

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

(As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015)

### 35-1. Definitions.

- (a) **Appeal:** The written request of an applicant for employment or employee for review of an administrative decision on a grievance, disciplinary action or other personnel action for which appeal privileges are provided that adversely affects employment, opportunity for employment, or promotion.
- (b) **Appellant:** The County employee, applicant for employment, or volunteer firefighter or rescuer who files an appeal with the MSPB.
- (c) **De novo:** The MSPB's examination of an appeal anew, regardless of any prior proceedings.
- (d) **Responding party:** The party against whom the charges have been brought.
- (e) **Hearing:** An employee's appearance before 2 or more members of the MSPB or a designated hearing officer to present evidence or arguments concerning the employee's appeal.
- (f) **Deposition:** Testimony given under oath before both parties prior to a hearing that is submitted in writing as evidence in lieu of requiring the witness to appear.
- (g) **Rebuttal:** The charging party's response to evidence submitted by the responding party.
- (h) **Surrebuttal:** The responding party's response to rebuttal evidence.
- (i) **Working days:** All days except Saturdays, Sundays and official or special County holidays.

### 35-2. Right of appeal to MSPB.

- (a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the MSPB.
- (b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if

the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.
- (e) An employee or applicant for County employment who alleges discrimination on the basis of political affiliation may file a direct appeal with the MSPB.
- (f) A volunteer firefighter or rescuer may file an appeal with the MSPB over an adverse final action of the Fire Chief or local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire rescue activities, as if the individual were a County merit system employee. A volunteer firefighter or rescuer is entitled to a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal or involuntary resignation. The MSPB must hear and decide each such appeal except for an appeal of a personnel matter subject to an employee grievance procedure under a collective bargaining agreement.
- (g) An employee with merit status may file an appeal with the MSPB alleging a personnel action in retaliation for:
  - (1) refusing to obey an instruction involving an illegal or improper action; or
  - (2) disclosing to a Federal, State, or County official or employee, information concerning illegal or improper action in County government with a reasonable good-faith belief that the information disclosed is accurate.

### **35-3. Appeal period.**

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:
  - (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal;
  - (2) receives a notice of termination;

- (3) receives a written final decision on a grievance;
  - (4) resigns involuntarily; or
  - (5) knows or should have known of a personnel action
- (b) An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position.
- (c) Per Chapter 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the MSPB within 30 days after receiving a final notice of disciplinary action unless another law or regulation requires that an appeal be filed sooner.

#### **35-4. Appeal filing requirements.**

- (a) An employee or applicant must file an appeal with the MSPB in writing, providing the following information:
- (1) appellant's name, signature and date;
  - (2) home address, telephone number, and email address;
  - (3) title of position;
  - (4) department, agency, or office, if applicable;

- (5) concise description of the action or decision being appealed;
  - (6) reason why the appellant disagrees with the action or decision; and
  - (7) relief requested, subject to later modification by the appellant.
- (b) Alternatively, an employee or applicant may complete the MSPB Appeal Form (Appendix V) and provide the information requested on the Form.
- (c) An employee or applicant may instead choose to file an appeal electronically by completing the MSPB Appeal Form found on the MSPB County website.
- (d) Depending on the nature of the appeal, an employee or applicant must include the following documentation with the appeal:
- (1) If the employee is contesting a disciplinary action, a copy of the Notice of Disciplinary Action must be provided to the Board;
  - (2) If the employee is contesting a decision by the Chief Administrative Officer (CAO), a copy of the CAO's decision must be provided to the MSPB; or
  - (3) If the employee or applicant is contesting a nonselection/nonpromotion decision, a copy of the notification of nonselection/nonpromotion must be provided.

### **35-5. Service requirements for a party to an appeal.**

- (a) Each party to an appeal must send to every other party a copy of every paper filed with the MSPB.
- (b) A party to an appeal must indicate on every paper filed with the MSPB that a copy was sent to the other party to the appeal.

### **35-6. Appeal does not act as automatic stay of action.**

- (a) The filing of an appeal does not automatically stay the action at issue in the appeal.
- (b) The MSPB on its own motion may stay the action or grant a stay requested by the appellant based on reasons that the MSPB believes are proper and just.
- (c) If the MSPB orders a stay, it must give written notice of its action to all parties.

**35-7. Dismissal of an appeal.**

- (a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.
- (b) The MSPB may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. The MSPB must give the County and the appellant prior notice of its intent to dismiss for lack of prosecution or compliance with an MSPB rule or order.
- (c) The MSPB must dismiss an appeal if it determines it lacks jurisdiction.
- (d) The MSPB may dismiss an appeal if the appeal becomes moot.
- (e) The MSPB may dismiss an appeal based on the appellant's failure to exhaust administrative remedies.
- (f) The MSPB may dismiss an appeal for any other reason in compliance with applicable laws, rules and regulations.

**35-8. Notification, response and submission of record in appeal.**

- (a) The MSPB must promptly notify the CAO, County Attorney, OHR Director, and department director in writing that a County merit system employee filed an appeal and provide the County Attorney and OHR Director with a copy of the appeal.
- (b) The MSPB must promptly notify the CAO, County Attorney, OHR Director, Fire Chief, and Local Fire and Rescue Department in writing that a volunteer firefighter or rescuer filed an appeal and provide the County Attorney, the OHR Director and the head of the Local Fire and Rescue Department with a copy of the appeal.
- (c) An appellant must respond to an MSPB request for documentation in support of an appeal within 15 working days. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.
- (d) The OHR Director and County Attorney must respond to an appeal filed by a County merit system employee within 30 calendar days and forward a copy of the action or decision appealed and all relevant reports, papers, and documents to the MSPB. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.
- (e) The OHR Director and County Attorney must respond to an appeal filed by a volunteer firefighter or rescuer challenging an action taken by the Fire Chief within 30 calendar days and forward a copy of the action or decision appealed and

all relevant reports, papers, and documents to the MSPB. In all other appeals filed by a volunteer firefighter or rescuer, the Local Fire and Rescue Department must respond within 30 calendar days and forward a copy of the action or decision appealed and all relevant reports, papers, and documents to the MSPB. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.

**35-9. Appellant's right to representation.** The appellant has the right to be represented by an individual of the appellant's choosing.

**35-10. Appellant's right to review; right to hearing.**

- (a)
  - (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.
  - (2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.
- (b) A volunteer firefighter or rescuer is entitled to a de novo hearing before 2 or more members of the MSPB or a designated hearing officer on appeal from a demotion, termination, dismissal or involuntary resignation. In all other cases, the MSPB may choose to decide the appeal on the basis of a written record without an evidentiary hearing.
- (c) The appealing party, the County Attorney, and the OHR Director must be served with a written notice of the time, date, and place of the prehearing conference.
- (d) The MSPB may assign a hearing officer to hear any case appealed to the MSPB. If the MSPB refers an appeal to a hearing officer, the hearing officer must issue a notice of hearing within 15 working days. The hearing officer must issue the notice at least 30 working days prior to the date of the hearing. Within 20 working days of completion of a hearing, the hearing officer must submit written findings and recommendations to the parties and the MSPB. Within 15 working days of receipt of the hearing officer's report, the MSPB may schedule oral arguments.
- (e) The MSPB or hearing officer designated by the MSPB must conduct hearings under the Administrative Procedures Act, Chapter 2A of the County Code (Appendix D).
- (f) The MSPB or hearing officer may:
  - (1) administer oaths;
  - (2) issue subpoenas for witnesses and documents enforceable by injunction by the party requesting the subpoena(s) in a court of competent jurisdiction;

- (3) rule on petitions to revoke subpoenas;
  - (4) rule on motions and offers of proof;
  - (5) dispose of procedural requests or similar matters;
  - (6) call, examine and cross-examine witnesses;
  - (7) accept evidence by stipulation of facts;
  - (8) maintain an orderly procedure at all times;
  - (9) set the time limits for a hearing or part of a hearing; and
  - (10) take any action necessary to assure a fair disposition of the appeal.
- (g) A hearing must not be open to the public unless the appellant requests it in writing at the time of the prehearing submissions.

**35-11. Prehearing procedure in appeal; motions; requests for reconsideration of preliminary matters; conduct of hearing; continuances.**

- (a) *Prehearing procedure in appeal.*
- (1) In all cases where the MSPB conducts an evidentiary hearing, the County must submit the following information to the MSPB or hearing officer and to any other party at least 20 calendar days before the prehearing conference:
    - (A) complete list of charges;
    - (B) copy of all written reports, documents, photographs, charts, hearing;
    - (C) names and addresses of all prospective witnesses and a summary of their anticipated testimony;
    - (D) names and addresses of witnesses, documents, and records requiring service of a subpoena; and,
    - (E) estimated time required for presentation of the case.
  - (2) The Appellant must submit the same information except for a complete list of charges to the MSPB or hearing officer and the County at least 10 calendar days before the prehearing conference.

- (3) Requests, after stated deadlines, to call witnesses or to use documentation not contained in the prehearing submission may be granted only on good cause shown.
  - (4) **Motions.** Any motion to the MSPB seeking a determination of a preliminary matter including, but not limited to, motions to compel discovery, motions to exclude evidence (motions in limine), and motions to quash subpoenas, must be in writing. The opposing party has 10 calendar days from the date of the motion to respond to the motion before the Board rules on the motion.
  - (5) **Requests for reconsideration of MSPB decisions on preliminary matters.** Any request to the MSPB to reconsider its ruling on a preliminary matter must be in writing and must be filed within 5 calendar days from the date of the ruling. The opposing party has 5 calendar days from the date of the request for reconsideration to respond to the request before the Board issues a written decision on the request. This preliminary ruling by the Board is not a final decision for purposes of judicial review and appeal.
- (b) **Conduct of a hearing.** The order of procedure in the conduct of a hearing is usually:
- (1) disposition of preliminary motions and matters, if any;
  - (2) opening statements, which must be a summary of the appeal to be presented;
  - (3) presentation of the factual case for the party making the charges and cross examination of all witnesses;
  - (4) presentation of the factual case for the responding party and cross examination of all witnesses;
  - (5) rebuttal evidence of the charging party;
  - (6) surrebuttal evidence of the responding party; and
  - (7) closing arguments.
- (c) **Continuances.** A party must submit a request for continuance in writing to the MSPB or hearing officer with a copy to the opposing party at least 5 calendar days before the hearing date. The MSPB or hearing officer may grant the request for a continuance where good cause is shown. The MSPB, on its own motion, may decide to continue a hearing less than 5 calendar days before the hearing date if it determines a continuance is in the interest of justice.

### 35-12. Testimony of witnesses at hearing; interrogatories and depositions.

- (a) ***Testimony of witnesses at hearing.***
- (1) All witnesses must testify under oath and only witnesses having direct knowledge of the facts on which the charges are based will be heard. The MSPB or hearing officer will hear testimony:
    - (A) directly related to the charges;
    - (B) indirectly related to the charges, provided a relevant relationship has been established; and
    - (C) of past work record, but only for the purpose of determining degree of penalty, if any.
  - (2) Each party must have a reasonable amount of time to examine and cross-examine witnesses and to submit evidence. The MSPB or hearing officer may examine witnesses as deemed appropriate.
  - (3) A witness under oath who intentionally falsifies material facts or willfully and falsely testifies in a hearing is subject to the penalties of perjury under State law and, if a County employee, dismissal.
- (b) ***Interrogatories and depositions.*** The MSPB or hearing officer may accept a statement of a witness taken by written interrogatory or a deposition made under oath. This does not preclude a party from taking a deposition or interrogatory of a witness prior to the hearing for impeachment or discovery purposes as authorized by the Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-7(b). A party must file a true copy of an interrogatory, answer, or deposition with the MSPB or hearing officer.

**35-13. Payment of witnesses for appearance.**

- (a) A department director must reimburse a County employee who is required to appear as a witness with pay or compensatory time under applicable laws and regulations.
- (b) If the witness is not a County employee, the MSPB must determine a reasonable fee that must be paid to a witness by the party that subpoenaed the witness.

**35-14. Record of MSPB proceedings.** The MSPB must record hearings.

**35-15. MSPB may enforce settlement agreements.**

- (a) If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.

- (b) If the parties settle a case while in proceedings before the MSPB, the parties may agree to enter the settlement agreement into the record. If requested to enter the agreement into the record, the MSPB will retain jurisdiction to enforce the terms of the agreement.

### 35-16. MSPB decisions.

- (a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB*. The MSPB may order appropriate relief, which includes but is not limited to the following:
- (1) retroactive appointment, promotion or reclassification with or without back pay;
  - (2) change in position status, grade, work schedule, working conditions, and benefits;
  - (3) priority consideration for an employee found qualified before other candidates are considered;
  - (4) reinstatement with or without back pay, although the CAO may reinstate an employee either to a position previously held or to a comparable position of equal pay, status, and responsibility;
  - (5) cancellation of a personnel action found to be in violation of law or personnel regulation, but any cancellation must not, without following any process otherwise required, adversely affect the employment rights of another employee;
  - (6) participation in an employee benefit previously denied, such as training, an educational program or assistance, preferential or limited work assignments and schedules, overtime pay, or compensatory time;
  - (7) removal from administrative or personnel records of any reference or document pertaining to an unwarranted disciplinary or personnel action;
  - (8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale; and
  - (9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.
- (b) The MSPB must:
- (1) issue written decisions that set forth findings of fact and conclusions of law;

- (2) include a statement of each party's appeal rights and the time limit for filing an appeal;
- (3) send a copy of each decision to:
  - (A) the appellant or appellant's counsel of record;
  - (B) the CAO;
  - (C) the County Attorney;
  - (D) the OHR Director;
  - (E) the department director; and/or
  - (F) the Fire Chief and the local fire and rescue department in a case where the appellant is a volunteer firefighter and rescuer.
- (c) An MSPB decision is final and binding unless appealed to a court of competent jurisdiction;
- (d) A court of competent jurisdiction may enforce an MSPB decision.

**35-17. Request for rehearing or reconsideration of MSPB final decisions.**

- (a) A party may submit a written request to the MSPB for rehearing or reconsideration of a final decision within 10 calendar days after the MSPB's final decision is issued. After the 10-day period, the MSPB must not grant reconsideration except in a case of fraud, mistake, or irregularity.
- (b) A party must submit a request for rehearing or reconsideration in writing with supporting reasons and must provide a copy to any opposing party or the opposing party's representative. The opposing party may respond to the request for rehearing or reconsideration. Any response must be filed within 5 calendar days from receipt of the request.
- (c) A party's timely request for reconsideration stays the time for any further judicial appeal until the MSPB makes a decision on the request. A request for rehearing or reconsideration does not stay the operation of any order in the MSPB's final decision unless the MSPB so states. The MSPB must issue a written decision on the request. If the MSPB does not grant a reconsideration request within 10 calendar days after it receives the request, the request is deemed denied.

**35-18. Appeals to court of MSPB decisions.** A party may appeal a final MSPB decision by filing a petition for appeal to a court as provided in Section 33-15 of the County Code.

**35-19. Penalties for unauthorized interference with MSPB.** A person who intimidates, bribes, or attempts to coerce or influence an MSPB member, MSPB staff, or MSPB hearing officer, or a

witness is subject to appropriate criminal charges and, if a County employee, is subject to dismissal.

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

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

**35-21. Prohibited practices; protections for employees.**

- (a) ***Prohibited practices.*** It is unlawful for any person to:
- (1) coerce or attempt to coerce any merit system employee into taking an illegal or improper action;
  - (2) retaliate against or penalize an employee, or threaten an employee with retaliation or penalty because of that employee's:
    - (A) refusal to obey an instruction involving an illegal or improper action;
    - (B) disclosure of information to a Federal, State, or County official or employee concerning illegal or improper action in County government with a good faith belief that the information disclosed is accurate; or
    - (C) providing information to, cooperating with, or in any way assisting the Inspector General or the Office of Legislative Oversight.
- (b) ***Protection for employee.***
- (1) The MSPB must protect a merit system employee from any retaliatory or coercive action for:
    - (A) refusing to obey an instruction involving an illegal or improper action; or
    - (B) disclosing information to a Federal, State, or County official or employee concerning illegal or improper action in County government that the employee had a reasonable good-faith belief:
      - (i) was accurate; and
      - (ii) concerned an illegal or improper action.
  - (2) The MSPB must not protect the employee if it is determined that:
    - (A) the employee's actions were frivolous, unreasonable, and without foundation, even though not brought in bad faith;
    - (B) the employee, without good cause, did not comply with applicable regulations concerning the making of such disclosures; or
    - (C) the employee was the subject of an otherwise proper personnel action that would have been taken regardless of the employee's disclosure of information concerning illegal or improper action in County Government.

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**35-22. Due process protections.**

- (a) If the MSPB determines that an investigation pursuant to Section 35-20 of these Regulations is warranted, the MSPB must prepare a memorandum before the start of the investigation stating the legal authority, scope, and beginning date of the investigation.
- (b) At least 5 working days before an employee is expected to participate as a witness, custodian of records, or possible subject, the MSPB or a special personnel investigator appointed by the MSPB must give the employee a written request to participate that includes the following:
  - (1) date of the request;
  - (2) name of the employee whose participation is requested;
  - (3) whether the employee is requested to participate as a witness, custodian of records, or possible subject of the investigation;
  - (4) name of the investigative authority;
  - (5) name of the individual conducting the investigation;
  - (6) law or regulation authorizing the investigation and the request for participation;
  - (7) subject areas to be covered in the investigation;
  - (8) if the employee is a possible subject, a clear and detailed statement of all allegations of misconduct;
  - (9) notice that the employee has the right to be assisted by legal counsel; and
  - (10) signature of the chairperson of the MSPB certifying that the MSPB has officially initiated an investigation and requested the employee's participation.
- (c) Within 30 days after the employee's participation, the MSPB or a special personnel investigator appointed by the MSPB must provide the employee with a copy of:

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

**Editor's note** – The subjects covered in this section of the Personnel Regulations are addressed for bargaining unit employees in the current collective bargaining agreements as indicated below:

<b>Bargaining unit</b>	<b>Articles of current agreements with references to MSPB</b>
Firefighter/Rescuer	38, Contract Grievance Procedure
OPT/SLT	10, Grievances 46, Records
Police	34, Grievance Representation 51, Personnel Files 52, Termination