason why they denied my application stating that I didn’t meet screening criteria.”

While the County argues that it is not obligated to provide specific reasons why an applicant has been determined to not meet screening criteria it nevertheless provided the information to the Board and Appellant.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, § 33-9, Equal Employment Opportunity and Affirmative Action, which provides, in pertinent part:

(c) *Appeals by applicants.* Any applicant for employment or promotion to a merit system position may appeal decisions of the chief administrative officer with respect to their application for appointment or promotion. . . . Appeals alleging that the decisions of the chief administrative officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the merit system protection board. . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), Section 6, Recruitment and Application Rating Procedures, which provides, in relevant part:

§ 6-14. Appeals by applicants.

Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual’s application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Montgomery County Personnel Regulations, 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, June 30, 2015, and June 1, 2020), Section 35, Merit System Protection Board Appeals, Hearings and Investigations, which states in applicable part:

§ 35-2. Right of appeal to MSPB.

(c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

ISSUE

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

In a nonselection appeal the appellant has the burden of proving that the County's decision on the application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, § 33-9(c); MCPR § 6-14; MSPB Case No. 18-13 (2018). *See* MCPR § 34-9(d)(2). The County argues that Appellant cannot meet this substantial burden of proof under the Personnel Regulations and County Code to show that the County's decision was arbitrary and capricious, or illegal. The Board agrees and concludes that Appellant has failed to meet this burden.

Although Appellant stated that she did not provide the necessary information to allow OHR to properly assess her experience because the instructions were confusing, we find that the instructions were explicit and clear. Just as importantly, the application and Appellant's resume do not demonstrate that she met the minimum qualifications for work experience.

Under MCPR § 6-4(b), "the OHR Director may disqualify an applicant at any point in the hiring process if: (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification; . . .". Appellant's attempts to now provide work experience details omitted from her application must be rejected. The Board has previously held that the County may rely on information provided with the application and that the Board will not reverse the County's decision based on subsequently provided information. MSPB Case No. 19-03 (2018); MSPB Case No. 16-15 (2016); MSPB Case Nos. 15-14 and 15-23 (2015).

We also note that while there may be no explicit regulation requiring OHR to give detailed explanations as to why applicants do not meet screening criteria when notifying an applicant, under the Maryland Public Information Act an applicant such as Appellant is a "person in interest" who may be entitled to documents containing that information. Md. Code Ann., General Provisions Article, § 4-311(b). However, Appellant does not suggest that she contacted OHR to ask for an explanation before filing her appeal. In any event, the appeals process resulted in Appellant being given an explanation and being allowed to respond.

Appellant has failed to meet her burden of showing that the nonselection decision, based on the lack of required work experience she listed on her application, was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed. Montgomery County Code, § 33-9(c); MCPR, § 6-14.

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from her nonselection for the position of Office Services Coordinator (IRC54076).

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
September 27, 2022

CASE NO. 23-01

FINAL DECISION

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of the Montgomery County Department of Health & Human Services (DHHS) not to promote her to a position as a Nurse Manager. The Appeal was filed on August 24, 2022. The County filed its response to the appeal (County Response) on October 17, 2022, and Appellant replied that same day.

The appeal was considered and decided by the Board.

FINDINGS OF FACT

A DHHS recruitment for a Grade 25 Nurse Manager (IRC54213) was posted on May 11, 2022, with a closing date of June 10, 2022. County Exhibit (CX) 1; Affidavit of MS, CX 2, ¶5; Affidavit of RS (RS or “hiring manager”), CX 5, ¶5. By June 10, only Appellant had applied for the position. CX 2, ¶6.

After discussions between DHHS and the Office of Human Resources the recruitment was extended and readvertised with a new closing date of July 1, and then changed to “open until filled.” CX 2, ¶s 7-8.

Appellant continued to be under consideration for the Nurse Manager position. The extended recruitment specifically provided that applicants who had previously applied remained under consideration. CX 2, ¶7.

Ultimately there were eight applicants. Five of the candidates, including Appellant, were placed on the eligible list as qualified to be interviewed. CX 3. Appellant was interviewed by the three-person interview panel. CX 4. The selected candidate received the highest scores in the panel consensus evaluation form from the structured interview process, with six “above average” scores. CX 4. Appellant received two “below average,” three “average” and one “above average” scores. CX 4.

Appellant alleges that RS, the hiring manager, was biased and retaliated against her. Appellant claims that RS urged one of Appellant’s co-workers to apply for the promotion and told the coworker that she had no intention of promoting Appellant. Appeal Form, p. 3.

The hiring manger denied under oath having done so: “I did not inform any staff member that I had ‘no intention’ of hiring [Appellant] as the Nurse Manager.” CX 5, ¶6. The hiring manager also stated that she did not know the selected candidate prior to the interview process. CX 5, ¶8.

Appellant suggests that the alleged retaliation by the hiring manager was based on Appellant’s criticisms of the department’s operations: “I feel that I am being discriminated against due to the fact that I have been vocal about changes that need to happen in the Department. . . We (the nurses) also contacted the union in the last year, and I was vocal about wanting to speak to them about the problems we were dealing with, and I think another CHN told her [RS] that I was

the one who called them (when it actually wasn't) and feel she retaliated because of this also." Appeal Form, p.3.

Appellant further alleged that she suspected improper favoritism based on her speculation that the applicant selected was a friend of someone the hiring manager knows. Appeal Form, p. 3 ("I think the person she hired is a friend of someone she knows."). Appellant repeated this conjecture in subsequent correspondence. Appellant email of September 14, 2022 ("I'm more convinced than ever that the new Manager is a friend of the Germantown Health Center's manager and therefore, I was not given a fair chance by her either. The Germantown manager was part of the [interview] panel as well."); Appellant email of October 17, 2022, to OHR ("The new manager most likely is a friend of someone who works in the county who was told about the position.").

Appellant provided no basis or proof for her assumptions and the hiring manager denied having knowledge of the selectee. CX 5, Affidavit of RS, ¶8 ("I do not have previous knowledge of the applicant who was selected for the Nurse Manager position.").

Appellant also alleges that the other members of the interview panel may have been biased against her. Appeal Form, p. 3 ("I also know the other 2 people that were on the panel and they definitely could have preconceived notions about me."). Appellant does not explain why that may be the case or provide any evidence to support the allegation.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, which provides, in pertinent part:

§33-9(c). Appeals by applicants. Any applicant for . . . promotion to a merit system position may appeal decisions of the chief administrative officer with respect to their application for appointment or promotion. . . . Appeals alleging that the decisions of the chief administrative officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the merit system protection board. . .

Montgomery County Personnel Regulations (MCPR), 2001, Section 6. Recruitment and Application Rating Procedures, (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010, July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016), provides in pertinent part:

§6-3. Employment application deadline.

- (a) The OHR Director may establish a reasonable deadline of not less than two weeks for receipt of applications for announced vacancies. The OHR Director may shorten the two-week announcement period.
- (b) The OHR Director may designate certain positions for open continuous or open until filled recruitment.
- (c) The OHR Director must not accept an application submitted after an announced application deadline.

§6-9. Eligible list. . . The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. . .

§6-14. Appeals by applicants. Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Montgomery County Personnel Regulations, Section 7, Appointments, Probationary Period, and Promotional Probationary Period (as amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), states, in part:

§ 7-1. Use of eligible list. If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

(a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

(b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.

Montgomery County Personnel Regulations, 2001, Section 27, Promotion, (as amended June 30, 2015), provides, in part:

§27-4. Appeal of promotional action.

(a) An employee with merit system status may file a grievance under Section 34 of these Regulations over a promotional action. The employee must show that the action was arbitrary and capricious or in violation of established procedure.

(b) An employee who applied for promotion to a merit system position and who alleges that the CAO's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may file an appeal directly with the MSPB.

(c) An employee who alleges discrimination prohibited by the County's EEO policy in a promotional action may not file a grievance but may file a complaint under the processes described in Section 5-4 of these Regulations.

ISSUE

Was the County's decision on Appellant's application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

Appellant has the burden of proving that the County's decision to deny her the promotion was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MCPR § 27-4; MCPR § 34-9(d)(2). *See* MSPB Case No. 21-12 (2021); MSPB Case No. 20-04 (2020). The County argues that Appellant has failed to meet her substantial burden of proof.

Extension of the Recruitment

Appellant seems to suggest that there was something questionable about the County's decision to extend the application deadline for the recruitment after she was the only one to apply before the original deadline. The Board has found that extending a recruitment to increase the number of candidates may be appropriate. MSPB Case No. 20-04 (2020) ("The Department's desire to broaden the pool of applicants to obtain more qualified candidates is certainly not arbitrary, capricious or illegal."). See MCPR §6-3(b) ("The OHR Director may designate certain positions for open continuous or open until filled recruitment."). We do not view the County's effort to seek competition as improper when there was only one applicant during the initial posting period.

Alleged Retaliation or Bias

Appellant argues that the hiring manager was biased and retaliating against her, alleging that RS urged one of Appellant's co-workers to apply for the promotion and telling her that she had no intention of promoting Appellant. Appeal Form, p. 3. Appellant suggests that the alleged retaliation was "due to the fact that I have been vocal about changes that need to happen in the Department. . . We (the nurses) also contacted the union in the last year, and I was vocal about wanting to speak to them about the problems we were dealing with, and I think another CHN told her that I was the one who called them (when it actually wasn't) and feel she retaliated because of this also." Appeal Form, p.3.

The hiring manger denied under oath telling another employee that she had prejudged Appellant's candidacy: "I did not inform any staff member that I had "no intention" of hiring [Appellant] as the Nurse Manager." CX 5, ¶6.

Appellant's allegations concerning what her coworker told her the hiring manager had said constitutes second level hearsay, also referred to as "hearsay within hearsay." While it is true that hearsay is admissible in administrative proceedings, Montgomery County Code, Administrative Procedures Act, § 2A-8(e), we are obligated to take into consideration that such hearsay is less reliable than a sworn statement. MSPB Case No. 17-05 (2017). See *Travers v. Baltimore Police Department*, 115 Md. App. 395, 413 (1997); *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725-26 (1989). Appellant did not provide any written statement from the coworker, either sworn or unsworn. She instead complains that DHHS or OHR should have obtained a statement from the coworker. However, because in nonselection appeals it is the appellant who bears the burden of proof we are unable to credit Appellant's claim that the hiring manger made the contested statement.

In this regard we note that Appellant's response to the County's submission acknowledges that she cannot carry her burden of proof without a statement from the coworker. See Appellant's Email of October 17, 2022 ("Did anyone speak with [EP]? She is my co-worker that advised that my previous supervisor, [BS], made these statements. . . I can't prove anything if you don't speak to the person who told me. I don't understand why no one has asked [EP] about this or asked for an affidavit from her.").

Favoritism

Appellant's allegations of favoritism are based on her assumption that the selected applicant was a friend of someone the hiring manager knows, specifically the Germantown Health Center's manager. See Appellant email of September 14, 2022. However, Appellant is clearly

speculating, as indicated by the language she uses. For example, in her Appeal Form Appellant says, “*I think* the person she hired is a friend of someone she knows.” (emphasis added). And in Appellant’s email of October 17, 2022 to OHR she says, “The new manager *most likely* is a friend of someone who works in the county who was told about the position.” (emphasis added). Appellant also alleged that the other members of the interview panel might have been biased against her, without explaining how Appellant knows that may be the case or even why she thinks it may be the case. Once again, Appellant’s language indicates that she is guessing. Appeal Form, p. 3, (“I also know the other 2 people that were on the panel and they definitely *could have* preconceived notions about me.”) (emphasis added). These are not factual assertions; they are suppositions without proof.

The Board has held that allegations of favoritism without proof may not constitute a basis for upholding an appeal. MSPB Case No. 20-04 (2020) (“There is no evidence to support Appellant’s bald allegation of favoritism . . . Allegations without proof may not form a basis for us to uphold the appeal. . .”).

The Board has also held that a hiring official knowing a candidate is an insufficient basis to find favoritism or bias:

Indeed, even if the selected candidate was known to those involved in the selection process it would not be enough for us to conclude that there had been improper favoritism. *See* MSPB Case No. 00-12 (2000), *aff’d*, *Montgomery County v. Clarke*, No. 2580, Sept. Term, 2000 (Md. Ct. Spec. App. Dec. 5, 2001) (“The fact that the selecting official picks someone who is previously known and viewed favorably, or doesn’t select someone who is previously known and viewed unfavorably, does not, in the Board’s view, render the procedure defective.”).

MSPB Case No. 20-04 (2020).

In her appeal Appellant mentioned that she has “a chronic illness and the supervisor knows this and this stress doesn’t help.” Appeal Form, p. 3. The hiring manager acknowledged in her affidavit that Appellant verbally shared information concerning her health condition but noted that she did not have a Health Status Report from OMS from 2021 or 2022. CX 5, ¶10. Appellant also disclosed the nature of her health condition in her October 17 response to the County submission: “FYI, I have [chronic disease]. It’s a chronic disease and yes, I should have given OMS my health record from my neurologist but it’s very bothersome to submit this yearly when it’s not changing.” However, Appellant does not allege that as part of the promotional process she has suffered discrimination due to her health condition or that she required an accommodation.

The Board must give deference to the hiring authority because Appellant has not provided any evidence that she was subjected to retaliation, favoritism, or bias, or was clearly the best candidate. *See* MSPB Case No. 18-05 (2018) (“In a non-selection case, the Board will not substitute its judgment for that of the hiring official unless the appellant demonstrates qualifications plainly superior to those of the appointee.” *citing* MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). *See also* MSPB Case No. 14-03 (2013); MSPB Case No. 10-11 (2010); and MSPB Case No. 09-01 (2009). Moreover, the undisputed record evidence indicates that the consensus evaluation of the interview panel rated the selected candidate higher than Appellant. The Board has consistently held that “Selection of a higher rated candidate is consistent with the County personnel regulations.” MSPB Case No. 18-05 (2018). *See* MCPR § 7-1.

ORDER

On the facts in the record before us and based upon the foregoing analysis, the Board must **DENY** Appellant's appeal from her nonselection for the position of Nurse Manager.

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
January 18, 2023

CASE NO. 23-02

FINAL DECISION

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of the Montgomery County Office of Human Resources (OHR) Occupational Medical Services (OMS) division that Appellant was not medically acceptable to perform the duties of a Security Officer I. The Appeal was officially filed August 29, 2022.¹ The County filed its response to the appeal (County Response) on September 28, 2022. Additional information was supplied by the County on December 14, 2022, in response to the Board's request for clarification of the recruitment timeline. Appellant did not file a reply to either County submission.

The appeal was considered and decided by the Board.

FINDINGS OF FACT

On April 27, 2021, the County posted a recruitment notice (IRC47985) for five vacant Security Officer I positions with the Montgomery County Police Department (MCPD). County Exhibit (CX) 1. The recruitment was open and accepted applications through May 11, 2021. Appellant applied on May 11, 2021. CX 6. Appellant was placed on the Eligible List rated as "Well Qualified" on June 25, 2021, and was interviewed on November 1, 2021. CX 6.

On November 21, 2021, Appellant was provided with a background check booklet to complete, and he returned the completed form on March 17, 2022. CX 6. After a successful background check was completed, the County sent Appellant an email with a conditional offer of employment on May 20, 2022. CX 4. The conditional offer of employment was subject to a medical evaluation finding that Appellant met the medical standards for employment. CX 4.

The job specifications require that candidates undergo a Medical Exam Protocol involving a Core Exam with a Drug/Alcohol Screen. CX3. *See* Montgomery County Personnel Regulations (MCPR) §8-6(b)(2)(C).

The job specifications for a Security Officer I position (CX3) state that:

¹The envelope containing Appellant's appeal was apparently hand-delivered through the MSPB office door mail slot at a time or date that the MSPB office was not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

Employees may encounter threatening situations and unknown risks when responding to security incidents, and confront abusive and combative individuals in unlawful acts. Work requires continuous periods of patrolling County buildings and other facilities and typically involves . . . walking, climbing stairs, pushing, pulling, etc. Employee is subject to adverse weather conditions while patrolling and to occasional confrontations with unruly, aggressive people and other situations involving some risk to self, requiring attention to safety precautions to avoid injury.

Appellant was examined by Dr. SR of OHR's Occupational Medical Services. The medical examination found that Appellant had uncontrolled diabetes mellitus, non-insulin-dependent diabetes (NIDDM). CX 2 (unredacted). After the medical examination Dr. SR concluded:

I cannot clear him based on end organ disease and continued out of controlled diabetes long standing. He has had a cva² 2019 with complete occlusion of the rt vertebral artery, Cardiac stented RCA³ 2021 and appears despite aggressive diabetic therapeutic interventions has had uncontrolled diabetes at least since 6/2019 to and including to 6/2022.

His risk of sudden incapacitation based on the potential physical demands of a security officer which could include carrying a gun, having to run- restrain another in role of a body guard assigned to protect a county VIP in MCO makes it to [*sic*] risky to clear him for this position. He is not fit for duty at this time. CX 2 (unredacted)

Regarding the Not Fit for Duty determination, Dr. SR also said "If at a latter [*sic*] time he has his diabetes in good control then he may reapply and have his medical evaluation reconsidered." CX2 (unredacted).

Neither the jobs specifications nor the job posting mention that an employee in a Security Officer position would be required to carry a firearm. CX 1; CX 3.

As a result of the medical evaluation, Occupational Medical Services notified MCPD on August 9, 2022, that, after completing his medical examination, Appellant was not fit for duty. CX 6. That same day MCPD sent Appellant a notice rescinding the conditional offer of employment. CX 5, CX 6.

In response to the Board's request for clarification of the timeline of Appellant's application and eventual nonselection, on December 14, 2022, the County submitted an Affidavit from SB, a Program Manager II with MCPD. CX 6.

² CVA is an abbreviation for a cerebrovascular accident.

³ RCA is an abbreviation for the right coronary artery.

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Personnel Regulations, Section 8. Medical Examinations and Reasonable Accommodation (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015), provide in pertinent part:

§8-1. Definitions.

(b) *Conditional offer*: An offer of County employment that the OHR Director may withdraw if the applicant fails to meet the medical requirements for the position. .

(f) *Fitness-for-duty evaluation*: A medical evaluation of an employee to determine if the employee has a physical or psychological condition that affects the employee’s ability to perform the essential functions of the employee’s job.

§8-3. Medical requirements for employment.

(a) An applicant who is selected for a County position must meet the medical requirements for the position before the applicant is appointed to the position. . .

§8-6. Required medical examinations of applicants; actions based on results of required medical examinations.

(a) *Medical and physical requirements for job applicants.*

(1) The OHR Director may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry required of all entering employees in the same job or occupational class. . .

(b) *Medical exam protocols*

(2) *Types of medical exam protocols.*

(C) Core Exam. This protocol includes the same requirements as the limited core exam, but also includes a physical examination by a physician, urinalysis, EKG, additional blood tests, and additional tests for communicable diseases. . . This protocol is for applicants for positions in occupational classes that involve:

- (i) moderate or heavy physical demands;
- (ii) significant exposure to potentially aggressive or combative people;
- (iii) emergency communications; or
- (iv) frequent shift rotation.

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, or announced examination and scoring procedures that were not followed?

ANALYSIS AND CONCLUSIONS

Appellant has the burden of proving that the County's decision on his application was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. Montgomery County Code, §33-9(c); MSPB Case No. 21-12 (2021); MSPB Case No. 18-13 (2018); MSPB Case No. 15-01 (2015). *See* MCPR § 34-9(d)(2).

The Board has held in numerous cases that a County determination on whether a medical or psychological condition impacts an applicant's ability to perform a job should be given "significant deference" or "substantial latitude" absent a showing that it is arbitrary, capricious, or clearly unsupported by facts. *See, e.g.*, MSPB Case No. 15-30 (2015); MSPB Case No. 13-01 (2012); MSPB Case No. 03-01 (2003).

The criteria used to screen out an applicant with disabilities as part of a medical examination "must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation. . .". 29 C.F.R. § 1630.14(b)(3). A determination that there is a significant risk of substantial harm to the health or safety of the applicant or others that cannot be eliminated or reduced by reasonable accommodation must "be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." 29 C.F.R. § 1630.2(r). That determination "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Id.*

There are two prior MSPB decisions concerning diabetic applicants for Police Officer positions where the applicants were determined to not be fit for duty. *See* MSPB Case No. 07-09 (2007) (Where applicant had "extremely erratic fluctuations in blood glucose levels" it was "reasonable for Dr. SS to conclude that because of the symptoms associated with erratic fluctuations in blood glucose levels caused by Type I Diabetes Mellitus, Appellant was not fit for duty as a Police Officer Candidate as Appellant would be unable to perform the essential duties of the position."). *See also* MSPB Case No. 02-08 (2002). Similarly, in this appeal Dr. SR found that Appellant had uncontrolled diabetes mellitus.

Despite Dr. SR's mention that the job "could include carrying a gun" when that may not be the case, he identified the physical demands of a Security Officer position, such as "having to run- restrain another." The physical demands of the Security Officer job are thus comparable in key respects to those of a police officer. We find that the medical examination and evaluation identified significant and undisputed medical conditions that would impair Appellant's ability to perform the essential functions of a Security Officer position and posed a significant risk of substantial harm to himself and others. CX 2 and 3.

Appellant did not file a reply to the County's submission. In nonselection cases where the appellant has the burden of proof it is significant when an appellant does not file a response. MSPB Case No. 20-16 (2020) ("Finally, we note that it is significant that despite being provided with the opportunity, Appellant did not contest the County's Response to his appeal. *See* MSPB Case No. 20-11 (2020); MSPB Case No. 16-01 (2015)"). Indeed, Appellant has provided no basis to support his appeal. Appellant's appeal simply says that he is appealing the County's decision to rescind the offer of employment and wants a reevaluation of his application. Appellant offers no

explanation of why he believes the County's decision was in error. In sum, the Board has no choice but to conclude that Appellant has failed to carry his burden of proof.⁴

Accordingly, the Board must deny the appeal and uphold the County's decision to rescind the contingent offer of employment.

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Security Officer (IRC47985). It is further **ORDERED** that should Appellant apply for a future Security Officer position the County will reconsider Appellant's medical acceptability based on his then existing medical condition.

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
February 14, 2023

⁴ There is no suggestion in the record that Appellant requested a reasonable accommodation or that a reasonable accommodation is possible. In this regard we note that Appellant did not respond to Dr. SR's effort to contact him. CX 2 ("I did attempt to call him and left a message on listed telephone last week and have not heard back from him to discuss this.").

GRIEVANCES

In accordance with § 34-10(a) and § 33-9(b) of the Montgomery County Personnel Regulations (MCPR), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. The appeal must be filed in writing or by completing the [Appeal Form](#) on the Board's website. The appeal must include a copy of the CAO's decision. MCPR § 35-4(d)(2).

Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney, Office of Labor Relations, and Office of Human Resources of the appeal and provides the County with thirty (30) calendar days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. MCPR § 35-8. The County must also provide the employee with a copy of all information provided to the Board. After receipt of the County's response, the employee is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require additional submissions or oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record and issues a written decision.

The Montgomery County Code, § 33-56, also permits an appeal to the MSPB from a decision of the CAO regarding a retirement issue. Appeals of retirement grievances must be filed within fifteen (15) calendar days.

During fiscal year 2023 the Board issued the following grievance decisions.

CASE NO. 22-41

FINAL DECISION

Appellants are twelve Battalion Chiefs and Assistant Chiefs of the Montgomery County Fire and Rescue Service (MCFRS). They have filed appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County's Chief Administrative Officer (CAO) denying them emergency pay during the COVID-19 pandemic.

The County submitted responses to each of the appeals. (County Responses). Appellants each filed a response to the County's submission. (Appellant Responses). On April 21, 2022, the County filed a motion to consolidate MSPB Case Nos. 22-21 through 22-32 and represented that Appellants had agreed that consolidation is appropriate, under certain conditions.¹ On June 7, 2022, the Board issued an order consolidating the appeals as MSPB Case No. 22-41.

The appeals were reviewed and considered by the Board.

FINDINGS OF FACT

Appellants are twelve (12) MCFRS management level employees at the rank of either Division Chief, Battalion Chief, or Assistant Chief. As high level supervisors above the rank of Captain, none of the appellants are members of the bargaining unit represented by the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), or covered by the collective bargaining agreement. IAFF Agreement with Montgomery County, Article 1.

On March 5, 2020, in order to control and prevent the spread of COVID-19, the Governor of Maryland issued a proclamation under the authority of the Maryland Constitution and Title 14 of the Public Safety Article, declaring a state of emergency and catastrophic health emergency. County Exhibit (CX) 13.² The Governor's emergency declaration was renewed on March 17th and numerous times thereafter as the pandemic continued. On March 18, 2020, a letter from the County Executive was sent to all County employees. CX 18. The first line of the letter referenced the COVID-19 "public health emergency." On March 26, 2020, the President issued a Major Disaster Declaration for Maryland, authorizing emergency Federal funding coordinated through the Federal Emergency Management Administration (FEMA). CX 14. However, the Montgomery County Executive never declared a state of emergency. *See* MSPB Case No. 22-13 (2022).

On April 3, 2020, the County entered into agreements with three unions, including the IAFF, providing for COVID-19 differential compensation. CX 1-3. The agreements provided for the additional COVID-19 compensation for bargaining unit members to begin retroactive to March

¹ The County represented that the Appellant in Case No. 22-24 responded on behalf of the other appellants and agreed to "consent to consolidating the appeals on the following conditions:

1. When addressing the consolidated appeals, the Board will consider only those documents that, (a) I have already submitted as exhibits to my grievance; (b) the County has already submitted as exhibits; and (c) are otherwise mutually agreed to by all Appellants and the County; and,
2. Documents already submitted to the Board by the Appellants and the County will only be used for the specific grievance/appeal for which it was submitted."

Motion for Consolidation, ¶ 11.

² The County introduced 35 exhibits in eleven of the twelve appeals. MSPB Case No. (22-25) has 36 exhibits, with County Exhibit (CX) 36 being unique to that appeal. For each of the appeals CX 1 - 11 and CX 13 - 35 have identical numbering and content. For each of the twelve appeals CX 12 is the grievance form for that appellant.

29, 2020, and specifically waived the right of employees to receive emergency pay, as described in the collective bargaining agreement. *Id.* The additional compensation was to be paid for the duration of the declared State of Maryland COVID-19 state of emergency. *Id.* Under the Agreement with IAFF hours worked from March 29, 2020, were to be compensated at the rate of an additional \$10 per hour, except for those hours teleworked. CX 1. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX 4. *See* MSPB Case No. 22-13 (2022).

On April 10, 2020, the County Executive issued a press release publicly announcing that the County had reached an agreement concerning COVID-19 differential pay with the three unions representing County employees. CX 7. The press release specifically noted that “under provisions of existing county bargaining agreements . . . the unions could have insisted on much larger benefits, but they understood the importance of the ongoing fiscal health of the county.” CX 7.

In addition to the April 10 press release there were communications to all County employees as well as public statements and testimony from County officials concerning the COVID pandemic emergency, and the local news media reported on the issue in 2020 and early 2021. *See, e.g.,* CX 16-31. Some communications by county officials did use the term “emergency” in discussing the County’s response to the pandemic but these statements did not necessarily address hazard or emergency pay or pay issues regarding the appellants in this appeal. For example, a letter from the County Executive emailed to all County employees on March 18, 2020, referred to the “public health emergency” in the first line. CX 18. An April 6, 2020, issue of the County Employee Connect also referred to the “emergency.” CX 21. But these did not change the fact that there was no declaration of a state of emergency by the County Executive or any other issuance that covered all County employees.

In a letter dated April 29, 2020, twenty-six (26) MCFRS Battalion and Assistant Chiefs wrote to the County Executive and Chief Administrative Officer requesting COVID-19 hazard or general emergency pay. CX 6.³ Three of the appellants in this matter signed the joint letter: [Name] (22-21); [Name] (22-29); and [Name] (22-32). The letter quoted the April 10, 2020, press release language concerning the right of the unions to insist on larger benefits and from the union bargaining agreements that waived the right for employees to receive emergency pay. The letter further stated that since the personnel regulations exclude MLS employees from eligibility for emergency pay but make no mention of MCFRS management employees “we believe that there is a legal basis for paying . . . Fire Rescue Management Emergency Pay.” CX 6.

On July 2, 2020, the County Executive sent a letter to FEMA seeking reimbursement for labor costs related to the COVID-19 pandemic. CX 10, pp. 70-72. The letter sought to demonstrate that the County had a pre-existing obligation to members of the bargaining units to compensate employees for emergency pay, noting that in “a general emergency, bargaining unit members under each agreement are entitled to ‘twice their regular hourly rate.’” CX 10, p. 71. The letter further admitted that “the event triggering the emergency pay provision of the CBAs is the global COVID-19 pandemic . . . the Governor’s [COVID-19] emergency declarations, further reinforced by the Federal government’s disaster declaration - triggered the emergency pay provisions of the CBAs” and “the emergency pay provisions, while unquestionably invoked, were a financial catastrophe for the County.” CX 10, p. 71.

³ A total of 56 police and fire managers signed the letter.

Emergency pay was explicitly addressed during a public hearing of the County Council on October 13, 2020. Agenda Item 9, a briefing on the Coronavirus Relief Fund, included a discussion of the COVID-19 differential pay.⁴ During that discussion the CAO reminded the Council that the contracts with the unions have emergency pay provisions and that the County was able to negotiate with the unions for a 75% reduction from the emergency pay rate.⁵ Apparently expressing his belief it was unclear whether the emergency pay provision of the union contracts were applicable, Council Member Hans Riemer said that a fair reading of the union contracts could lead in different directions.⁶ The CAO responded by discussing the requests for reimbursement from FEMA for the COVID differential pay program. With regard to FEMA eligibility criteria, he specifically said that it was important to FEMA that the County not seek reimbursement for a newly created pay obligation but instead, since the contracts with the unions already had emergency pay provisions at a higher rate, the County had negotiated a significantly reduced rate for emergency pay.⁷ The next day the media reported on the hearing and referenced the CAO's statement that emergency pay is written into the union contracts. CX 28, Rebecca Tan, *This wealthy suburb gives out millions in pandemic hazard pay. Some officials aren't sure the county can afford to*, The Washington Post, October 14, 2020.

County employee eligibility for emergency pay during the COVID pandemic was also discussed in an October 30, 2020, *Washington Post* editorial. CX 25, *Local governments are tightening their belts. But Montgomery County is going on a spending spree*, The Washington Post, October 30, 2020. The editorial specifically addressed the County Executive's suggestion that the agreement to provide COVID differential pay was fiscally responsible because otherwise employees would have been entitled to emergency pay: "Mr. Elrich contends that Montgomery employees were entitled to the bonus pay under a previously negotiated labor agreement; he argued that his union allies actually cut the county a break by not demanding more." The last day for COVID differential pay was February 13, 2021. CX 4. An email announcing the end of COVID pay was sent to all County employees on February 14, 2021. CX 5. The last paychecks containing COVID pay were issued for the pay period ending on February 26, 2021.

The CAO provided the County Council with an update on the Coronavirus Relief Fund on March 23, 2021, and again included a discussion of Federal reimbursement for COVID-19 differential pay.⁸ His testimony clearly was focusing on the pre-existing emergency pay provisions in the union contracts and explained that the COVID differential pay was a replacement for the contractual emergency pay at a more affordable rate due to the long term nature of the COVID-19 pandemic.⁹ The public hearing testimony of the CAO was reported on by the news media. CX 29, Briana Adhikusuma, *County still working with FEMA on reimbursement of hazard-pay funding*, Bethesda Magazine, Bethesda Beat, April 2, 2021 ("Madaleno noted that instead of paying employees double time, the county negotiated with the unions for a decreased rate.").

⁴ The Council hearing on Agenda Item 9 may be found at: <https://www.youtube.com/watch?v=BAjfiJW7N-E>. The discussion concerning COVID differential pay begins at 1:55:50.

⁵ The CAO's remarks concerning the emergency pay provisions of the union contracts are at 2:00:57 to 2:01:35.

⁶ Beginning at 2:03:02.

⁷ Beginning at 2:05:48.

⁸ The Council hearing on Agenda Item 2B may be found at: <https://www.youtube.com/watch?v=LdhIRIIJruw>. The discussion concerning COVID differential and emergency pay begins at 2:11:45.

⁹ See, e.g., 2:18:21.

Governor Hogan issued an Executive Order on June 15, 2021, terminating the various emergency proclamations and orders he had previously issued during the COVID-19 pandemic, effective July 1, 2021. Governor's Executive Order 21-06-15-01 (June 15, 2021).¹⁰

Twenty-three (23) MCFRS managers filed grievances concerning COVID-19 differential pay and settled with the County. *See* MSPB Case Nos. 21-33 and 21-114 (2021). Similar grievances were filed by 15 managers in the Montgomery County Sheriff's Office, 45 managers in the Montgomery County Police Department, and 16 Department of General Services managers. *See* MSPB Case Nos. 21-109, 21-110, 21-111 and 21-112. The County settled a total of 99 appeals.¹¹ As part of the settlement agreements the County paid COVID differential pay in exchange for waiver of claims to emergency pay.

For Fiscal Year 2022 Council Resolution No. 19-872 required Council approval for any emergency pay or hazard pay extending for more than 10 consecutive days and for any COVID-19 differential pay. CX 8. As a result, 83 of the settlement agreements that required FY22 funding were submitted to the County Council for approval. CX 9.

On November 30, 2021, the County Attorney and CAO testified at a public County Council hearing concerning a supplemental appropriation for the settlement agreements. CX 9 & 10.¹² In response to Council member questions about the July 2, 2020, letter that the County Executive had sent to FEMA, the then-County Attorney explained that the Office of the County Attorney (OCA) was recommending settlement because there was a possibility that the County could lose if challenged in litigation.

The CAO testified that FEMA would only reimburse the County for expenses incurred under pre-existing legal or contractual obligations and that the July 2, 2020, letter, and copies of collective bargaining agreements were provided to show that the County had pre-existing emergency pay provisions. The CAO asserted that the County's emergency pay provisions were intended for short term circumstances like severe weather events, but not designed for long term events such as the COVID-19 pandemic. The CAO further explained that although employees were potentially due emergency pay the unions and the County agreed to the COVID-19 differential pay because all sides acknowledged that the cost of double pay for an extended pandemic of unknown duration was unsustainable and unaffordable.

The Council held another public hearing on the supplemental appropriation for the settlement agreements on December 7, 2021.¹³ Counsel representing the twenty-two MCFRS appellants in MSPB Case No. 21-114 testified in support of Council funding of the settlement agreement and warned the Council that if the funding was not approved, under the settlement agreement the parties would return to the MSPB to finish litigating the appeals.

¹⁰ Executive Order 21-06-15-01, entitled *Terminating Various Emergency Orders*, may be found at: <https://governor.maryland.gov/wp-content/uploads/2021/06/Termination-Roadmap-6.15.21.pdf>.

¹¹ The grievance filing dates for these appeals were as follows: MSPB Case No. 21-33 (10/15/20); MSPB Case No. 21-114 (10/2/20 to 12/6/20); MSPB Case No. 21-109 (9/23/20 to 10/6/20); MSPB Case No. 21-110 (10/25/20 to 2/26/21); MSPB Case No. 21-111 (10/5/20); MSPB Case No. 21-112 (9/30/20).

¹² A recording of the November 30 Council hearing is available at https://www.youtube.com/watch?v=sc6xGXn4_wI. Discussion concerning the COVID-19 differential pay supplemental appropriation begins at 1:36:20.

¹³ A recording of the public hearing is available at: https://www.youtube.com/watch?v=T45_JBKbLtA. Testimony on the supplemental appropriation begins at 0:04:45.

Ten of the appellants in this appeal previously filed front facing COVID-19 differential pay grievances. By Order dated October 4, 2021, the Board consolidated five of those appeals. MSPB Case Nos. 22-04, 22-06, 22-09, 22-10, and 22-11 were consolidated and referenced as MSPB Case No. 22-13. The other four appeals were MSPB Case Nos. 22-07, 22-12, 22-16, and 22-19. One of the appeals was withdrawn by the appellant and dismissed as moot on December 15, 2021. MSPB Case No. 22-14 (2021). The Board denied the remaining nine appeals as untimely filed on April 18, 2022.¹⁴

Prior to a promotion in September 2020 the Appellant in MSPB Case No. 22-25 was a member of the bargaining unit and received COVID-19 differential pay pursuant to the County's agreement with the IAFF. CX 1, CX 36 (22-25); Appellant's Response, March 14, 2022 ("March 16, 2020, through September 13, 2020, I was not a member of MCFRS management"). As a result, Appellant (22-25) only requested emergency pay from September 13, 2020, to June 5, 2021. CX 12. Appellant in MSPB Case No. 22-31 admits that she "primarily Teleworked" but nevertheless is seeking emergency pay for all hours worked between March 16, 2020, and June 5, 2021. CX 12.

Appellants filed grievances in this matter between December 15, 2021 (MSPB Case No. 22-24) and January 5, 2022. (MSPB Case No. 22-22). Appellants filed grievances that were virtually identical. Indeed, the statements attached to the grievance forms filed by nine of the appellants are essentially identical. CX 12. The statements filed in MSPB 22-23, 22-25, and 22-31 are quite similar but contain some minor variations. For example, the appellant in 22-25 alleged that he became aware of the grounds for a grievance on December 1, 2021, while the appellant in 22-23 included additional references and included links to the source materials. The appellant in 22-31 added a paragraph acknowledging that she "primarily Teleworked" during the time at issue.

The appellants allege the support for the grievances was the fact that in March 2020 the Governor had declared a state of emergency, the President had declared a National Emergency, and that the County Executive had announced the closing of public schools and non-essential County government offices. They also rely on the agreements that were negotiated with the unions for their members concerning differential pay. The Appellants note that an April 9, 2020, timekeeping guidance from the OHR and Finance Directors made no mention of emergency pay. They contend that this omission, and similar omissions in other County communications, "appears to have been a deliberate effort not to notify the affected Public Safety Managers or respective Department heads that the general emergency pay provisions had been triggered" in an effort to avoid paying general emergency pay. CX 12.

The three Appellants who signed the April 29, 2020, joint letter to the County Executive requesting emergency pay (CX 6) filed grievances seeking emergency pay on December 20, 2021, (CX 12, 22-32); December 22, 2021, (CX 12, 22-29); and December 30, 2021 (CX 12, 22-21). Appellant in MSPB Case No. 22-22 filed a grievance on January 5, 2022. CX 12 (22-22).

The Office of Labor Relations (OLR) Chief denied all the grievances as untimely.

¹⁴ The appellants in MSPB Case Nos. 22-22 and 22-29 had not previously filed front facing COVID-19 differential pay grievances.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and June 1, 2020), § 34, *Grievances*, which provides, in pertinent part:

§34-9. Grievance procedure.

(a) Time limit for filing a grievance.

(1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or

(B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

...

(6) The OLR Chief may extend the time limits stated in the grievance procedure for compelling reasons. The OLR Chief must give the parties prompt notice of an extension.

(b) Technical and procedural review of grievances.

...

(5) The OLR Chief must review the grievance and decide if the grievance:

(A) presents an issue that is grievable under Section 34-4;

(B) was timely filed; and

(C) otherwise complies with this section.

(6) If the grievance does not satisfy the requirements of Section 34-9(b)(5) the OLR Chief must dismiss the grievance.

(7) The department that the grievance was filed against should not respond to the grievance if OLR advises the department that the issue is not grievable or the grievance is not timely filed.

...

(9) The OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process.

ISSUE

Did Appellants file timely grievances?

ANALYSIS AND CONCLUSIONS

The Governor of Maryland issued an executive order declaring a state of emergency during the COVID-19 pandemic from March 5, 2020, until July 1, 2021. Appellants seek emergency pay for hours they worked during that time. Appellants contend that their requests for emergency pay are valid and timely even though the County Executive never declared a state of emergency for

Montgomery County, and Appellants did not file grievances for such pay until about six months after the end of the state of emergency. Appellants make those claims because they allege that they only became aware that they may have been entitled to emergency pay on November 30, 2021, as a result of Council testimony that day by the CAO and County Attorney and the public release of the July 2, 2020, FEMA letter. Appellants do not provide any other justifications for filing their claims as late as December 2021 and January 2022.

There was no consideration or determination by the CAO or the OLR Chief on the merits of Appellants' grievances. We thus consider whether the timeliness of the grievances filed by Appellants is dispositive.

Timeliness is the narrow issue before us. We need not address the question of whether MCFRS managers were legally qualified for and entitled to receive emergency pay during the COVID-19 pandemic. The only question before us is when the Appellants knew or should have known that they were not going to receive additional compensation as a result of the COVID-19 emergency so that they could make timely claims for emergency pay. The facts in the record demonstrate that they had sufficient information that gave them notice to file claims, as required by the grievance regulations, long before they actually filed grievances for emergency pay.

Timeliness

The grievance regulations limit the time within which a grievance may be filed to thirty calendar days after “the date on which the employee knew or should have known of the occurrence or action on which the grievance is based.” MCPR § 34-9(a)(1)(A).

Appellants contend that they only became aware that they could file grievances seeking emergency pay as a result of information revealed at the November 30, 2021, Council hearing on the COVID-19 front facing differential pay settlements. CX 12.¹⁵ See Appellant Responses. During that hearing the July 2, 2020, FEMA letter was discussed, and the Council testimony of the County Attorney contained statements expressing his view that employees such as appellants may have had claims to emergency pay.¹⁶ Even under this theory, Appellant [Name] (22-22) filed an untimely grievance on January 5, 2022, 36 days after the November 30, 2021, Council hearing. MSPB Case No. 22-22 (CX 12). For that reason alone, the appeal in MSPB Case No. 22-22 must be dismissed as untimely.

Grievances seeking emergency pay were required to be filed by all appellants within 30 days after appellants knew or should have known of the basis for a grievance. Maryland courts have adopted a “discovery rule” which is used to determine when a party knew or should have known that they had a claim. *Hecht v. Resolution Trust. Corp.*, 333 Md. 324, 335 (1994). The discovery rule “contemplates actual knowledge that is express cognition, or awareness implied from ‘knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.’” *Poffenberger v. Risser*, 290 Md. 631, 637 (1981) (*quoting Fertitta v. Bay Shore Dev. Corp.*, 252 Md. 393, 402 (1969)). We must

¹⁵ The statements attached to the grievance forms filed by nine of the appellants appear identical. The statements filed in MSPB 22-23, 22-25, and 22-31 are quite similar but contain some minor variations. CX 12. For example, the appellant in 22-25 alleged that he became aware of the grounds for a grievance on December 1, 2021.

¹⁶ Although the County Attorney testified before the Council that there was an argument that employees might be able to successfully assert before this Board that they were entitled to emergency pay, he did not say that he had concluded that they were entitled to such pay.

determine when appellants had actual knowledge of the basis for an emergency pay grievance or when such knowledge should be imputed or implied to appellants.

Under the discovery rule, a claim “accrues when the claimant in fact knew or reasonably should have known of the wrong.” *Poffenberger*, 290 Md. at 636. *See* MCPR § 34-9(a)(1)(A). Under the first prong of the discovery rule “a plaintiff must have notice of the nature and cause of his or her injury.” *Windesheim v. Larocca*, 443 Md. 312, 327 (2015) (*quoting Frederick Rd. Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 96 (2000)). That notice includes actual notice, which includes not only knowledge, but also information received from others, and inquiry notice, which is “circumstantial evidence from which notice may be inferred.” *Windesheim*, 443 Md. at 327 (*quoting Poffenberger*, 290 Md. at 637). The discovery rule thus may be satisfied if Appellants were on “inquiry notice.” *Dual, Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 167-68 (2004).

In the joint letter dated April 29, 2020, twenty-six (26) Battalion and Assistant Chiefs and thirty (30) police managers wrote to the County Executive and Chief Administrative Officer requesting COVID-19 hazard or general emergency pay. CX 6. In that joint letter a significant number of MCFRS leadership employees alleged that they were entitled to emergency pay. This strongly suggests that knowledge of the April 10 press release was widespread among MCFRS and police managers.¹⁷

Three of the appellants in this matter were signatories to that joint letter. By having expressly articulated in writing a specific claim for emergency pay in April 2020, appellants [Name] (22-21), [Name] (22-29), and [Name] (22-32) evidenced actual knowledge that they were aware of the information necessary for them to file grievances seeking emergency pay. The signatures of those three appellants on the April 29, 2020, letter refutes their arguments that they were unaware of the possibility of a claim for emergency pay until November 30, 2021. We thus find that the grievances of [Name] (22-21), [Name] (22-29), and [Name] (22-32) were untimely filed by over 19 months and must be dismissed because we find they had actual knowledge that they would not be receiving additional compensation. *See* MSPB Case No. 17-14 (2017); MSPB Case No. 15-28 (2015); MSPB Case No. 11-08 (2011); MSPB Case No. 06-03 (2006).

Although we have already determined that four appellants had actual knowledge of the basis for emergency pay claims over 30 days before filing their untimely grievances,¹⁸ we shall also determine whether all 12 of the appellants knew or should have known that they had possible claims for emergency pay.

As noted above, on March 5, 2020, the Governor declared a State of Emergency and Catastrophic Health Emergency in response to the COVID-19 pandemic. CX 13. The emergency declaration was widely reported, and Appellants do not deny that they were aware of the Governor’s emergency declaration. However, they argue that because the County Executive had not declared a general emergency, they were not aware that they might have viable claims for emergency pay until the November 30, 2021, Council hearing and release of the FEMA letter.¹⁹

Appellants make the distinction between the Governor’s emergency declaration and the requirement in County law that the County Executive declare an emergency for employees to be eligible for general emergency pay. Under the County personnel regulations employees are entitled

¹⁷ Indeed, other public safety managers did file grievances seeking emergency pay in 2020. *See* CX 32-35.

¹⁸ [Name] (22-21), [Name] (22-22), [Name] (22-29), and [Name] (22-32).

¹⁹ It is undisputed that the County Executive never declared a COVID-19 pandemic state of emergency.

to general emergency pay if the employees are required to work “during a period of general emergency.” MCPR, § 10-1(e). *See* MCPR, § 10-14. A “general emergency” is defined in MCPR § 1-29 as “[a] period *declared by the County Executive or CAO* during which government offices are closed and public services are temporarily limited or not available because of severe weather or other extraordinary conditions.” (Emphasis added). While “other extraordinary conditions” may be construed to include an epidemic, the requirement of a declaration by the County Executive or CAO excludes the COVID-19 state of emergency declared by the Governor.

Nevertheless, the County took steps to ensure that it would not be faced with claims for emergency pay. On April 3, 2020, the County entered into agreements with the three unions that specifically waived the rights of bargaining unit employees to receive emergency pay, while providing for less expensive COVID-19 differential pay. CX 1-3. On April 10, 2020, the County Executive issued a press release publicly announcing the agreements and specifically stating that “under provisions of existing county bargaining agreements . . . the unions could have insisted on much larger benefits, but they understood the importance of the ongoing fiscal health of the county.” CX 7.

The April 10, 2020, press release was quoted in the April 29, 2020, joint letter from 56 members of police and MCFRS management, including 26 MCFRS managers. CX 6. The fact that so many public safety managers were aware of the potential claim for emergency pay suggests that such knowledge was widespread and available. Furthermore, the County Executive’s concern that employees might have been eligible for emergency pay was discussed by the CAO at public hearings and widely reported in the news media. *See supra*, pp. 2-4. Moreover, the union agreement with IAFF providing for COVID differential pay and specifically waiving emergency pay also provided Appellants with notice of a potential claim for emergency pay. CX 1.

Inquiry notice was triggered when the Appellants recognized, or reasonably should have recognized, that they may have been entitled to but were not to receive emergency pay, not when they found out that they might be able to “successfully craft a legal argument.” *Fitzgerald v. Bell*, 246 Md. App. 69, 94 (2020) (*quoting Estate of Adams v. Cont’l Ins. Co.*, 233 Md. App. 1, 32 (2017)). Inquiry notice began when Appellants became aware of facts that would cause a reasonable person to make further investigation, not when they discovered that claims for emergency pay were more likely to be successful. *See Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 451 (2000) (“The statute of limitations . . . begins to run when the plaintiff should know that he might have a potential claim against another person, not when the plaintiff develops a full-blown theory of recovery.”).

We find that Appellants were on actual notice and/or inquiry notice when they knew that the Governor had declared a state of emergency and that the County had made it clear that they were not to receive the COVID differential pay that their subordinates were receiving, nor the emergency pay provided in the County personnel regulations.

There is no continuing violation

A “time limitation may be waived . . . if the otherwise untimely allegation is part of a ‘continuing violation,’ *i.e.*, a related series of acts, at least one of which occurred within the limitations period.” MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The emergency that appellants argue justified their double pay ended when the Governor’s emergency orders terminated effective July 1, 2021. Governor’s Executive Order 21-06-15-01 (June 15, 2021). Appellants’ grievances were filed about six months after the

end of the state of emergency declared by the Governor. Accordingly, we must find that the grievances do not allege and meet the standard for a continuing violation. *See* MSPB Case No. 22-13 (2022).

There is no basis to waive the time limits

We note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that “[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process.” §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 (“The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it.”). The fact that Appellants may have found evidence they perceived would bolster their arguments for emergency pay when they became aware of the County Attorney’s November 30, 2021, Council testimony and the July 2, 2020, FEMA letter does not provide a basis for waiving the grievance time limits. Becoming aware of a legal theory that might strengthen a claim does not excuse an untimely grievance. *Cf.*, MSPB Case No. 14-43 (2014) (“That he subsequently discovered evidence that he believed might have bolstered his appeal does not excuse the untimeliness of his appeal.”). Appellants have not provided any justification for late filing that would constitute “good cause” for the Board to exercise its authority to extend the time limit for the initial filing of a grievance. MSPB Case No. 22-13 (2022).

Claim Preclusion/Res Judicata

Most of the appellants in these appeals had also filed grievances and appeals seeking COVID differential pay.²⁰ Nine of those appellants had their COVID differential pay grievance appeals denied by the Board.

The appeals of those nine appellants are also barred under the doctrine of *res judicata*, which precludes a second action involving the same parties and based on claims that were, or could have been, raised in the prior proceeding.²¹

The elements of *res judicata* are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and (3) that there was a final judgment on the merits. *Colandrea v. Wilde Lake Community Association, Inc.*, 361 Md. 371, 392 (2000). Moreover, if a party could have raised a claim in the prior litigation it too may be barred by *res judicata*. *Colandrea*, 361 Md. at 392; MSPB Case No. 14-38 (2014); MSPB Case No. 20-08 (2020), *affirmed in part and reversed in part on other grounds*, *Lee v. Montgomery County*, Circuit Court Civil Action No. 482732-V (December 23, 2021).

These principles apply in administrative proceedings, such as those conducted by the Board. *Batson v. Shiflett*, 325 Md. 684, 702 (1992) (“agency findings made in the course of

²⁰ Appellants in MSPB Case Nos. 22-22 and 22-29 did not previously file front facing COVID-19 differential pay grievances and only filed emergency pay grievances. Appellant in MSPB Case No. 22-30 withdrew her front facing differential pay appeal prior to a Board decision on the merits. *See* Order of Dismissal, MSPB Case No. 22-14 (2021).

²¹ Although the County did not raise the issue of *res judicata*, we do so *sua sponte*. MSPB Case No. 20-08 (2020), *affirmed in part and reversed in part on other grounds*, *Lee v. Montgomery County*, Circuit Court Civil Action No. 482732-V, (December 23, 2021); *See Sabersky v. Dep’t of Justice*, 91 M.S.P.R. 210, 2002 WL 522300 (2002), *aff’d*, 61 F. App’x 676 (Fed. Cir. 2003) (issue of *res judicata* may be raised *sua sponte*).

proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court.”).

Because the nine appellants in MSPB Case Nos. 22-21, 22-23 through 22-28, 22-31, and 22-32 knew or should have known that they had possible claims for emergency pay when they filed their grievances and appeals for COVID-19 differential pay in MSPB Case Nos. 22-07, 22-12, 22-13, 22-16, and 22-19, and had an opportunity to raise that issue with the Board as part of their appeals in those cases, their claims for emergency pay in this appeal are barred by the doctrine of *res judicata*. MSPB Case No. 14-38 (2014).²²

ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeals in Case No. 22-41 be and hereby are **DENIED**.

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
September 29, 2022

CASE NO. 23-07

FINAL DECISION

Appellant is a Deputy Chief of Security & Facilities/Acting Deputy Warden of Operations for the Montgomery County Department of Correction and Rehabilitation (DOCR). Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) challenging the decision of the County’s Chief Labor Relations Officer denying him differential pay during the COVID-19 pandemic.

The County submitted a response to the appeal on January 23, 2023. (County Response). To date, Appellant has not filed any response to the County’s submission.

The appeal was reviewed and considered by the Board.

FINDINGS OF FACT

On March 5, 2020, in order to control and prevent the spread of COVID-19, the Governor of Maryland issued a proclamation under the authority of the Maryland Constitution and Title 14 of the Public Safety Article, declaring a state of emergency and catastrophic health emergency. County Exhibit (CX) 3. The Governor’s emergency declaration was renewed on March 17th and numerous times thereafter as the pandemic continued. On March 13, 2020, the President of the United States issued a Proclamation declaring COVID-19 to be a National Emergency. CX 4.

On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented

²² This conclusion is reinforced by the fact that other public safety managers did indeed file grievances seeking emergency pay. *See* CX 32-35.

employees, but not for higher level management employees such as those in the MLS, the Police Leadership Service (PLS), and the fire rescue services management. CX 7, pp. 7 & 10. The timekeeping guidance memorandum specifically states: “Note: MLS employees are not eligible for on-site COVID-19 differential pay. CX 7, p. 7 (emphasis in original). The timekeeping guidance memorandum was revised on April 11, 2020, and repeated the statement that MLS employees were not eligible for COVID-19 differential pay. CX 8, p. 8. The timekeeping guidance memorandum was distributed to Executive Branch Department and Office Directors and copied to many other employees including those in the MLS. Similar timekeeping guidance with the specific exclusion of MLS employees from COVID-19 differential pay eligibility was issued every two weeks through February 2021.¹

On April 10, 2020, the County Executive issued a press release publicly announcing that the County had reached an agreement with the three unions representing County employees providing for COVID-19 differential compensation. CX 5. The press release specifically noted that “under provisions of existing county bargaining agreements . . . the unions could have insisted on much larger benefits, but they understood the importance of the ongoing fiscal health of the county.” CX 5.

On February 13, 2021, the County Executive announced that COVID-19 differential pay would end effective February 14, 2021. CX 6

Governor Hogan issued an Executive Order on June 15, 2021, terminating the various emergency proclamations and orders he had previously issued during the COVID-19 pandemic, effective July 1, 2021. Governor’s Executive Order 21-06-15-01 (June 15, 2021).

Twenty-three (23) MCFRS managers filed grievances concerning COVID-19 differential pay and settled with the County. *See* MSPB Case Nos. 21-33 and 21-114 (2021). Similar grievances were filed by 15 managers in the Montgomery County Sheriff’s Office, 45 managers in the Montgomery County Police Department, and 16 Department of General Services managers. *See* MSPB Case Nos. 21-109, 21-110, 21-111 and 21-112. The County settled a total of 99 appeals.² As part of the settlement agreements the County paid COVID differential pay in exchange for waiver of claims to emergency pay.

The County Council held public hearings concerning the settlements, including sessions on November 30 and December 7, 2021. On December 14, 2021, the County Council voted to approve the settlements. Appeal Form, p. 3; CX 1; Council Resolution 19-1101 (adopted December 14, 2021); County Council Minutes, December 7, 2021, Item 7, p. 6; County Council Minutes, December 14, 2021, Item 19.5, p. 9.

Appellant, Deputy Chief of Security & Facilities and Acting Deputy Warden of Operations with DOCR’s Pre-Release Services and Detention Services units and an MLS III employee, alleges that he only became aware that other public safety managers had filed grievances seeking COVID differential pay, and that the County Council approved settlements to provide such pay to public safety managers, as a result of a “casual conversation with another Montgomery County employee.” Appeal Form, p. 3. Appellant filed his grievance on February 15, 2022, a few days

¹ *See* Montgomery County Department of Finance, MCTime Prior Timekeeping Guidance, found at: https://montgomerycountymd.gov/mctime/guidance_archive.html.

² The grievance filing dates for these appeals were as follows: MSPB Case No. 21-33 (10/15/20); MSPB Case No. 21-114 (10/2/20 to 12/6/20); MSPB Case No. 21-109 (9/23/20 to 10/6/20); MSPB Case No. 21-110 (10/25/20 to 2/26/21); MSPB Case No. 21-111 (10/5/20); MSPB Case No. 21-112 (9/30/20).

after that conversation. CX1; Appeal Form, p. 3. The Office of Labor Relations (OLR) Chief denied the grievance as untimely on December 12, 2022. CX 2. Appellant filed this appeal on December 21, 2022.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and June 1, 2020), § 34, Grievances, which provides, in pertinent part:

§34-9. Grievance procedure.

(a) Time limit for filing a grievance.

(1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or

(B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

ISSUE

Did Appellant file a timely grievance?

ANALYSIS AND CONCLUSIONS

Appellant's appeal seeks "fair and equal treatment to that of my Public Safety Senior Manager counter parts and please grant me the COVID-19 hazard pay." Appeal Form, p. 3. Appellant alleges that he only became aware that other public safety managers had filed grievances seeking COVID differential pay, and that the County Council approved settlements to provide such pay to public safety managers, as a result of a "casual conversation with another Montgomery County employee." Appellant filed his grievance on February 15, 2022, a few days after that conversation. CX1; Appeal Form, p. 3.

COVID-19 front facing differential pay began March 29, 2020, and ended on February 14, 2021. Starting in early April 2020, OHR distributed a timekeeping guidance memorandum. The guidance memorandum was sent to County management employees, including Appellant, every two weeks. The memorandum contained language specifically stating that MLS employees such as Appellant were not eligible for COVID front facing pay. Appellant does not deny receiving the timekeeping guidance memoranda or suggest that he was unaware that bargaining unit employees were receiving the additional COVID-19 pay between March 29, 2020 and February 14, 2021.

Appellant filed his grievance asserting entitlement to the differential pay a full year after the program had already ended in February 2021. Appellant admits that he filed his grievance only after learning that the grievance appeals of other management employees were ultimately settled. Appellant argues that time limit for filing a grievance over what he characterizes as the unfair treatment only began when he became aware of the County's decision to settle with other employees and give them COVID-19 differential pay.

Although Appellant makes a generalized claim that the settlements of other public safety managers constitute unfair treatment of him, we surmise that he is making a contention based on

MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged “improper, inequitable or unfair application of the compensation **policy.**” (*emphasis added*). Under this interpretation, the relevant date to calculate the time limit for filing a grievance might be argued to be July 29, 2021, when the settlements became public, or December 14, 2021, when the County Council approved the settlements. In either case, settlement of an appeal by one employee or group of employees and not including other employees who were not parties to the litigation does not constitute a change in policy. Nor can it be considered a “grievable act.” *See* MSPB Case No. 22-13 (2022).

Moreover, longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee’s grievance or settlement may serve as a triggering event for grievance filing time limits. MSPB Case No. 22-13 (2022); MSPB Case No. 01-07 (2001). *See* MSPB Case No. 00-05 (2000) (“an employee cannot use the knowledge of another employee’s grievance as an alternative operative date from which the time for filing a grievance runs.”).

Appellant’s argument that his grievance, filed a year after the COVID-19 differential pay program ended, and two months after the settlements were publicly approved by the County Council, is without merit and must be denied.

ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 23-07 be and hereby is **DENIED**.

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
March 14, 2023

CASE NO. 23-09

FINAL DECISION

Appellant is a Pre-Trial Services Manager for the Montgomery County Department of Correction and Rehabilitation (DOCR) and a Management Leadership Service (MLS) employee. On January 5, 2023, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB) challenging the decision of the County’s Chief Labor Relations Officer denying him differential pay during the COVID-19 pandemic.

The County submitted a response to the appeal on February 6, 2023. (County Response). To date, Appellant has not filed any response to the County’s submission.

The appeal was reviewed and considered by the Board.

FINDINGS OF FACT

On March 5, 2020, in order to control and prevent the spread of COVID-19, the Governor of Maryland issued a proclamation under the authority of the Maryland Constitution and Title 14

of the Public Safety Article, declaring a state of emergency and catastrophic health emergency. County Exhibit (CX) 3. The Governor's emergency declaration was renewed on March 17th and numerous times thereafter as the pandemic continued. On March 13, 2020, the President of the United States issued a Proclamation declaring COVID-19 to be a National Emergency. CX 4.

On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the MLS, the Police Leadership Service (PLS), and the fire rescue services management. CX 7, pp. 7 & 10. The timekeeping guidance memorandum specifically states: "Note: MLS employees are not eligible for on-site COVID-19 differential pay. CX 7, p. 7 (emphasis in original). The timekeeping guidance memorandum was revised on April 11, 2020, and repeated the statement that MLS employees were not eligible for COVID-19 differential pay. CX 8, p. 8. The timekeeping guidance memorandum was distributed to Executive Branch Department and Office Directors and copied to many other employees including those in the MLS. Similar timekeeping guidance with the specific exclusion of MLS employees from COVID-19 differential pay eligibility was issued every two weeks through February 2021.¹

On April 10, 2020, the County Executive issued a press release publicly announcing that the County had reached an agreement with the three unions representing County employees providing for COVID-19 differential compensation. CX 5. The press release specifically noted that "under provisions of existing county bargaining agreements . . . the unions could have insisted on much larger benefits, but they understood the importance of the ongoing fiscal health of the county." CX 5.

On February 13, 2021, the County Executive announced that COVID-19 differential pay would end effective February 14, 2021. CX 6

Governor Hogan issued an Executive Order on June 15, 2021, terminating the various emergency proclamations and orders he had previously issued during the COVID-19 pandemic, effective July 1, 2021. Governor's Executive Order 21-06-15-01 (June 15, 2021).

Twenty-three (23) MCFRS managers filed grievances concerning COVID-19 differential pay and settled with the County. *See* MSPB Case Nos. 21-33 and 21-114 (2021). Similar grievances were filed by 15 managers in the Montgomery County Sheriff's Office, 45 managers in the Montgomery County Police Department, and 16 Department of General Services managers. *See* MSPB Case Nos. 21-109, 21-110, 21-111 and 21-112. The County settled a total of 99 appeals.² As part of the settlement agreements the County paid COVID differential pay in exchange for waiver of claims to emergency pay.

The County Council held public hearings concerning the settlements, including sessions on November 30 and December 7, 2021. On December 14, 2021, the County Council voted to approve the settlements. Appeal Form, p. 3; CX 1; Council Resolution 19-1101 (adopted

¹ *See* Montgomery County Department of Finance, MCTime Prior Timekeeping Guidance, found at: https://montgomerycountymd.gov/mctime/guidance_archive.html.

² The grievance filing dates for these appeals were as follows: MSPB Case No. 21-33 (10/15/20); MSPB Case No. 21-114 (10/2/20 to 12/6/20); MSPB Case No. 21-109 (9/23/20 to 10/6/20); MSPB Case No. 21-110 (10/25/20 to 2/26/21); MSPB Case No. 21-111 (10/5/20); MSPB Case No. 21-112 (9/30/20).

December 14, 2021); County Council Minutes, December 7, 2021, Item 7, p. 6; County Council Minutes, December 14, 2021, Item 19.5, p. 9.

Appellant, a Pre-Trial Manager with DOCR's Pre-Trial Services unit and an MLS III employee, alleges that he only became aware that other public safety managers had filed grievances seeking COVID differential pay, and that the County Council approved settlements to provide such pay to public safety managers, as a result of a "casual conversation with another Montgomery County employee." Appeal Form, p. 3. Appellant filed his grievance on February 15, 2022, a few days after that conversation. CX1; Appeal Form, p. 3. The Office of Labor Relations (OLR) Chief denied the grievance as untimely on January 5, 2023. CX 2. Appellant filed this appeal that same day.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and June 1, 2020), § 34, Grievances, which provides, in pertinent part:

§34-9. Grievance procedure.

(a) Time limit for filing a grievance.

(1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or

(B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.

ISSUE

Did Appellant file a timely grievance?

ANALYSIS AND CONCLUSIONS

Appellant's appeal seeks "fair and equal treatment to that of my Public Safety Senior Manager counter parts and please grant me the COVID-19 hazard pay." Appeal Form, p. 3. Appellant alleges that he only became aware that other public safety managers had filed grievances seeking COVID differential pay, and that the County Council approved settlements to provide such pay to public safety managers, as a result of a "casual conversation with another Montgomery County employee." Appellant filed his grievance on February 15, 2022, a few days after that conversation. CX1; Appeal Form, p. 3.

COVID-19 front facing differential pay began March 29, 2020, and ended on February 14, 2021. Starting in early April 2020, OHR distributed a timekeeping guidance memorandum. The guidance memorandum was sent to County management employees, including Appellant, every two weeks. The memorandum contained language specifically stating that MLS employees such as Appellant were not eligible for COVID front facing pay. Appellant does not deny receiving the timekeeping guidance memoranda or suggest that he was unaware that bargaining unit employees were receiving the additional COVID-19 pay between March 29, 2020 and February 14, 2021.

Appellant filed his grievance asserting entitlement to the differential pay a full year after the program had already ended in February 2021. Appellant admits that he filed his grievance only after learning that the grievance appeals of other management employees were ultimately settled. Appellant argues that time limit for filing a grievance over what he characterizes as the unfair treatment only began when he became aware of the County's decision to settle with other employees and give them COVID-19 differential pay.

Although Appellant makes a generalized claim that the settlements of other public safety managers constitute unfair treatment of him, we surmise that he is making a contention based on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy.**" (*emphasis added*). Under this interpretation, the relevant date to calculate the time limit for filing a grievance might be argued to be July 29, 2021, when the settlements became public, or December 14, 2021, when the County Council approved the settlements. In either case, settlement of an appeal by one employee or group of employees and not including other employees who were not parties to the litigation does not constitute a change in policy. Nor can it be considered a "grievable act." *See* MSPB Case No. 22-13 (2022).

Moreover, longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. MSPB Case No. 22-13 (2022); MSPB Case No. 01-07 (2001). *See* MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Appellant's argument that his grievance, filed a year after the COVID-19 differential pay program ended, and two months after the settlements were publicly approved by the County Council, is without merit and must be denied.

ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 23-09 be and hereby is **DENIED**.

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
March 14, 2023

DISMISSAL OF APPEALS

Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if, among other reasons, the appeal is untimely, the appellant fails to prosecute the appeal or comply with appeal procedures, the Board lacks jurisdiction, the appeal is or becomes moot, the appellant failed to exhaust administrative remedies, there is no actual (*i.e.*, justiciable) controversy, or the appellant fails to comply with a Board order or rule. The County's Administrative Procedures Act (APA), Montgomery County Code § 2A-8(j), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal.

During fiscal year 2023, the Board issued the following dismissal decisions.

DISMISSAL FOR MOOTNESS

CASE NO.23-05

ORDER OF DISMISSAL

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on September 12, 2022.¹ On October 27, 2022, the Board wrote to the employing department seeking clarification of the Appellant's employment status and copying Appellant. That same day Appellant emailed a response to the Board indicating that he had resigned and wished to withdraw his appeal. The Board's Executive Director responded to Appellant asking Appellant to confirm that he had voluntarily resigned and wished to withdraw his appeal. Appellant responded and affirmed that his resignation was voluntary, and that he wished to withdraw his appeal.

Pursuant to Montgomery County Personnel Regulations (MCPR), §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 22-14 (2021); MSPB Case No. 21-02 (2020); MSPB Case No. 17-18 (2017).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-05 be and hereby is **DISMISSED**.

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
October 31, 2022

CASE NO.23-06

ORDER OF DISMISSAL

On December 19, 2022, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board) and attached a Notice of Disciplinary Action (NODA) dated December 12, 2022, which had marginal comments suggesting that it may be a draft copy.¹ Furthermore, the NODA did not state the date on which the disciplinary action would take effect or contain information explaining Appellant's appeal rights. *See* Montgomery County Personnel Regulations (MCPR), §33-6(c)(1)(B) and (E).

On January 10, 2023, the County filed a Motion to Dismiss. In support of its motion, the County stated that on January 6, 2023, the Montgomery County Office of Public Information

¹ The appeal was filed online Friday, September 9, 2022, a date when the MSPB office is not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

¹ The file name of the NODA was "memo_[Appellant]_noda_3_day_suspension_draft_12.8.22_1."

issued a Notice of Recission. On January 24, 2023, Appellant emailed the Board and asked that his appeal be withdrawn because the County had rescinded the discipline.

Pursuant to MCPR) §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 22-14 (2021); MSPB Case No. 21-02 (2020); MSPB Case No. 17-18 (2017).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-06 be and hereby is **DISMISSED**.

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
February 13, 2023

CASE NO. 23-12

ORDER OF DISMISSAL

On April 20, 2023, the Merit System Protection Board (MSPB or Board) received by electronic mail an appeal concerning Appellant's requests for transfers and leave with the Department of Recreation. That same day the Board's Executive Director sent Appellant a letter acknowledging receipt of the appeal, explaining the need for supporting documentation, and referencing Appellant's previous appeal concerning the same matters that was filed on September 7, 2022. That appeal was dismissed without prejudice on December 6, 2022, due to failure to comply with the Board's appeal procedures, for lack of jurisdiction, and for failure to exhaust administrative remedies. MSPB Case No. 23-04 (December 6, 2022). The Board received an email response from Appellant shortly thereafter explaining:

When I came into work today, I noticed several emails in my sent box that I did not send. What you received was sent over a year ago. I have ended my fight with Recreation and have tried to move on. I don't know how or why these emails were in my sent emails, but please disregard.

I did not send any emails today...

On April 24, 2023, the County requested that this appeal be dismissed because it was filed in error.

Although Appellant's email is not identical to the one he sent in 2022 he expressly states that this appeal was filed in error and that he wishes to have the Board disregard the appeal. Pursuant to MCPR) §35-7(d), the Board may dismiss an appeal if the appeal becomes moot. The Board has long taken the position that the withdrawal of an appeal renders that appeal moot. MSPB Case No. 22-14 (2021); MSPB Case No. 21-02 (2020); MSPB Case No. 17-18 (2017).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-12 be and hereby is **DISMISSED**.

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
April 26, 2023

DISMISSAL ON MULTIPLE GROUNDS

CASE NO. 22-34

ORDER OF DISMISSAL

Appellant electronically filed the above captioned appeal of his dismissal with the Merit System Protection Board (Board or MSPB) on April 7, 2022.¹ Appellant and the representative designated on his appeal form, [EB], Executive Director of the Montgomery County Volunteer Fire Rescue Association (MCVFRA), were advised by a letter from the Board emailed April 7, 2022, that Appellant's prehearing submission was due on May 31, 2022. Mr. [EB] responded by email, clarifying that "the complaint is against MCFRS [Montgomery County Fire and Rescue Service] not Cabin John Park VFD."

On May 9, 2022, the County filed its prehearing submission and separately filed a motion to strike Appellant's representative, asserting that Mr. [EB] does not have the legal authority to represent Appellant in his capacity as the MCVFRA's Executive Director. Neither Appellant nor Mr. [EB] responded to the County's Motion to Strike or filed Appellant's prehearing submission by the due date. *See* Montgomery County Personnel Regulations (MCPR) §35-11(a)(4) (response opposing a motion is due within 10 calendar days). On June 1 the Board's Executive Director sent an email to Mr. [EB] and Appellant requesting the status of the required prehearing submission and an immediate response to the motion to strike. The email also advised that absent the proper filing of a prehearing submission and a response to the motion to strike, the Board might rule on the motion and may dismiss the appeal. MCPR § 35-7(b). The email further requested that if Mr. [EB] was no longer Appellant's representative, the Board should be provided with the contact information for the new representative.

When Appellant did not file the requested prehearing submission and response to the motion, or otherwise contact the Board, on June 21, 2022, a second letter was sent by email and first-class mail to Appellant, and a separate letter was emailed addressed to Mr. [EB]. The letter to Appellant requested a written explanation for the lack of response and the filing of a prehearing submission by June 29, 2022. The letter also asked whether Mr. [EB] was still Appellant's representative and whether Appellant intended to continue with his appeal. Appellant was advised that failure to file an explanation and a prehearing submission by June 29th might result in the dismissal of his appeal.

In the letter to Mr. [EB], the Board requested a written explanation for the lack of response to the motion to strike and the filing of a prehearing submission by June 29, 2022. The letter asked Mr. [EB] to advise if he was still Appellant's representative and whether Appellant intended to continue with his appeal. The letter also stated that failure to file an explanation and a prehearing submission by June 29th may result in the dismissal of the appeal.

When the Board received no response from Appellant or Mr. [EB] it issued a July 18, 2022, Show Cause Order requiring Appellant to provide an explanation and a prehearing submission by July 25th. The Order advised "that absent the proper filing of a prehearing submission, and a finding

¹ The appeal was filed by electronic mail on Wednesday, April 6, 2022, 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).

by the Board of good cause for his failure, the Board will dismiss his appeal for failure to prosecute the appeal or comply with established appeal procedures.”

Appellant responded to the Show Cause Order on July 25th but did not provide an explanation for his failure to provide the required prehearing submission. Instead, Appellant requested “an additional 90 days to prepare my case, seek counsel, and work with the MCVFRA clarifying the County’s new position on MCVFRA representation.” His representative, Mr. [EB], has submitted nothing and has not contacted the Board with any explanation of whether he remains Appellant’s representative. Nevertheless, Appellant’s statement expressed his desire to have the MCVFRA and its Executive Director, Mr. [EB], continue to provide him with representation. Neither Appellant nor Mr. [EB] have provided a response to the County’s motion to strike Mr. [EB] as representative. Appellant also complained that the County has confused matters by moving to strike Mr. [EB] and the MCVFRA as his representative, and asked that the Board require the County respond to his appeal on the merits. This request ignored the fact that at the same time the County filed a motion to strike it also filed its full prehearing submission opposing the appeal on the merits.

The County makes a persuasive argument that Appellant has not shown “such good cause as exists for why he has failed to file the required prehearing submission” or provided a satisfactory explanation for his failure to do so. Under MCPR § 35-7(b) the Board “may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures.”

Appellant has not provided a prehearing submission, and the Board finds that he has no satisfactory explanation for that failure. Accordingly, the Board must dismiss this matter for failure to comply with established appeal procedures and due to Appellant’s failure to prosecute his case. MCPR, § 35-7(b). *See* MSPB Case Nos. 19-19 & 19-26 (2019); MSPB Case Nos. 19-24 & 19-25 (2019).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-34 be and hereby is **DISMISSED**.

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
August 10, 2022

CASE NO. 22-35

ORDER OF DISMISSAL

Appellant filed an appeal of a disciplinary action on April 27, 2022. When Appellant failed to provide a Notice of Disciplinary Action (NODA) after multiple written requests, on June 16, 2022, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as existed for why he had failed to file the required documentation to proceed with his appeal. On June 23, 2022, Appellant responded by email and attached a copy of the NODA.

On June 28, the Board's Executive Director spoke with Appellant by telephone, explaining Appellant's options regarding an appeal of the disciplinary action received. The Executive Director followed up with an email to Appellant that same afternoon, explaining that a scheduling letter would be sent providing the due date for the prehearing submission. On June 29, 2022, an acknowledgment letter was sent to the parties providing the due dates of the prehearing submissions. On July 19, the County requested a two-week extension of the due dates, to which Appellant replied on the same day that he did not object. An email was sent at 11:14 am on July 19th to the parties granting the County's request and advising Appellant that his prehearing submission must be submitted on or before Tuesday, September 6, 2022.

When Appellant did not file his prehearing submission by September 6, the Board's Office Services Coordinator notified Appellant by email on September 7th that the prehearing submission was not received and requested that Appellant notify the Board in writing if he no longer intended to pursue his appeal. When Appellant did not respond, an email was sent on September 12th again asking when the prehearing submission would be filed and requesting that the Board be notified in writing if Appellant no longer intended to pursue his appeal. After no response from Appellant, on September 15th a letter was emailed and sent by first class mail to Appellant requesting a written explanation for the lack of response and the filing of the prehearing submission by September 26, 2022. The letter also stated that failure to file an explanation and a prehearing submission by September 26th might result in the dismissal of his appeal.

On September 22, Appellant replied to the Board's September 12th email by asking, "Could I have an extension on filing this?" Within an hour the Board's Executive Director responded to Appellant as follows:

The Board has attempted to contact you on multiple occasions since you missed the September 6 deadline and until now has not received any response. Attached is the September 15 letter that was emailed and sent by first class mail advising that you should provide a written explanation for your lack of response **and** that must you file your prehearing submission by September 26, 2022. If you do not provide a satisfactory explanation and file the prehearing submission by September 26 your appeal may be dismissed. (emphasis in original).

On September 26th Appellant responded by email, stating:

I like to proceed with the prehearing. I am not sure the process is. please guide me through it.

I might have missed the notice earlier, I've been taken vacation since 9/11/2022 where I had almost no email access. that's not an excuse. Please accept my apologies for not responding earlier.

Despite repeated written notifications advising Appellant of his obligation to file a prehearing submission Appellant has failed to do so. For the above reasons, on September 27th the Board issued another Show Cause Order. Appellant was ordered to provide a statement of such good cause as exists for why he has failed to timely file the required prehearing submission. The statement was to be filed with the Board on or before close of business October 5, 2022, with a copy served on the County. On October 4th Appellant sent an email to the MSPB mailbox but did not copy the County. The email stated:

I might have missed the notice earlier, I've been taken vacation since 9/11/2022 where I had almost no email access. That's not an excuse. Please accept my apologies for not responding earlier.

I hereby submitting my request for prehearing statement.

That same day, the Board's Executive Director replied to Appellant's email and copied the County:

The Show Cause Order (attached) requires that by tomorrow, October 5, you must file your prehearing statement, and a statement of such good cause as exists for why you have failed to file the required prehearing submission on time. If you fail to do so your appeal may be dismissed.

You have repeatedly been advised that you must submit a prehearing statement. You were sent a letter on June 29 providing you with a link to the Board's Hearing Procedures (attached). On page 3 of the procedures, it is explained that you must submit:

- Copies of all written reports, documents, photographs, charts, letters, or any other material to be introduced or used at the hearing, and that all exhibits must be labeled and tabbed shall be placed in a 3-ring binder.
- The names and addresses of all prospective witnesses, and a summary of their anticipated testimony.
- The names and addresses of witnesses and documents and records requiring service of a subpoena.
- The estimated time required for your presentation of the case.

Please remember to also provide a copy of anything you send to the Board to Associate County Attorney [Name].

Appellant has still not provided a prehearing submission and the Board finds that he has no satisfactory explanation for that failure. Appellant has not shown such good cause as exists for why he has failed to file the required prehearing submission or provided a satisfactory explanation for his failure to do so. Under MCPR § 35-7(b) the Board "may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures."

While we recognize that Appellant is pursuing his appeal without the benefit of counsel, it is a longstanding principle of Maryland law that procedural rules apply equally to *pro se* litigants in quasi-judicial administrative proceedings. *Department of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 411 (1999) ("It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel."). *See Tretick v. Layman*, 95 Md. App. 62, 68 (1993) ("The principle of applying the rules equally to *pro se* litigants is so accepted that it is almost self-evident.").

Accordingly, the Board must dismiss this matter for failure to comply with established appeal procedures and due to Appellant's failure to prosecute his case. MCPR, § 35-7(b). *See* MSPB Case No. 22-34 (2022); MSPB Case Nos. 19-19 & 19-26 (2019); MSPB Case Nos. 19-24 & 19-25 (2019).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-35 be and hereby is **DISMISSED**.

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
October 12, 2022

CASE NO. 23-03

ORDER OF DISMISSAL

On August 31, 2022, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board), attaching a Statement of Charges for a 3-day suspension dated August 26, 2022. That same day the Board's Executive Director sent Appellant a letter acknowledging receipt of the appeal. The acknowledgement letter also explained that a Statement of Charges is not the same as a Notice of Disciplinary Action (NODA), Montgomery County Personnel Regulations (MCPR) § 33-6, and that a direct appeal to the MSPB may only be filed after receipt of a NODA. MCPR §35-2(a); §35-4(d)(1). Appellant was asked to provide a NODA and warned that if the MSPB did not receive a NODA an order dismissing the appeal without prejudice may be issued.

On October 27, 2022, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why he has failed to file the required NODA with the Board. The statement was to be filed with the Board on or before close of business November 8, 2022. To date, Appellant has not filed the requested documentation or otherwise contacted the Board.

As Appellant was notified that absent the filing of the required documentation and a finding by the Board of good cause for his failure to timely file the documentation, the Board would dismiss his appeal, the Board will dismiss the appeal. MCPR § 35-7(b) and (c); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-03 be and hereby is **DISMISSED WITHOUT PREJUDICE** for failure to comply with the Board's appeal procedures and for lack of jurisdiction. MCPR § 35-7(b) and (c). Should Appellant receive a NODA he may then file a timely 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
December 5, 2022

CASE NO. 23-04

ORDER OF DISMISSAL

On September 7, 2022, the Merit System Protection Board (MSPB or Board) received by electronic mail what appeared to be an appeal concerning Appellant's requests for transfers and leave with the Department of Recreation.¹ That same day the Board's Executive Director sent Appellant a letter acknowledging receipt of the appeal and requesting Appellant's home mailing address.

Because the attachment Appellant submitted with his appeal suggested that he had already filed grievances through his union representative, the acknowledgement letter advised Appellant that if the issues he was raising were covered by the MCGEO collective bargaining agreement the MSPB may not have jurisdiction to hear his appeal. Montgomery County Personnel Regulations (MCPR), § 34-2(c). Appellant was further told that he should consult with his union representative about his options, and that even if he wished to file an administrative grievance, he should also be aware that the MSPB does not have the authority to accept a direct appeal of a grievance. Appellant was directed to MCPR [Section 34](#) for information regarding the administrative grievance procedure, specifically, the first two steps of the grievance procedure in MCPR, § 34-9(e). Appellant was further advised that he may wish to explore the possibility of filing grievances before the time for doing so had expired. Appellant was asked to provide a copy of a Chief Administrative Officer (CAO)'s Step 2 decision or provide an adequate explanation of the reason for a direct grievance appeal.

When Appellant had not provided his home mailing address or a CAO's Step 2 decision, and otherwise contacted the Board, on October 27, 2022, the Board ordered Appellant to provide a statement of such good cause as exists for why he has failed to file the required documentation. The statement was to be filed with the Board on or before close of business November 8, 2022, with a copy served on the County. The County had the right to file a response on or before November 14, 2022. Appellant was notified that absent the proper filing of documentation and a finding by the Board of good cause for his failure to timely file the documentation, the Board would dismiss his appeal. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

On October 31, 2022, the Board received an email response from Appellant with two attachments.² Appellant also provided his home address. That same day, the Board's Executive Director sent a reply asking Appellant if his email was his entire response to the Show Cause Order, whether Appellant had additional information concerning his pursuit of the grievance process under the collective bargaining agreement or the administrative grievance procedure, and whether Appellant filed a grievance appeal to the CAO or only a direct appeal to the MSPB.

On November 7, 2022, the Board received Appellant's response by email with an attachment which he requested be added "as documentation of unfair hiring practices in Montgomery County Recreation."³ That same day, the Board's Executive Director acknowledged receipt of Appellant's supplemental submission and asked if Appellant would be providing

¹ The appeal was filed by electronic mail on September 6, 2022, 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).

² Appellant sent an email to the MSPB mailbox on Friday, October 28, 2022, a date that the MSPB office is closed.

³ Appellant responded to the Executive Director's October 31 email on Saturday, November 5, 2022, a date that the MSPB office is closed.

information and documentation concerning any grievances Appellant had filed. The Executive Director also asked whether Appellant has filed any grievances other than the ones through MCGEO and, if so, whether he appealed any of those grievances to the CAO at Step 2 of the grievance procedure. Appellant was also reminded that under the Show Cause Order, his deadline for his statement was close of business the next day. Appellant responded by email later that day but did not provide the requested documentation or information.

Appellant's email included the statements "I have an ongoing Grievance for unfair hiring practices thru my Union" and "It took 9 months for my Union to file a grievance." Appellant indicated that he had filed employment discrimination complaints and that he has been in contact with the Office of Labor Relations (OLR). Appellant also stated that "While I have been fighting Recreation, I have experienced retaliation in the form of denied leave, tough work assignments and not allowed 4 transfers." MCPR § 34-7(a) provides that an employee may file a complaint with OLR for retaliation based on the filing of a grievance. An appeal to the MSPB is only allowed "if the OLR Chief denies the complaint" and the employee files the appeal with the MSPB within 10 working days after the employee receives the OLR Chief's decision. § 34-7(c). Although Appellant's email says that "I have been to OLR and am still waiting for a positive result," it is not clear whether he filed a retaliation complaint with OLR, or if he did, when the complaint was filed.

If Appellant filed a complaint of retaliation with OLR and has not received a written report of findings within 30 calendar days, he may treat the failure to respond as a denial and appeal to the MSPB under MCPR § 34-7(c). Section 34 of the MCPR concerning grievances permits an employee to appeal a grievance to the next highest level if a response was not provided. MCPR § 34-9(a)(3) ("If the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level."). Although § 34-9(a)(3) does not specifically mention OLR or complaints of retaliation, we find that the right to appeal a non-response exists since the terms "complaint" and "grievance" are treated interchangeably in the personnel regulations. MCPR §34-7 refers to "complaints of harassment or retaliation" and the definition in MCPR §1-31 says that a grievance is a "formal complaint."⁴

Despite repeated requests for Appellant to provide information and documentation about any grievances and complaints he has filed there is no indication that he has filed any administrative grievances and followed the appeals process of the grievance procedure. Rather, it appears that the only grievance Appellant has pursued is under the collective bargaining agreement. To the extent that Appellant is seeking to file a direct Board appeal of a grievance, he is doing so without exhausting his administrative remedies. Such direct appeals are not within the Board's jurisdiction. The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 17-28 (2017); MSPB Case No. 11-08 (2011). *See* MCPR § 35-2(b) ("An employee . . . may file an appeal with the MSPB . . . after receiving an

⁴Our view might be different if the personnel regulations expressly required that an employee be specifically advised that the failure to respond to a grievance or complaint within the stated time limits would constitute a deemed denial. We also note that neither the Grievance Form for County Grievance Procedure (MCPR Appendix Q) nor the Department/Supervisor Grievance Response Form (MCPR Appendix R) advise that an appeal may be taken to the next step upon a failure to respond within the applicable time limits. *See Hughes v. Moyer*, 452 Md. 77, 97-98 (2017) ("the right to be heard 'has little reality or worth unless one is informed . . . and can choose for himself whether to appeal or default, acquiesce or contest.'").

adverse final decision on a grievance from the CAO”). Further, the Board lacks jurisdiction to hear an appeal by a bargaining unit employee over an issue covered by the collective bargaining agreement’s grievance procedure. MCPR § 34-2(c); MSPB Case No. 16-05 (2015); MSPB Case No. 14-07 (2013).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-04 be and hereby is **DISMISSED WITHOUT PREJUDICE** for failure to comply with the Board’s appeal procedures, for lack of jurisdiction, and for failure to exhaust administrative remedies. MCPR § 35-7(b), (c) & (e).

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
December 6, 2022

RECONSIDERATION

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code, § 2A-7(c) of the Administrative Procedures Act (APA) and Montgomery County Personnel Regulation (MCPR) § 35-11(a)(5). A request to reconsider a ruling on a preliminary matter must be filed within five (5) calendar days from the date of the ruling.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days from a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within ten (10) days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

During fiscal year 2023 the Board did not issue any decisions on a request for reconsideration of a Final Decision.

MOTIONS

The County's Administrative Procedures Act (APA), Montgomery County Code, § 2A-7(c), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to dismiss a party and substitute another, motions to quash subpoenas, motions *in limine* (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions for summary decision may also be filed before a hearing. § 2A-7(d). The opposing party is typically given ten (10) calendar days to respond to a motion on a preliminary matter. Montgomery County Personnel Regulations (MCPR) § 35-11(a)(4). The Board may issue a written decision or may, at the Prehearing Conference or at the merits hearing, rule on a motion.

Motions may be filed at any time during a proceeding to decide offers of proof, rule on the admission of evidence, and to address issues of privilege. Motions may also include procedural requests, including those for continuance, to amend a pre-hearing statement, or to obtain reopened or consolidated hearings or rehearings § 2A-8(h); MCPR § 35-10(f) and § 35-11(c).

The following is a decision on a motion concerning jurisdictional issues issued during an appeal proceeding in fiscal year 2023.

CASE NO. 22-36

ORDER ON JURISDICTION

The Merit System Protection Board's (MSPB or Board) Prehearing Order of September 7, 2022, ordered the Bethesda Fire Department (BFD) and Appellant to file briefs on jurisdictional issues raised by the BFD and the Board.

This appeal involves the removal of Appellant from both the Board of Directors and the membership rolls of the Bethesda Fire Department. The BFD argues that the MSPB does not have jurisdiction over Appellant's removal from the Board of Directors but does have jurisdiction over Appellant's removal as a member of the BFD. In addition, the parties were asked to address whether the Board has jurisdiction or authority to consider and provide relief for Appellant's claims regarding reimbursement for certain items Appellant purchased and for meals.

The BFD was also asked to indicate the role Appellant was performing when he was engaging in the conduct described in each charge filed against him, and to specify the dates on which the alleged conduct occurred. The parties were also asked to indicate Appellant's various positions within BFD over the past three years and the dates he served in those positions. The Board also asked the BFD to provide clarity on whether representation by Mr. AW, Executive Advisor to the BFD, would comport with Maryland law prohibiting the unauthorized practice of law.

The BFD filed a brief on September 21, 2022, addressing the jurisdictional issues and moving to dismiss the appeal insofar as it involves Appellant's removal from the BFD Board of Directors and his request to be reimbursed. Appellant filed a response on October 6, 2022.

ANALYSIS AND CONCLUSIONS

Does the Board have jurisdiction over Appellant's removal from the BFD Board of Directors?

The Montgomery County Code provides the MSPB with jurisdiction over the discipline of volunteer firefighters and rescuers. The County Code, § 21-7(a), provides that "the Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee."

Under the County Code, § 21-1(c), a "volunteer" is defined as "an individual who, without salary, performs fire, rescue, emergency medical, or related services as provided in this Chapter with the Montgomery County Fire and Rescue Service." This definition does not encompass membership on a local fire and rescue department's (LFRD) governing board.

Appellant alleges that the BFD's corporate bylaws give the MSPB jurisdiction because they provide that the BFD must comply with the Montgomery County personnel regulations (MCPR) in grievances. BFD Ex 2, §13.1B. However, nothing in the MCPR gives the MSPB jurisdiction over grievances by LFRD corporate board members, as opposed to volunteer firefighters subject to discipline. More importantly, even if the BFD corporate bylaws purported to give the MSPB jurisdiction over BFD board members, under Maryland law the BFD corporate bylaws could not vest the MSPB with jurisdiction. The MSPB's jurisdiction is established by County law. *See Stewart v. State*, 287 Md. 524, 527-28 (1980) (it is "widely acknowledged" that

“parties cannot confer jurisdiction . . . by consent.”); *State v. Walls*, 90 Md. App. 300, 305 (1992) (“Jurisdiction over the subject matter cannot be conferred by consent of the parties . . .”).

Appellant also argues that since County Code § 21-7(a) gives the MSPB jurisdiction over any volunteer firefighter aggrieved by an adverse final action of a LFRD, and he was aggrieved, the MSPB has jurisdiction over his removal from the BFD board. However, Appellant fails to note that § 21-7(a) says that the MSPB has jurisdiction when a volunteer firefighter is “aggrieved by an adverse final action . . . involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual *as if the individual were a County merit system employee.*” (emphasis added). The provision expressly applies to individuals serving as volunteer firefighters acting in roles that are akin to employees, not to persons serving as members of the organization’s corporate governing body.

The Board finds that it lacks jurisdiction to hear Appellant’s appeal of his removal from the BFD corporate board. Accordingly, Appellant’s appeal concerning his removal from the BFD corporate board is **DISMISSED**.

Does the Board have jurisdiction over Appellant’s removal as a volunteer firefighter/rescuer?

The BFD concedes that Appellant was “considered a ‘volunteer firefighter or rescuer.’” BFD Brief, p. 3. The Board thus finds that it has jurisdiction to hear Appellant’s appeal of his dismissal as a volunteer firefighter or rescuer.

May the Board order the BFD to reimburse Appellant for items he purchased and that were not returned to him?

Under County Code, § 33-14(c)(10) the Board may “Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.” Thus, the County Code confers on the Board expansive remedial powers, although such authority is limited to the types of relief listed in § 33-14(c)(1)-(9). *Opinion of the County Attorney*, (December 17, 2008) (MSPB authority under MCC § 33-14(c)(10) must be “interpreted to include only forms of relief similar to the types of relief enumerated in the preceding paragraphs.”). *See Lussier v. Maryland Racing Commission*, 343 Md. 681, 686-87 (1996) (in determining whether an administrative agency is authorized to act in a particular manner the governing standard is whether the action is “consistent with the letter and spirit of the law under which the agency acts.”). *Cf.*, *Gutwein v. Easton Publishing Co.* 272 Md. 563 (1974), *cert. denied*, 420 U.S. 991 (1975) (State civil rights agency authority to “take affirmative action” did not permit the award of compensatory damages.).

Among the specifically identified relief in § 33-14(c)(1)-(9) is the authority to “Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale.” MCC § 33-14(c)(8). The failure to reimburse Appellant for items he provided to the BFD for training purposes, or to return the items to him, may be an adverse effect within the meaning of (c)(8).

The Board finds that it has jurisdiction to consider whether the requested relief is appropriate and supported by the evidence. Accordingly, the BFD’s motion to dismiss that part of the appeal is **DENIED**.

BFD representation.

The Board asked the BFD to provide clarity on whether representation by Mr. AW, a non-lawyer, would comport with MD Code Ann., Business Occupations and Professions Article (BOP), § 10-206. *See* BOP § 10-601 (“(a) Except as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar. . . (c) It is not a defense to a charge of a violation of this section that the defendant acted through an officer, director, partner, trustee, agent, or employee who is a lawyer.”).

Mr. AW’s status is unclear from the parties’ submissions. BFD contends that Mr. AW is serving as “an employee designated by an officer of a corporation” while Appellant suggests that he is a contractor not an employee. It is not within the purview of the matter before us to adjudicate the status of Mr. AW within the BFD organization.

The Board considers Mr. NF as counsel of record in this matter and recognizes that as an active member of the Maryland Bar he may represent the BFD before the MSPB. Mr. NF and any other counsel entering an appearance and authorized to practice law in Maryland will be responsible for the conduct of the hearing, including but not limited to oral argument, objections, motions, the introduction of evidence, the examination of witnesses, and may make any pre or post hearing submissions on behalf of the BFD. *See Turkey Point Property Owners’ Association, Inc. v. Anderson*, 106 Md. App. 710, (1995) (Maryland corporation may not be represented by nonlawyer).

Appellant’s status with the BFD.

Notwithstanding our finding that Appellant may be considered a volunteer firefighter or rescuer, the Board would also like further clarification as to Appellant’s membership class under the Constitution and Bylaws of the BFD and the dates he was in different roles. As we understand it, County Code, § 21-21(j)(1) requires the BFD to maintain a detailed and accurate record for each volunteer that reflects their volunteer status. The BFD shall provide the Board with a copy of the detailed record of Appellant’s service as a volunteer firefighter or rescuer for the last 4 years by **October 19, 2022.**

For the Board
October 13, 2022

ENFORCEMENT OF BOARD DECISIONS AND ORDERS

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions. Montgomery County Personnel Regulations, § 35-15.

The Board may also be asked to enforce a final decision. The Board, where appropriate, may seek enforcement of its decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. Montgomery County Code, § 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly failed to comply with the Board decision to determine whether there is a basis for seeking enforcement.

During FY23, four settlement agreements were entered into the record.

CASE NO. 22-20

ORDER ACCEPTING SETTLEMENT AGREEMENT

On December 28, 2021, Appellant, a Liquor Store Clerk with the Montgomery County Alcohol Beverage Services (ABS), filed an appeal with the Merit System Protection Board (Board or MSPB) challenging his termination. On August 15, 2022, the parties notified the Board that a settlement agreement had been reached and filed a fully executed settlement agreement. The parties asked the Board for expedited review of the settlement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MSPB Case No. 22-05 (2022). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is *pro se*, and that the agreement was freely entered into by the parties. MSPB Case No. 21-36 (2021). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS** that:

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
3. The appeal in MSPB Case No. 22-20 be and hereby is **DISMISSED** as settled; and
4. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
August 16, 2022

CASE NO. 22-37

ORDER ACCEPTING SETTLEMENT AGREEMENT

On May 2, 2022, Appellant, a supervisor with the Montgomery County Alcohol Beverage Services (ABS), filed an appeal with the Merit System Protection Board (Board or MSPB) challenging his demotion. On June 30, 2022, the parties notified the Board that a settlement agreement had been reached and, on July 6, 2022, the parties filed a fully executed settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 22-05 (2022). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is *pro se*, and that the agreement was freely entered into by the parties. MSPB Case No. 21-36 (2021). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS** that:

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
3. The appeal in MSPB Case No. 22-37 be and hereby is **DISMISSED** as settled; and
4. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
July 18, 2022

CASE NO. 22-38

ORDER ACCEPTING SETTLEMENT AGREEMENT

On May 4, 2022, Appellant, a Private First Class with the Montgomery County Department of Correction and Rehabilitation (DOCR), filed an appeal with the Merit System Protection Board (Board or MSPB) challenging his one (1) day suspension.

On September 24, 2022, the parties notified the Board that a settlement agreement had been reached and requested that the hearing scheduled for September 27 and 28 be canceled pending written confirmation of the settlement. On October 3, 2022, the parties filed a fully executed settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 22-05 (2022). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is *pro se*, and that the agreement was freely entered into by the parties. MSPB Case No. 21-36 (2021). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS** that:

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;

3. The appeal in MSPB Case No. 22-38 be and hereby is **DISMISSED** as settled; and
4. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
October 4, 2022

CASE NO. 22-40

ORDER ACCEPTING SETTLEMENT AGREEMENT

On May 17, 2022, Appellant, an Administrative Specialist with the Montgomery County Office of Management and Budget (OMB), filed an appeal with the Merit System Protection Board (Board or MSPB) challenging her two (2) week disciplinary suspension.

On October 19, 2022, the parties notified the Board that a settlement agreement had been reached and requested that the prehearing conference scheduled for October 20 be canceled pending written confirmation of the settlement. Later that day, the parties filed a fully executed settlement agreement.

The Board finds that it has jurisdiction over the appeal and may accept the settlement agreement into the record. Montgomery County Personnel Regulations (MCPR), § 35-15; MSPB Case No. 22-05 (2022). Pursuant to MCPR, § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is *pro se*, and that the agreement was voluntarily entered into by the parties. MSPB Case No. 21-36 (2021). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS** that:

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented all terms of the settlement agreement, including Appellant's transfer;
3. The appeal in MSPB Case No. 22-40 be and hereby is **DISMISSED** as settled; and
4. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
October 20, 2022

SHOW CAUSE ORDERS

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to the grievance procedure, MCPR § 34-9(a)(3), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, § 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a show cause order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the Personnel Regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a show cause order to determine whether the appeal is in fact timely.

Finally, the Board may issue a show cause order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the Personnel Regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

The following is an example of a show cause order issued in fiscal year 2023.

CASE NO. 23-03

SHOW CAUSE ORDER

On August 31, 2022, Appellant filed an online appeal with the Merit System Protection Board (MSPB or Board), attaching a Statement of Charges for a 3-day suspension dated August 26, 2022. That same day the Board's Executive Director sent Appellant a letter acknowledging receipt of the appeal. The acknowledgement letter also explained that a Statement of Charges is not the same as a Notice of Disciplinary Action (NODA), Montgomery County Personnel Regulations (MCPR) § 33-6, and that a direct appeal to the MSPB may only be filed after receipt of a NODA. MCPR §35-2(a); §35-4(d)(1). Appellant was asked to provide a NODA and warned if the MSPB did not receive a NODA an order dismissing the appeal without prejudice may be issued. To date, Appellant has not filed the requested documentation or otherwise contacted the Board.

Accordingly, the Board hereby **ORDERS** Appellant to provide a statement of such good cause as exists for why he has failed to file the required NODA with the Board. The statement shall be filed with the Board on or before close of business **November 8, 2022**, with a copy served on the County. The County shall have the right to file a response on or before **November 14, 2022**. Appellant may file the statement by email to MSPB.Mailbox@montgomerycountymd.gov or hardcopy mailed to and received by the Board's office at 100 Maryland Avenue, Suite 113, Rockville, Maryland 20850 by the due date.

Appellant is hereby notified that absent the filing of the required documentation and a finding by the Board of good cause for his failure to timely file the documentation, the Board will dismiss his appeal. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

For the Board
October 27, 2022

ATTORNEY'S FEE REQUESTS

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees which result from the judicial review. The County is responsible for determining what is reasonable using the criteria set forth above.

In *Montgomery County v. Jamsa*, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance to respond. The Board then issues a decision based on the written record.

The Board issued one attorney’s fee decision during fiscal year 2023.

CASE NO. 20-08

DECISION ON ATTORNEY'S FEE REQUEST

This is the Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's Petition for Attorney's Fees (Appellant's Request). Appellant seeks \$27,303.02 in attorney's fees and litigation costs in the amount of \$235.38. The total amount of attorney's fees and costs requested for both her current attorney and Appellant's previous attorney was \$27,538.40. The total attorney's fees charged by Mr. JC's firm amounts to \$19,458.52, while the amount Appellant paid was \$17,368.52. The total amount Appellant paid to her previous attorneys, [ZAG], for attorney's fees and costs was \$7,844.80. As of June 24, 2022, Appellant had paid her attorneys a total of \$25,253.32.

The County objects to certain elements of Appellant's Request, arguing that because Appellant only prevailed on one of the issues she appealed, that of Paid Time Off (PTO) that was denied, compensation for attorney's fees should be reduced to reflect that partial success, if not denied entirely. The County also argues that Appellant is not entitled to fees related to the preparation of Appellant's fee petition or for services which were incurred after the Board's Supplemental Decision Concerning Enforcement of Settlement Agreement (June 15, 2022), other than 0.2 hours for her attorney to review the decision. *See* County Response, July 5, 2022, pp. 5-6, 9.

BACKGROUND

In 2015 Appellant entered into a settlement agreement with the County resolving an employment dispute that she had appealed to the Board. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15, the Board issued an Order accepting the settlement agreement into the record and retaining jurisdiction over any disputes concerning interpretation or enforcement. MSPB Case No. 15-24 (September 30, 2015).

A month after entering into the settlement agreement Appellant filed a motion with the Board to enforce the agreement, claiming that the County had breached the agreement by not giving her assigned parking in the Executive Office Building (EOB). The Board ruled on December 17, 2015, that there was no breach of the settlement agreement. MSPB Case No. 16-06 (2015).

In 2019 Appellant again sought to have the Board enforce the terms of the settlement agreement. In her 2019 enforcement request Appellant alleged that the County breached the 2015 settlement agreement by failing to remove certain documents from her personnel file and by failing to provide her with the proper salary and benefits. On June 8, 2020, the Board issued a Decision Concerning Enforcement of Settlement Agreement denying Appellant's request for enforcement. Appellant then filed a petition for judicial review in the Circuit Court for Montgomery County.

After receiving briefs and hearing oral argument the Circuit Court issued an opinion and order remanding the matter to the MSPB. *Lee v. Montgomery County*, Civil Case No. 482732-V, MSPB Case No. 20-08 (December 22, 2021). The Court:

1. affirmed the Board's ruling that *res judicata* barred Appellant's claim for a parking spot in the EOB parking lot;

2. affirmed the Board's ruling that *res judicata* barred Appellant's claim for paid time off (PTO) that had been rescinded before the Board issued its decision in MSPB Case No. 16-06 in December 2015;
3. reversed the Board's ruling that *res judicata* barred Appellant's claim for PTO not granted after the Board issued its decision in MSPB Case No. 16-06;
4. reversed the Board's ruling that Appellant's claims were untimely; and
5. affirmed the Board's decision that the County did not materially breach the Agreement regarding (a) the contents and maintenance of confidential personnel files, and (b) the proper calculation of Appellant's cost of living adjustments.

The Court remanded the matter to the Board to determine: (1) whether the County failed to grant PTO to Appellant in January 2016 and every six months thereafter; and, if so, (2) whether the County's failure to grant PTO was a material breach of the Agreement.

The parties briefed the two issues remanded by the Circuit Court. Appellant filed a brief, the County filed a response, and Appellant filed a reply brief. The Board then issued a Supplemental Decision Concerning Enforcement of Settlement Agreement on June 15, 2022.

The Board's supplemental decision found that the PTO was a material benefit of the agreement and that the County's failure to grant PTO was a material breach of the Agreement. The Board ordered the County to pay Appellant 30 hours of salary at Appellant's highest rate of pay, and in no event less than \$1,974.30.

APPROPRIATE REIMBURSEMENT FORMULA

The Montgomery County Code, § 33-14(c), provides the Board with remedial authority to “[o]rder the County to reimburse or pay all or part of the employee's reasonable attorney's fees.” See *Montgomery County v. Jamsa*, 153 Md. App. 346, 355 (2003). In determining what constitutes a reasonable fee, § 33-14(c)(9) of the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code, § 33-14(c)(9).

In *Manor Country Club v. Flaa*, 387 Md. 297 (2005), the Court of Appeals considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The provisions of § 27-7(k)(1) then in effect were identical to § 33-14(c)(9), which is controlling on the Board. The *Flaa* Court noted that the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v.*

Bergeron, 489 U.S. 87 (1989), were “in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)” for determining an appropriate attorney’s fees award. 387 Md. at 313.¹

In *Friolo v. Frankel*, 403 Md. 443, 460 (2008), the Court of Appeals cited both *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Flaa* for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney’s fees. See MSPB Case No. 00-13 (2000). In this case, the County seeks to reduce the award of attorney’s fees based on Appellant’s degree of success.

ANALYSIS AND CONCLUSIONS

Appropriate Hourly Rate

The Board has consistently looked to the Local Rules of the United States District Court for the District of Maryland for guidance in determining an appropriate hourly rate for attorney’s fees, as well as considering the nature and complexity of the case.² See, e.g., MSPB Case No. 18-02 (2018); MSPB Case No. 15-27 (2017); MSPB Case No. 14-33 (2016); MSPB Case No. 14-17 (2014); MSPB Case No. 13-07 (2013). Those guidelines are “intended solely to provide practical guidance.” United States District Court for the District of Maryland Local Rules, Appendix B at 124. Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

The hourly billing rate actually charged by an attorney is credible evidence that the rate is consistent with the local market rate, because the client freely agreed to pay that rate. MSPB Case No. 18-02 (2018); MSPB Case No. 15-27 (2017); MSPB Case No. 14-33 (2016). See *Willis v. U.S. Postal Service*, 245 F.3d 1333, 1340 (2001). Where an attorney and a client have agreed upon a specific fee for legal services in a Board case, we presume that the amount agreed upon represents a reasonable fee. MSPB Case No. 14-33 (2016). See *Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, 160-61 (2001); *Gensburg v. Department of Veterans Affairs*, 85 M.S.P.R. 198, 206 (2000). That presumption is, of course, rebuttable based upon the factors we are required to consider under Montgomery County Code, § 33-14(c)(9). Among those factors is the customary fee for such services and the experience, reputation, and ability of the attorney.

Appellant’s current attorney, Mr. JC, attached copies of billing invoices with Appellant’s Request. A review of the documentation reveals that Mr. JC consistently billed at an hourly rate of \$350, and that his associate billed at an hourly rate of \$200. He asserts that the submitted rate is reasonable as he has been a member of the Maryland Bar since 2005 and is an experienced employment lawyer. Appellant’s Request at 5. With regard to Mr. JC’s hourly rate, the County simply acknowledges that the District Court guidelines provide a suggested hourly rate for lawyers admitted to the bar for fifteen to nineteen years is between \$275 and \$425, and that Mr. JC’s rate of \$350 is within the range provided for in the guidelines. County Response at 8; United States District Court for the District of Maryland Local Rules, Appendix B at 125. The County does not appear to contest Mr. JC’s hourly rate.

Mr. JC is an experienced employment lawyer with a decade and a half of litigation experience. Exhibit 5. Furthermore, the Board was favorably impressed by the pleadings he

¹ The Court of Appeals in *Flaa* noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). See 387 Md. at 313.

² Appendix B of the United States District Court for the District of Maryland Local Rules (July 1, 2021), is available at: <http://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf>.

submitted. MSPB Case No. 15-27 (2017). *See Johnson*, 488 F.2d at 718-19. It is unlikely that another attorney could have obtained a more positive result for Appellant. Finally, the County does not appear to object to Mr. JC's hourly rate of \$350. County Response at 8. We thus conclude that the hourly rate of \$350 is reasonable and appropriate for Mr. JC.

Appellant's current attorney also billed for the time of an associate, VG, at an hourly rate of \$200. Mr. JC's affidavit indicates that his firm typically bills between \$250 and \$295 per hour for Ms. VG's services. Exhibit 5. The U.S. District Court guidelines recommend that for attorneys with less than five years of experience the hourly rate should be \$150 to \$225. The County urges that this hourly rate should be reduced due to Ms. VG's inexperience as she has only been a member of the Bar since December 2020. Because the hourly rate is below the top end of the guideline and below her customary hourly rate as attested by Mr. JC, we conclude that \$200 per hour for Ms. VG's 1.7 hours of service is reasonable.

Appellant's previous attorneys in this matter were MA and AB of the law firm ZAG. Mr. MA billed Appellant at \$350 per hour while Mr. AB was billed at \$250 per hour. Mr. MA has been a member of the Bar since 2009. Exhibit 3. Mr. MA primarily represented Appellant during 2019 when he had been a member of the bar for 10 years. While we have previously held that where an attorney and a client have agreed upon a specific fee, we presume that the amount agreed upon is reasonable, we also held that the presumption is rebuttable based upon the other factors we are required to consider under Montgomery County Code, § 33-14(c)(9), including experience and ability. MSPB Case No. 18-02 (2018). Here we consider that the U.S. District Court guidelines suggest that lawyers admitted to the bar for nine to fourteen years should be compensated an hourly rate between \$225 and \$350. While Mr. MA may be a capable attorney, his experience level at the time he worked on this case suggests that his hourly rate should be set below the maximum of the range. We find that his hourly rate should be \$300.

Mr. AB was admitted to the Bar in 2017, and his involvement with this matter took place when he had less than three years at the Bar. While he has experience as an employment law attorney, his hourly rate of \$250 is above the \$150 - \$225 range for attorneys with his experience level as suggested by the U.S. District Court guidelines. Exhibits 1 and 4. In light of his normal billing rate and the range of the guidelines for attorneys at his experience level we find that his hourly rate should be at \$225 per hour.

The County objects to time charged by ZAG for services provided by unidentified individuals. County Response at 4. However, Appellant points out that these charges are for paralegal services at an hourly rate of \$135. That rate is well within the \$95 to \$150 range recommended by the U.S. District Court in Appendix B, and well below the 2019-20 hourly rate of \$173 for paralegal charges provided for in the United States Attorney's Office for the District of Columbia Matrix. Exhibits 1 and 2. We see no reason to disallow these reasonable paralegal charges.

Number of Hours Billed

The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees. MSPB Case No. 18-02 (2018); MSPB Case No. 15-27 (2017). *See Hensley v. Eckerhart*, 461 U.S. at 437; *Casali v. Department of the Treasury*, 81 M.S.P.R. 347 (1999). One factor the Board must consider in awarding attorney fees is the time and labor required, *i.e.*, the number of hours reasonably expended. Montgomery County Code, § 33-14(c)(9)(a).

Appellant is seeking an award for 89.6 hours of attorney time. Exhibits 6 and 7. The County argues against the reasonableness of the number of attorney hours expended.

Appellant argues that the amount of attorney time charged is reasonable given the work required to pursue the agreement enforcement case initially before the Board, then at the Circuit Court on judicial review, and again before the Board on remand. Appellant's Request at 6-8. Appellant further contends that the novelty and complexity of the legal issues also required significant effort. Appellant's Request at 8-9.

The County argues that the "legal issues are neither novel nor complex and Appellant should not be rewarded for arguments that were eventually deemed unsuccessful by both the Board and the Circuit Court." County Response at 6.

Appellant's attorneys did not represent her in 2015 when the original appeal and settlement were resolved. Instead, they were retained to represent her in 2019. This required them to familiarize themselves with the settlement agreement, prior pleadings and decisions in this matter, and the various legal issues raised during the litigation. They point out that they had to prepare and file at least six pleadings, four filed with the Board and two with the Circuit Court. Appellant's Request at 8. We agree with Appellant that there was some level of complexity to the various issues raised in this case. Appellant points out that among the issues that required legal research and analysis were interpretation of the settlement agreement, including the term "benefit"; whether and how the doctrines of *res judicata*, laches, and timeliness applied; and whether there was a material breach of the agreement. *Id.* Further, it was necessary to interpret and apply various provisions of the settlement agreement and County personnel regulations to the specific facts.

The County also argues that because of redactions on the invoices it is "impossible to ascertain if . . . [the hours] are reasonable or even associated with the instant matter." County Response at 4. We find no reason to believe that Appellant's attorneys submitted, under oath, improper invoices reflecting hours worked on unrelated matters. While normally the Board's preference is for unredacted invoices, what Appellant's attorneys provided was adequate to ascertain the attorney time that was expended, and the dates on which the services occurred. The Board finds that the issues in this case were challenging and that the time spent was adequately documented and reasonably necessary to achieve the partially successful outcome.

The County objected to fees related to services performed preparing the attorney's fee petition. County Response at 5-6. The County argues that while the Board has discretion to order reimbursement for the time reasonably required to prepare a fee petition, such discretion should be exercised only "to accomplish the remedial objectives" of the Code and "only in unusual circumstances, such as, where there is a showing that a more extensive explanation is reasonably required to be documented in the fee application." County Response at 5, *citing* MSPB Case No. 00-09 (2005); MSPB Case No. 98-02 (1998). The County asserts that the fee petition was straight forward and does not meet this standard. *Id.*

In MSPB Case No. 98-02 (1998) the Board was troubled by the fact that 5.4 hours was expended to prepare the fee petition, while a total of 8.6 hours was needed to brief the merits of the case. In other words, the attorney's fee request amounted to 38% of the total attorney effort on the case. The Board deemed the time spent on preparation of the fee petition excessive. In this case, however, Appellant's fee petition required an explanation concerning the two law firms and four attorneys involved, as well as an argument concerning the Board's precedent concerning partial success. Moreover, the attorney time expended to prepare and file the petition for attorney's

fees in this case was at most 6.2 hours out of a total request of 89.6 hours, or 7% of the total attorney effort. In addition, we note that 1.7 of the 6.2 hours of attorney work was performed at a significantly lower hourly rate by Ms. VG.

The second case cited by the County, MSPB Case No. 00-09 (2005), also involved a question of partial success and a reduction of the hours that should be reimbursed. There the Board granted the full request for hours spent preparing the fee petition.

We thus reject the County's contention that, except for 0.2 hours of attorney time spent reviewing the Board's supplemental decision, all the hours reflected on Invoice 1841 after the supplemental decision should be denied. In our view, the invoice reflects time considering and discussing Appellant's options, such as whether to seek further judicial review or move for reconsideration, and in preparing the fee petition. These are legitimate and reasonable expenditures of attorney time in the wake of a partial success. The Board concludes that in this matter the hours related to communication with Appellant and preparation of the fee petition after the Board's supplemental decision are recoverable.

The Degree of Success Achieved

The County argues that because Appellant did not completely prevail in her appeal the amount of attorney's fees should be reduced. County Response at 8-9. The County Code, § 33-14(c), does provides the Board with the authority to allow reimbursement of "all *or part* of the employee's reasonable attorney's fees." (emphasis added). Under Maryland law and Board precedent, when an appellant partially prevails the Board will only award a portion of the fees sought. MSPB Case No. 15-27 (2017); MSPB Case No. 13-02 (2013). *See Friolo v. Frankel*, 403 Md. 443 (2008) (degree of success is a crucial factoring determining a fee award); *Manor Club v. Flaa*, 387 Md. 297, 305 (2005). *See also, Hensley v. Eckerhart*, 461 U.S. at 436 (most critical factor in determining amount of attorney's fees is degree of success obtained).

Under our precedent, if the degree of success is sufficiently high that it cannot reasonably be characterized as "partial" and the fees requested are modest, we will award the full amount of fees requested. *See* MSPB Case No. 14-17 (2014) (full attorney's fees awarded because appellant had "achieved the overwhelming majority of the relief he has sought"). Here, however, the County prevailed on every issue other than the claim for PTO after January 1, 2016. The Board thus finds merit to the County's argument that Appellant only partially prevailed and that a reduction in the fees requested is appropriate.

In MSPB Case No. 13-02 (2013) the Board refused to grant the County's request for a demotion and a twenty-day suspension but did impose a ten-day suspension. The Board concluded that the ten-day suspension was a significant penalty, and clearly demonstrated that the Appellant did not completely prevail. The Board concluded that reducing the number of hours billed by 25% was appropriate based upon degree of success. *See* MSPB Case No. 15-27 (2017) (Board rescinded appellant's demotion but upheld a 30-day suspension; attorney's fees reduced by 25%); MSPB Case No. 00-22 (2001) (discipline mitigated from discharge to demotion; fees reduced by 50%); MSPB Case No. 00-13 (2000) (four grade demotion mitigated to one grade and 10% pay reduction for 8 weeks; attorney's fees reduced by 50%).

In MSPB Case No. 00-09 (2005), where the appellant only prevailed on one of four grievances, the Board allowed reimbursement of only those attorney hours that were directly attributable to the grievance where the appellant prevailed.

In this case, Appellant made claims: for a parking spot in the EOB parking lot; for PTO rescinded before the Board issued its decision in MSPB Case No. 16-06 in December 2015; for PTO not granted after December 2015; that the County materially breached the settlement agreement by failing to properly maintain the confidentiality of her personnel files; and that the County improperly calculated her cost-of-living adjustments.

The relief requested in Appellant's Amended Complaint, filed November 22, 2019, was: to increase her salary and benefits to at or above the M-3 level for the remainder of her employment; require the County to remove certain documents from her personnel file; provide Appellant with PTO as an M-3 benefit; restore 353 hours of PTO or, in the alternative, awarding her \$23,206.00 for the PTO she was denied; and award Appellant \$2,951.12 for cost of living adjustments.

In Appellant's February 3, 2020, Response to the County's Opposition she suggested that the only appropriate remedy would be an extension of the terms of the settlement, to include providing the higher salary, recalculated cost of living adjustments, and PTO. Alternatively Appellant asked for payments of \$6,223.65 in PTO benefits and additional compensation of \$2,951.12 for missed COLA adjustments.

However, Appellant only prevailed on one claim, her entitlement to PTO from January 1, 2016, to the expiration of the settlement agreement. Most of those PTO hours were offset by the annual and sick leave she was given. In the end, her net recovery was monetary compensation of approximately \$2,000 for the 30 hours of PTO that exceeded her other leave earnings. The modest recovery contrasts unfavorably with both the amount sought for PTO benefits and the total amount of attorney's fees requested. We consider this factor as "reasonably related to a fair award of attorneys' fees." *Monmouth Meadows Homeowners Ass'n v. Hamilton*, 416 Md. 325, 337-38 (2010) ("Although fee awards may approach or even exceed the amount at issue, the relative size of the award is something to be evaluated."). See *Friolo v. Frankel*, 438 Md. 304, 323 (2014) (it is "not only appropriate, but necessary" to consider monetary relief obtained "in determining the level and degree of . . . success").

We conclude that based upon the modest degree of success in this case that it is reasonable and appropriate for the number of hours billed to be reduced to 25% of the total hours billed prior to the Circuit Court's decision of December 22, 2021. Because on remand from the Circuit Court Appellant prevailed on the PTO issue before the Board attorney hours subsequent to the Circuit Court's order of December 22, 2021, shall be fully compensable. Accordingly, the request for attorney's fees incurred prior to the Circuit Court's order will be reduced by 75%, while the hours billed for services after the Court's order shall be fully compensated.

As discussed above, the hourly rates of attorney MA shall be \$300 per hour, resulting in compensable fees of attorney AB at \$225 per hour, and paralegals at \$135 per hour. Attorney MA billed a total of **8** hours, attorney AB billed **19.6** hours, and the paralegals billed **1.4** hours. Reducing the billing hours by 75% results in adjusted total compensable hours of **2** at \$300 an hour for attorney MA (**\$600**) and **4.9** hours at \$225 per hour for attorney AB (**\$1,102.50**), for a total of **\$1,702.50**. After accounting for discounts indicated on the invoices for the paralegals the total billed amount was \$144.50, which is reduced by 75% to **\$36.13**. The adjusted total of compensable attorney's fees for ZAG is thus **\$1,738.63**.

The hourly rate for attorney JC shall remain at \$350, but the **40.85** hours he billed for services prior to December 22, 2021, shall be reduced by 75%, resulting in a total of **10.2**

compensable hours billed and attorney's fees of **\$3,570.00**. The **14.9** hours of attorney time billed by Mr. JC and Ms. VG (at \$200 an hour) subsequent to the Circuit Court's order remanding the case to the Board shall be fully compensable in the amount of **\$4,960.00**. The adjusted total of compensable attorney's fees for BC, LLC is thus **\$8,530.00**.³

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the County is hereby **ORDERED** to reimburse Appellant for **\$10,268.63** in attorney's fees and **\$235.38** in costs for a total amount of **\$10,504.01**.

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 an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
November 28, 2022

³ The total hours for all attorneys omit invoiced hours indicated as discounted and not billed to Appellant.

OVERSIGHT

The Board is required to perform certain oversight functions.

Personnel Regulation Review. Pursuant to the County Charter, § 404, and the Montgomery County Code, § 33-7(a), the MSPB has long engaged in the prior review of proposed personnel regulations. In fiscal year 2023 the Board reviewed and commented on the following proposed personnel regulations:

- 1) Executive Regulation 18-22 - Amendments to MCPR – Performance-Based Pay
- 2) Executive Regulation 3-23 - Reports to Inspector General Process Amendments
- 3) Executive Regulation 9-23 - MCPR Section 32

Classification Creation. The Montgomery County Code, § 33-11, provides in applicable part that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service

Based on the above-referenced provision of the Code, § 9-3(b)(3) of the Montgomery County Personnel Regulations provides that the Office of Human Resources Director shall notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class.

In fulfilling this mandate during fiscal year 2023, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) New Occupational Class Creation – IT Project Manager Series

Temporary Promotions. The Montgomery County Personnel Regulations require that County agencies obtain the approval of the MSPB for noncompetitive temporary promotions of longer than 12 calendar months. MCPR § 27-2(c)(1)(B). The County Code, § 1A-105(c) and (g) also requires the Merit System Protection Board to approve a merit employee serving as an acting director beyond 12 months. The MSPB reviews such requests to determine if they are supported by “exigent or compelling circumstances.” MCPR § 27-2(c)(3).

In fiscal year 2023 the MSPB reviewed eleven requests for extensions of temporary promotions. The Board denied three of the requests and one was withdrawn.

Classification and Compensation Audit

Under § 404 of the Montgomery County Maryland Charter, the Merit System Protection Board is required to, “...conduct on a periodic basis, special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council.” The County Council appropriated funding in the Fiscal Year 2023 and 2024 budgets to allow the MSPB to hire a consultant to conduct an independent analysis of the County’s classification and compensation plan and procedures. *See* Montgomery County Personnel Regulation § 9-3(h)(2)(A) (“At least once every 5 years, the MSPB must have a consultant who is a specialist in the field and independent of the County government conduct an objective audit of the entire classification and compensation plan and procedures”).

In June 2023 the Board entered into a contract with The Segal Company (Eastern States), Inc., to design and conduct a comprehensive review and audit of the County's classification and compensation program and procedures. The objective of the review is to: (1) to ensure the accuracy, equity, justice, validity, and integrity in the administration of the classification and compensation program and execution of its procedures; and (2) to determine the effectiveness of the current classification and compensation models and methodologies. The audit will determine whether the present Classification and Compensation Program and Procedures are administered properly and fairly in accordance with best practices, assuring equitable treatment of employees, coupled with meeting the needs of the County to attract and retain a quality work force. The audit will also determine the effectiveness of the County's job classification models and practices as compared to other similar public and private sector organizations in the regional market.

The Board anticipates that the audit report will be finalized by the end of calendar year 2024. When the independent review and audit is complete, the Board will submit the audit report to the County Council, County Executive, and the Chief Administrative Officer.