

Merit System Protection Board Annual Report FY2020

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Angela Franco, *Vice Chair*
Sonya E. Chiles, *Associate Member*

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FY 2020
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 with a set annual salary 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 2020 were:

Harriet E. Davidson	Chair
Angela Franco	Vice Chair
Sonya E. Chiles	Associate Member
Michael J. Kator	Chair & Associate Member (until December 2019)

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 sends a notice to the parties, requiring 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. Upon completion of the Prehearing Conference, a formal hearing date is set by the Board in consultation with the parties. 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 2020 the Board issued the following decisions on appeals concerning disciplinary actions.

DISMISSAL

CASE NO. 19-16

DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of Appellant. On January 15, 2019, Appellant filed this appeal challenging his dismissal from a Firefighter/Rescuer II position with the Department of Fire and Rescue Services (DFRS, MCFRS, or Department).¹ County Exhibit (CX) 1.

BACKGROUND

The discipline in this matter relates to a March 25, 2018, incident involving Appellant's alleged assault on his domestic partner at their home in Northern Virginia, as well as allegations that Appellant subsequently violated a protective order and failed to fully cooperate with a DFRS investigation by providing false and misleading statements to investigators. CX 1. On December 31, 2018, DFRS issued a Notice of Disciplinary Action (NODA) dismissing Appellant, effective January 7, 2019. CX 1.

The NODA found that Appellant violated various provisions of the Montgomery County Personnel Regulations (MCPR) and the DFRS Code of Conduct arising out of Appellant's assault on his domestic partner, violation of a protective order, and failure to cooperate with the DFRS investigation by providing false and misleading statements to the investigators. Specifically, the NODA found that Appellant had exhibited conduct unbecoming when he assaulted his significant other and thus violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.0 and § 5.14 (conduct unbecoming). CX 1, CX 18, CX 19. The NODA also found that Appellant had violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.14 (conduct unbecoming) by calling his significant other from jail on two occasions in violation of an emergency protective court order. CX 1, CX 18, CX 19. Finally, the NODA found that by failing to provide honest and accurate information during an internal affairs investigation Appellant had violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(g) (knowingly making a false statement), MCPR § 33-5(aa) (failure to cooperate with an investigation), DFRS Regulation 22.00, Code of Ethics, § 4(c)(13) (false or misleading statement during an investigation), DFRS Policy 529, Internal Affairs, § 4.10 (truthfully answer questions). CX 1, CX 20, CX 21.²

¹ The appeal was filed online Friday, January 11, 2019, a day that the MSPB offices are not open, and County offices were closed on Monday, January 14, 2019, due to inclement weather. Accordingly, the appeal was considered to have been officially received by the Board on January 15. *See* MSPB Case Nos. 17-14 and 17-16 (2017).

² County Exhibits 1 through 26 and Appellant Exhibits (AX) 1 through 27 were admitted into the record. The County Exhibits are as follows:

- CX 1 - Notice of Disciplinary Action
- CX 2 - Protective Order
- CX 3 - 911 Audio
- CX 4 - Jail Call Number 1 Audio
- CX 5 - Jail Call Number 2 Audio

A hearing on the merits was conducted on September 10 and 11, 2019. Subsequent to the hearing the parties submitted post-hearing briefs, including proposed findings of fact and conclusions of law. *See* Closing Brief of Montgomery County, October 21, 2019 (County’s Brief); Appellant’s Proposed Findings of Fact and Conclusions of Law, October 21, 2019; (Appellant’s Brief).

After hearing the testimony and reviewing the exhibits and briefs of the parties, the appeal was considered and decided by the Board.

FINDINGS OF FACT

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

1. AH, Investigator/Background Screening Specialist, DFRS (AH)
2. ES, Assistant Fire Chief, DFRS (ES)
3. Captain RH, DFRS (RH)
4. SG, Fire Chief, DFRS (SG)
5. AL (AL)
6. KJ (KJ or Appellant)

At the time of his dismissal, Appellant was employed as a Firefighter/Rescuer II with DFRS and had been a firefighter for less than six years. September 11, 2019, Hearing Transcript (Tr. (Day 2)) 196. Appellant had no prior disciplinary record. Tr. (Day 2) 198; Stipulations, ¶4, August 10, 2019.

The disciplinary action against Appellant arose out of an incident that occurred on March 25, 2018, at his home in Fairfax County, Virginia. Appellant and his significant other, AL, engaged in an altercation and AL called 911 at approximately 2:09 p.m. AL told the 911 operator three

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- CX 6 - KL Internal Affairs Interview Audio
 - CX 7 - AL Internal Affairs Interview Audio
 - CX 8 - KK Internal Affairs Interview Audio
 - CX 9 - 911 Transcript
 - CX 10 - Jail Call Number Transcript
 - CX 11 - Jail Call Number Transcript
 - CX 12 - KJ Internal Affairs Interview Transcript
 - CX 13 - AL Internal Affairs Interview Transcript
 - CX 14 - KK Internal Affairs Interview Transcript
 - CX 15 - Fairfax County Police Photographs of AL
 - CX 16 - Internal Affairs Acknowledgement form Signed by KL
 - CX 17 - Internal Affairs Investigative Report
 - CX 18 - MCFRS § 33-5
 - CX 19 - MCFRS Code of Conduct
 - CX 20 - MCFRS Executive Regulation 22-00
 - CX 21 - MCFRS Policies and Procedures No. 529, Internal Affairs
 - CX 22 - Fairfax County Police Report
 - CX 23 - Arrest Report
 - CX 24 - Fairfax County Police DV Screen and LAP Checklist
 - CX 25 - 2006 MOU Re: Levels of Discipline
 - CX 26 - Collective Bargaining Agreement, Article 30 – Discipline

separate times that she had been choked or strangled by Appellant while at their home. Specifically, AL first told the 911 operator, “He hurt me. He strangled me.” CX 9 at 2:20. AL also said, “He just f***ing strangled me.” *Id.* at 4:16. Finally, AL told the operator, “He just - I was standing outside on the balcony. He just came out and just started grabbing and choking me.” *Id.* at 7:1-3. In the audio of the 911 call AL’s voice is unmistakably angry and emotional. CX 3.

The Fairfax County Police promptly responded to Appellant’s residence, interviewed AL, and prepared a report. The report indicates that AL told the responding officers the following:

VI [AL] stated her and the offender [Appellant] were arguing over a facebook picture. During the argument she opened the glass door and went outside on to the patio. At this time the offender then closed the sliding glass door and locked VI outside. VI then started knocking on the glass door to come back inside. The offender opened the door and in a violent manner grabbed VI’s right arm and throat and continuously pushed her backwards until she fell onto the patio furniture.

CX 22, p. 3.

AL also answered questions from the officers when they administered the FCPD Domestic Violence Lethality Screen for First Responders. CX 24. AL affirmed that Appellant had tried to choke her and initialed the form.

The police officers, AL and AL’s roommate took photographs of AL. The pictures of AL in CX 15 “were taken, on-scene, by members of the Fairfax County Police and/or by [AL] and/or by [KK] on March 25, 2018.” Stipulations, ¶1. Several of the photographs taken by AL or KK immediately after the incident clearly show red marks on AL’s neck and right arm. CX 15. The red marks are consistent with AL’s statements to the police, immediately after the incident, that she had been assaulted by Appellant and that he had grabbed her arm and choked her.

Although Appellant was still in the residence when AL called 911, he did not remain there for the entire call. He took his daughter to a birthday party before the police arrived.

Later that day, after Appellant was advised that the police wanted to speak with him, he turned himself in to the police and was arrested. Appellant was charged with felony strangulation under Va. Code Ann. § 18.2-51.6. AL was contacted by someone with the Fairfax County prosecutor’s office and asked if she intended to press charges against Appellant. AL replied “no.” Tr. (Day 2) 138-40. Prosecutors in Fairfax County ultimately entered a *nolle prosequi* on that charge. Stipulations, ¶2.

A protective order pursuant to Va. Code Ann. § 16.1-253.4 was issued at 4:17 pm on March 25, 2018, and Appellant was served with it shortly after his arrest. CX 2. The court specifically ordered that Appellant “shall have no contact of any kind with [AL].”

Appellant was held in jail the night of March 25, 2018. Notwithstanding the protective order, Appellant called AL from jail twice that evening. Both calls were recorded. CX 4, 5, 10, and 11.

The first call was made by Appellant just after 8:00 pm. CX 4, CX 10, p. 2. Appellant told AL that he had not been released on bond because the charge against him was “like up there with like murder and all that so there's no bond.” CX 10, p. 4. AL, who had expressed surprise that Appellant had not been released, responded by saying “Oh, my god.” *Id.*

Later in the call, after Appellant expresses his love for her, AL voiced remorse for calling the police:

[Appellant]: I love you so much.

[AL]: Love you too. I'm so sorry.

[Appellant]: It's not your fault, babe.

[AL]: It is. I shouldn't have called. I didn't think. I didn't think they were going to do that. I didn't say you strangled me or anything. . .

CX 10, p. 9.

Appellant then tells AL that he has researched the charge against him and explains what the State will need to prove to obtain a conviction:

[Appellant]: Just in court you got to say, you know, the truth because

[AL]: What?

[Appellant]: I looked it up and they're only supposed to charge you if you're like applying pressure and not allowing air to the victim or whatever, but (inaudible) .

[AL]: I mean I told her it happened for 2.5 seconds.

[Appellant]: Yeah.

[AL]: So I mean if worse comes to worse when I testify I'll just say it just happened and like -- I mean, the pictures, they just show red.

[Appellant]: Yeah.

[AL]: Like you know what I mean? Like I don't know. Maybe I can say I'm just --

[Appellant]: We'll talk about it.

[AL]: -- (inaudible). It only happened for two seconds. Like it wasn't -- I mean, it's not right for them to charge you for that. . .

After strategizing about Appellant's defense and AL's potential testimony, the first call ends with Appellant telling AL, "I'll call you in a little bit, okay?" and AL saying "Okay. Call me." CX 10, p. 10.

Appellant makes the second call at 10:05 pm that same evening. CX 11, p. 2. This time the call was made to KK, the housemate of AL and Appellant. The first thing KK says to Appellant is, "She's on the phone with her lawyer." *Id.* This suggests that, as promised at the conclusion of the first call, Appellant is trying to reach AL. Indeed, Appellant interrupts KK to say, "Well, I told her I'd call her back." CX 11, p. 3.

When AL is finished speaking with the lawyer she gets on the phone with Appellant. AL then tells Appellant that the lawyer was knowledgeable, explained what proof the State would need, and suggested that it would be difficult for the State to convict Appellant. CX 11, p. 8. AL then advised Appellant that the lawyer suggested how she should testify if she wanted Appellant to avoid a conviction: "He was saying that like I could say that like I didn't remember or (inaudible) or I'm on a lot of medication." CX 11, p. 10. She then indicated that the lawyer reassured her that

if she just said she does not remember that would be enough to end the matter. *Id.*, pp. 10-11. Towards the end of the conversation, Appellant told AL that they needed to discuss their relationship.

After DFRS learned of Appellant's arrest an investigation was initiated. DFRS Internal Affairs Investigator AH interviewed AL on April 9, 2018. AL told Investigator AH that Appellant only gave her a "bear hug" to calm her down. CX 13, p. 6. AL also said she was "loopy" from a lot of medication at the time of the incident. *Id.*, pp. 5-6.

AL told Investigator AH that the police were "pushing" her to say certain things, but that "I never said he strangled me. I never said that he touched my throat or tried. I never said that." CX 13, p. 7. During the interview she repeatedly denied that Appellant had strangled her. CX 13, pp. 11, 21. With regard to the marks on her arm and neck that AL had documented and shared with the police, she told Investigator AH that they were "just red marks that I could simply get from just running outside, I would think." CX 13, p.12.

Investigator AH testified that after the interview he obtained and listened to the audios of AL's 911 call and the two calls Appellant made to her from the jail. AH heard that contrary to what she had told him, AL did say that Appellant had strangled her. Tr. (Day 1) 64.

Appellant was interviewed by Investigator AH on June 11, 2018 and signed an Investigation Acknowledgement Form that was also an order signed by the Fire Chief on June 7. CX 16. The order required Appellant "to answer all questions truthfully" and warned that failure to do so "could lead to disciplinary action up to and including dismissal."

During the interview, however, Appellant denied having contact with AL while he was in jail. CX 12, p. 30. After Investigator AH confronted Appellant with the audio of the first call Appellant admitted making the call. When Investigator AH asked if Appellant had any other contact with AL while subject to the protective order Appellant indicated that he did not recall any, and when asked about the second call denied any recollection. CX 12, p. 50.

Notwithstanding Appellant's acknowledgement of the Fire Chief's order "to answer all questions truthfully," Appellant admitted during his hearing testimony that he was not truthful with the Internal Affairs investigator when asked if he had contacted AL while the protective order was in effect. Tr. (Day 2) 219. Appellant explained that he lied to the Internal Affairs investigators because he was concerned that he would lose his job if he told the truth:

I was terrified I was going to lose my job, and I thought that if I told them that I'd never talked to [AL] during the protective order that it would let me keep my job. And I truly regret doing that. . . I wish I could go back and change that, but I made a mistake, and I regret it.

Tr. (Day 2) 219.

In Appellant's November 14, 2018, response to the Statement of Charges Appellant admitted that "As to the charge that I violated an emergency protective order on the night that it was served on me, it is true that I initiated two calls that evening and spoke to [AL] each time." AX 1.³ Appellant also acknowledged during his hearing testimony that he violated the protective order by speaking to AL from jail on March 25, 2018. Tr. (Day 2) 235, 237-38.

³ Appellant's Exhibits are as follows:

Appellant downplayed his role in the altercation with AL, telling Investigator AH that all he did was to give AL a bear hug. CX 12, p. 35. Appellant also testified at the hearing that all he did was give AL a bear hug. Tr. (Day 2) 228. He denied grabbing AL by the neck and pushing her into the furniture on the porch. Tr. (Day 2) 228-29. Appellant conceded that AL’s arm and neck area are the only places in the photographs with redness. Tr. (Day 2) 229.

During her testimony at the hearing AL admitted that her alleged lack of memory was part of a strategy she discussed with the lawyer she obtained to defend Appellant. Tr. (Day 2) 185. She also testified that during the incident she was angry and out of control, and that when she lunged at Appellant he was calm and tried to get her under control with a bear hug. Tr. (Day 2) 128. AL admitted that she told the police that Appellant had caused the marks on her neck. Tr. (Day 2) 167. AL suggested that the red marks in the photographs were actually due to “Asian flush,” a result of drinking alcohol. Tr. (Day 2) 192. AL’s Asian flush theory was not raised to the police, during the telephone call from jail where AL and Appellant discussed how to explain the red marks (CX 10, p. 10), or at the investigatory interview with AH.

Investigator AH testified that Appellant demonstrated the bear hug as being face to face. Tr. (Day 1) 80. Investigator AH further testified that the redness on AL’s arm and neck were inconsistent with the bear hug maneuver as demonstrated by Appellant during the interview. Tr. (Day 1) 81.

AX 1 - November 14, 2018 Response from Appellant to Chief SG
AX 2 - November 13, 2018 Letter from Captain RH to Chief SG
AX 3 - DFRS Domestic Violence Spreadsheet
AX 4 - Disciplinary Action Documents, Firefighter A
AX 5 - Disciplinary Action Documents, Firefighter B
AX 6 - Disciplinary Action Documents, Firefighter C
AX 7 - Disciplinary Action Documents, Firefighter D
AX 8 - Disciplinary Action Documents, Firefighter E
AX 9 - Disciplinary Action Documents, Firefighter F
AX 10 - Disciplinary Action Documents, Firefighter G
AX 11 - Disciplinary Action Documents, Firefighter H
AX 12 - Disciplinary Action Documents, Firefighter I
AX 13 - Disciplinary Action Documents, Firefighter J
AX 14 - Disciplinary Action Documents, Firefighter K
AX 15 - Disciplinary Action Documents, Firefighter L
AX 16 - Disciplinary Action Documents, Firefighter M
AX 17 - Disciplinary Action Documents, Firefighter N
AX 18 - Disciplinary Action Documents, Firefighter O
AX 19 - Disciplinary Action Documents, Firefighter P
AX 20 - Disciplinary Action Documents, Firefighter Q
AX 21 - Disciplinary Action Documents, Firefighter R
AX 22 - Disciplinary Action Documents, Firefighter S
AX 23 - Disciplinary Action Documents, Firefighter T
AX 24 - Disciplinary Action Documents, Firefighter U
AX 25 - Disciplinary Action Documents, Firefighter V
AX 26 - Disciplinary Action Documents, Firefighter W
AX 27 - Appellant’s 2017 Individual Performance Planning and Assessment Form
AX 28 - Disciplinary Action Documents, Firefighter X

APPLICABLE LAW

Montgomery County Personnel Regulations, 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-2. Policy on disciplinary actions.

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

(c) *Progressive discipline.*

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

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

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

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

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

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

(2) the employee's work record;

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

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

(5) any other relevant factors.

§ 33-3. Types of disciplinary actions.

(h) *Dismissal.* Dismissal is the removal of an employee from County employment for cause.

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

(c) violates any established policy or procedure;

(d) violates any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, or is convicted of a criminal offense, if such violation is related to, or has a nexus with, County employment; . . .

(g) knowingly makes a false statement or report in the course of employment; . . .

(aa) fails to cooperate or provide information when the employee is the subject of an investigation, unless the employee invokes the Fifth Amendment right against self-incrimination or refuses to give information that the employee is ethically or legally prohibited from revealing, such as attorney-client privileged material or mental health records; . . .

Montgomery County Department of Fire and Rescue Services, Policies and Procedures, Code of Conduct, Code of Personal Conduct, No. 502, May 6, 1996, which states in applicable part:

5.0 Employees will, at all times, conduct themselves in such a manner as to reflect favorably on the DFRS and Fire-Rescue-EMS Service in general. . .

5.14 No employee will commit any act which constitutes conduct unbecoming a merit system employee. “Unbecoming” conduct includes, but is not limited to, any criminal, dishonest or improper conduct.

Montgomery County Department of Fire and Rescue Services, Policies and Procedures, Internal Affairs, No. 529, September 9, 1997, which provides, in pertinent part:

4.10 Employees are required to truthfully and promptly answer questions concerning performance of duty, adherence to Department procedures, or suspected misconduct.

Montgomery County Department of Fire and Rescue Services, Executive Regulation, Code of Ethics and On-Duty Personal Conduct, No. 22-00 AM, July 9, 2002, which provides, in applicable part:

Sec. 4. Policy. It is the policy of the Fire and Rescue Commission to ensure that all **on-duty personnel** maintain an exemplary standard of personal integrity and ethical conduct in their relationships with each other and with the public at all times. **On-duty personnel** must conduct themselves in a professional manner that is beyond reproach. . .

c. Personal Conduct. **On-duty personnel** must behave in a professional manner that reflects favorably on the **Montgomery County Fire and Rescue Service** at all times. They must not commit any act that constitutes **conduct unbecoming** a member of the fire and rescue service. . .

13. **MCFRS personnel** must not make any false or misleading statements during the course of an investigation, or in order to initiate an investigation.

Issue

The following issue will be heard and decided by the Board:

Was Appellant’s dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

Burden of Proof

In a disciplinary matter, the County bears the burden of proving its case by a preponderance of the evidence. Montgomery County Code, Administrative Procedures Act (APA), § 2A-10. The Board has explained that preponderance of the evidence exists when evidence presented has more convincing force than the opposing evidence, and thus results in a belief that such evidence is more likely true than not. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013). *See, Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); *Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc.*, 310 Md. 365, 370 (1987); *Muti v. University of Maryland Medical System*, 197 Md. App. 561, 583 n.13 (2011), *vacated on other grounds* 426 Md. 358 (2012) (“the preponderance of evidence standard generally translates to a greater-than-fifty-percent probability”).

The Testimony of Appellant and AL Lacked Credibility

Appellant testified that the domestic altercation with AL, his significant other, consisted of him applying a defensive “bear hug” to AL. This is inconsistent with the telephone call recordings and transcripts, the testimony of Investigator AH, and AL’s contemporaneous statements to the police. Accordingly, the Board is obligated to consider and resolve the issue of credibility for Appellant. As the Board has previously explained, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013).

Investigator AH credibly testified that Appellant’s reenactment of the face-to-face bear hug he claimed to have used on AL demonstrated that from the placement of his hands it could not have resulted in the red marks on AL’s neck as reflected in the photographs. Given AL’s statements to the police and the 911 operator and the photographic evidence, we find Appellant’s defensive bear hug explanation to be self-serving and implausible. As Appellant conceded that he knowingly lied to DFRS Internal Affairs Investigator AH about contacting AL in violation of the protective order, we conclude that Appellant’s hearing testimony is not worthy of credence.

The hearing testimony of AL was significantly different from the statements she made to the 911 operator and police in the immediate aftermath of the domestic altercation. Further, her behavior in taking photographs of herself immediately after the assault is at odds with the bear hug account. Accordingly, the Board is also obligated to consider and resolve the issue of credibility for AL.

AL’s hearing testimony contradicted her previous statements to the police and was inconsistent with the recordings and transcripts of her telephone calls with the 911 operator and Appellant. AL’s new version of what occurred on March 25, 2018, differed markedly from her report to the 911 dispatcher and the police officers that responded to her call. She repeatedly told the 911 operator that Appellant tried to strangle or choke her. She told the police officers the same thing. She even took the initiative to photograph the marks Appellant left on her to preserve the evidence of his assault.

Only after Appellant telephoned her from jail, in violation of the protective order, did she change her story. In the audio and transcripts of the calls from jail AL expresses regret that reporting the assault had resulted in a serious felony charge against Appellant. She discusses the need to explain away the red marks on her neck and her statements to the police that she had been strangled by Appellant. After speaking to the criminal defense attorney AL tells Appellant that she

was advised to say she was using drugs and had a limited recall of the incident.⁴ At some point after the calls she and Appellant apparently came up with the “bear hug” explanation for the obvious red marks on her neck and arm following the altercation. At the hearing AL presented yet another explanation, that of the “Asian flush.”

We conclude that it is far more likely that AL was a domestic violence victim and told the truth to the police and the 911 operator when she said that Appellant choked or strangled her. Those statements were made in the immediate aftermath of the assault and we consider them more reliable than AL’s testimony at the hearing.⁵ AL’s testimony during the hearing that she fabricated her accusations that Appellant strangled her on March 25, 2018, are not credible.⁶

Conduct Unbecoming – Assault on a Domestic Partner

The County charged Appellant with conduct unbecoming for assaulting AL, violating the protective order, and for being untruthful when questioned by the Internal Affairs investigator. Under the DFRS Code of Conduct, § 5.0 and § 5.14, Appellant was required to conduct himself “in a manner as to reflect favorably on the DFRS” and not to “commit any act which constitutes conduct unbecoming a merit system employee.” Section 5.14 specifically provides that conduct unbecoming “includes, but is not limited to, any criminal, dishonest or improper conduct.”

Appellant knowingly contacted AL after having been served with a protective order prohibiting that conduct. Appellant admits to having been dishonest to investigators when he denied violating the protective order by having contact with AL. By these actions he violated Virginia law, an order of the Fire Chief, and DFRS policy.

Furthermore, the County proved by preponderant evidence that Appellant did assault and strangle AL on March 25, 2018. The audio and transcript of the 911 call, the statements to the police, the photographs of AL’s neck and arm, and the audio and transcript of the jailhouse calls from Appellant to AL provide ample support for a finding that Appellant violently assaulted his domestic partner.⁷

When, as here, the County seeks to discipline an employee on charges that involve off-duty misconduct, the County bears the burden of proving that there is a nexus between the alleged misconduct and the employee’s position with the County. Thus, for example, the Board has sustained disciplinary action against a firefighter who assaulted a prostitute, MSPB Case No. 16-08 (2016); a correctional officer involved with illegal narcotics, MSPB Case No. 14-17 (2014); as well as a security officer engaged in domestic violence. MSPB Case No. 14-19 (2014).

⁴A witness feigning a lack of memory is not uncommon. *Nance v. State*, 331 Md. 549, 572 (1993) (“The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized. 2 *McCormick on Evidence, supra*, § 251, at 121.”).

⁵Hearsay is admissible in an administrative hearing. APA § 2A-8(e); *Eger v. Stone*, 253 Md. 533, 542 (1969).

⁶We note that for various reasons it is not unusual for victims of domestic violence to recant statements made to the police and try to reconcile with their abusers. Abusers may utilize emotional and other forms of manipulation of their victims to accomplish that goal. See MSPB Case No. 14-19 (2014) (Victim’s testimony recanting allegations she made to police was disregarded as not credible); *Cody v. Commonwealth*, 68 Va. App. 638, 812 S.E.2d 466 (2018). Cf., *State v. Smullen*, 380 Md. 233, 253-54 (2004).

⁷While Appellant’s arrest for assaulting AL does not alone supply the nexus or evidence of misconduct to support removal, the charge is not based on his having been arrested. Rather, the specification alleging that he physically assaulted his significant other was based on the underlying facts that led to the Appellant’s arrest, and not merely that he was arrested.

We find that the County has met its burden. Strangulation of one's significant other is violent and potentially life-threatening. Such a serious assault may provide sufficient nexus and warrant removal, especially where Appellant's job involves responding to the homes of County citizens. *Hayes v. Department of Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984) (for purposes of nexus agency properly concerned about off duty domestic abuser's access to residential housing in connection with work as a mechanical planner-estimator).

Further, a loss of trust and confidence in job performance is sufficient to establish nexus. *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509 (2010) (nexus requirement met with proof that misconduct adversely affected the agency's trust and confidence in appellant's job performance); *Raco v. Social Security Administration*, 117 M.S.P.R. 1 (2011); *Adams v. Department of Labor*, 112 M.S.P.R. 288 (2009).

In MSPB Case No. 16-08, upholding the dismissal of a Master Firefighter for off duty conduct, we held that:

Nexus may be demonstrated simply by showing that an employee engaged in off-duty misconduct that is inconsistent with the agency's mission and undermines confidence in the employee.

As was the case with the appellant firefighter in Case No. 16-08, Appellant's position as a firefighter with DFRS is dedicated to the protection and preservation of life, health, and safety. Appellant's violent domestic assault was inconsistent with the mission of DFRS and a job in which Appellant would be entrusted with the health and safety of the citizens of Montgomery County. *Cf.*, MSPB Case No. 14-19 (2014) (Domestic violence is incompatible with the responsibilities of a security officer to protect the safety of County employees). *See Social Security Administration v. Long*, 2010 M.S.P.B. 19, 113 M.S.P.R. 190 (2010), *aff'd*, 635 F.3d 526 (Fed. Cir. 2011) (ALJ dismissed for domestic violence; victim recanted, criminal charges dropped); *Kinslow v. Department of the Treasury*, 315 F. App'x 286, 289 (Fed. Cir. 2009) (removal of an IRS agent who assaulted his wife);); *Carlton v. Department of Justice*, 95 M.S.P.R. 633 (Deputy U.S. Marshal dismissed for choking, throwing vase, and pointing gun at wife; "misconduct was serious and raises serious concerns about his lack of judgment and impulse control and his ability to perform the duties of his position."), *review dismissed*, 115 F. App'x 430 (Fed. Cir. 2004). *Banks v. Dep't of Veterans Affairs*, 25 F. App'x 897, 900 (Fed. Cir. 2001) (VA hospital food service worker's domestic violence assault provides nexus).

We therefore find that Appellant's egregious behavior violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.0 and § 5.14 (conduct unbecoming). CX 1, CX 18, CX 19.

Knowing Violation of the Protective Order

The second charge against Appellant was that by calling his significant other from jail he knowingly violated an emergency protective court order.

The emergency protective order issued against Appellant specifically required that Appellant have no contact of any kind with AL. Appellant's telephone calls from jail to the victim (AL) the same day as the assault were clear violations of the no contact provision of the protective order under Virginia law. *Cody v. Commonwealth*, 68 Va. App. 638, 812 S.E.2d 466 (2018). *See Elliott v. Commonwealth*, 277 Va. 457, 675 S.E.2d 178 (2009) (telephone call constitutes "contact")

for purposes of a protective order). Appellant's telephone calls constituted two separate violations of the protective order.

Appellant's contact violations of the protective order were conscious and intentional. Moreover, the violations involved some risk to Appellant given that violation of the provisions of a protective order is a crime under Virginia law. Va. Code Ann., § 16.1-253.2. Appellant was apparently willing to take the risk in order to engage in emotionally manipulative behavior designed to generate AL's sympathy and convince her not to testify against him in criminal court. Appellant seems to have achieved his objective, and the criminal charges were dismissed. In an effort to save his job, it is likely that Appellant used a similar approach to cause AL to change her initial story and describe Appellant's actions as a defensive bear hug rather than an assault involving strangulation or choking.

In our view, violation of the protective order provides a nexus to Appellant's job. The intentional violation of a court order designed to protect a domestic violence victim from undue threat or pressure on at least two occasions demonstrates that Appellant is untrustworthy and willing to violate the law in order to achieve what is in his best interest. This does not equate with running a red light or making a late payment of one's taxes. If Appellant takes an order of a court so lightly then how can his superiors trust him to carry out supervisory directions in emergency situations that affect public safety. Likewise, if Appellant finds it so easy to put his own interests above compliance with a lawful court order, he can exhibit this behavior in a situation in which his supervisors and co-workers must count on him to follow direction and department protocol.

Moreover, Appellant's efforts to hide the violation from investigators demonstrates that he was well aware of the serious nature of his transgression and willing to engage in a cover up. Only when confronted with irrefutable proof did he admit what he had done and express regret.

Fire Chief SG and Assistant Chief ES testified that in a public safety organization where employees must follow orders and instructions DFRS leadership cannot tolerate serious doubts concerning the integrity and character of their emergency first responders. An ability to follow orders is of paramount importance to the mission of the department. Appellant's violation of a court order raised serious concerns for the Fire Chief about Appellant's ability to follow orders. Tr. (Day 1) 147-49; 269. It is legitimate for DFRS to demand that firefighters obey all lawful orders, not just those with which they agree or which serve their interests at the time.

Appellant's failure to comply with the protective order seriously undermined the Chief's confidence that Appellant would, without hesitation, follow lawful orders from his superiors even when he might have personal doubts or disagree with those orders or when faced with an emergency situation. There is nothing in the record to call into question the Chief's sincerely held beliefs about the need for all of his subordinates to follow orders and his lack of confidence in Appellant's ability to do so.

It is also significant that Appellant's own behavior suggests an acknowledgement that there is a nexus between his violation of the protective order and his job. Appellant explained that he was untruthful to investigators *because* he was aware that his improper and illegal contact with the victim jeopardized his employment. *Cf., Pekrul v. DOJ*, 2006 MSPB LEXIS 4224 (M.S.P.B. August 1, 2006) ("appellant has not rebutted the presumption of nexus between his misconduct and his position. . . his remarks in the background of the 911 dispatcher's call . . . show he is aware his actions jeopardized his employment.").

We therefore find that the County has demonstrated nexus and proven by a preponderance of the evidence that Appellant violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(d) (violates law), and DFRS Code of Conduct § 5.14 (conduct unbecoming), by calling AL from jail in violation of an emergency protective court order. CX 1, CX 18, CX 19.

False or Misleading Statements to Investigators

The third charge against Appellant is that he failed to provide honest and accurate information during the Internal Affairs investigation. At the beginning of the interview with Investigator AH Appellant signed an Investigation Acknowledgement Form that was also an order signed by the Fire Chief on June 7. CX 16. The order required Appellant “to answer all questions truthfully” and warned that failure to do so “could lead to disciplinary action up to and including dismissal.”

Nevertheless, Appellant admitted he was not truthful with the Internal Affairs investigator when asked if he had contacted AL while the protective order was in effect. Appellant testified that he “was terrified” that he would lose his job if he told the truth. Tr. (Day 2) 219. Appellant also acknowledged during his hearing testimony that he violated the protective order by speaking to AL from jail on March 25, 2018. Tr. (Day 2) 235, 237-38.

Accordingly, there can be no dispute that the County has shown that Appellant was untruthful to investigators. Indeed, Appellant admits that he was knowingly deceitful in an effort to avoid dismissal. Although Appellant admitted in his November 14, 2018, response to the Statement of Charges that “it is true that I initiated two calls that evening and spoke to [AL] each time,” AX 1, Appellant attempts to justify part of his deception by arguing that the second call from jail to AL was not a call to her but instead to their housemate KK. Tr. (Day 2) 213-14, 238-39; Appellant’s Brief, p. 11.

We have reviewed the audio and transcripts of both telephone calls from the jail and find Appellant’s denial that he intended to call AL the second time not worthy of belief. Appellant ended the first call by telling AL he would call her again. Appellant then called KK’s phone to reach AL, consistent with his promise of two hours earlier. Indeed, he told KK that he had promised to call AL and, at the conclusion of the second call, Appellant indicated that he would likely attempt to make a third call, if possible. Clearly Appellant had no qualms about repeatedly calling AL in violation of the protective order.

Appellant’s denials concerning the second call are disingenuous and a further indication of Appellant’s character failings when it comes to matters of integrity. We find that the County has proven by a preponderance of the evidence that Appellant twice violated MCPR § 33-5(c) (violates any established policy or procedure), MCPR § 33-5(g) (knowingly making a false statement), MCPR § 33-5(aa) (failure to cooperate with an investigation), DFRS Regulation 22.00, Code of Ethics, § 4(c)(13) (false or misleading statement during an investigation), DFRS Policy 529, Internal Affairs, § 4.10 (truthfully answer questions). CX 1, CX 20, CX 21.

Level of Discipline

Appellant has admitted providing false information to Internal Affairs investigators and to violating the protective order. As a consequence, Appellant acknowledges that he deserves significant discipline. Appellant’s Brief, p. 26. His argument is that the level of discipline is too severe and that he should instead receive a 5% reduction in pay for 10 pay periods. *Id.*

Fire Chief SG testified that since January 2018, DFRS has made a conscious decision to be stricter and more consistent with respect to off-duty domestic violence conduct. Tr. (Day 1) 257-61. We have previously found that the County may legitimately contend that penalties in previous cases may have been too lenient, and it need not continue to make the same mistakes in subsequent cases. MSPB Case No. 18-06 (2019); MSPB Case No. 18-07 (2019), *citing Davis v. U.S. Postal Service*, 120 MSPR at 457, 465 (2013); *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, 651 (2012). Moreover, to the extent some of the discipline in the comparison cases was the result of settlement, DFRS need not explain the difference in treatment. MSPB Case No. 18-07 (2019), *citing Davis v. U.S. Postal Service*, 120 MSPR at 463-64; *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325, *aff'd*, 975 F.2d 869 (Fed. Cir.1992).

This is not to say that the discipline in prior cases was always more lenient than now. As discussed above, in MSPB Case No. 16-08 this Board upheld the dismissal of a firefighter for off-duty behavior that could be characterized as domestic abuse.

Appellant's attorney cross-examined Fire Chief SG concerning previous cases that had similarities to this one but did not result in dismissal. While the Fire Chief testified that he would now impose a higher level of discipline, including dismissal, *e.g.*, Tr. (Day 2) 45, none of those cases were identical to this one and thus not appropriate as comparators. Tr. (Day 2) 102-03. The Fire Chief testified that the three charges against Appellant (domestic violence, violation of a protective order, and failure to be truthful to an investigator) would have justified his dismissal even before the DFRS effort to be more consistent and stricter with domestic violence matters. Tr. (Day 2) 103-05.

The Fire Chief also testified that since January 2018 five firefighters, including Appellant, have been disciplined for off-duty conduct that included domestic violence and three were given NODAs for dismissal. Tr. (Day 2) 18. One of the two not dismissed received a 5% percent pay reduction for six pay periods for an incident where he poked his former mother-in-law in the forehead with his finger at a child's soccer game. Tr. (Day 2) 80, 111. The other involved an employee whose penalty was reduced after meeting with the Fire Chief because the employee was not aware that there was a prohibition on secondary employment while on administrative leave. Tr. (Day 2) 64-66.

Appellant has not shown that he and the comparison employees engaged in similar misconduct without differentiating or mitigating circumstances. MSPB Case No. 10-04 (2010). Thus, we believe that the Fire Chief provided an adequate explanation for his determination that Appellant's serious misbehavior and lack of trustworthiness justified the highest level of discipline.

Montgomery County Code, § 33-14(c), grants the Board substantial latitude to decide the appropriate level of penalty. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986). The Board will normally uphold an agency determined penalty unless we find some aspect of the personnel action to have been improper. In this case, the facts support a finding that Appellant committed the acts for which he was charged, and the law supports a conclusion that he violated the provisions of law under which he was charged. By his own admission Appellant's behavior merits significant discipline. Moreover, Appellant has continued to demonstrate his untrustworthiness by testifying in a manner that was simply not credible. His continued failure to

be completely honest indicates that he is unable to be fully rehabilitated. We see no improper agency action in the Fire Chief's decision to dismiss Appellant, and we do not find sufficient mitigating circumstances to justify reducing the penalty.

Accordingly, we conclude that the discipline of dismissal was appropriate and consistent with law.

ORDER

For the foregoing reasons, the Board **DENIES** Appellant's appeal of his dismissal.

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
December 30, 2019

Appellant's petition for judicial review of this decision was denied and dismissed by the Circuit Court for Montgomery County on July 6, 2020 (Civil Action No. 477712-V).

CASE NO. 19-16

SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART OF CHAIRMAN MICHAEL KATOR

The Department of Fire and Rescue Services (DFRS, MCFRS, or Department) removed Appellant from his Firefighter/Rescuer II position on the basis of Appellant's alleged assault on his domestic partner at their home in Northern Virginia, as well as allegations that Appellant subsequently violated a protective order and failed to fully cooperate with a DFRS investigation by providing false and misleading statements to investigators. I join my colleagues in their disposition of the allegations concerning Appellant's failure to fully cooperate with DFRS investigators and I have no quarrel with their resolution of the various factual disputes presented in this case.

My disagreement principally centers around their disposition of the allegations surrounding the off-duty misconduct, and in particular, their conclusion that there is a nexus between this misconduct and Appellant's performance of his job. Most particularly, I would find there is no nexus concerning the violation of the court order charge. Because DFRS's record of disciplinary actions against other firefighters makes clear that failing to cooperate in an investigation alone (or even in conjunction with a charge of domestic violence) is not a sufficient basis to remove a firefighter, I would not sustain Appellant's removal.

The Need to Establish Nexus

In cases involving off-duty misconduct, the County must establish a nexus between the alleged misconduct and the employee's ability to perform his duties. This obligation flows directly from the County Charter, which mandates the establishment of a merit system that "shall provide the means to . . . maintain an effective, non-partisan, and responsive work force *with personnel*

actions based on demonstrated merit and fitness.” Montgomery County, Maryland, Code § 401 (emphasis added). See also MCPR § 33-5 (allowing discipline for violation of “any provision of the County Charter, County statutes, ordinances, regulations, State or Federal laws, . . . if such violation is related to, or has a nexus with, County employment.”) (emphasis added).

Thus it was in MSPB Case No. 16-08 (2016), for example, that the Board sustained the removal of a firefighter who had been convicted of reckless endangerment. The particular conduct that underlaid the conviction was the employee’s failure to inform the 911 operator (whom he had called to report an assault on him) that he had left his alleged assailant lying in a pool of blood after he had struck her in the head with a metal object. As the Board observed there, the employee’s “private conduct mocks the mission of the agency that employs him.” *Id.* at 10 (internal quotation omitted).

This Board does not sit generally to judge a County employee’s off-duty behavior. Rather, this Board sits to protect the merit system. Its mandate is to ensure that personnel actions are taken on the basis of *demonstrated merit and fitness*. Thus, in the context of off-duty misconduct, the Board must require that the County demonstrate—not articulate or speculate—that the identified off-duty misconduct actually impacts the employee’s ability to get his job done.

The DFRS Failed to Establish a Nexus between Appellant’s Off-duty Misconduct and His Job

It cannot be gainsaid that Appellant’s off-duty misconduct was serious. Domestic violence is a societal bane with impacts that scar families for life. There is no excuse for it and there is no excusing it. So too, defiance of a court order is serious misconduct. It may be that Appellant’s abuse was not as severe as others or that he had reason to defy the court order.¹ But at least for the first part of DFRS’s burden—to prove that Appellant violated the law—there can be no dispute.

But in my view DFRS has failed to link this misconduct to Appellant’s ability to perform his duties as a firefighter. The Department’s witnesses testified, with respect to the domestic violence incident, that the putative link was an issue of “public trust.” *See e.g.*, Tr. Day 1 at 258-59. While it may be inarguable that there must be a high degree of trust between the public and public safety officials, simply mouthing the words like some magical incantation does not establish the link between private conduct—no matter how egregious—and the employee’s ability to do his job. Indeed, the fact that DFRS routinely imposed discipline less severe than removal on firefighters who engaged in domestic violence seriously challenges the assertion that domestic violence raises issues of public trust: if in fact these firefighters have violated a public trust then why are they still employed?

The link between a firefighter’s domestic violence and the performance of his duties may exist, but it is the County’s obligation to prove it and I do not think it has done so here.² Where nexus exists, it generally is easily proven. *See e.g.*, MSPB No. 14-17 (2014) (finding nexus to

¹ Appellant testified that he originally contacted his domestic partner to check on the welfare of his daughter, whose supervision was uncertain while he was in custody. The Department’s witness acknowledged that this violation of the protective order standing alone would not have been the predicate for discipline. See Tr. Day 1 at 234.

² This Board has never adopted the doctrine of “presumed nexus,” a theory predicated on the notion that some off-duty misconduct is so egregious a nexus to employment can be presumed. *See e.g.*, *Williams v. General Services Administration*, 22 M.S.P.R. 476 (1984) (presuming nexus where the employee pled guilty to sexual assault of a minor). I see no reason for the Board to adopt this theory in the future, for if the conduct is egregious then proving nexus should not be difficult. Arguing about the egregiousness of any particular act of misconduct rather than the effect of the misconduct on job performance is a sure tell of a tenuous connection to the job.

discipline a correctional officer for off-duty heroin use.). Conversely, where the County struggles to identify a nexus and finds itself relying instead on platitudes, nexus almost certainly is absent.

In my view, however, the Department's greatest shortcoming is in failing to prove a nexus to the charge of violating the court order. This failure is critical because the court order charge is the only thing that separates Appellant's case from other DRFS cases involving domestic violence and dishonesty where the firefighter was not terminated. *See* Appellant's Ex. 8 and 28 (firefighters disciplined, but not removed for conduct involving domestic violence and dishonesty). That is, but for this charge, Appellant would not have been removed.

The Department's witnesses testified that because of his failure to comply with the court order they could not trust Appellant to carry out their orders. *See e.g.*, Tr. Day 1 at 269, 14-19. To me this explanation borders on the facetious.

Perhaps this explanation might carry some force if it came from Appellant's direct supervisor. But it did not. Rather, it came from the highest echelons of the Department, from individuals as far divorced from having to trust Appellant to carry out orders as possibly could be. Compounding this is the fact that his most direct supervisor testified that he had no such concerns. I find Appellant's direct supervisor's view far more compelling and probative.

Moreover, the Department's lack of trust argument is too facile. The same argument could be made for a firefighter who received a traffic ticket for running a red light or a penalty from the IRS for late payment of estimated taxes. But does it really make sense to say that a firefighter who breaks the law by filing his tax returns late cannot be trusted to carry out orders to put out fires?

That is not to say that an employee could never be disciplined for such off-duty misconduct—perhaps a Ride-On bus driver could be disciplined for off-duty traffic violations or a Finance Department employee for irregularities in their tax returns. Perhaps even a law enforcement officer or an attorney could be disciplined for failing to follow a court order. But in those cases there is at least arguably a specific link between their off-duty violations and their jobs. That is what is lacking here. Under the Department's rationale, any employee in any job performing any function could be disciplined for any off-duty misconduct so long as the Department head testified that they lost faith in the employee's ability to follow orders. This would turn the concept of nexus into an empty rhetorical exercise—not can the County demonstrate that there is a direct and obvious link between the employee's job performance and misconduct that is private in nature but instead can it simply say that it no longer can trust the employee to follow orders. Such a test would not be true to the County's Charter to “maintain an effective, non-partisan, and responsive work force *with personnel actions based on demonstrated merit and fitness.*”

Conclusion

By all accounts, Appellant had proven himself to be a valuable and reliable employee. *See e.g.*, Tr. Day 2 at 247:9-24 (testimony of direct supervisor attesting to Appellant's performance record). In his private life he committed serious transgressions—ones that could have subjected him to criminal and civil liability. Other forums have jurisdiction over those transgressions, but we have neither the competence nor expertise to opine whether Appellant should have been held to account there. Our role is to determine whether these transgressions bear on his ability to

perform his job—more precisely, to determine whether the Department has proven that these transgressions bear on his ability to perform his job.

Because I believe the Department has failed to carry that burden I cannot join my colleagues in sustaining Appellant’s removal.

CASE NO. 20-01

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of Appellant. On July 1, 2019, Appellant filed this appeal challenging his dismissal from a Federal Transit Administration (FTA) Safety Sensitive Mechanic II position with the Department of General Services (DGS or Department) due to a positive drug test result.¹

BACKGROUND

On June 20, 2019, DGS issued a Notice of Disciplinary Action (NODA) dismissing Appellant, effective July 6, 2019. County Exhibit (CX) 4. The NODA stated that on April 3, 2019, the Department was notified by the County Occupational Medical Services (OMS) that a random drug test conducted on March 19, 2019, was determined to be positive. As a consequence, the County found that Appellant had violated Montgomery County Personnel Regulations (MCPR) § 33-5(c) (violates any established policy or procedure), MCPR § 32-5(i)(1) (immediate removal from Safety Sensitive duties), and § 32-5(i)(2)(A) (Safety Sensitive employee with positive drug test must be dismissed). CX 4.

On October 23, 2019, the parties appeared before the Board for a prehearing conference. As reflected in the Board’s Prehearing Order of November 14, 2019, the Board requested that the County file a motion addressing certain issues raised at the prehearing conference. Specifically, the County was asked to explain its legal position that Appellant’s dismissal was mandatory and that the Board lacked the authority to impose a different level of discipline and to address recent law on the inadvertent ingestion of cannabis products. Moreover, as Appellant had raised the issue of unequal punishment, the County was instructed to provide Appellant and the Board with any relevant reports, papers, and documents concerning similarly situated employees who failed drug tests yet were not dismissed. The Board reiterated the requirement that the County provide this comparator information in orders of December 4, 2019, and January 6, 2020.

The County produced records concerning the comparator employees on January 27, 2020. Those records included a redacted spreadsheet listing the 45 comparators as well as documents for each individual employee. The comparator employees are identified by number. Appellant is No. 39 and the only employee identified by name. We admit the comparator records into evidence as Joint Exhibit (1).²

On February 25, 2020, the parties filed a pleading titled “Joint Supplemental Stipulations, Request to Hold Hearing in Abeyance in Lieu of Cross-Motions for Summary Decision, and

¹ The appeal was filed on Friday, June 28, 2019, at 7:57 p.m., a date and time when the Merit System Protection Board (MSPB) office was not open. Accordingly, the appeal was officially received by the MSPB the next business day.

² The pages of Joint Exhibit 1 are Bates stamped from page 001 to page 267.

Proposed Briefing Schedule.” The pleading asserted the view of both parties that the material facts in the appeal were not in dispute and that the case could appropriately be resolved by summary decision. The parties jointly suggested that the merits hearing scheduled for March 30 and 31, 2020, be held in abeyance while they submit, and the Board consider, cross-motions for summary decision. On February 27, 2020, the Board so ordered. The parties filed cross-motions for summary decision on March 16, 2020, followed by oppositions, and then replies.

After reviewing the motions and briefs of the parties and the exhibits in the record the appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant is a Mechanic Technician II and has worked for the Department of General Services since 2014. Because he works on and test drives County Ride-On busses, Appellant has a Commercial Drivers License (CDL) and is an FTA Safety Sensitive employee.

On March 19, 2019 Appellant tested positive for Tetrahydrocannabinol (THC) on a random drug test. Appellant does not dispute the validity of the drug test but alleges that he tested positive for THC because he took the drug test shortly after he had used Cannabidiol (CBD) oil and that some of the comparator employees who also tested positive were not dismissed.

The parties agreed to the following stipulations of fact on February 4 and 25, 2020, which we have combined and lightly edited:

1. Appellant took and passed a pre-employment drug test.
2. Appellant was hired as a Mechanic I and has been employed with DGS since 2014.
3. Appellant became a Mechanic II in 2016.
4. Appellant has worked at three different DGS depots, including Kensington and most recently Silver Spring (Brookeville Maintenance Facility).
5. March 19, 2019 was the first time during Appellant’s County employment that he was drug tested.
6. The March 19, 2019 drug test was positive for THC.
7. Appellant’s position as a Mechanic II at the time of the drug test was an FTA Safety-Sensitive Position.
8. The comparator records produced by the County in response to the Board’s earlier orders are authentic business records of the County.
9. The February 18, 2020, United States Department of Transportation Notice concerning CBD products and drug testing (County Exhibit 16) is authentic.

Appellant’s motion for summary decision calls our attention to the following comparator employees who were not dismissed.

After a positive test for an unprescribed controlled substance, Comparator No. 19 received a statement of charges on December 4, 2009. JX 1, p. 100. No. 19 agreed to a “Last Chance Settlement Agreement” on 5/12/10. JX 1, 094 - 99. The terms of the settlement agreement included reduction of the proposed dismissal to a 3-day suspension, required No. 19 to complete a course of substance abuse treatment, and provided for two years of regular drug and alcohol screening.

Subsequently, No. 19 tested positive on a drug test, JX 1, 086, and received a statement of charges for dismissal dated February 12, 2014. JX 1, 091 - 92. The employee agreed to have the matter referred to Alternative Dispute Resolution (ADR). JX 1, 088, 090. As a result of the ADR process the County and No. 19 agreed to a settlement on March 6, 2014. JX 1, 088 – 89. Under the settlement agreement No. 19 was permitted to exhaust all personal, annual, and sick leave and then go on leave without pay until June 6, 2014. JX 1, 089. During the time before June 6 No. 19 was permitted “to explore medical priority placement.” Under the terms of the settlement agreement, if no placement was found No. 19 would resign effective June 6, 2014. No. 19 apparently was unable to obtain a medical priority placement and resigned effective June 6, 2014. JX 1, 087.

Comparator employee No. 44 was a safety sensitive transit employee who reported to work inebriated and failed an alcohol test on December 18, 1998. JX 1, 243. Subsequently, on March 22, 1999, a Notice of Disciplinary Action – Dismissal was issued. JX 1, 242 – 46. Pursuant to a Last Chance Settlement Agreement dated January 10, 2000, employee No. 44 was reinstated. JX 1, 235 - 40. In 2009, employee No. 44 had an alcohol breath test result of .034, below the .04 level that would mandate dismissal under MCPR § 32-5(i)(2)(A)(ii). On July 15, 2009, pursuant to a Last Chance Settlement Agreement, employee No. 44 received a ten-day suspension. JX 1, 252 - 59.

Employee No. 44 is the only comparator not separated from County employment. Twenty-three of the comparator employees resigned, thirteen were terminated, and eight were dismissed.

APPLICABLE LAW

Montgomery County Personnel Regulations, Employee Drug and Alcohol Use and Drug and Alcohol Testing, Section 32, (As amended October 21, 2008, July 12, 2011, July 24, 2012, June 30, 2015 and September 27, 2017).

§ 32-5. Prevention of Prohibited Drug Use and Alcohol Misuse by FTA Safety-Sensitive Employees Under Federal Transit Administration Regulations

(a) *Application of section.* This Section applies to any employee assigned to an FTA Safety-Sensitive position on a full-time, part-time, temporary, or intermittent basis. . . .

(c) *FTA Safety-Sensitive positions.* The following are FTA Safety-Sensitive positions if the employee must have a CDL or operates, dispatches, controls, or maintains Montgomery County transit vehicles and operations: . . .

(7) Mechanic; . . .

(e) *Drug and alcohol prohibitions.*

(1) *Prohibitions for FTA Safety-Sensitive employees.* In addition to the prohibitions of Section 32-3, an FTA Safety-Sensitive employee must not:

(A) use a prohibited drug;

(B) report for duty, remain on duty, or perform a safety-sensitive function after testing positive for a prohibited drug;. . .

(f) *Drug and alcohol testing.* . . .

(2) *Prohibited drugs.* When administering a drug test under FTA regulations, the County must ensure that employees are tested for the following drugs:

(A) marijuana; . . .

(i) *Consequences for an employee of prohibited drug use, alcohol misuse, or refusal to take a drug or alcohol test.*

(1) ***Consequences under FTA regulations.*** Under FTA regulations, the following are the required consequences for an employee who has a verified positive drug test result, violates the alcohol misuse prohibitions, or who refuses to be tested:

(A) immediate removal from safety-sensitive duties; and

(B) referral to a Substance Abuse Professional for evaluation.

(2) ***Consequences under County authority.***

(A) Under County authority not derived from the FTA regulations, a department director must dismiss an FTA Safety-Sensitive employee with merit system status . . . who:

(i) has a confirmed positive drug test result;

(ii) has a confirmatory alcohol test with an alcohol concentration of 0.04 or greater; or

(iii) refuses to take a drug or alcohol test. . .

Code of Federal Regulations, Title 49 – Transportation, Subtitle A -- Office of the Secretary of Transportation, Part 40 -- Procedures for Transportation Workplace Drug and Alcohol Testing Programs, Subpart G -- Medical Review Officers and the Verification Process.

§ 40.151 What are MROs prohibited from doing as part of the verification process?

As an MRO, you are prohibited from doing the following as part of the verification process:

* * *

(d) It is not your function to consider explanations of confirmed positive, adulterated, or substituted test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that someone slipped amphetamines into her drink at a party, that she unknowingly ingested a marijuana brownie, or that she traveled in a closed car with several people smoking crack. MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted).

(f) You must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative. .

..

ISSUE

Was Appellant's dismissal consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

Appellant Had a Confirmed Positive Drug Test Result

Although Appellant alleged in his Appeal, p. 2, that he falsely tested positive for THC because he took the drug test shortly after he used CBD oil, Appellant no longer appears to dispute the validity of the drug test and has never contested that he was an FTA Safety Sensitive employee. Appellant's central argument is that the County has imposed lesser discipline in similar cases and should also reduce Appellant's discipline.

In any event, under Federal Department of Transportation regulations Appellant's explanation concerning the use of CBD oil is unavailing. The Federal regulations, 49 CFR § 40.151(d), provide that in verifying the test result a medical review officer (MRO), such as the County Occupational Medical Services, may not

consider explanations of confirmed positive. . . test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that . . . she unknowingly ingested a marijuana brownie. . . MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.

Moreover, § 40.151(e) states that an MRO "must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted)." Further, § 40.151(f) requires that an MRO "must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative."

We conclude that Appellant was an FTA Safety Sensitive employee with a confirmed positive drug test result and is subject to discipline under the County Personnel Regulations. Thus, the County has met its burden of proof that discipline is warranted. The question now is what penalty is proper.

Appropriate Level of Discipline

The County contends that because Appellant was an FTA Safety Sensitive employee, the County Personnel Regulations mandate that he must be dismissed, and that neither the Department nor the MSPB have discretion to impose a lesser sanction.

We reject the County's argument that the MSPB lacks the authority to reduce Appellant's penalty if we find that the County acted improperly. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986) ("the Board . . . must be able to grant appropriate relief. . . 'the remedial and enforcement powers of the board shall be fully exercised by the board as needed to rectify personnel actions found to be improper....' ") (*quoting* County Code § 33-7(a)).

The controlling County regulation, MCPR § 32-5(i)(2)(A), states that “a department director must dismiss an FTA Safety-Sensitive employee . . . who: (i) has a confirmed positive drug test result.” It is well settled that use of the term “must” is mandatory. MSPB Case No. 17-20 (2018). *See Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 512 (1990) (use of the word “must” is mandatory, and not a mere “nudge”).

Notwithstanding the straightforward and mandatory language of the regulation Appellant argues that his offense was relatively minor, he is of good character, and that dismissal is an unjustifiably harsh sanction considering the lesser sanctions given to two of the comparator employees. Appellant suggests that since the County has not consistently dismissed those who test positive, Appellant should be treated like comparator employees No. 19 and 44, *i.e.*, the County “should terminate him technically, [and] reinstate him immediately, as he has shown that he is not a safety threat with a last clear chance agreement.” Appellant’s Opposition to the County’s Motion for Summary Judgment, p. 6. *See* Appellant’s Motion for Summary Judgment, p. 3, (“Appellant should get no more than the discipline allotted to employees #19 and #44.”).

The County argues that those two cases were from years ago, may have been “mistakes,” and involved settlements.

On June 30, 2015, § 32-5(i)(2)(A) was amended to clarify the requirement for dismissal of FTA safety sensitive employees who test positive:

Under County authority not derived from the FTA regulations, a [department director may take disciplinary action, up to and including dismissal, against an employee who uses prohibited drugs, misuses alcohol, or refuses to take a required drug or alcohol test. A] department director must dismiss [a] an FTA Safety-Sensitive [Transit] employee with merit system status or terminate [a] an FTA Safety-Sensitive [Transit] probationary employee who:

Executive Regulation 16-13AMII, Resolution No. 18-199 (effective June 30, 2015) (brackets indicate language deleted by the amendment). Moreover, the regulation was also amended to delete the following language in § 32-5(i)(1), the subsection concerning the consequences under FTA regulations for an employee who tested positive: “(C) if the employee is not terminated, return-to-duty testing and follow-up testing as directed by a Substance Abuse Professional.” *Id.*

Nevertheless, we have no evidence that there was a mistake or misinterpretation, and it is not possible to ascertain the reasoning behind the County’s decisions to settle with comparator employees No. 19 and 44. This is unsurprising since settlement negotiations are typically confidential and settlement agreements frequently omit any detailed or specific discussion of the underlying motivations and justifications of the parties. More importantly, under our precedent the County is not obligated to explain differences in disciplinary treatment resulting from settlements.

This Board has held that the County is not strictly bound in perpetuity by disciplinary precedent, and that employees whose cases resulted in settlements may not be used as comparators for level of discipline determinations.

An agency may legitimately contend that a penalty in a previous case was too lenient and that . . . it need not make the same mistake again. *Davis v. U.S. Postal*

Service, 120 MSPR at 457, 465 (2013); *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, 651 (2012).

Second, the level of discipline was the result of a settlement. In that circumstance, DOCR need not even explain the difference in treatment. *Davis v. U.S. Postal Service*, 120 MSPR at 463-64 (“The Board has held that if another employee receives a lesser penalty, despite apparent similarities in circumstances, as the result of a settlement agreement, the agency is not required to explain the difference in treatment. *See Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013).”); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325 (agency not required to explain lesser penalties imposed against other employees whose charges were resolved by settlement), *aff’d*, 975 F.2d 869 (Fed. Cir.1992).

MSPB Case No. 18-06 (2019). *See also* MSPB Case No. 18-07 (2019). Thus, we do not take into account the settlements involving comparator employees No. 19 and 44 in determining whether “the discipline given to other employees in comparable positions in the department for similar behavior” was the same as that given to Appellant. MCPR § 33-2(d)(3).

In 96% of the comparator cases (43 of 45) the employees resigned, were dismissed or were terminated.³ Appellant’s final reply argues that in a number of the comparator dismissals the County did not specifically cite to the regulatory provision mandating dismissal. Appellant’s argument is inapposite as in many of those cases employees chose to resign prior to formal charges or as part of a settlement, and others involved the termination of probationary employees who had an employment status distinct from that of an employee with merit system status like Appellant. That the citation of a specific regulation may have been absent is immaterial to the question of whether “the discipline given to other employees in comparable positions in the department for similar behavior” was the same as that given to Appellant. What is important is that with the exception of two settlements the County has consistently separated from County employment individuals who were similarly situated to Appellant, whether by dismissal, termination, or resignation in lieu of dismissal or termination.⁴

Appellant also argues that comparator employees disciplined after Appellant should not be considered by the Board. Appellant’s Motion for Summary Judgment, p. 3. We disagree. Those cases simply reinforce our conclusion that in non-settlement cases the County has consistently dismissed employees who were similarly situated to Appellant.⁵

Appellant has failed to show unequal application of discipline since the only two comparable situations that did not result in dismissal were the result of settlements. As discussed above, because settlements may be entered into for various unknown reasons, such as the strength or weakness of the facts in the case, a desire to quickly resolve the matter, or a desire to avoid costly litigation, the Board will not consider them for level of discipline comparison purposes.

Finally, we decline to follow Appellant’s suggestion that the County “should terminate him technically, [and] reinstate him immediately.” Appellant’s Opposition to the County’s Motion for

³ The County may wish to consider whether evolving societal standards regarding the use of CBD products warrants the amendment of County regulations to permit disciplinary action other than dismissal.

⁴ Although the terms “termination” and “dismissal” are frequently and inaccurately used interchangeably, both still result in separation from County employment. *See* MCPR § 29-1, § 33-3(h).

⁵ We also would have taken those subsequent cases into consideration had the employees been treated more favorably than Appellant.

Summary Judgment, p. 6. In making that request Appellant again relies on the two settlements, which we have already found to be inappropriate to consider in determining whether discipline has been consistently applied. Moreover, a remedy involving the adjustment of the penalty is not appropriate in this case because the County correctly interpreted the relevant regulation and we have determined that the County acted properly and within its authority regarding Appellant's drug test and discipline.⁶

Accordingly, we conclude that the discipline of dismissal was appropriate and consistent with law.

ORDER

For the foregoing reasons, the Board **DENIES** Appellant's appeal of his dismissal.

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
May 11, 2020

⁶ The comparator records indicate in a comment section that Appellant "is not eligible for re-hire in all safety-sensitive positions with DGS." JX 1, 203. Although we note that in some circumstances MCPR § 32-3(g) permits the hiring of applicants for safety-sensitive positions two years after a positive drug test, we express no opinion on Appellant's eligibility for rehire by the County in a safety-sensitive position at some date in the future.

SUSPENSION

CASE NO. 19-20

FINAL DECISION AND ORDER

On March 4, 2019, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the decision of the Department of Corrections and Rehabilitation (DOCR) to suspend him for fifteen (15) days.

FINDINGS OF FACT

The discipline in this matter relates to an incident involving Appellant's use of force against an inmate at the Montgomery County Correctional Facility (MCCF). On November 6, 2019, a hearing on the merits was held before the Board.

The following witnesses testified and are identified by their initials, or as "Appellant," elsewhere in this decision. The County called two witnesses: AT, the Director of DOCR, and Acting Deputy Warden MW. At the time of the incident and subsequent investigation MW was a Captain and the Professional Standards and Compliance Manager of DOCR. Appellant testified on his own behalf and called the following witnesses to testify: Lieutenant CM; Sergeant GS; and Case Manager DC.

Appellant has been employed by the County as a Correctional Officer since January 28, 2013. County Exhibit (CX) 2. On November 4, 2018, he was assigned to work the MCCF West One Pod Five (W-1-5) housing unit on the "3 Shift" (2:30 - 11:00 p.m.). CX 2. The W-1-5 pod is one of MCCF's four medium and maximum security housing units for inmates classified as requiring a higher level category of security. Hearing Transcript (Tr.) 30. The pod is composed of various cells on a ground and upper level tier. In addition to cells on the ground tier there is a day area with seating areas, tables, and televisions. There is also a desk for the officer on duty located on the ground tier. The desk was Appellant's post and he was responsible for the immediate supervision, custody, safety, and control of inmates in the pod.

At approximately 5:15 p.m., inmate MJ approached Appellant as he was standing by the officer's desk to complain about the quality of the chicken on his dinner tray. CX 7 & 8; Tr. 37. Appellant and inmate MJ then walked to the other end of the day room area, and shortly thereafter Appellant returned to the desk and telephoned the cluster sergeant for guidance as to how to remedy the inmate's complaint. CX 7; Tr. 31, 37, 47, 147. While Appellant was on the telephone with the cluster Sergeant the inmate returned to the desk, gestured in an agitated manner at his dinner tray, then walked away from the desk and threw or slammed the contents of his dinner tray into a trash receptacle, tossed the tray into the location set aside for dirty trays, and washed his hands. CX 7; Tr. 31, 37-38, 148, 212-13. According to Captain MW, who investigated the incident, inmate MJ threw the tray in a "[v]ery agitated, aggressive in a threatening manner." Tr. 38.¹

¹ The Board is puzzled by the County's failure to introduce a copy of the investigatory report. Providing such reports in disciplinary appeals would avoid speculation concerning the actual contents of the report.

Appellant called CM² as a witness. Sergeant CM testified that he was on the telephone with Appellant discussing inmate MJ's complaint about his chicken when he heard the inmate yelling. Tr. 212. Sergeant CM testified that Appellant told him "never mind" because inmate MJ had taken his dinner tray and dumped it into the trash. *Id.* Sergeant CM then related that he verified with Appellant that he did not wish to order another dinner for inmate MJ. Tr. 212-13, 220.

The inmate then went across the day room and walked up the stairs to his assigned cell on the upper tier. A verbal exchange between inmate MJ and Appellant ensued. Sergeant CM testified that he was watching events unfold on a monitor at his location and was unconcerned about the "banter" between Appellant and inmate MJ because the inmate had gone up the stairs to the upper tier towards his cell. Tr. 213. Sergeant CM testified that when inmate MJ went up the stairs and Appellant said "don't worry about ordering the tray because he threw his food away" he assumed inmate MJ was locking himself in his cell. Tr. 215, 220-21. Sergeant CM then turned his attention towards other pods that were also his responsibility. Tr. 213-14.

Appellant left the desk and walked towards the back of the day room, looking up at the upper tier while gesturing and speaking to the inmate. Sergeant CM testified that when he heard the yelling he looked back at the monitors for W-1-5 and saw Appellant come out from behind the desk, go out into the day room looking up towards the cell area in the upper tier. Tr. 213-14. Sergeant CM could not hear what was being said.

Appellant admitted that he used profanity in addressing inmate MJ, calling him "a f***ing baby." Tr. 55. As Appellant was returning to the desk the inmate descended the stairs and approached him in the center of the room. Sergeant CM testified that when he saw inmate MJ coming back down the stairs, he got up from the cluster desk and started responding to West 1-5. Tr. 214.

Appellant went into a boxer's stance and punched inmate MJ once in the face with a closed fist. At all times there were at least a dozen other inmates present in the day room, and several of them exhibited excitement at the altercation. CX 7. Corporal K saw the incident, called for assistance, and quickly entered the W-1-5 pod. Tr. 214, 221. Sergeant CM was among the officers responding to W-1-5 and handcuffed inmate MJ and escorted him to the Medical Section for evaluation and treatment. CX 7 & 8; Tr. 45, 50-51, 214-15.

As part of Captain MW's investigation of the incident security camera video was pulled and reviewed. Tr. 29. The Board reviewed the video during the hearing and was able to clearly see the entire incident from two different angles. CX7.

Captain MW testified that DOCR requires correctional officers to follow a six step use of force continuum so that the least amount of force necessary is used in order to reduce the risk of injury to both staff and inmates, and to avoid the excessive use of force. Tr. 20-23. In ascending order the six levels in the use of force continuum are: (1) officer presence; (2) verbal command; (3) show of force, (*i.e.*, increase the number of correctional officers present); (4) "soft" empty hand control, (*e.g.*, handcuffs, joint locks, pressure points) and "hard" empty hand control, (*e.g.*, use of tools such as pepper spray); (5) less lethal control devices, (*e.g.*, Taser, baton); and (6) deadly force. Tr. 20-24, 33-34; CX 5.

On July 20, 2017, Appellant was given a copy of the use of force policy and counseled on the use of force. CX 5 & 9; Tr. 28. Appellant was specifically told that he should not take it upon himself

² CM, who is now a Lieutenant, was the cluster sergeant at the time of the incident.

to take action when the use of force was not necessary or safe, and that “[w]hen possible call your cluster [sergeant], use your radio, and wait for help.” CX 9; Tr. 28, 171-72.

During his testimony Appellant admitted that he had used poor judgment in handling the November 4, 2018, incident with inmate MJ and that he had allowed the situation to unnecessarily escalate. Tr. 172.

On February 12, 2019, DOCR issued a Notice of Disciplinary Action (NODA) suspending Appellant for fifteen (15) days. CX 2.³ The NODA found that Appellant violated the following provisions of the Montgomery County Personnel Regulations (MCPR): § 33-5(c) (violates any established policy or procedure); § 33-5(e) (fails to perform duties in a competent or acceptable manner); § 33-5(h) (negligent or careless in performing duties). The County alleged that during an interaction with an inmate that Appellant perceived as a threat Appellant failed to call for assistance, did not lock the inmate in his cell, verbally incited the inmate, urging him to return for a potential physical altercation, and ultimately punching the inmate.

In addition, Appellant was found to have violated multiple DOCR policies, as follows. DOCR Policy Number 1300-10: § III(B) (“When force is used, the least amount of force reasonably necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved”); § V(A) (“Whenever an officer believes that the use of physical force may be necessary, he/she must immediately contact the Shift Administrator/Shift Manager/Assistant Unit Manager”); § V(C) (“Physical force is used only after all other means to handle the situation have been exhausted. When at all possible, inmates should be persuaded to carry out instructions. Often the show of sufficient manpower is enough to persuade an individual to comply with given orders and instructions. Inmates not involved in the incident should be removed from the immediate area and secured in their cells or some other area”), CX 5.

Appellant was also charged with violations of DOCR Policy Number 3000-7: § V(C) (“Only such force as is necessary should be used to control an unruly visitor/ defendant/ inmate/ resident/ participant.”); § V(D) (“Personnel shall not strike or lay hands on a visitor/ defendant/ inmate/ resident/ participant except to defend themselves, to prevent an escape, to prevent serious injury, or damage to person or property, to quell a disturbance, to search a visitor/ defendant/ inmate/ resident/ participant or to move an unruly or uncooperative inmate/ resident/ visitor”); § V(E) (“Personnel should treat visitors/ defendants/ inmates/ residents/ participants with respect,

³ County Exhibits 1 through 13 and were admitted into the record. The County Exhibits are as follows:

- CX 1 - MSPB Appeal Form, March 4, 2019
- CX 2 - Notice of Disciplinary Action (NODA), February 12, 2019
- CX 3 - Amended Statement of Charges, January 11, 2019
- CX 4 - Statement of Charges, January 3, 2019
- CX 5 - DOCR Policy and Procedure 1300-10
- CX 6 - DOCR Policy and Procedure 3000-7
- CX 7 - CD-ROM Containing Video
- CX 8 - Adjustment Report drafted by Appellant
- CX 9 - Email between Captain MM and Warden SM, August 9, 2017
- CX 10 - Redacted NODA, August 24, 2017
- CX 11 - Redacted NODA, August 24, 2017
- CX 12 - Redacted NODA, October 3, 2017
- CX 13 - Redacted NODA, March 18, 2019

courtesy, and fairness. Profane, demeaning, insulting, and threatening language directed toward an inmate/resident/participant shall not be tolerated. Personnel should never engage in an argument or shouting match with an inmate/ resident/ participant”); § VII(E)(3) (“Employees shall use force only in accordance with the law and departmental policy and procedures and shall not use more force than is necessary to control the situation or protect themselves and/or other from harm”); § VII(E)(9) (conduct unbecoming) (“No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming includes, but not limited to any breach of the peace, neglect of duty, misconduct or any other conduct on the part of any employee of the department. . .”); § VII(E)(10) (Neglect of Duty/Unsatisfactory Performance) (“Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Unsatisfactory performance is demonstrated by an inability or unwillingness to perform assigned tasks, or the failure to take appropriate action in a situation deserving attention. . .”), CX 6.

Appellant filed an Appeal with the Board on March 4, 2019 and represented himself at the hearing.⁴

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-1. Definition.

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

§ 33-2. Policy on disciplinary actions.

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

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

⁴ Appellant Exhibits (AX) 1 through 15 were admitted into the record. Appellant’s exhibits are as follows:

- AX 1 - Appeal of 15-day suspension
- AX 2 - Adjustment report involving the stabbing of an officer, May 7, 2018
- AX 3 - Adjustment report involving an assault on an officer, July 6, 2018
- AX 4 - Adjustment report involving a use of force on a violent inmate, December 5, 2018
- AX 5 - Statement of Charges against Cpl. CT, December 15, 2017
- AX 6 - Adjustment report involving Cpl. CT and inmate DW, 8/14/2017
- AX 7 - Article from *The Baltimore Sun* that mentions inmate MJ
- AX 8 - Adjustment report involving inmate MJ, 10/1/2018
- AX 9 - Adjustment report involving inmate MJ and DCA 36s from Sgt. CM, Cpl. K, Cpl H, and Cpl. Z, 11/4/2018
- AX 10 - DCA 36 incident report involving inmate MJ, 4/10/2018
- AX 11 - DCA 36 incident report involving inmate MJ, 4/6/2019
- AX 12 - Adjustment report involving inmate MJ, 3/14/2019
- AX 13 - DCA 36 incident report involving inmate MJ, 2/21/2019
- AX 14 - DCA 36 incident report involving inmate MJ, 11/12/2018
- AX 15 - DCA 36 incident report involving inmate MJ, 3/6/2019

- (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:
 - (A) the severity of the employee's misconduct and its actual or possible consequences; or
 - (B) the employee's continuing misconduct or attendance violations over time.
- (2) Progressive discipline does not require a department director to apply discipline in a particular order or to always begin with the least severe penalty. In some cases involving serious misconduct or a serious violation of policy or procedure, a department director may bypass progressive discipline and dismiss the employee or take another more severe disciplinary action.

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

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

§ 33-3. Types of disciplinary actions.

(e) **Suspension.**

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

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

- (c) violates any established policy or procedure; . . .
- (e) fails to perform duties in a competent or acceptable manner; . . .
- (h) is negligent or careless in performing duties. . .

Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct/Code of Ethics, effective December 30, 2016, (replacing policy of November 5, 2012), which states in applicable part:

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

C. Only such force as is necessary should be used to control an unruly visitor/ defendant/ inmate/ resident/ participant. (See Policy and Procedures on Use of Force.)

D. Personnel shall not strike or lay hands on a visitor/ defendant/ inmate/ resident/ participant except to defend themselves, to prevent an escape, to prevent serious injury or damage to person or property, to quell a disturbance, to search a visitor/ defendant/ inmate/ resident/ participant or to move an unruly or uncooperative inmate/ resident/ visitor.

E. Personnel should treat visitors/ defendants/ inmates/ residents/ participants with respect, courtesy, and fairness. Profane, demeaning, insulting and threatening language directed toward an inmate/ resident/ participant shall not be tolerated. Personnel should never engage in an argument or shouting match with an inmate/ resident/ participant.

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules:

3. Use of Force:

Employees shall use force only in accordance with the law and departmental policy and procedures and shall not use more force than is necessary to control the situation or protect themselves and/or others from harm. No employee shall use force in a discriminatory manner. . .

9. Conduct Unbecoming:

- a. No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming includes, but is not limited to any breach of the peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or stated in other Departmental policies, shall be considered conduct unbecoming an employee of this Department, and will subject the employee to disciplinary action by the Department.
- b. Examples of conduct unbecoming include but are not limited to falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, retaliation, misuse of a county owned radio, and the failure to cooperate with an internal investigation.

10. Neglect of Duty/Unsatisfactory Performance:

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

Montgomery County Department of Correction and Rehabilitation, Policy Number: 1300-10, Use of Force, Chemical Agents & Restraints, effective March 23, 2018, (replacing policy of April 15, 2015), which provides, in relevant part:

II. DEFINITIONS

C. Force

Any action within the force continuum by a staff member intended to compel an uncooperative or aggressive inmate to act or to cease acting.

D. Force Continuum

A sequential order of force beginning with the least amount of force and progressing through the degrees of non-deadly and deadly force.

Note: These represent different levels of the **MCDOCR** use of force continuum that can be adopted by staff. While they can represent individual levels that are gone through a step at a time, it is important to realize that staff may skip levels and enter confrontations at different levels. Staff should use the minimal amount of force necessary to handle each situation.

DOCR Use of Force Continuum:

1. Officer Presence - Identification of Authority.
2. Verbal Direction - Commands of Direction.
3. Show of Force - At least one additional Officer called to the scene. Additional commands or directions and a larger officer presence.
4. Empty Hand Control, and/or use of Oleoresin Capsicum (OC) aerosol.
 - a. *Soft* Empty Hand Control -
Techniques that have minimal probability of injury. (Examples handcuffing, escort, pressure points (joint locks), takedowns, other pain compliance strikes).
 - b. Hard Empty Hand Control, or **OC Pepper use - Techniques that have a moderate to high probability** of injury, to include the use of physically touching an individual. (Examples: takedowns, other pain compliance strikes). These techniques and or the use of OC

aerosol should be determined by the user, depending upon specific circumstances and instances.

5. Less Lethal Control Devices:

The use of equipment that may have a higher probability of injury. (Example: Use of the approved X26PTaser in Taser Mode and/or Drive Stun Mode, baton, impact shield and impact weapon strikes, or PepperBall gun).

6. Deadly Force: Only in situations intended to prevent serious bodily injury or death.

(Examples: Firearms, other emergency equipment, or unarmed selfdefense techniques. Note: (refer to Firearms Policy and Procedure 1300-10-01).

III. POLICY

It is the policy of the MCDOCR that: . . .

- B. When force is used, the least amount of force reasonably necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved.

V. USE OF PHYSICAL FORCE - GUIDELINES

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

- A. Except in cases of extreme emergency, ONLY the Shift Administrator/ Shift Manager/ Assistant Unit Manager shall authorize the use of physical force to either move or restrain an unruly or uncooperative inmate. Whenever an officer believes that the use of physical force may be necessary, he/she must immediately contact the Shift Administrator/ Shift Manager/ Assistant Unit Manager. . . .
- C. Physical force is used only after all other means to handle the situation have been exhausted. When at all possible, inmates should be persuaded to carry out instructions. Often the show of sufficient manpower is enough to persuade an individual to comply with given orders and instructions. Inmates not involved in the incident should be removed from the immediate area and secured in their cells or some other area.

ISSUE

Was Appellant’s suspension consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

The material facts in this appeal are unambiguous and for the most part undisputed. The best evidence presented was a video compilation of security camera footage from two vantage points. CX 7. Significantly, Appellant admitted that he used poor judgment in handling the November 4, 2018, incident with inmate MJ, and that he allowed the situation to unnecessarily escalate. Tr. 172, 254; AX 1. Appellant suggests that he acted with the best of intentions, but also concedes that discipline is warranted. Tr. 255.

The video evidence was clear, complete and compelling. On November 4, 2018, at 5:15 p.m. Appellant was on duty in the West 1-5 pod of MCCF when inmate MJ became upset about the condition of the chicken he had been served for dinner. Apparently unsatisfied with Appellant's attempt to address the issues with his meal, the inmate walked away from Appellant's post and slammed the contents of his food tray into a trash can. He then put the tray in the proper place, washed his hands, and walked past the officer's desk and up the stairs to his cell on the upper tier.

When inmate MJ reached the upper tier, he found that the cell door was closed, so inmate MJ could not enter without Appellant pushing a button to unlock it. Appellant did not unlock the cell. Tr. 42.

Appellant left the desk and walked through the day room of the pod looking up at inmate MJ, gesturing, and talking. CX 7. There were a dozen of other inmates in the vicinity, most of them still eating dinner and watching the interaction between Appellant and inmate MJ.

Inmate MJ then walked back along the tier and down the stairs. Inmate MJ approached Appellant and stopped at least an arm's length away. Appellant took a boxing stance with his fists up. Inmate MJ leaned forward from the waist and pointed his finger at Appellant. It is clear from the video that inmate MJ posed no imminent threat to Appellant's safety. It is also clear from the video that Appellant was the aggressor when he then punched inmate MJ once in the face with his closed fist. Inmate MJ turned to the door, outside of which were other correctional officers, and gestured at them. Other inmates in the pod reacted with varying levels of excitement. The other officers quickly entered the pod to take control and deescalate the situation.

Captain MW testified that after the inmate behaved in an agitated and aggressive manner Appellant should have, consistent with the continuum of force policy, requested that the cluster sergeant or other correctional officers report to the West 1-5 pod. Tr. 38. Even though Appellant was on the phone with the cluster sergeant during inmate MJ's outburst he did not request assistance. Instead he hung up the phone and proceeded to have an animated verbal exchange with inmate MJ. Appellant's behavior and language were unprofessional and inciteful, provoking inmate MJ to descend from the upper tier. Appellant was certainly not being threatened by inmate MJ once the inmate had gone to the upper tier. The use of force could have been avoided entirely had Appellant's emotions not gotten the best of him. Tr. 150-51. Because of Appellant's failure to deescalate the situation by calling for assistance or allowing inmate MJ to enter his cell, a face-to-face confrontation between two angry men occurred. Although inmate MJ stopped in front of Appellant and merely pointed his finger, this avoidable confrontation ultimately culminated in Appellant punching inmate MJ in the face.

Appellant alleged that he struck inmate MJ in self-defense. Appellant presented a witness, Sgt. GS, who testified that Appellant's behavior was reasonable. We find this testimony to be unpersuasive and contrary to what we could see on the video. Appellant unnecessarily provoked

inmate MJ instead of calling for assistance from other officers or simply opening inmate MJ's cell (by pressing a button on his desk) and letting him go in to the cell to lock in and calm down. Unable to enter his cell, and with Appellant still striding across the floor and verbally provoking him from the day room, inmate MJ came back down the stairs.

Appellant immediately went into a boxer's stance. Rather than move aggressively towards Appellant or adopt his own fighting stance, inmate MJ stood flat footed, bent from the waist, and merely pointed a finger at Appellant. Nevertheless, Appellant chose to strike inmate MJ in the face with his fist.

DOCR's regulation on the Use of Force makes clear that physical force is only to be used after all other means to handle the situation have been exhausted. Appellant had options to avoid a one-on-one confrontation and, even when the confrontation occurred, had no valid reason for using physical force on inmate MJ. Therefore, the Board concludes that the County proved by a preponderance of the evidence that Appellant failed to perform his duties in a competent and acceptable manner when he used force on the inmate.

Level of Discipline

Having determined that the County proved by a preponderance of the evidence that Appellant violated established policy or procedure and failed to perform his duties in a competent or acceptable manner and engaged in an unnecessary physical altercation with an inmate while on duty, the Board will address whether the penalty of a 15-day suspension is appropriate.

As a threshold matter, we note that the County did not call any witnesses who had actually participated in drafting or deciding to issue either the statement of charges or the notice of disciplinary action. This could be problematic on a number of levels, not the least of which being that it might open the County to a Due Process challenge. Specifically, an employee is entitled, as a matter of constitutional due process, to notice of both the charges leveled against him and the factors that were considered in imposing the particular level of discipline. *See Ward v. USPS*, 634 F.3d 1274, 1280 (Fed. Cir. 2011) (due process requires predeprivation disclosure of all facts "material to the merits of the underlying charge or material to the penalty to be imposed."). Where, as here, there is scant evidence as to what factors were considered in selecting the penalty, and no witness to bolster the record, an employee could assert that he did not have notice of or an opportunity to respond to the specific factors that led to the selection of the penalty in his case. Because Appellant did not raise any Due Process challenge to his discipline, however, we express no view as to whether such a Due Process issue is present here.

Moreover, MCPR § 33-2(d) states that in addition to progressive discipline the County "should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be," listing such considerations as "(1) the relationship of the misconduct to the employee's assigned duties and responsibilities; (2) the employee's work record; [and] (3) the discipline given to other employees in comparable positions . . . for similar behavior. . .". We also understand "[i]t is well settled that use of the term "should" or "may," rather than "shall" or "must," means that the . . . requirement is precatory, not mandatory." MSPB Case No. 17-20 (2018). *See* MSPB Case Nos. 18-06 & 18-07 (2019). This Board has not formally adopted the factors in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), *see* MSPB Case No. 17-20 (2018) and MSPB Case No. 00-22 (2000), and need not do so at this time. Nor do we hold here that the County "must" consider the factors MCPR § 33-2(d) says it "should" consider. Nonetheless, while the Board is not bound by the County's choice of penalty, and does not defer

to that choice in any significant way, it is much more likely to sustain a County-imposed penalty if it is clear on the record that these factors have been considered and the individuals who in fact made those considerations are called to testify.

Turning to the specific discipline imposed in this case, the unjustified use of force against an inmate is a serious infraction and it is appropriate for DOCR to hold officers engaged in such behavior strictly accountable. In a number of prior cases we found that dismissal was appropriate punishment for an unnecessary confrontation and use of force on an inmate. *See, e.g.*, MSPB Case Nos. 18-06 & 18-07 (2019); Case No. 07-10 (2007). *See also* CX 10-13. Moreover, Appellant's offense is aggravated by the fact that he had previously been specifically counseled to try to avoid the use of force and "[w]hen possible call your cluster [sergeant], use your radio, and wait for help." CX 9; Tr. 28, 171-72. Appellant could easily have requested assistance in dealing with inmate MJ while he was on the phone with his cluster sergeant. Doing what his counseling urged would have obviated the need for force and complied with the use of force continuum.

Appellant has acknowledged that he used poor judgment in handling the November 4, 2018, incident, that he allowed the situation to unnecessarily escalate. Tr. 172, 254; AX 1. Although he disputes the level of discipline Appellant concedes that discipline is warranted. Tr. 255. There was testimony that Appellant was usually able to appropriately resolve situations by talking. Tr. 199, 202. This suggests to us that Appellant is capable of rehabilitation, that he is likely to be an improved correctional officer as a result of this discipline, and that dismissal would be excessive.

We find that while Appellant's behavior on November 4, 2018, may have been out of character, it was nevertheless an egregious display of poor judgment. Because of Appellant's good work record and potential for rehabilitation, we agree with the County that rather than dismissal a 15-day suspension is appropriate and justified.

ORDER

For the foregoing reasons, the Board **DENIES** Appellant's appeal of his suspension.

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
December 30, 2019

CASE NO. 19-23

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board or MSPB) on the appeal of Appellant. On March 19, 2019, Appellant filed an appeal with the Board challenging the decision of the Department of Corrections and Rehabilitation (DOCR) to suspend her for two (2) days from her position as a Correctional Supervisor - Sergeant. The discipline

was based on the County's allegation that on October 10, 2018, Appellant conducted an improper and unauthorized search of a subordinate Correctional Officer of a different gender at the Montgomery County Correctional Facility (MCCF).

BACKGROUND

A hearing on the merits of the Appeal was held on September 25th and 26th, 2019. The County was represented at the hearing by an Associate County Attorney, while Appellant was represented by attorney WP. The hearing was conducted before Board Vice Chair Harriet E. Davidson and Board Member Angela Franco, and they considered and decided the Appeal. The Board's former Chair, Michael J. Kator, did not participate in the hearing or consideration of this Appeal.¹

FINDINGS OF FACT

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

1. Corporal LT (LT)
2. Corporal LV (LV)
3. Lieutenant AM (AM)
4. Corporal SJ (SJ)
5. Warden SM (SM)
6. Sergeant TB (TB or Appellant)
7. Acting Deputy Warden MW (MW)²

After hearing testimony and reviewing the exhibits³ and stipulations of the parties,⁴ the Board made the following factual findings.

¹ Board Member Sonya Chiles, who took office on January 1, 2020, did not participate in the hearing or consideration of this Appeal.

² At the time of the incident and subsequent investigation MW was a Captain and the Professional Standards and Compliance Manager of DOCR.

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

- AX 1 - Incident Report completed by Appellant dated November 18, 2018
- AX 2 - Incident Report completed by Appellant dated January 18, 2019
- AX 3 - Employment related e-mails, to and from Sgt. TB
- AX 4 - DOCR Policy and Procedure 3000-19, Searches
- AX 5 - Montgomery County Code, Chapter 33 Personnel and Human Resources, Article II, Merit System

⁴ Prior to the hearing the parties agreed to and the Board accepted the following stipulations of fact. Tr. 8.

1. County Exhibit (CX) 12 is a fair and accurate representation of the schematics of MCCF.
2. Sgt. TB has been employed with DOCR since August 23, 2004.
3. On October 10, 2018, Sgt. TB was assigned to work at the West-Two Cluster support post during the #3 shift.
4. On October 10, 2018, Cpl. LT was assigned to work at the West-Two-Five post during the #3 shift.
5. Sgt. TB is higher in rank than Cpl. LT.
6. Lt. AM was one of two Lieutenants assigned to work during the #3 shift on October 10, 2018.
7. Sgt. TB was served with CX 1 (Statement of Charges) on January 13, 2019.
8. On January 18, 2019, Sgt. TB waived her right to go through the ADR process.
9. On March 15, 2019, Sgt. TB was served with CX 2 (Notice of Disciplinary Action).

Subsequent to the hearing the Board accepted the following additional stipulations:

It is undisputed that Appellant has been employed as a Correctional Officer by DOCR since August 23, 2004, and that effective September 4, 2016, Appellant was promoted to Correctional Supervisor - Sergeant, a front-line supervisory position. Appellant was working at MCCF in that capacity on October 10, 2018 and was assigned to the West-Two Cluster support post during the third shift. Captain MM was the ranking member on the shift. However, since he was not on duty that day, Lieutenant AM was the shift supervisor. Tr. 117-18.

During roll call, just prior to the start of the 2:30 p.m. to 11:00 p.m. or #3 shift, Appellant observed Corporal LT using a non-DOCR issued cellphone. Hearing Transcript (Tr.) 206. Corporal LT admits that he had the cellphone in the roll call room. Tr. 27. There is no DOCR policy that forbids correctional officers from having their cell phones in the room during roll call. Tr. 70, 159, 161, 238.

As was her typical practice during roll call, Appellant stood by the doors that connect the roll call room to the main lobby of MCCF. Tr. 26, 75, 208, 229; County Exhibit (CX) 12.⁵ From that vantage point Appellant could not see the mail room, the key watch, and did not have a complete view of the door to enter the secure portion of MCCF. Tr. 92-93, 237-38.

Corporal LT was permitted to leave roll call early to report to his post in the W-2-5 pod. Tr. 26-27. Appellant observed Corporal LT place the cell phone in his pants pocket. Tr. 206, 248. Appellant did not see Corporal LT enter the mail room or obtain his keys from the key watch prior to entering the facility. Tr. 237-38. Appellant did not see Corporal LT place the cell phone in his mailbox prior to entering the secure portion of MCCF. Tr. 28, 248, 253-54. Thus, Appellant believed that Corporal LT had his cell phone on his person. DOCR policy forbids correctional officers from having personal cell phones in a secure area of the correctional facility.

When Appellant arrived at her assigned post, the W-2 Cluster desk, she called Corporal LT and told him that she would be sending Corporal LV to relieve him so that he could take his cell

10. Sgt. TB was temporarily promoted to the position of Acting Sergeant effective May 3, 2015, through April 30, 2016.

11. Sgt. TB received “on-the-job Sergeant training” on May 5-9, 2015 (4 days), while she was in the position of Acting Sergeant.

12. Sgt. TB was permanently promoted to the position of Sergeant effective September 4, 2016.

13. Sgt. TB received First Line Supervisor Training through the Maryland Correctional Training Commission. This was a 70-hour course which was completed on January 20, 2017. Sgt. TB received a 100% pass rate.

14. After being permanently promoted to the position of Sergeant, Sgt. TB did not receive further “on-the-job Sergeant training” within the Department.

15. The Department’s on-the-job training for a Sergeant is supposed to last two weeks.

⁵ County Exhibits 1 through 12 were admitted into the record. The County Exhibits are as follows:

CX 1 - Statement of Charges, January 3, 2019

CX 2 - Notice of Disciplinary Action (NODA), March 11, 2019

CX 3 - Investigative report, December 5, 2018

CX 4 - CD-ROM Containing Video of October 10, 2018 incident

CX 5 - Shift Administrator’s Investigative Report, October 30, 2018

CX 6 - Incident Report of Cpl. LT, October 16, 2018

CX 7 - Incident Report completed by Appellant, November 18, 2018

CX 8 - Montgomery County Maryland Personnel Regulations (MCPR), § 33

CX 9 - DOCR Policy and Procedure 3000-7, Standard of Conduct/Code of Ethics

CX 10 - DOCR Policy and Procedure 3000-19, Searches

CX 11 - NODA - Written Reprimand, December 11, 2014

CX 12 - Montgomery County Correctional Facility (MCCF) Floor Plans

phone to his locker. Tr. 32. DOCR policy regarding searches provides that cell phones must be stored in a locker on the non-secure side of the facility. Corporal LT protested that he did not need to be relieved since he did not have his cell phone in the secure portion of the facility. Tr. 32, 77.

When Corporal LV went to the W-2-5 pod, Corporal LT said that he did not have his cell phone and thus did not need to be relieved. Tr. 32, 78; CX 6. Corporal LV then returned to the W-2 Cluster desk and informed Appellant about his conversation with Corporal LT. Tr. 78.

Appellant then went to the W-2-5 pod and confronted Corporal LT. Tr. 33. The County introduced a video recording of the entire incident which the Board carefully reviewed. CX 4.

Corporal LT again told Appellant that he did not have his cell phone. Tr. 33. Appellant came around the desk where Corporal LT was standing and reached towards his left pants pocket. Tr. 35, 50; CX 4, at 2:57:37. Appellant touched Corporal LT's pocket in an attempt to determine whether he had his cell phone on his person in the secure area of MCCF. Tr. 214, 241-42; CX 3. From touching Corporal LT's pants pocket Appellant was able to determine that there was no cell phone. Tr. 242. Appellant did not call for guidance or assistance prior to initiating the search of Corporal LT. Tr. 40, 96, 240-42; CX. At the time of this "search" there was at least one inmate outside of his cell. Tr. 36-37, 215; CX 4, at 2:57:11.

Corporal LT recoiled from Appellant and no further search was conducted. Tr. 35; CX 4, at 2:57:38. Appellant had not told Corporal LT that she was about to touch or search him, nor did she obtain consent to do so. Tr. 35. An argument ensued between Appellant and Corporal LT and Appellant then called Lieutenant AM and asked him to come to W-2-5. Tr. 35.

When Lieutenant AM arrived, Appellant and Corporal LT were arguing. Tr. 40, 96. Lieutenant AM had them move into an office located behind the desk to continue the conversation. Tr. 40, 97. During the conversation Appellant admitted that she had touched Corporal LT. Tr. 71, 99, 242. When Lieutenant AM asked whether she had conducted a pat-down search of Corporal LT, Appellant responded, "I'll be the first one to admit that I was wrong." Tr. 99, 103. Appellant apologized to Corporal LT for touching him. Tr. 201-02, 215, 217, 221; CX 7. After Appellant left the office, Lieutenant AM attempted to calm down Corporal LT and recommended that he accept Appellant's apology, which he apparently did. Tr. 126.

While they were in the office Corporal LT suggested several times that they verify that his cellphone was in his mailbox in the unsecured area of the facility. Tr. 41, 127-28; CX 3; CE 6. Neither Appellant nor Lieutenant AM confirmed that the cell phone was in Corporal LT's mailbox. Tr. 99, 246. Lieutenant AM testified that he was convinced that Corporal LT did not have his cell phone in the secure area of MCCF and did not feel that it was necessary to check his mailbox. Tr. 129.

Appellant never saw Corporal LT with his cell phone inside the secure portion of MCCF. Tr. 132, 248. Appellant did not locate the cell phone when she touched the pocket of his pants. Corporal LT did not have the cell phone on his person when he entered the secure portion of MCCF. Tr. 28.

Lieutenant AM did not issue an oral admonishment to Appellant. Tr. 134-35, 190-91, 198-199.

On October 16, Corporal LT gave Lieutenant AM an incident report, in which he alleged that Appellant had sexually assaulted him. Lieutenant AM gave the report to Captain MM, who initiated an investigation.

Warden SM received an undated anonymous note under her door indicating that Appellant had done a pat down of Corporal LT. In addition, on October 28, 2019, the Warden received a letter from a law firm informing her that the firm had been retained by Corporal LT regarding an inappropriate search by Appellant, stating that no action had been taken to address the incident and apprising her that Lieutenant LT had filed a report of sexual harassment with the “authorities.”

On November 6, 2018, the Warden requested that the Director of DOCR initiate an investigation by DOCR’s Internal Affairs Investigator, which was approved on November 7, 2018. The Investigator issued his report on December 5, 2018 recommending disciplinary action.

In 2014, Appellant was issued a written reprimand for refusing to conduct a search on an inmate. Tr. 182, CX 11.

In a memorandum dated January 3, 2019, the Warden issued to Appellant a Statement of Charges (SOC) in support of a proposed two (2) day suspension. On March 11, 2019, the Director of DOCR issued a Notice of Disciplinary Action (NODA) suspending Appellant for two (2) days. CX 2.

APPLICABLE LAW AND POLICIES

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), § 33, *Disciplinary Actions*, which provides, in pertinent part:

§ 33-1. Definition.

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

§ 33-2. Policy on disciplinary actions.

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

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

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

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

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

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

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

- (1) the relationship of the misconduct to the employee's assigned duties and responsibilities;
- (2) the employee's work record;
- (3) the discipline given to other employees in comparable positions in the department for similar behavior;
- (4) if the employee was aware or should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and
- (5) any other relevant factors.

§ 33-3. Types of disciplinary actions.

(e) **Suspension.**

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

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

- (c) violates any established policy or procedure; . . .
- (e) fails to perform duties in a competent or acceptable manner; . . .
- (h) is negligent or careless in performing duties. . .

Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-7, Standards of Conduct/Code of Ethics, effective December 30, 2016, (replacing policy of November 5, 2012), which states in applicable part:

VII. DEPARTMENT RULES FOR EMPLOYEES

E. Specific Departmental Rules: . . .

9. Conduct Unbecoming:

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

Department, and will subject the employee to disciplinary action by the Department.

- b. Examples of conduct unbecoming include but are not limited to falsifying a written or verbal report, excessive absenteeism, assault on a fellow employee, sexual harassment, retaliation, misuse of a county owned radio, and the failure to cooperate with an internal investigation.

10. Neglect of Duty/Unsatisfactory Performance:

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

Montgomery County Department of Correction and Rehabilitation, Policy Number: 3000-19, Searches, effective December 30, 2016, (replacing policy of April 5, 2015), which provides, in applicable part:

I. DEFINITIONS

- A. Pat Down/Frisk Search: A manual pat down of an individual's body through the clothing including the use of a metal detector, if applicable, passed over the body. As deemed appropriate by the Officer, the inmate is required to remove shoes and socks for these items to be searched. The metal detector should only be used in cases of opposite gender searches.

IV. SEARCH OF STAFF AND VISITORS

A. General Policy

The Visiting Officer is responsible for conducting a search of all persons entering the MCCF/MCDC lobby area by utilizing the walk through metal detector, hand held metal detector, or ultimately performing a frisk search on persons not satisfying a metal detector scan. All persons will remove their coats, jackets, sweaters, and all objects from the pockets of their clothing and place them in the article tray prior to walking through the metal detector. The Visiting Officer will visually check the article tray to ensure it does not contain contraband. Items considered contraband are cigarettes, gum, matches, lighters, pagers, cell phones, knives, glass objects, radios, cameras or any other items that would jeopardize security. These items are not permitted in the facility. Coats, jackets, and sweaters will be scanned with a hand held metal detector first. If not cleared by the metal detector, Officers are to conduct a more thorough search of these items. After the individual has walked through the metal detector without activation and all articles have been searched and cleared, the articles are returned to them. Persons who cause an activation of either the walkthrough metal detector or hand held metal detector will not be granted entry into the lobby area. The scanning process is

repeated until the object causing the activation is discovered. If the repeated process still causes activation, the individual may submit to a frisk search before entry is allowed. *A frisk search is not performed without prior notification and presence of the Shift Administrator, a Shift Manager, or an Assistant Unit Manager. The Visiting Officer must perform the frisk search in a private area, with a supervisor observing. Staff will only frisk search individuals of the same gender. [emphasis added]* The supervisor present will then determine the person's entry status. The incident will be documented on an Incident Report (DCA-36). In an effort to enhance staff, visitor, inmate and public safety, the Montgomery County Detention Center (MCDC) and the Montgomery County Correctional Facility (MCCF) have implemented a process that will limit the size and type of carrying devices that may be brought into the facility.

*Note - Carrying Devices: Items designed for the sole purpose of transporting articles associated with **work functions** in and out of the facility.*

B. Staff:

1. All **MCDOCR** staff must adhere to the General Policy concerning staff and visitor searches.
2. There is a ban on all carrying devices that are not completely clear and see through (this includes the bottom portion of the device as well) into the secure portion of the facility. Anyone carrying devices which do not meet the criteria will not be granted access to these facilities. There are limited courtesy carrying devices available at the visiting desks.
3. Purses, gym bags, cell phones, personal keys or other non-business related items must be stored in a locker on the non-secure side and may not be brought into the secure areas of the facility. Staff Lockers have been installed at **MCDC** in the Administrative area to store items not permitted into the secure portion of the facility but that are not appropriate to be left in a vehicle. Issued clear meal bags may be brought into the secure area.

ISSUE

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

ANALYSIS AND CONCLUSIONS

It is undisputed that Appellant placed her hand, or at least her fingers, on the pants pocket of Corporal LT, a male subordinate, in an attempt to ascertain whether he had a cell phone on his person in a secure area of a correctional facility. DOCR policies require that prior to any type of search of a person, the person to be searched must be informed, consent obtained, and a Lieutenant or Captain must be present. Moreover, the search must be conducted in a location outside the view of others. Tr. 172-74; CX 10.

It is also undisputed that she did so without prior notice, without Corporal LT's consent, and without the presence of a Lieutenant or Captain.

The factual findings detailed *supra* leave no doubt that Appellant behaved in an inappropriate manner inconsistent with Department policy. A correctional officer is not allowed to conduct a body search of an opposite gender person, unless it is an emergency and the person is an inmate. Tr. 82, 100, 173, 175, 198. Searches of opposite gender correctional officers are not permitted. Tr. 246; CX 10. Such behavior merits some discipline, especially because, as a Correctional Supervisor - Sergeant, Appellant is in a correctional supervisory position of substantial trust and responsibility.

This Board has previously found that correctional supervisors are given a high degree of trust and must be held to a high standard of conduct. MSPB Case No. 18-06 (2019); MSPB Case No. 15-27 (2016); MSPB Case No. 07-13 (2007).

In our view there is little question that Appellant violated established policy and procedure when she searched a staff member of the opposite sex without prior notice and consent and without notifying a Shift Supervisor. Appellant's behavior constitutes conduct unbecoming. In the absence of any urgent circumstances or justification Appellant searched a subordinate officer of a different gender in front of inmates. Disrespecting and humiliating another correctional officer in the presence of inmates is clearly conduct unbecoming as it is "conduct. . . which tends to undermine the good order, efficiency, or discipline of the Department." CX 9, § VII(E)(9); Tr. 179.

The County further established that Appellant failed to perform her duties in an acceptable manner when she searched a staff member of the opposite sex in the presence of inmates without the proper notification, consent and approval of a superior officer.

We also find that Appellant was guilty of neglect of duty when she failed to notify her supervisors that she suspected Corporal LT of having a cell phone on his person in a secure portion of the facility and instead improperly began to conduct an improper search of his person. By doing so, she failed to "take appropriate action in a situation deserving attention," and failed to "conform to work standards established for [her] rank, grade, and position." CX 9, § VII(E)(10). Appellant admitted that at the time Appellant attempted to conduct the search she knew that doing so was inappropriate. Tr. 242.

Because we conclude that the County proved by a preponderance of the evidence that Appellant violated established policy or procedure, failed to perform her duties in a competent or acceptable manner, and was negligent or careless in performing her duties when she conducted an improper search of another correctional officer of a different gender, the Board will address whether the penalty of a two (2) day suspension is appropriate.

The Board recognizes that Appellant admits that she erred and has expressed appropriate remorse. Appellant's primary argument is with the level of discipline. As Appellant testified:

I'm human. I made a mistake, and I apologized for it. It was not a two-day suspension mistake.

Tr. 221.

MCPR § 33-2(d) states that in addition to progressive discipline the County "should also consider the following factors when deciding if discipline is appropriate or how severe the disciplinary action should be: (1) the relationship of the misconduct to the employee's assigned duties and responsibilities; (2) the employee's work record; (3) the discipline given to other employees in comparable positions . . . for similar behavior; (4) if the employee was aware or

should have been aware of the rule, procedure, or regulation that the employee is charged with violating; and (5) any other relevant factors.”

The Warden testified that she and the Deputy Warden made recommendations concerning Appellant’s discipline; however, RLG, then Director of DOCR, imposed the discipline at issue in this case. As Director G, the deciding official, did not appear at the hearing due to employment elsewhere, we have no testimony regarding the factors he considered in determining the level of discipline. Thus, we are limited to the testimony provided by the Warden.

Turning to the specific discipline imposed in this case, Warden SM testified that she took the following factors into consideration when determining the appropriate level of discipline: the seriousness of the offense; Appellant’s prior discipline; and the impact on the victim. She also explained her general rationale for the imposition of discipline.

The Warden testified that Appellant’s conduct disrespected and humiliated a subordinate in front of the very inmates he was required to supervise.

As an experienced correctional officer and a supervisor Appellant knew or should have known that her actions were a serious breach of DOCR policy.

The Warden indicated that past discipline is generally considered a factor in determining the level of discipline. The Warden stated that she was aware that Appellant had a reprimand in 2014 for failing to search an inmate but did not address the weight she gave this penalty in selecting the appropriate level of discipline for Appellant. We note that Appellant’s reprimand was issued four years prior to the incident in question.⁶ Subsequent to that time, the County promoted Appellant to the position of Sergeant. Thus, we will not give any weight to the reprimand in our evaluation of the appropriateness of Appellant’s discipline.

Regarding comparable discipline, Warden SM testified that there have been no instances of a correctional supervisor conducting an improper search or touching another correctional officer. Tr. 180, 202-03.

In her analysis of the impact on the victim, the Warden indicated that Appellant had disrespected and humiliated a subordinate staff member in the presence of inmates whom he then needed to supervise. We acknowledge the seriousness of Appellant’s conduct and the potential it had for undermining Corporal LT’s authority with inmates. However, Appellant thought that Corporal LT was being insubordinate and undermining her authority in the facility. While this may have prompted her actions, the appropriate response under DOCR policy would have been to contact the shift supervisor, prior to touching Corporal LT’s pocket. Tr. 105,137, 241.

The Montgomery County Code, § 33-14(c), grants the Board substantial latitude in determining the appropriate remedy and ruling on appeal. The Board has the authority to modify the discipline imposed by management if it finds that doing so is necessary to protect the employee’s rights under the merit system and to rectify personnel actions found to be improper. *Robinson v. Montgomery County*, 66 Md. App. 234, 243 (1986) (Board “must be able to grant

⁶ While MCPR § 33-3(b) does not provide a time frame for the expunction of a written reprimand, § 28.2 of the Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), states that “[a]ll reprimands contained in central personnel files shall become null and void after a period of one year. A reprimand can be removed from the file at any time.”

appropriate relief” and may modify dismissal to a 30-day suspension). Conversely, the Board may increase discipline if appropriate. MSPB Case No. 07-08 (2007).

Although we do not condone Appellant’s misconduct, there are mitigating factors that deserve consideration.

While inappropriate and ill-advised, Appellant’s search involved minimal physical contact. It was not egregious, and did not appear to be aggressive, provocative, or otherwise unduly offensive. It certainly did not rise to the level of sexual assault as alleged by Corporal LT and management did not treat it as such.

Having observed Appellant’s demeanor at the hearing, the Board concludes that Appellant sincerely believed that she was acting to protect the security of the institution. When Appellant saw Corporal LT put his cell phone into his pocket, she reasonably believed that he had brought it into the secure area. She did not see him place it in the mailbox, as had occurred.

Both the Warden and Lieutenant AM testified that one of Appellant’s job responsibilities was to ensure that DOCR personnel did not bring their personal cell phones into the secure areas of the correctional facility. However, there is no question that they took issue with the means that Appellant employed to guard against contraband. Appellant never should have searched Corporal LT in a public area without obtaining his consent and without the presence of a supervisor, but she nonetheless recognizes that her actions were inappropriate and regrets her behavior.⁷

The Warden testified that she considered Appellant’s apology but then added “I have a lot of officers who admit when they’re -- when the wrongdoing is discovered. That does not mean that we do not follow through with the appropriate level of discipline.” Tr. 202. Thus, it appears that she gave it little weight.

The facts in this case are different from the situation described by the Warden. Here Appellant apologized to Corporal LT soon after she touched his pants packet. She apologized again when both Corporal LT and Lieutenant AM were in the office. Both apologies were of Appellant’s own volition and made prior to the creation of any incident report, the initiation of an investigation, or the commencement of any disciplinary action. She also admitted what she did was “wrong.” Lieutenant AM, who had the opportunity to assess the sincerity of Appellant’s statements after the incident, told Corporal LT to accept Appellant’s apology because she was remorseful.

We find that Appellant’s admission of misconduct, expression of remorse and statements of apology to the “victim” are evidence of rehabilitative potential. They should have been considered as a relevant mitigating factor considering the timing of these acts of contrition and the fact that they were freely initiated by Appellant. *See Casarez v. Department of the Army*, 70 M.S.P.R. 131, 134 (1996).

We also consider the Warden’s own articulation of the purpose of discipline; namely, to reduce the impact of the conduct on DOCR operations, to convey to the employee the inappropriateness of the behavior, to communicate that it is not condoned by management, to ensure that the employee who committed the act understands that it was wrong, to ensure that the conduct will not reoccur in the future, and to “get the individual’s attention.” Appellant already

⁷ Appellant attempted to argue that she was not properly trained as a sergeant. Even if true that would not justify her actions in this case as she has admitted her error and that she was aware at the time of her actions that her behavior was inappropriate. Tr. 221, 227-28, 242. In any event, the stipulations of the parties strongly suggest that Appellant has received adequate training.

acknowledged the inappropriateness of her behavior on the day it occurred. She clearly stated that she knew it was wrong. She understood that it would not be condoned by management and there is no indication that it will reoccur in the future. Thus, based on the totality of the circumstances, we feel that a lesser penalty is justified.

Accordingly, weighing the nature and seriousness of Appellant's misconduct together with the mitigating factors and Appellant's strong potential for rehabilitation, the Board has determined that in accord with the concept of progressive discipline the appropriate penalty for Appellant's misconduct is a one (1) day suspension.

ORDER

For the foregoing reasons, the Board **ORDERS** that:

1. The County reduce Appellant's suspension from two (2) days to one (1) day;
2. Appellant be made whole for lost wages and benefits;
3. That within 45 days of this decision the County provide the Board with written certification that the suspension has been reduced, that all County records reflect that change, and that Appellant has been made whole; and
4. Because the Board has mitigated the penalty, the County must pay reasonable attorney fees and costs. 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). Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have ten (10) calendar days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, § 33-14(c)(9).

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
May 6, 2020

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 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 2020 the Board issued the following decisions on appeals concerning the denial of employment.

CASE NO. 20-03

FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 12, 2019, appealing a denial of a permanent promotion to a Grade 21 Lead Animal Services Officer position with the County Department of Police (Department or DOP) (IRC 37949).

Because the appeal did not include a copy of a formal notification of non-promotion, as required by Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), by letter dated August 12, 2019, the Board stayed the processing of the appeal and requested submission of a copy of the notification of nonselection.

On August 19, 2019, Appellant submitted an August 5, 2019, email from the Animal Services Director advising Appellant of the end date of her temporary promotion. Appellant's email stated that it was "the closest thing I received as the Director have [*sic*] me verbal notification."

On August 21, 2019, the Board issued a show cause order requiring the County to provide a statement of whether: (1) there has been a final selection for the Lead Animal Services Officer position; (2) a determination has been made that Appellant does not meet the minimum qualifications; and (3) a final determination has been made that Appellant will not be appointed.

On August 26, the Board received the County's statement acknowledging that Appellant was denied the promotion. Appellant was thereby relieved of her obligation to respond to the show cause order.

The County submitted a response to the Appeal on October 7. Appellant's due date for a reply was October 28. To date, Appellant has not submitted a reply contesting the County's submission.

The Appeal was reviewed and considered by the Board.¹

FINDINGS OF FACT

The Appellant in this appeal is an Animal Services Officer III, Grade 20. County Submission, p. 1. Appellant has served at various times as a Temporary Lead Animal Services Officer. County Exhibit (CX) 2; Appeal and Notice of Non-promotion. Appellant has been a Montgomery County employee since July 22, 2002. Appeal Form, p. 2.

On May 31, 2019, the Department posted a recruitment for the position of Lead Animal Services Officer, Grade 21, with a closing date for applications of June 14, 2019. CX 1 (IRC 37949). Appellant filed a timely application for the promotion, as did seven other individuals. CX 1 and 2.

After an evaluation of the applications, five applicants were deemed "not qualified." Appellant and one other applicant were found to be qualified and were placed on the eligible list. CX 1. Appellant and the other applicant were then interviewed by a three-person panel on July 8, 2019.

¹ The Board's former Chair, Michael J. Kator, did not participate in the hearing or consideration of this Appeal. Member Sonya Chiles, who took office on January 1, 2020, also did not participate in the hearing or consideration of this Appeal.

CX 2 and 3. After the competitive recruitment process, the other qualified applicant was selected for promotion to a permanent position of Lead Animal Services Officer.

The Appeal Form states that on July 29, 2019, Appellant “received verbal notification from the Animal Services Director that my application for the permanent position of Lead Animal Services Officer was denied.” According to Appellant, the selected candidate had less experience with the Animal Services Division. Appeal Form, p. 2. The Appeal further alleges that the decision not to promote Appellant to the Lead Animal Services Officer

was incorrect based on my years of experience, training, and leadership in the Department. I have received both formal and on the job training in Leadership, Management, Animal Science, Adult Education, Criminal Justice, and Emergency Management. I am a life long Montgomery County, Maryland resident who has served the county, my home and community, loyally since I was hired. I have worked with co-workers as a team member and a team leader and always go out of my way to assist my fellow officers on my shift.

Appeal Form, p. 2.

The County notes that Appellant has only intermittently served as the Temporary Lead Animal Services Officer and that the selected candidate has also periodically served in that capacity over the past few years. County Response, p. 2; County Exhibit 3.

Pursuant to the County’s selection guidelines,² each member of the interview panel completed an individual evaluation form rating the two candidates. The ratings were based on the applicants’ responses to the same five questions. County Exhibits 2 and 3. Then, as a group, the panel members completed a consensus evaluation form for each applicant interviewed. The interview panel’s consensus evaluation was consistent with the individual ratings completed by each panel member.

The selected candidate was chosen based on the interview panel’s conclusion that her responses during the interview were superior to Appellant’s. County Exhibits 2 and 3. The interview panel’s consensus rating of the selected candidate’s responses was “Above Average” (the highest rating category) on four out of the five questions. County Exhibit 3. The selected candidate received a rating of “Average” for the question concerning “sound judgement/result orientation.” *Id.*

The interview panel’s consensus rating of Appellant’s interview responses was well below the scores of the selected candidate. County Exhibits 2 and 3. Although Appellant was rated as “Above Average” in “sound judgement/result orientation” while the selected candidate was rated as “Average,” Appellant was rated as “Average” in her response to three other questions and “Below Average” (the lowest rating category) for “job qualifications.” County Exhibit 2. The selected candidate was rated as “Above Average” in those four categories. County Exhibit 3.

As a result, the rating panel recommended the selected candidate for the promotion and Appellant to be considered at a later time.

APPLICABLE CODE PROVISIONS AND REGULATIONS

² *Selection Guidelines for Montgomery County: A Users Guide for Hiring Managers* (Revised June 3, 2016), p. 8.

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 pertinent part:

§ 6-5. Competitive rating process.

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list. . .

§ 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 (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which provides, in pertinent 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.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended June 30, 2015), Section 27, Promotion, which provides in applicable 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. . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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

To prevail in a nonselection/nonpromotion case, Appellant must demonstrate that the decision not to select her was arbitrary, capricious or illegal. MCC § 33-9(c); MCPR §34-9(d)(2). The County argues that Appellant failed to meet her substantial burden of proof.

The County presented un rebutted documentary evidence supporting the legitimate reasons for selecting the other qualified applicant. Ratings for each applicant were assigned by the three person interview panel based on the job related questions asked of both applicants. The consensus rating of the interview panel was that the other applicant was significantly more qualified for the promotion.

Appellant only presented the Board with an argument that she deserved the promotion because she was qualified and experienced, had temporarily held the position on an acting basis, and had a longer tenure with the agency. The County pointed out that both applicants had appropriate job related experience and qualifications, and both had temporarily held the position on an acting basis. Appellant did not contest the County's evidence concerning the interview and applicant evaluations.

In sum, while Appellant was one of only two applicants deemed qualified and eligible to be interviewed for the promotion, the interview panel was unanimous and provided detailed reasons for its conclusion that the other applicant was the superior candidate.

Selection of a higher rated candidate is consistent with the County personnel regulations. MCPR § 7-1. 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. MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). The Board has reviewed the documentation and does not see any basis for overturning the agency decision.

ORDER

Because Appellant has failed to demonstrate that the County's decision on her application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, the appeal of her nonselection for the position of Lead Animal Services Officer, is hereby **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 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
March 16, 2020

CASE NO. 20-04

FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 21, 2019, appealing a denial of a promotion from a Grade 21 Administrative Financial Specialist I to a Grade 25 Program Manager II position in the Alcoholic Beverage Service (ABS or Department).¹

In her appeal Appellant alleges that “although I met the highest qualifications interviewed . . . and after the position was closed DLC reopened and with no explanation to the current candidates another round of interviews were held. Low and behold once again, another Caucasian male with no experience was hired.” Appeal Form, p. 2.

The County filed a response to the appeal on September 24, 2019, arguing that Appellant had provided no evidence concerning her claims and that any employment discrimination claims were outside the Board's jurisdiction. County Response, p. 2.

On October 24, 2019, the Board requested that the County provide a supplemental response to specifically address “why and under what authority the recruitment process for the Program Manager II position . . . was extended.” The Board also asked the County to provide a full response to Appellant's allegation that the extension and reposting of the position was due to favoritism.

The County submitted a supplemental response on November 18, 2019. Appellant's due date for a reply to the County's initial response was October 15, and the due date for her to respond to the County's supplemental submission was December 2, 2019. To date, Appellant has not submitted a response contesting either the County's September 24 submission or its November 18 supplemental response.

The Appeal was reviewed and considered by the Board.²

¹ Effective July 1, 2019, the Montgomery County Department of Liquor Control (DLC) was renamed as the Alcohol Beverage Services. Chapter 673, Laws of Maryland 2019.

² The Board's former Chair, Michael J. Kator, did not participate in the consideration of this Appeal. Member Sonya Chiles, who took office on January 1, 2020, also did not participate in the consideration of this Appeal.

FINDINGS OF FACT

In late 2018 the Department of Liquor Control (renamed Alcohol Beverage Services in July 2019) requested that the Office of Human Resources (OHR) reclassify a Grade 23 Program Manager I position to a Grade 25 Program Manager II position. The justification for the reclassification request was the need for a retail pricing analyst who could supervise two other employees. County Response, County Exhibit (CX) 1.³ The position was reclassified effective December 20, 2018, and the vacancy was posted on March 19, 2019, as IRC35483. County Response, CX 2. The closing date for the recruitment was April 5, 2019. County Supplemental Response, CX 1.

Appellant, a Grade 21 Administrative Financial Specialist I, timely applied for a promotion to the Grade 25 Program Manager II Retail Pricing Analyst position (IRC35483) on April 5, 2019. County Response, CX 3. Appellant and eight other applicants were rated as “Qualified” for the position and six, including Appellant, were interviewed on April 18, 2019. County Supplemental Response, CX 1 & CX 2.

The interview panel consisted of three high level Department employees who asked interviewees the same eleven job related questions.⁴ County Supplemental Response, CX 2 & 3. The rating of candidates was by consensus. Appellant and three other applicants were rated as “Not Recommended” by the interview panel. The other two interviewed applicants were rated as “Consider at a Later Date.” No applicant was rated as “Recommended.” County Supplemental Response, CX 1.

Appellant’s overall “Not Recommended” rating was based on her responses to the interview questions. The consensus ratings by the interview panel were that Appellant’s responses were “Average” on questions 1, 3a, 4, and 6, “Below Average” on questions 2, 3b, 3c, 5, 7, and 8, and “Well Below Average” on question 3d. County Supplemental Response, CX 2.

Because none of the applicants responding to the original announcement were rated in the highest rating category (“Recommended”), the Department requested that OHR extend the recruitment under IRC35483. *Id.* On May 3, 2019, the recruitment was re-announced. The reposting stated that “This is a re-announcement. The status of applicants who previously applied will remain the same.” County Response, CX 2; County Supplemental Response, CX 1. The recruitment closed on May 10, 2019. *Id.*

Three additional qualified candidates were interviewed by the same panel and asked the same questions on June 13, 2019. County Supplemental Response, CX 1. Two of those candidates were rated as “Consider at a Later Date” by the interview panel.

The third candidate was the only applicant rated as “Recommended” by the interview panel and was thus selected for the position. County Supplemental Response, CX 1 & CX 3. The selected candidate’s overall “Recommended” rating was based on his responses to the interview questions. The consensus ratings by the interview panel were that the selected candidate’s responses were

³ The County exhibits are numbered according to the written response to which they were appended. The September 24 County Response had four exhibits, numbered CX 1 through CX 4. The November 18 County Supplemental Response had three exhibits, numbered CX 1 through CX 3.

⁴ We say that there are eleven questions because the interview sheets list eight questions with question three consisting of four subparts. County Supplemental Response, CX 2 & 3.

“Well Above Average” on questions 1 and 3a-d, “Above Average” on questions 2, 4, 5, 7, and 8, and “Average” on question 6. County Supplemental Response, CX 1 & CX 3.

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?

APPLICABLE LAW AND POLICY

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

§ 33-5. Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article.

(b) Merit system principles. The merit system established by this chapter encompasses the following principles: . . .

(2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills . . .

(6) All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other nonmerit factors in all aspects of personnel administration. . . .

§ 33-9. Equal Employment Opportunity and Affirmative Action

(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 pertinent part:

§ 6-5. Competitive rating process.

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

. . .

§ 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 (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which provides, in pertinent 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.
- (c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended June 30, 2015), Section 27, Promotion, which provides in applicable 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.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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.

...

- (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.

Selection Guidelines for Montgomery County: A Users Guide for Hiring Managers, (Revised June 3, 2016), pp. 30-31:

Based on the consensus evaluation of which candidates should be hired, the interview panel will make a determination of ‘recommended’ or ‘not recommended’. Those you do not recommend at this time due to a particular number to be sent forward or other factors should be recommended for ‘consideration at a later date’.

ANALYSIS AND CONCLUSIONS

The Board’s Jurisdiction is Limited to the Authority Granted by Statute

As this Board has ruled in numerous cases, the Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over Appeals That Allege Discrimination

Appellant asserts that “there are a limited number of female managers and [ABS] just recently hired an African American manager. . . not because of what she knows but because of who she knows. Which is typical of DLC as almost all the upper management folks worked with each other outside of DLC.” Appeal Form, p. 2. To the extent Appellant is attempting to allege race or sex discrimination, her claims are outside the Board’s jurisdiction.

The County Code provides that an applicant may challenge the Chief Administrative Officer’s decision regarding an application for employment or promotion. However, the Code explicitly requires that appeals alleging discrimination prohibited by Chapter 27 of the Montgomery County Code (MCC) must be filed with the Human Rights Commission. MCC § 33-9(c). Appellant alleges that she may have been denied the promotion based on her race and sex. Appellant’s claims are outside of the Board’s jurisdiction as the Board lacks the authority to adjudicate such claims of discrimination. *See* MCC § 27-19(a), (c) and (g); MCPR § 35-2(d).⁵ MSPB Case No. 18-05 (2018); MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014).

In addition, the Montgomery County Code expressly provides that an employee may not pursue as a grievance “employment matters for which another forum is available to provide relief.”

⁵ MCC Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, gender identity, and genetic status.

MCC § 33-12(b). Appellant had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 18-05 (2018); MSPB Case No. 93-25 (1993) (interpreting § 33-12(b)'s "another forum available" limitation as applying to discrimination claims). *See also* MCPR § 27-4(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.").

The Board thus lacks jurisdiction over Appellant's discrimination claims.⁶

Appellant Has Failed to Show That Her Nonselection Was Improper

To prevail in a nonselection case, an appellant must demonstrate that the decision was arbitrary, capricious or illegal. MCC § 33-9(c); MCPR §34-9(d)(2). The County argues that Appellant failed to meet her substantial burden of proof.

The selection of a candidate for the Program Manager II position was based on applicant ratings assigned by the interview panel based on the job related questions asked of all applicants selected for interviews. In response to the Board's question as to why the County reposted the position, the County submitted an affidavit from an OHR recruitment specialist attesting that the position was re-announced because there were no applicants in the highest rating category ("Recommended") responding to the original announcement. County Supplemental Response, CX 1. The Department's desire to broaden the pool of applicants to obtain more qualified candidates is certainly not arbitrary, capricious or illegal.

Once the recruitment was extended, under MCPR § 7-1(a), it was entirely appropriate for the Department to select a candidate from the highest rating category. If the Department had for some reason wished to select a candidate from a lower rating category, under § 7-1(c) the Department would have had to justify that unusual selection in writing. Moreover, bypassing the higher rated candidate to select Appellant would have required CAO approval. Indeed, as Appellant was rated "Not Recommended," the Department would have had to justify bypassing not only the selected candidate, but also the two candidates rated "Consider at a Later Date." The County Personnel Regulations and selection guidelines certainly do not require an agency to take those extraordinary steps.

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. MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). Appellant has not shown that she was more qualified than the selected candidate, nor has she provided any evidence to support her belief that she was denied the promotion for reasons other than those related to her relative qualifications. Indeed, we do not discern any evidence in the record to establish arbitrary and capricious or illegal conduct on the part of the County. On the contrary, the interview records submitted by the County indicate that Appellant was appropriately rated as "Not Recommended," and that the significantly higher scores of the selected candidate justified his rating as

⁶ Appellant also alleged that when the position was open three years ago she had performed the duties of the job she sought "single handily . . . for 5+ years by myself" and that "when the position was . . . posted in 2016 DLC hired a new incumbent who did not have the skills but because he was a friend/former colleague of one of the hiring managers." Of course, any claim regarding a 2016 nonselection would be untimely.

“Recommended.” The unrebutted evidence of record indicates that the selected candidate was the best qualified.

The Merit System law provides that the “advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills,” and that employees of the County “shall be assured fair treatment without regard to . . . nonmerit factors.” Montgomery County Code, § 33-5(b)(2) & (6). Here, the County’s recruitment effort adhered to its own policies and procedures and was designed to identify the most qualified candidate. There is no evidence to support Appellant’s bald allegation of favoritism or any other kind of unequal treatment. Allegations without proof may not form a basis for us to uphold the appeal. *Cf.*, MSPB Case No. 15-31 (2015), n. 2.⁷ 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.”).

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Program Manager II position and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations. MCPR § 7-1. MSPB Case No. 17-05 (2017) (In DLC failure to promote appeal “Selection of a higher rated candidate is consistent with the County personnel regulations.”).

Accordingly, we find no merit in Appellant’s claim that she was improperly denied promotion to a position for which she was the best qualified and that Appellant has not met her heavy burden of proving that the County’s decision was arbitrary, capricious or based on other non-merit factors. MCC, § 33-9(c); MCPR, §34-9(d)(2).

ORDER

To the extent Appellant’s Appeal is based on alleged discrimination or human rights violations, it is **DISMISSED** based on a lack of jurisdiction. Moreover, Appellant has failed to demonstrate that the County’s decision on her application for a promotion was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors. Accordingly, the appeal of her nonselection for the position of Program Manager II, is hereby **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 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
March 5, 2020

⁷ It is significant that despite being provided with the opportunity, Appellant did not contest the County’s Response or its Supplemental Response. *See* MSPB Case No. 16-01 (2015).

CASE NO. 20-11

FINAL DECISION

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 13, 2020, appealing a denial of a promotion to Manager, Fire Code Compliance Section (FCC), Division of Fire Prevention and Code Compliance, Department of Permitting Services (DPS or Department).

In his appeal Appellant alleges that the “person selected does not have managerial experience except with a personal company that she is involved with.” Appeal Form, p. 2. Appellant further alleges that:

The same individual prior to all candidates being interviewed went to another candidate and told him directly that they offered her the position. Additionally there is a serious conflict of interest because the questions were produced by Mr. [RM] that vacated the position. Mr. [RM] and the selected candidate are in business together.

Id.

Appellant also complains that he only found out about the promotion when an officewide announcement was issued.

Because the appeal did not include a copy of a formal notification of nonpromotion, as required by Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), by letter dated February 13, 2020, the Board stayed the processing of the appeal and requested submission of a copy of the notification of nonselection/nonpromotion. On February 18, 2020, Appellant provided a copy of a February 11, 2020, officewide email announcing the promotion of another employee to the position of Manager, Fire Code Compliance Section. The Board treated that document as a notification of nonselection/nonpromotion and on February 19 sent a letter to the County and Appellant setting the schedule for the County to respond to the Appeal and for Appellant to reply to the County’s submission.

The County filed a response to the appeal on March 17, 2020. Appellant’s due date for a reply was April 13. To date, Appellant has not submitted a reply to the County’s submission.

The Appeal was reviewed and considered by the Board.

FINDINGS OF FACT

Appellant is a Permitting and Code Inspector III (Grade 23) in the County Fire Code Compliance Section, Division of Fire Prevention and Code Compliance, Department of Permitting Services. On December 19, 2019, the County posted a vacancy announcement (IRC41489) for the position of Manager of the Fire Prevention and Code Compliance division, at the Management Leadership Service (MLS) III level, (Grade M3). County Exhibit (CX) 1.

The minimum qualifications for the Manager position were stated in the vacancy announcement for IRC41489:

Experience: Five (5) years full-time work experience in progressively responsible professional experience in managing building/fire code compliance, inspections, and enforcement operations.

Education: Graduation from an accredited college or university with a Bachelor's Degree.

Equivalency: An equivalent combination of education and experience may be substituted.

CX 1. In addition, candidates were advised of the "preferred criteria" that would be used to determine preference for interviews. The preferred criteria included, in relevant part:

- Experience as a building/fire code official managing programs responsible for the interpretation, plan review, inspection and enforcement of the following construction codes: commercial buildings, life/fire safety, fire alarm, sprinkler, and mechanical;
- Experience in building/fire code enforcement, documenting violations, providing testimony to judicial, quasi-judicial and administrative bodies;
- Experience in managing programs that feature a commitment to customer services as a central working principle and staff supervision;
- Maryland Fire and Rescue Institute Fire Inspector, I or Equivalent Certificate;
- Experience in working with clients of diverse backgrounds and skills, individually and in groups, to provide service and communicate decisions/policies.

Id.

Appellant's resume indicates that since 2015 he has been employed by DPS as a Fire Code Inspector III (Grade 23). CX 3.¹ Prior to joining DPS Appellant served with Prince George's County Fire and Emergency Medical Services from 1992 to 2014 in progressively more responsible positions, rising from the rank of Firefighter to Lieutenant, Captain, and finally Battalion Chief. *Id.* Appellant earned an Associate of Applied Science in Fire Science at the College of Southern Maryland, but it does not appear that he has a bachelor's degree. Appellant's considerable amount of relevant work experience was undoubtedly deemed to be an appropriate substitute for the education requirement. Appellant also attended numerous continuing education courses and received several certifications. Appellant timely applied for the promotion, was found to be "Qualified," placed on the eligible list, and selected for an interview. Appellant's interview was conducted by a three-person interview panel on January 27, 2020. CX 3.

The resume of the selected candidate, PW, indicates that since 2016 she had been employed by DPS as a Senior Permitting Services Specialist (Grade 26). CX 2. Prior to her employment by DPS Ms. PW held various progressively responsible positions: Lead Fire Test Engineer with the Bureau of Alcohol, Tobacco, Firearms and Explosives; Fire Protection Engineer, Deputy Fire Marshal, NASA Goddard Space Flight Center; Engineer III and then a Senior Fire Protection Engineer with Montgomery County Fire and Rescue, Office of the Fire Marshal. From 2011 to at least the date of her application Ms. PW was also a partner in Q-DOT Engineering, LLC, an engineering company in York, Pennsylvania, "with approximately 30 employees including engineers, inspectors, and administrative staff." CX 2. Ms. PW earned a Bachelor of Science in Fire Protection Engineering from the University of Maryland, College Park and obtained postgraduate education, as well as numerous licenses and certifications. Ms. PW is a Registered Professional Engineer (PE) in Maryland

¹ While Appellant's formal classification is Permitting and Code Inspector III his working title appears to be Fire Code Inspector III.

and five other states, and a Certified Safety Professional (CSP). Ms. PW is a member of various boards and committees, including being a director of the Maryland Building Officials Association. Ms. PW was also found to be “Qualified,” placed on the eligible list, and selected for an interview. Ms. PW’s interview was conducted by the same three-person interview panel on January 29, 2020. CX 2.

The interview panel asked both Appellant and Ms. PW the same nine job related questions.² County Response, CX 2 & 3. The rating of candidates was by consensus. The consensus ratings by the interview panel were that Appellant’s responses were “Average” on questions 2 A & B, 3, and 4, those that measured Job Qualifications. On the questions concerning Sound Judgment/Problem Solving Appellant was rated as “Average” on question 1 but “Below Average” on questions 6 and 7. Similarly, in the category of Results Orientation Appellant was rated as “Average” on question 1 but “Below Average” on questions 2 C and 5. CX 3. Appellant was rated as “Not Recommended” by the interview panel based on his responses to the interview questions, with an overall numerical score of 23.

Ms. PW’s answers to all three Job Qualifications questions were rated as “Well Above Average.” CX 2. For the Sound Judgment/Problem Solving questions she was rated as “Above Average” on question 7 and “Average” on questions 1 and 6. Ms. PW’s answers to questions 2 C and 5 in the Results Orientation category were rated as “Well Above Average,” while her answers to question 1 was rated as “Average.” Ms. PW was rated as “Recommended” by the interview panel based on her responses to the interview questions, with an overall numerical score of 38. CX 2.

On February 11, 2020, HM, the FCC Division Chief, sent a broadcast email to all DPS staff announcing the selection of PW as the Manager of the FCC. *See* Notice of Nonselection. Appellant responded to the email, saying that “[a]s one of the personnel who was in the interview process, I find this unpleasant to be notified in such a manner.” A short time later GL, a DPS Permitting Services Manager and a member of the interview panel, responded to Appellant: “I’m very sorry that you were notified this way. I wasn’t aware that other candidates had not been notified directly.” *Id.*

APPLICABLE CODE PROVISIONS AND REGULATIONS

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

§ 33-9. Equal employment opportunity and affirmative action.

(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 (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 pertinent part:

² We say that there are nine questions because the interview sheets list seven questions with question two consisting of three subparts. County Response, CX 2 & 3.

§ 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 (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, March 9, 2010, July 23, 2013, and June 30, 2015), Section 7, Appointments, Probationary Period, and Promotional Probationary Period, which provides, in pertinent 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.

(c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director's selection is not final unless it is approved by the CAO.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended June 30, 2015), Section 27, Promotion, which provides in applicable 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. . .

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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

Appellant Has Failed to Show That His Nonselection Was Improper

The Merit System law provides that the "advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills," and that employees of the County "shall be assured fair treatment without regard to . . . nonmerit factors." Montgomery County Code, § 33-5(b)(2) & (6). Here, the County's recruitment effort adhered to its own policies and procedures and was designed to identify the most qualified candidate.

To prevail in a nonselection case, an appellant must demonstrate that the decision was arbitrary, capricious or illegal. MCC § 33-9(c); MCPR §34-9(d)(2). The County argues that Appellant failed to meet his substantial burden of proof.

The selection of a candidate for the Manager, Fire Code Compliance Section position was based on applicant ratings assigned by the three-person interview panel based on the answers to job related questions asked of all applicants selected for interviews.

The interview records submitted by the County indicate that Appellant was appropriately rated as "Not Recommended," and that the significantly higher scores of the selected candidate justified her rating as "Recommended." Documents submitted by the County indicate that Appellant and the selected candidate were interviewed on the same questions and that the selected candidate performed significantly better than Appellant. The un rebutted evidence of record indicates that the selected candidate was the best qualified. It was entirely appropriate for the Department to select a candidate from the highest rating category. If the Department had for some reason wished to select a candidate from a lower rating category, under § 7-1(c) the Department would have had to justify that unusual selection in writing. Moreover, bypassing the higher rated candidate to select Appellant would have required CAO approval. As Appellant was rated "Not Recommended," the Department would have had to justify bypassing the selected candidate. The County Personnel Regulations and selection guidelines certainly do not require an agency to take those extraordinary steps.

Appellant alleges that the "person selected does not have managerial experience except with a personal company that she is involved with." Appeal Form, p. 2. While it is true that the minimum experience requirements for the position includes five years full-time work experience in "managing building/fire code compliance, inspections, and enforcement operations" and that Ms. PW's experience in the private sector may not have been full-time, the rest of her resume reflects significant professional and managerial experience. Indeed, the interview panel rated her as "Well Above Average" in job qualifications.

In a nonselection 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. MSPB Case No. 20-04 (2020); MSPB Case No. 17-10 (2017); MSPB Case No. 06-02 (2006). Given Ms. PW's impressive resume it would be difficult for Appellant to show that he was clearly more qualified. Other than his allegation that she lacked management experience, which we

discussed and disposed of above, Appellant has made no attempt to argue that he is more qualified or in what way.

Nor has Appellant provided any evidence to support his belief that he was denied the promotion for reasons other than those related to his relative qualifications. We do not find any evidence in the record to establish arbitrary and capricious or illegal conduct on the part of the Department. The County correctly notes that Appellant provided no evidence to substantiate his claim that the selected candidate is in business with former incumbent, RM. Just as importantly, he has suggested no reason why her business relationship with the prior Manager, even if true, would have had any bearing on the interview panel's recommendation. Appellant does not suggest that Appellant's business partner attempted to or was in a position to directly influence the interview panel's assessment of the candidates. He does not allege that the three members of the interview panel were improperly subjected to any attempted influence or that they would have allowed such an attempt. Nor did Appellant provide evidence to support his allegations that RM provided questions to the interview panel or why that would have been improper. We assume Appellant is implying that RM must have shared the interview questions with Ms. PW. But speculation is not proof, and even Appellant stops short of alleging that such an ethical breach actually occurred.

Nor did Appellant provide evidence to support his allegations that prior to all candidates being interviewed Ms. PW told another unnamed candidate that she had been offered the position. While hearsay is admissible in administrative proceedings, it must be credible and of sufficient probative force. In this instance we have doubt concerning the reliability of such second level hearsay, also referred to as "hearsay within hearsay." *See Travers v. Baltimore Police Department*, 115 Md. App. 395, 413 (1997). Appellant's failure to even provide an explanation for why he did not identify the unnamed candidate, let alone produce an affidavit from the person, raises significant concerns over the reliability of the hearsay. *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725-26 (1989). Appellant cannot rely on this slimmest of reeds to make his case.

There is simply no reliable evidence to support Appellant's bald allegations of favoritism or unequal treatment. Indeed, even when the selected candidate and the Appellant are both known to those involved in the selection process it is not enough for us to conclude that there had been improper favoritism to one of them. *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."). Appellant has not provided any evidence that the hiring process was procedurally flawed in any way or based on favoritism. Allegations without proof may not form a basis for us to uphold the appeal. *MSPB Case No. 20-04 (2020). Cf., MSPB Case No. 15-31 (2015), n. 2.*³

We conclude that the County has offered legitimate reasons for selecting an applicant other than Appellant for the Manager, Fire Code Compliance Section position, and that selection of the higher rated candidate was done in a manner consistent with the County Personnel Regulations. MCPR § 7-1. As we stated in a prior failure to promote case, "[s]election of a higher rated

³ It is significant that despite being provided with the opportunity, Appellant did not contest the County's Response. *See MSPB Case No. 16-01 (2015).*

candidate is consistent with the County personnel regulations.” MSPB Case No. 17-05 (2017). *See* MSPB Case No. 20-04 (2020).

Finally, while Appellant was understandably disturbed that he found out about Ms. PW’s promotion when a Department wide announcement was made, that minor discourtesy does not reflect on the propriety of the selection process. We see no violation and believe that the immediate apology to Appellant was appropriate and sufficient.

Accordingly, we find no merit in Appellant’s claim that he was improperly denied promotion to a position for which he was the best qualified and that Appellant has not met his heavy burden of proving that the County’s decision was arbitrary, capricious or based on other non-merit factors. MCC, § 33-9(c); MCPR, §34-9(d)(2).

ORDER

Because Appellant has failed to demonstrate that the County’s decision on his application was arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors, the appeal of his nonselection for the position of Manager, Fire Code Compliance Section, Division of Fire Prevention and Code Compliance, is hereby **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 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
June 5, 2020

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 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 2020 the Board issued the following decisions in retirement grievance appeals.

CASE NO. 18-31

FINAL DECISION

Appellant and 16 other Appellants who are Fire/Rescue Battalion Chiefs with the Montgomery County Fire and Rescue Services (MCFRS) filed grievances with the Office of Human Resources (OHR) claiming that they should not be considered exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). As relief Appellants seek time and a half and back pay for overtime (OT) they have worked.

On June 11, 2018, Appellants filed this consolidated appeal (Appeal) challenging a May 30, 2018, decision by the Montgomery County Chief Administrative Officer (CAO) denying their grievances.¹ Appellants filed the CAO decision on June 18, 2018.

The County filed a response to the Appeal on July 23, 2018 (County Response). Appellants filed final comments (Appellants' Reply) on September 17, 2018.² The appeal was considered and decided by the Board.

FINDINGS OF FACT

The MCFRS is headed by a Fire Chief, who has five Division Chiefs as direct reports. The Operations Division Chief has eight Assistant Chiefs, four of whom are Duty Operations Chiefs.

¹The grievances were consolidated on April 25, 2017, pursuant to Montgomery County Personnel Regulations (MCPD) § 34-9(c).

² Appellants' Reply of September 17, 2018, included the following 19 attachments as Appellant Exhibits (AX):

1. County Response of July 23, 2018, page 2.
2. MCFRS Telestaff Roster for July 5, 2018.
3. MCFRS Telestaff Roster for July 13, 2018.
4. Montgomery County Class Specification: Fire/Rescue Battalion Chief.
5. Supervisory Endorsement Notification regarding Firefighter MM's application for promotion sent to Battalion Chief MD on August 8, 2018.
6. Supervisory Endorsement Notification regarding Firefighter MM's application for promotion sent to Captain BM on August 8, 2018.
7. Collection Bargaining Agreement (CBA) with Montgomery County Career Fire Fighters Association IAFF Local 1664, Article 29 – Promotions.
8. MCFRS Station Reference Manual.
9. Email to Battalion Chief MD from Battalion Chief P regarding Captain K temporary station commander assignment.
10. Email to Battalion Chief MD from Battalion Chief F regarding Captain K temporary station commander assignment.
11. Email to Battalion Chief MD from Battalion Chief M regarding Captain K temporary station commander assignment.
12. CBA, Article 28 – Transfers.
13. Station Personnel Vacancy List and Transfer Processing Guidelines (Updated 9/12/2018 K).
14. MCFRS Battalion Personnel Roster, 9/13/18.
15. Transfer Request Receipt for Battalion Chief MD, 9/8/18.
16. Transfer Request comments Notification to Captain BM, 9/8/18.
17. CBA, Article 30 - Discipline.
18. Battalion Chief Bump-Up, Administrative Services Labor Relations PowerPoint presentation.
19. Email from EC regarding financial disclosure, 6/18/18.

Appellant Battalion Chiefs report to the Duty Operations Chiefs. There are MCFRS Battalion Chiefs who did not file grievances and are not appellants.

Battalion Chiefs are high-level managers of firefighting functions and regularly supervise lower levels of classified fire and emergency personnel. The Appeal in this case was filed by “field assigned” Fire/Rescue Battalion Chiefs who claim that unlike “administrative” Battalion Chiefs, field assigned Battalion Chiefs are not FLSA exempt. There is no separate County classification or other designation for field assigned Battalion Chiefs.

The Fire/Rescue Battalion Chief classification is a Grade B3 on the Fire/Rescue Services Management Salary Schedule, along with Assistant Chief (B4) and Division Chief (B6). At all times since the filing of Appellants’ grievances in Fiscal Year (FY) 2017 the minimum salary for Battalion Chiefs has been in excess of \$76,000.³

Battalion Chiefs are managers responsible for all facets of their respective battalions. The Class Specification for Fire/Rescue Battalion Chief (CX 1; AX 4) describes the duties of Appellants as involving “command level administrative and management work,” such as:

delivery of direct firefighting, rescue, and emergency medical services (EMS) as the highest ranking officer of a district; or as manager of a countywide fire/rescue program or service. . .

supervises assigned staff; plans, conducts and coordinates work in such areas as budget, procurement, personnel administration, labor relations, training, and maintenance and security of buildings, grounds and equipment.

Battalion Chiefs may direct the activities of their battalions during emergency incidents but, unlike Captains and Lieutenants who also act as supervisors, Battalion Chiefs do not perform the work of their subordinates. Appellants’ Reply did not dispute this point.

In their grievance Appellants argued that Battalion Chiefs assigned to the field must respond to emergency incidents but that administrative Battalion Chiefs are not required to respond to emergencies. The CAO decision indicated that at the Step 2 meeting evidence was presented, and that Appellants acknowledged, that they are not required to respond to every emergency. Appellants have not provided any documentary evidence supporting their allegation. Tellingly, Appellants’ Reply did not dispute the CAO’s finding or the contention in the County Response that field assigned Battalion Chiefs are not required to respond to every emergency.⁴ We therefore conclude that Appellant Battalion Chiefs are not required to respond to every emergency.

³ According to the Fire/Rescue Services Management Salary Schedules for each fiscal year, in FY18 the minimum salary for the Battalion Chief classification was \$77,893 per year, effective October 1, 2017; in FY19 it was \$79,451; and effective November 10, 2019, in FY20 it is \$81,357.82. The FY19 maximum salary for the Battalion Chief classification was \$132,034, and for FY20, \$144,833, not counting any additional longevity pay for individuals with 20 years of service or more who meet certain conditions. *See* MCPR § 12-9.

⁴ The County Response of July 23, 2018, included the following 8 attachments as County Exhibits (CX):

1. Classification Specification, Fire/Rescue Battalion Chief, Montgomery County. Government, revised October 2014.
2. Policies and Procedures No. 101, Montgomery County, Division of Fire and Rescue Services, “Chain of Command,” 06/17/02.
3. Email dated April 16, 2018 from ER to MD and KL entitled: Grievance Memo to L 9-29-17. pdf.
4. Memorandum from Assistant Chief ER to BL dated September 29, 2017 entitled: Operational Battalion Chief Grievance.

Appellants suggest that they do not have the effective authority to make employment status recommendations, *i.e.*, whether to hire and fire. Although it is part of the Battalion Chief job description and duties to make employment status recommendations, Appellants note that OHR oversees the hiring process and that there are many restrictive regulations. Appellants do concede that they often sit on interview panels with other MCFRS employees, including those of lower rank, and frequently provide recommendations for hiring and discipline. However, they claim there is “no indication” that their personnel recommendations carry more decision making weight than lower level supervisors. Appellants admit that they investigate and initiate the Request for Discipline (RFD) process, but claim that they have little involvement in subsequent disciplinary procedures.

The County argues that even if Appellants do not have authority to make ultimate decisions, since employment status matters are subject to approval by the Fire Chief, their suggestions and recommendations as to promotion, firing, and other employee status matters have “particular weight.” The County further asserts that the recommendations of Appellants are frequently relied upon. The County suggests that Appellants are only arguing that they are not sure that is the case and emphasize anecdotal examples of transactions where their recommendations might not have been followed.

We find that Appellants investigate employee conduct violations and initiate discipline through an RFD, which is sent to the Fire Chief via the Assistant Chief for Labor Relations. Ranks below Battalion Chiefs (such as Captains) are not authorized to take discipline recommendations directly to the Fire Chief and must instead obtain Battalion Chief approval by way of an RFD. As to hiring, Appellant Battalion Chiefs serve on interview panels and their recommendations are given particular weight by hiring panels.

APPLICABLE STATUTES AND REGULATIONS

Montgomery County Personnel Regulations, Section 1. Definitions, (As amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016).

§ 1-4. Base hourly salary: The base hourly salary for an employee is an amount equal to the annual salary for the employee's position, divided by the number of work hours per year normally assigned to the position. Base hourly salary is calculated on the basis of full-time salary and full-time work hours per year for a given position. The base hourly salary includes only pay differentials that apply even if the employee is not in work status, as, for example, if the employee is on paid leave. The base hourly salary does not include overtime or differentials, such as shift differentials, that are paid only if an employee is in work status.

§ 1-5. Biweekly base salary: An employee's biweekly base salary is calculated by multiplying the employee's base hourly salary by the number of hours that the employee is normally scheduled to work in a pay period. (The use of an hourly salary to calculate the

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5. Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), U.S. Department of Labor, Wage and Hour Division, Revised July 2008.
 6. Fact Sheet #1 7B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA), U.S. Department of Labor, Wage and Hour Division, Revised July 2008.
 7. 29 CFR 541.100 - General rule for executive employees.
 8. *Mullins v. City of New York*, 653 F. 3d 104 (2d Cir. 2011).

biweekly base salary of an FLSA-exempt employee does not imply that the employee is an hourly employee.)

§ 1-23. Exempt employee: Incumbent of a position that is not eligible for overtime pay under the Fair Labor Standards Act (FLSA) because of an exemption in the law.

§ 1-44. Non-exempt employee: An incumbent of a position that is eligible for overtime pay under the FLSA.

Montgomery County Personnel Regulations, Section 10. Employee Compensation, (As amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015)

§ 10-1. Definitions.

(i) Overtime compensation threshold: The point after which the County must compensate an employee for performing overtime work.

(j) Overtime work: Duties performed by an employee outside of a normal workday of at least 8 hours or a normal workweek of at least 40 hours.

§ 10-6. Overtime policy.

(f) An employee must not file a grievance under these Regulations to enforce Federal or State wage and hour statutes that are enforceable by filing a claim with the appropriate Federal or State agency.

§ 10-7. Overtime compensation.

(a) Overtime compensation threshold. A department director must compensate an employee with overtime pay or compensatory time if the employee’s total hours in a pay status during a workday or workweek exceed the overtime compensation threshold.

(b) Applicable overtime compensation thresholds. The applicable overtime compensation thresholds for County positions are reflected in the table below:

Normal Overtime Compensation Thresholds for County Employees			
Type of position	Threshold during regular workday	Threshold during regular workweek	Threshold if employee must work on holiday, in general emergency, or on employee’s day off
*	*	*	*
Firefighter/ rescuer at rank of battalion chief or above	number of hours in regular workday for full-time employee, plus 5 hours	53 hours or number of hours in regular workweek for full-time employee plus 5 hours	48 hours or number of hours in regular workweek for fulltime employee

* * *

(c) Normal overtime pay rates

(3) *For an exempt employee.* When an exempt employee is eligible for overtime compensation under these Regulations, the County must compensate the employee as follows:

* * *

(A) an exempt employee at grades 24 and under must be compensated at the rate of time and a half the employee's regular hourly salary for each hour in a pay status greater than the overtime threshold; and

(B) an exempt employee at grades 25 and higher must be compensated on an hour for hour basis for every hour in a pay status greater than the overtime threshold.

* * *

(d) Exception to normal overtime pay rates.

* * *

(2) If an employee has an unscheduled absence the day after having worked an overtime work assignment, then the County must compensate the employee at the regular (straight time) pay rate for the number of hours of the unscheduled absence, except when the FLSA requires such employee to receive overtime compensation at the time and a half rate. . .

(3) If an employee is in a public safety class that is not on the general salary schedule, a department director must compensate the employee as follows:

(C) an exempt employee in pay grades 25 and higher who is:

* * *

(ii) a firefighter/rescuer at the rank of battalion chief or above;

(f) Form of overtime compensation. A department director must provide compensation to employees for eligible overtime work performed. A director must provide overtime compensation at the specified rate in the form of overtime pay or compensatory time earned at the overtime rate.

(1) A department director must pay a non-exempt employee overtime pay for completed overtime work except when:

(A) the employee requests to receive compensatory time in lieu of pay and the supervisor approves the request; or

(B) the department director determines that the cost of overtime pay cannot be accommodated within the department's existing budget appropriations and the FLSA does not require the department director to give overtime pay.

Montgomery County Personnel Regulations, Section 15. Work Schedules, Attendance, Hours of Work, (As amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, June 30, 2015, and July 25, 2017).

§ 15-3. Workday and workweek.

(e) Alteration to normal workweek.

(2) A supervisor may grant an employee's request for a short-term alteration to the regular workday or workweek on an hour-for-hour basis, but must not pay overtime to the employee unless overtime pay is required under the FLSA.

Montgomery County Personnel Regulations, Section 34. Grievances, (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015).

§ 34-1. Definitions.

(c) **Consolidated grievance:** Two or more grievances that are filed by one employee or 2 or more different employees and which are processed as one grievance, if the grievances:

- (1) concern the same subject; and
- (2) request the same or similar relief.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, July 12, 2011, and June 30, 2015), Section 34. Grievances, provides in pertinent part:

§ 34-2. Eligibility to file a grievance.

(a) A merit system employee who has successfully completed the probationary period and has merit system status . . . may file a grievance on a matter described in Section 34-2.

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged: . . . (e) improper disciplinary action, which includes a written reprimand . . .

§ 34-9. Grievance procedure.

(c) **Consolidated grievances.**

- (1) The OHR Director may consolidate 2 or more grievances and process them together to save time.
- (2) OHR must give written notice to the employee or employees who filed the grievances that the grievances have been consolidated and will be processed together.
- (3) If the employee gives written notice to the OHR Director that the employee objects to the consolidation of the employee's grievance with other grievances, the OHR Director must process the employee's grievance separately.

(4) If a consolidated grievance includes grievances from more than one department, the OHR Director may designate one department director to respond to the consolidated grievance at Step 2 of the grievance procedure.

(5) The department director or CAO, as appropriate, must ensure that:

(A) each employee who filed a grievance that was consolidated with other grievances receives a copy of the decision issued at that level; and

(B) each employee receives consistent and appropriate relief.

(6) Each employee may decide to accept the decision and the relief offered, if any, or may file the grievance at the next level if the relief requested by the employee was not granted.

(d) Burden of proof. . .

(2) The grievant has the burden of proof in a grievance on any other issue.

Code of Federal Regulations (C.F.R.), Title 29. Labor, Subtitle B. Regulations Relating to Labor, Chapter V, Wage and Hour Division, Department of Labor, Subchapter A. Regulations.

29 C.F.R. § 541.3

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to . . . fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, . . . and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; . . . conducting investigations or inspections for violations of law; . . . or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a . . . fire fighter whose primary duty is to . . . fight fires is not exempt under section 13(a)(1) of the Act merely because the . . . fire fighter also directs the work of other employees in the conduct of . . . fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some . . . fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

29 C.F.R. § 541.100

(a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week . . . exclusive of board, lodging or other facilities;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.102. Management.

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.105. Particular weight.

To determine whether an employee’s suggestions and recommendations are given “particular weight,” factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee’s suggestions and recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

29 C.F.R. § 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee’s “primary duty” must be the performance of exempt work. The term “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary

duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

ISSUE

Did Appellants demonstrate by a preponderance of the evidence that the County Chief Administrative Officer erred when he found that the County policy treating “field assigned” MCFRS Battalion Chiefs as Fair Labor Standards Act exempt was not arbitrary, capricious, or discriminatory, or in violation of a law, regulation, or policy?

ANALYSIS AND CONCLUSIONS

The Board’s Jurisdiction

As this Board has ruled in numerous cases, the Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case Nos. 17-19 and 17-22 (2017); MSPB Case No. 15-28 (2015). *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *See Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

Appellants have the burden of proof on the issue of jurisdiction. MSPB Case No. 18-16 (2018); MSPB Case No. 17-16 (2017). Although the parties did not raise either the issue of the Board’s jurisdiction or of the grievability of this dispute, the Board may raise the issue of its jurisdiction *sua sponte*. MSPB Case No. 09-08 (2009).

In a 1998 decision the MSPB found that it did not have jurisdiction over FLSA cases. MSPB Case No. 86-130 (1998). The Board relied on a Court of Special Appeals decision that was reversed by the Court of Appeals in *Robinson v. Bunch*, 367 Md. 432, 444 (2002) (FLSA substantive provisions apply to State employees, but remedial provisions are governed by Maryland’s statutory administrative and judicial review remedy). See *Maryland Military Dept. v. Cherry*, 382 Md. 117 (2004) (grievance procedure was the sole means by which former employees could have obtained relief under the FLSA, even if the former employees were no longer able to file a grievance at the time of suit). However, the bar of Eleventh Amendment immunity to suit in federal courts against states does not extend to counties. *Zimmer-Rubert v. Bd. of Educ.*, 179 Md. App. 589, 596 (2008). Moreover, the Maryland Declaration of Rights, Article 2, provides that “The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof . . . shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.”

Nevertheless, MCPR § 10-6(f) provides that “An employee must not file a grievance under these Regulations to enforce Federal or State wage and hour statutes that are enforceable by filing a claim with the appropriate Federal or State agency.” This provision would seem to divest the Board of jurisdiction over a grievance appeal *if* Appellants were only seeking to enforce FLSA provisions not incorporated into County law *and* there was a Federal or State agency with jurisdiction. Thus, it appears that Appellants and the County implicitly agree that the substantive overtime provisions of the FLSA are incorporated into the County’s pay policies, and that the Board has jurisdiction to hear the appeal.

The County personnel regulations contain numerous references to compliance with the FLSA, and it appears that the FLSA has generally been incorporated into the regulations. See, e.g., MCPR § 1-23 (Defining “Exempt employee” as one “that is not eligible for overtime pay under the Fair Labor Standards Act (FLSA) because of an exemption in the law”); MCPR § 1-44 (Defining “Non-exempt employee” as someone in “a position that is eligible for overtime pay under the FLSA”); MCPR § 15-3(e)(2) (“A supervisor . . . must not pay overtime . . . unless overtime pay is required under the FLSA”). Thus, we are not deciding this appeal directly under the FLSA, but rather under the County’s personnel regulations which appear to incorporate FLSA standards.⁵

Burden of Proof

Appellants bear the burden of proof to show by a preponderance of the evidence that the DFRS policy on overtime compensation for Battalion Chiefs was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR, § 34-9(d)(2); MSPB Case No. 17-21 (2017).

Application of Law to the Facts

As Fire/Rescue Battalion Chiefs, Appellants are high-level managers of firefighting functions who regularly supervise lower ranks of fire and emergency personnel. The County personnel regulations, MCPR § 10-7(b) & (d), specifically provide that the County’s overtime standards must be applied to “Firefighter/rescuer at rank of battalion chief or above.” There is no separate County classification specification or other designation for “field assigned” Fire/Rescue Battalion Chiefs.

⁵ We note that the Maryland Wage and Hour Law does not apply because the County is not an “employer” within the meaning of Labor and Employment Article, § 3-401.

The County's personnel regulations also specifically presume that Battalion Chiefs are FLSA exempt:

If an employee is in a public safety class that is not on the general salary schedule, a department director must compensate the employee as follows: . . . (C) an exempt employee in pay grades 25 and higher who is: . . . (ii) a firefighter/rescuer at the rank of battalion chief or above. . .

MCPR § 10-7(d)(3)(C)(ii).

Appellants contend, however, that they should not be considered exempt from the overtime requirements of the FLSA under the exemption from its OT requirements for “bona fide executive, administrative, or professional” employees. 29 U.S.C. § 213(a)(1). The County asserts that Battalion Chiefs meet the requirements for “bona fide executive capacity” and are thus exempt employees.

Under the FLSA regulations an employee falls within the executive exemption where he or she: (1) receives a salary of not less than \$445.00 a week; (2) has a primary duty of management of the enterprise of the employer; (3) customarily or regularly directs the work of two or more other employees; and (4) “has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.” 29 CFR § 541.100.

Since 2004 the FLSA regulations have also contained a provision specifically applicable to first responders, such as police officers and firefighters. The first responder regulation provides that the FLSA exemptions do not apply to firefighters, regardless of rank or pay level, who perform work such as preventing, controlling, or extinguishing fires of any type; rescuing fire, crime or accident victims; . . . or other similar work.” 29 C.F.R. § 541.3(b). While a firefighter whose primary duty is to fight fires is not an exempt employee merely because the firefighter also directs the work of other employees in the conduct of fighting a fire, a high-ranking employees such as a fire battalion chief may still be exempt under the executive exemption. *U.S. Department of Labor (DOL) Opinion Letter FLSA 2005-40* (October 14, 2005) (Despite the clear language of § 541.3(b)(1) mandating that certain public safety employees are non-exempt “regardless of pay or rank,” DOL carves out an exception for fire battalion chiefs and above and opines that they may be exempt).

Federal courts have given deference to DOL's interpretation of the first responder regulation and have found high-level fire officials to be exempt executive or administrative employees if, in addition to satisfying the other requirements of the § 541.100 executive exemption, their primary duty is performing managerial tasks. *Mullins v. City of New York*, 653 F.3d 104, 113-17 (2d Cir. 2011) (high level firefighters may be exempt under the primary duty standard).

The United States Court of Appeals for the Fourth Circuit, which has federal appellate jurisdiction over Maryland, addressed the first responder regulation's application to firefighters in *Morrison v. County of Fairfax*, 826 F.3d 758, 767, 769, 772 (4th Cir. 2016), noting that “the first responder regulation . . . clarifies the application of the primary duty test to first responders. . .”. The court looked for guidance to 29 C.F.R. § 541.700(a), which describes an employee's “primary duty” as “the principal, main, major or most important duty that the employee performs,” “based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.” 826 F.3d at 769. The court went on to explain that “[i]t may be appropriate to think of a fire official responsible for ‘high-level direction of operations’ rather than ‘front-line firefighting’ as a manager first and a firefighter second. . .”. 826 F.3d at 772 (citing *Mullins*, 653 F.3d at 115). See, *Smith v. City*

of *Jackson*, 954 F.2d 296, 297, 299 (5th Cir. 1992) (battalion chiefs who supervised captains, responded to only some types of calls, and rarely performed “hands on” firefighting are exempt employees). Cf., *Colburn v. Dep’t of Pub. Safety & Corr. Servs.*, 403 Md. 115, 141-42 (2008) (Correctional Lieutenants, Captains and Majors are FLSA exempt because they perform duties that require discretion and independent judgment, including preparing shift and assignment schedules; providing specific guidance, direction, and supervision of subordinates; preparing written investigative reports and employee evaluations; counseling subordinates; and recommending changes to policy directives).

The Supreme Court has recently clarified that exemptions under the FLSA should be given a “fair (rather than a ‘narrow’) interpretation.” *Encino Motorcars, LLC v. Navarro*, 584 U.S. ___, 138 S.Ct. 1134, 1142 (2018) (citation and internal quotation marks omitted). Accordingly, as we review the four-part test for an exemption from the FLSA under the 29 C.F.R. § 541.100, rather than narrowly construing the exemptions, as some courts have in the past, we are instead required to apply a “fair reading” to the FLSA exemptions.

Salary of Not Less Than \$445.00 a Week

Battalion Chiefs are at Grade B3 on the Fire/Rescue Services Management Salary Schedule. MCFRS Assistant Chiefs (B4) and Division Chiefs (B6) are also on the Fire/Rescue Services Management Salary Schedule. The County points out that the minimum salary for Battalion Chiefs has at all times relevant to this Appeal been significantly in excess of the \$23,660 minimum required by the FLSA.

Appellants claim that they do not meet the salary test because there are variations in actual pay based on assignments and those differences are calculated using hourly pay rates. However, MCPR § 1-5 specifically provides that:

biweekly base salary is calculated by multiplying the employee’s base hourly salary by the number of hours that the employee is normally scheduled to work in a pay period. (The use of an hourly salary to calculate the biweekly base salary of an FLSA-exempt employee does not imply that the employee is an hourly employee)

Appellants’ suggestion that they are not salaried because the County may provide them with overtime, leave payouts, or other such benefits calculated using an employee’s base hourly salary is unpersuasive. We find Appellants’ argument that they are not salaried employees to be meritless.

Primary Duty of Management

For purposes of the FLSA an employee’s “primary duty” is his or her “principal, main, major or most important duty.” 29 C.F.R. § 541.700(a). Factors considered in determining an employee’s primary duty are the relative importance of exempt duties compared to other duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and wages paid to other employees for the kind of nonexempt work.

The first responder regulation, 29 C.F.R. § 541.3, does not alter the primary duty test. *Morrison*, 826 F.3d at 767. High-level employees who perform some first responder duties may nonetheless be exempt if their primary duty is managerial. When Battalion Chiefs are directing operations at an emergency scene, for example, they are performing a managerial duty. Only if they engage in the same front-line activities as their subordinates on a daily basis would their managerial status be in doubt. *Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 829 (10th Cir. 2012). There

is no evidence in the record that Battalion Chiefs perform front-line fire activities on a regular basis.

High-level fire officials are exempt if their primary duty is performing managerial tasks, and they have discretion to determine whether and where their assistance is needed. *Morrison*, 826 F.3d at 767. For that reason, the Fourth Circuit said that the question is whether the employee is a “manager first and a firefighter second.” *Morrison*, 826 F.3d at 772.

“Management” under FLSA includes, but is not limited to:

- Interviewing, selecting, and training employees;
- Setting and adjusting hours of work;
- Directing employees work;
- Maintaining records for supervision or control;
- Appraising employees for recommending promotions or other status changes;
- Handling employee complaints and grievances;
- Disciplining employees;
- Planning work;
- Determining techniques to be used;
- Apportioning work;
- Determining materials, supplies, machinery, equipment or tools to be used;
- Controlling the flow and distribution of materials or supplies;
- Providing for safety and security of employees or property;
- Planning and controlling the budget; and
- Monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102.

The Class Specification for Fire/Rescue Battalion Chief (CX 1; AX 4) describes in detail that the duties of a Battalion Chief involve “command level administrative and management work,” such as the “delivery of direct firefighting, rescue, and emergency medical services (EMS) as the highest ranking officer of a district; or as manager of a countywide fire/rescue program or service.” A Battalion Chief also “supervises assigned staff; plans, conducts and coordinates work in such areas as budget, procurement, personnel administration, labor relations, training, and maintenance and security of buildings, grounds and equipment.”

Battalion Chiefs are managers generally responsible for all aspects of their battalions. They may direct the activities of their battalions during emergency incidents but, unlike Captains and Lieutenants who also act as supervisors, Battalion Chiefs do not perform the work of their subordinates. This is a key indicator that the primary duty of Battalion Chiefs is management. Significantly, Appellants’ Reply does not dispute this point.

Appellants argue that Battalion Chiefs assigned to the field must respond to emergency incidents while “administrative” Battalion Chiefs are not required to respond to emergencies. However, the CAO’s decision points out that evidence was presented, and that Appellants acknowledged, that they are not required to respond to every emergency. Significantly, Appellants’ Reply to the County Submission made no attempt to dispute this fact.

Having the discretion not to respond to an emergency is an indicator that the primary duty of a Battalion Chief is management. *Morrison*, 826 F.3d at 769-70 (Captains’ primary duty is front line firefighting since they do not have discretion to not respond to an emergency, engine cannot leave the

station without a captain, they spend the same amount of time on an emergency as subordinates). Notwithstanding certain limitations on their authority, and the supervision they receive, Appellants have significantly more authority and discretion than Captains.

A duty that is discretionary is not primary duty. Because Appellants have some discretion whether to show up to certain emergencies it cannot be said that responding to emergencies is their primary duty. Moreover, when they are at an emergency scene they are directing operations, not typically engaging in the front-line firefighting activities. We conclude that the primary duty of Appellant Battalion Chiefs is managerial.

Supervise Two or More Employees

Battalion Chiefs supervise two or more employees. Appellants do not appear to dispute this factor.

Authority to Hire and Fire

The County presented evidence indicating that even though Appellants do not have authority to make ultimate decisions as to promotion, firing, and other employee status matters, their suggestions and recommendations on employee status matters carry “particular weight.” Appellants, for example, investigate conduct violations and initiate discipline through a Request for Discipline (RFD) to the Fire Chief through the Assistant Chief for Labor Relations. Captains, on the other hand, cannot send discipline recommendations directly to the Chief and instead must get Battalion Chief approval by way of an RFD.

Appellants dispute having authority to make employment status decisions and suggest that their recommendations are not given particular weight. Appellants note that OHR oversees the hiring process and that there are many restrictive personnel regulations. However, they concede that Battalion Chiefs sit on many interview panels with other MCFRS employees, including those of lower rank, and do provide recommendations for hiring and discipline. Appellants claim there is “no indication” that their personnel recommendations carry more decision making weight than lower level supervisors. Appellants admit that they investigate conduct violations and initiate the RFD process, but claim that they have little involvement in the subsequent disciplinary process.

Determining whether an employee’s suggestions and recommendations are given “particular weight” depends on factors such as whether it is part of the employee’s job description or duties to make such recommendations; the frequency with which such recommendations are made or requested; and the frequency with which the recommendations are relied upon. 29 CFR § 541.105; *DOL Opinion Letter FLSA 2005-40*.

The undisputed record reflects that Battalion Chiefs frequently serve on hiring and promotional interview panels. Appellants point to some specific personnel decisions where their recommendations might not have been followed, but their allegation that their recommendations are not given particular weight is speculative. The County provided support for its position that recommendations from Battalion Chiefs are given particular weight (*e.g.*, CX 3), and correctly contends that the FLSA executive exemption regulations do not require that the recommendations of Battalion Chiefs always be followed. *Holt v. City of Battle Creek*, 925 F.3d 905, 912 (6th Cir. 2019) (FLSA executive exemption applied where battalion chiefs’ input regarding personnel decisions was given particular weight by fire chief).

We find it more likely than not that the Fire Chief does give particular weight to the personnel recommendations of Battalion Chiefs.

Conclusion

The County provided sufficient justification for its policy of treating Battalion Chiefs as exempt under the FLSA, and that justification is not arbitrary, capricious, or discriminatory. As Appellants have not demonstrated how the County's implementation of the overtime policy for Battalion Chiefs violates any applicable provision of law, regulation, or policy, the grievance appeal must be denied.

ORDER

Based on the foregoing, the Board **DENIES** Appellants' appeal from the CAO's Step 2 decision.

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 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
December 30, 2019

CASE NO. 19-13

FINAL DECISION

Appellant is a former Rehabilitation Specialist with the Montgomery County Department of Housing and Community Affairs who, effective February 1, 2001, retired and began receiving pension benefits.

On November 27, 2018, Appellant filed this appeal challenging two November 19, 2018, decisions by the Montgomery County Chief Administrative Officer (CAO) interpreting the annual cost of living (COLA) calculation applied to his monthly retirement benefit, the reduction of benefits upon his reaching Social Security Normal Retirement Age (SSNRA), and changes in his group insurance benefits.¹ Appellant filed two supplemental documents on January 2, 2019.²

¹ Appellant submitted the following attachments with his appeal, which we will designate as Appellant Exhibits (AX):

AX 1 – Letter from CAO regarding retirement benefits, November 19, 2018.

AX 2 – Letter from CAO regarding group insurance benefits, with 4 attachments, November 19, 2018.

² The following are the supplemental documents submitted on January 2nd:

AX 3 – Letter from Appellant's attorney to CAO, October 9, 2018.

AX 4 – Letter from NRH of OHR, December 12, 2002.

The County filed a response to the appeal (County Response) on January 17, 2019.³ Appellant filed final comments (Appellant's Reply) on February 5, 2019. The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant was hired by the County as a Rehabilitation Specialist with the County Department of Housing and Community Affairs on December 10, 1984 and became a member of the integrated plan of Employees' Retirement System (ERS). It is undisputed that effective December 8, 2000, Appellant was dismissed for cause. AX 3, CX C.

Pursuant to a settlement agreement dated September 27, 2002, between Appellant, the County, and the Montgomery County Government Employees' Organization, UFCW Local 1994, Appellant retired effective February 1, 2001. CX C.

With regard to the terms of the settlement, Appellant's appeal states:

Through negotiations they resolved the case with the County reinstating him for six months so he could take retirement with the agreement that his future retirement benefits would not be reduced as confirmed by the county in writing. In violation of the agreement the County has in fact reduced his benefits.

The settlement agreement, ¶3, provided that the County would reinstate Appellant effective July 9, 2000, with backpay and benefits, for a period of six months. Under ¶4, Appellant's

³ The County submitted the following 20 exhibits which we designate as "CX":

- CX A – Letter from CAO regarding group insurance benefits, November 19, 2018.
- CX B – Letter from CAO regarding retirement benefits, November 19, 2018.
- CX C – Settlement Agreement and Release, September 27, 2002.
- CX D – Letter from OHR w/application for benefits & benefit calculations, December 12, 2002.
- CX E – Retiree Insurance Election Form, November 1, 2002.
- CX F – Letter from OHR, November 27, 2015.
- CX G – Letter from RG, December 23, 2016.
- CX H – Voluntary Dismissal Without Prejudice, Motion to Dismiss, and Complaint, Circuit Court Case No. 452561-V.
- CX I – County Code Sections 33-47 and 33-56.
- CX J – County Code Section 33-37.
- CX K – County Code Section 33-42, as of February 1, 2001.
- CX L – County Code Section 33-35.
- CX M – Affidavit of RG, January 10, 2019.
- CX N – County Code Section 33-44, as of February 1, 2001.
- CX O – Bill 25-01; Agenda Item 12, Bill 25-01, July 31, 2001; Agenda Item 6, Bill 19-01, June 26, 2001; Fiscal impact memo, Bill 19-01, June 1, 2001; April 18, 2001, letter from DR, WMM, Inc.; Bill 18-99.
- CX P – County Code Section 33-53.
- CX Q – MCERP Standard Operating Procedures, ERS Correction Procedures – Administrative Errors; January 30, 2017, Memorandum from LAH re Request for Reimbursement – Overpayment to Retiree.
- CX R – County Code Section 20-37.
- CX S – Group Insurance Summary Description, revised May 2018.
- CX T – Retiree Group Insurance Rates, 30% Cost Share chart, effective January 1, 2019.

“reinstatement for this six month period will make him eligible for early retirement, including group insurance benefits, effective February 1, 2001.” Pursuant to ¶5 of the settlement agreement, if Appellant elected to take early retirement within 30 days of the union receiving the agreement he would “receive retroactive retirement benefits from February 1, 2001, the date he became eligible for early retirement.” If Appellant did not elect to take early retirement within 30 days, under ¶6 of the agreement he would be considered to have resigned effective January 8, 2001. CX C.

On November 1, 2002, Appellant signed an Application for Retirement benefits and elected to take early retirement effective February 1, 2001, with a Modified Cash Refund Annuity. CX D.

On December 12, 2002, Appellant received a letter from NRH, a Human Resources Specialist with the County OHR, setting out “an outline of benefits to which you are entitled.” AX 4, CX D. The benefits set out in the letter included the following:

Monthly pension payments as provided by the Modified Cash Refund Annuity Option under the Mandatory Integrated Plan in the amount of \$780.11, *which will not reduce to \$412.23 on February 1, 2017* (subject to annual cost of living adjustments, less any authorized deductions).

* * *

You have the Lifetime Medicare Supplement Plan group insurance. Your coverage will continue for your lifetime, with Montgomery County paying 70% of the cost and you paying 30% of the cost. The current monthly premium for single coverage is \$99.95. When premium rates change the adjusted amount will be deducted from your check.

AX 4, CX D (emphasis added).

On November 27, 2015, the Office of Human Resources reminded Appellant that County health insurance benefits would begin coordinating with Medicare once he became Medicare eligible on January 7, 2016, his 65th birthday. CX F. Appellant participates in the CareFirst option of the County health benefits plan and Medicare is now his primary medical insurance. Since the County health plan now provides secondary insurance Appellant’s County premiums have decreased due to his Medicare eligibility. CX T; County Response, p. 6.

In 2016, the County found that the incorrect cost of living adjustment had been applied to Appellant’s retirement benefit, resulting in Appellant receiving overpayments totaling \$13,128.97 from February 1, 2001 through January 31, 2017. By letter dated December 23, 2016, Appellant was notified of the overpayment and his repayment options. CX G. The letter also indicated that due to Appellant having reached the Social Security Normal Retirement Age of 66 on January 7, 2017, his monthly benefit would reduce as of February 1, 2017. *Id.*

Appellant filed a Complaint in the Circuit Court of Montgomery County on August 9, 2018, alleging breach of contract and breach of fiduciary duty due to the reductions in his retirement and health benefits. On October 15, 2018, the parties filed a Consent Line of Voluntary

Dismissal Without Prejudice. CX H. Appellant then requested that the CAO provide an interpretation of the applicable law. The CAO provided his interpretations regarding Appellant's retirement benefits and group insurance benefits on November 19, 2018. CX A and B. Appellant then filed this appeal.

APPLICABLE LAW

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article III, Employees' Retirement System, which provides in applicable part,

§ 33-47. Administration.

- (a) *Responsibility for administration.* The chief administrative officer shall be responsible for the administration of the retirement system. . . .
- (c) *Chief administrative officer.* Except for the powers of the board, the chief administrative officer has the power and the duty to take all actions and to make all decisions to administer the retirement system.
- (d) *Powers and duties of the Chief Administrative Officer.* The chief Administrative Officer has, but is not limited to, the following powers and duties:
 - (1) Interpret the provisions of the retirement system;
 - (2) Decide the eligibility of any employee and the rights of any member or beneficiary to receive benefits;
 - (3) Compute the amount of benefits payable to any member or beneficiary; . . .

§ 33-56. Interpretations.

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.
- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

Montgomery County Code, Chapter 20, Finance, Article VII, Insurance, § 20-37, Comprehensive insurance and self-insurance program, which provides in applicable part:

§ 20-37. Comprehensive insurance and self-insurance program.

- (b) The county is hereby authorized and empowered to adopt or install a plan or system of group health and life insurance and group hospitalization in cooperation with the employees or any portion thereof in any office, agency or branch of the government of the county and with paid employees of quasi-public corporations engaged in the performance of governmental functions, such as fire departments, whenever it may deem such to be advisable in the interest of the health, comfort and welfare of the county.

* * *

- (g) This chapter, or any regulations adopted under this chapter, does not constitute or must not be interpreted as a waiver of the right of the county to rely on and raise the defense of sovereign or governmental immunity on behalf of the county or any participating agency when the county or the participating agency deems it appropriate.

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

§ 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.

ISSUE

Did the County err in denying Appellant’s request to not reduce his pension and health insurance benefits?

ANALYSIS AND CONCLUSIONS

This Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See Montgomery County Personnel Regulations (MCPR)*, § 35-7(c) (“The MSPB must dismiss an appeal if it determines it lacks jurisdiction.”). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Board Lacks Jurisdiction Over Appeals of the CAO's Interpretations Concerning Retiree Health Benefits

Under § 33-56(a) of the County Code, the CAO has authority to issue interpretations of the retirement law, Chapter 33, Article III, of the Montgomery County Code. (“The Chief Administrative Officer is responsible for deciding questions arising under this Article.”). The Board has jurisdiction to hear appeals of the CAO’s interpretations. § 33-56(c).

The County argues that the Board’s jurisdiction is limited to issues regarding retirement benefits but has no jurisdiction to review a decision of the CAO concerning group insurance benefits. County Response, pp. 5-6.

We have reviewed Article III, and find that it does not generally address group health or life insurance benefits.⁴ While the declaration of policy for Article III, § 33-34, states that the County’s policy is “to maintain a system of retirement pay *and benefits*,” the benefits being referred to are pension benefits, not health benefits. *See* County Attorney Opinion (May 13, 2008).

Accordingly, we find that the Board lacks jurisdiction to consider the Appeal insofar as it involves group health or life insurance benefits for retirees.

The CAO's Interpretation of the Retirement Statute is Entitled to Deference, if Reasonable.

As noted above, the County Council has vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. MSPB Case No. 14-33 (2015). *See Martin v. OSHA*, 499 U.S. 144, 156 (1991). Where, however, the CAO’s interpretation is predicated on an error of law, no deference is appropriate. *See Dep’t of Health & Mental Hygiene v. Riverview Nursing Ctr.*, 104 Md. App. 593, 602 (1995); MSPB Case No. 18-09 (2019); MSPB Case No. 11-03 (2010); MSPB Case No. 11-04 (2010).

The Settlement Agreement Was Not Breached

Montgomery County Personnel Regulations specifically provide that the MSPB may interpret and enforce a settlement agreement that is before the Board in connection with an appeal. MCPR § 35-15(a). The Board has jurisdiction to consider the provisions of the settlement agreement as both parties in this matter have presented the September 27, 2002, agreement to the Board for interpretation.

The Board has carefully considered the agreement and can find no language providing that Appellant is entitled to a level of retirement or group insurance benefits that differs from any other

⁴ The only exceptions are for the Deferred Retirement Option Plans (DROP) that allow an employee under limited circumstances to retire but continue to work, § 33-38A, and the 2010 Retirement Incentive Program, § 33-42A, under which employees eligible to retire and in a class of positions subject to a Reduction in Force were able to receive additional benefits or a buyout as an incentive to elect retirement. Neither situation is applicable here. We also note that while Chapter 33 contains provisions concerning the Consolidated Retiree Health Benefits Trust, they are contained in Article XI and not covered by the review and interpretation procedures of § 33-56, which are limited to issues arising under Article III.

retiree with the same age and service profile as Appellant's who selected the same retirement options. The agreement merely provides that Appellant would be "eligible for early retirement, including group insurance benefits, effective February 1, 2001." CX C, ¶4. The agreement also specifically states that Appellant "may contact" OHR "to receive information regarding the effect of electing early retirement." CX C, ¶5.

Appellant was provided with written details concerning his retirement options and submitted his signed application for early retirement, effective February 1, 2001. CX D. The Retirement Checklist indicated that his initial monthly benefit amount would be \$780.11 and that the Reduction Amount would be \$412.23 on February 1, 2017. That date was the first of the month following Appellant's 66th birthday, the date upon which he reached Social Security Normal Retirement Age (SSNRA). This information was also provided in a computer print out from the Benefit Administration System. CX D.

Appellant was also provided with information concerning his retiree medical and dental premiums and of the reduction schedule for life insurance. Appellant signed a Retiree Insurance Election Form containing the options. CX E. The form indicates Appellant's election of a premium sharing arrangement whereby the County pays 70% of the health insurance premiums and Appellant pays 30%. Appellant signed the election form on November 1, 2002 and checked the box and placed his initials by the premium sharing option. CX E.

Appellant does not challenge any of the County's exhibits or deny that they were received by Appellant. Nor does he deny signing and submitting the retirement and health insurance application forms, or the County's detailed description of the benefit election process. *See* CX D, E, and M. Instead, Appellant's sole argument is that because the December 12, 2002, letter from the County states that his benefits "will not reduce," the County has promised to maintain his benefits without the reductions disclosed in the retirement and health insurance application forms. Appellant's Reply; Appeal Form; AX 3. Appellant apparently views this alleged promise as part of the settlement agreement.

The County correctly notes that the December 12 letter was sent to Appellant after the settlement agreement was executed and Appellant had selected his benefit options. The County argues that the letter was not incorporated into the agreement and notes that the settlement agreement does not otherwise provide that Appellant's benefits would not be reduced. County Response, p. 4. Moreover, and most importantly, the County contends that inclusion of the word "not" was a typographical error.

We have carefully read the December 12 letter. The letter states that it is providing "an outline of the benefits to which you are entitled," followed by the sentence at issue. That sentence says: "Monthly pension payments as provided by the Modified Cash Refund Annuity Option under the Mandatory Integrated Plan in the amount of \$780.11, which will not reduce to \$412.23 on February 1, 2017 (subject to annual cost of living adjustments, less any authorized deductions)."

It is clear to us that the word "not" is the result of an inadvertent scrivener's error. Besides being inconsistent with the documents provided to Appellant, including those which Appellant signed, insertion of the word "not" makes no sense in the totality of the circumstances or the

context of the sentence. The County was not sending Appellant a letter specifying that he would receive pension payments in the amount of \$780.11, and that those payments would not be reduced to a specific amount. Deletion of the word “not” results in the December 12 letter accurately reflecting both parties’ understanding of Appellant’s retirement benefits at the time he signed the settlement agreement and the early retirement application. As it has long been “the fixed policy of the law to give effect to the real meaning of documents, without regard to inadvertent lapses of a merely verbal character,” we conclude that inclusion of the word “not” in the December 12 letter was a typographical error that must be disregarded. *Farrell v. City of Baltimore*, 75 Md. 493, 23 A. 1096, 1096-97 (1892) (*Citing Story, J., Commentaries on the Law of Promissory Notes*, § 12 (1851), for a case “where a person signed a paper in these words: ‘Borrowed of J. S. fifty pounds, which I promise not to pay;’ and it was held . . . that the word ‘not’ ought to be rejected.”). *See Chapman v. State*, 331 Md. 448, 474 (1993) (“obvious single typographical error” may be disregarded); *Attorney Grievance Comm’n of Maryland v. Ashworth*, 381 Md. 561, 570 (2004).

We thus find that the County has not breached the terms of the settlement agreement by applying the requirements of the County pension law and policies to Appellant in a manner consistent with the information provided to him when he applied for early retirement. Appellant is not entitled to special treatment or different benefits under the settlement agreement.

No Estoppel Against the County

Appellant’s Reply to the County’s Response only makes one argument: because the County made a commitment not to reduce Appellant’s benefits those benefits should be reinstated. Appellant also suggests that if funds are required to be paid to the pension system the money should come from the County and not Appellant. Appellant’s argument is based on the December 12, 2002, letter Appellant received from a Human Resource Specialist in the County Office of Human Resources. CX D; AX 7.

Although he does not do so expressly, it appears that Appellant is attempting to make an argument that the County is estopped from reducing Appellant’s benefits by the statement in the December 12 letter. We see no merit in Appellant’s argument because, as discussed above, it relies entirely on an obvious typographical error. Moreover, Appellant has not sufficiently alleged the elements of equitable estoppel against the County. Appellant did not allege that any County employee engaged in misconduct. MSPB Case No. 16-07 (2016); *Perez Peraza*, 114 M.S.P.R. 457 (2010) (Affirmative misconduct is a prerequisite for invoking equitable estoppel against the government; negligent provision of misinformation does not constitute affirmative misconduct). Further, Appellant does not meet the requirement of detrimental reliance because he submitted his early retirement and health insurance applications *prior* to receiving the December 12 letter. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (equitable estoppel against the government requires detrimental reliance); *King v. Office of Personnel Management*, 114 M.S.P.R. 181, 189 (2010) (equitable estoppel against the government requires that appellant have reasonably relied on a misrepresentation to his detriment and that he had changed his position for the worse or relinquished a valuable right).

Accordingly, we find that the County is not estopped from reducing Appellant’s benefits in accordance with the pension law and the calculations provided to Appellant at the time of his application for early retirement.

ORDER

Based on the foregoing, the Board **DENIES** Appellant's appeal from the CAO's interpretation.

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 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
July 10, 2019

On January 7, 2020, the Circuit Court for Montgomery County entered an order in Civil Action No. 470431-V affirming the Board's decision and denying Appellant's petition for judicial review.

CASE NO. 19-21

FINAL DECISION

Appellant, an employee of the Montgomery County Department of Police (Department), filed the above captioned grievance appeal with the Merit System Protection Board (Board or MSPB) challenging the County's decision to deny her longevity pay after she went from a Grade 24 Public Safety Shift Operations Communications Manager to a Grade 25 Public Safety Emergency Communications Manager position on September 18, 2016.¹ Appellant also alleges that the County improperly failed to continue her longevity pay beginning on September 27, 2009, when she was promoted to a Grade 23 Administrative Specialist III position.

Appellant filed a grievance concerning the denial of longevity pay on August 14, 2018 and appealed the Step 1 denial of her grievance to the Chief Administrative Officer ("CAO"). The CAO issued a Step 2 decision denying her appeal that was dated February 4, 2019, however, Appellant's appeal states that the decision was received by her on March 6, 2019.

On March 6, 2019, Appellant filed this appeal. The County filed a response to the appeal on April 8, 2019. (County Response). The County did not dispute Appellant's assertion that she received the CAO Step 2 decision on March 6, 2019. On April 15, 2019, Appellant filed a reply. (Appellant's Response).

After reviewing the submissions of the parties, on July 9, 2019, the Board requested that the County provide further information and clarification.² The County filed a Supplemental

¹As will be discussed below, whether Appellant was promoted or reclassified is a primary source of contention between the parties.

² Specifically, the Board asked for:

a full explanation and appropriate documentation . . . to support the County's position that the Appellant in the above appeal was promoted rather than having her position reclassified in 2009, 2015, and 2016. The Board would like to know whether the higher-level positions were posted and if there were other applicants. The Board would also like an explanation of the significance of the

Response on August 1, 2019. Appellant filed a reply to the County's Supplemental Response on August 8, 2019. (Appellant's Supplemental Response).

The Appeal was reviewed and considered by the Board.³

FINDINGS OF FACT

Appellant was serving as a Grade 22 Public Safety Communications Supervisor when she received a longevity increase to her salary, effective November 9, 2008. Appellant Exhibit (AX) A;⁴ County Exhibit (CX) 1.⁵ The longevity increment is a one-time 2% increase to an employee's base salary. Montgomery County Personnel Regulations (MCPR), § 12-9(a) and (b). Appellant was eligible for the longevity increment because she had over 20 years of County service, was at

"Formerly Titled" notations at the end of the Class Specifications for Public Safety Emergency Communications Manager (Code No. 103091) and Public Safety Emergency Communications Supervisor (Code No. 103092). Does this indicate that OHR reallocated a class from one pay grade to another or the creation of new classes under MCPR §9-3(b)? Are the Public Safety Communications Shift Operations Manager (Code No. 003092) and Public Safety Communications Supervisor (Code No. 003093) classes still in use? If not, will the classifications be eliminated?

³ At the end of his term of office, the Board's former Chair, Michael J. Kator, ceased to participate in the consideration or decision of this appeal. This decision is being issued by Board members Harriet E. Davidson and Angela Franco. Member Sonya Chiles, who took office on January 1, 2020, did not participate in the consideration of this Appeal.

⁴ Appellant included three attachments to her April 15, 2019, Response. We will identify those attachments as Appellant Exhibits (AX) as follows:

AX A – Personnel Action Form, November 28, 2008

AX B – Personnel Action Form, September 27, 2009 and General Salary Schedule FY2010

AX C – Core HR email re: longevity following promotion, October 18, 2018

⁵ The County's initial response included three exhibits. The County's Supplemental response included affidavits not marked as exhibits and attachments to the affidavits using the same exhibit numbering as in the initial response. To reduce confusion, we have identified the County's exhibits as follows.

CX 1 – Personnel Action Form, November 28, 2008

CX 2 – Letter confirming promotion, January 23, 2015

CX 3 – Letter confirming promotion, August 19, 2016

CX 4 – Affidavit of PD, August 1, 2019

CX 5 – Memorandum re New Occupational Class Series Creation – Public Safety Emergency Communications Specialists, December 29, 2015

CX 6 – Classification Action Form, May 13, 2016

CX 7 – Memorandum re Public Safety Emergency Communications Position Series, October 20, 2014

CX 8 – Memorandum re Classification of Public Safety Emergency Communications Specialists, October 7, 2015

CX 9 – Proposed Class Specification, Public Safety Emergency Communications Specialist I

CX 10 – Proposed Class Specification, Public Safety Emergency Communications Specialist II

CX 11 – Proposed Class Specification, Public Safety Emergency Communications Specialist III

CX 12 – Proposed Class Specification, Public Safety Emergency Communications Specialist IV

CX 13 – Proposed Class Specification, Senior Public Safety Emergency Communications Specialist

CX 14 – Proposed Class Specification, Public Safety Emergency Communications Supervisor

CX 15 – Proposed Class Specification, Public Safety Emergency Communications Manager

CX 16 – Quantitative Evaluation System (QES III) Factor Evaluation Sheets

CX 17 – Affidavit of JA, August 1, 2019

CX 18 – Letter confirming promotion, August 19, 2016

CX 19 – Vacancy Posting, IRC 22436

CX 20 – Applicant Listing, IRC 22436

CX 21 – Appellant resume

the maximum salary of the Grade 22 pay range and had received annual performance ratings of Highly Successful or Exceptional for at least two years. MCPR § 12-9(b).

On September 27, 2009, Appellant was promoted to a Grade 23 Administrative Specialist III position. AX B. Appellant was promoted to a Grade 24 Public Safety Operations Manager position, effective February 8, 2015. CX 2.

In 2015 and 2016 the County engaged in a process to create new occupational classifications for public safety communications specialists. CX 5 through CX 16. On December 29, 2015, the County submitted a request to the Board concerning the creation of a new occupational classification series for Public Safety Emergency Communications Specialist. CX 5.⁶ In accordance with MCPR, § 9-3(b)(3), the Board reviewed the proposal and had no comments or objections to the creation of the new Public Safety Emergency Communications Specialist classification series.

After the new Public Safety Emergency Communications classifications were created, the Department conducted a recruitment for various positions, including Public Safety Emergency Communications Manager. The recruitment notice for the Grade 25 positions (IRC22436) was posted on July 11, 2016, and applications were due by July 25, 2016. CX 19. Appellant submitted an application for the promotion. CX 20 and CX 21.

Although Appellant argues that she was reclassified and not promoted, the County points out that Appellant applied for the position by submitting a resume and received an August 19, 2016, letter advising of her “promotion to the full-time position of Public Safety Emergency Communications Manager, Grade 25.” CX 18; County Response, p. 3. Furthermore, Appellant was required to serve a promotional probationary period, CX 18, and both the Personnel Action Form of August 31, 2016, and her salary history indicate a “promotion” effective September 18, 2016. CX 1, CX 3, CX18. *See* Affidavit of JA, ¶15. CX 17

ISSUE

Did Appellant demonstrate by a preponderance of the evidence that the County Chief Administrative Officer erred when he found that denial of longevity pay was not arbitrary, capricious, or discriminatory, or in violation of a law, regulation, or policy?

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations, § 1, Definitions, (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, February 23, 2016, and July 17, 2018), provides in pertinent part:

§ 1-63. Promotion: The formal assignment of an employee to a position:

- (a) in a higher-graded occupational class; or
 - (b) on a different salary schedule accompanied by an increase in salary.
- The reclassification or reallocation of a position to a higher-graded occupational class under Section 9 of these Regulations is not a promotion.

⁶ We note that in a February 18, 2016, memorandum to the Board the County’s request was amended in a way that is not material to this appeal.

Montgomery County Personnel Regulations, § 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), which provides, in applicable part:

§ 6-2. Announcement of open jobs.

(a) The OHR Director:

- (1) must announce and electronically post notice of vacant positions that are open for competition among qualified candidates;
- (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;
- (3) may announce a vacancy to the general public or may restrict the vacancy to some or all County employees;

§ 6-5. Competitive rating process.

(a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion. . . .

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

Montgomery County Personnel Regulations, § 10, Employee Compensation, (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015), which provides, in relevant part:

§ 10-5. Salary-setting policies.

(a) *General.* A department director must ensure that an employee's base salary does not exceed the pay rate or range for the pay grade or pay band assigned to the employee's class, unless the department director:

- (1) demoted the employee because of reduction-in-force or disability under Section 10-5(d); or
- (2) reclassified or reallocated the employee's position to a lower pay grade or pay band under Section 10-5(f). . . .

(c) *Salary on promotion.*

(1) Compensation for a regular (non-temporary) promotion.

(A) A department director must ensure that an employee's base salary following promotion is not less than the minimum or more than the maximum salary for the new pay grade or pay band.

(B) A department director must give a merit system employee who is promoted at least a 5 percent increase in base salary

Montgomery County Personnel Regulations, § 12, Service Increments, (as amended January 18, 2005, February 14, 2006, December 11, 2007, October 21, 2008, July 12, 2011, and June 30, 2015), which provides, in applicable part:

§ 12-2. Eligibility for service increment.

(c) Any employee who is eligible to receive a service increment and whose position is reclassified or reallocated to a higher pay grade is still eligible to receive a service increment on the effective date of the position's reclassification or reallocation. In this case, the OHR Director must change the employee's service increment date to the effective date of the reclassification or reallocation of the employee's position.

§ 12-9. Twenty-year longevity/performance increment.

(a) A 20-year longevity/performance increment is a one-time increase to an employee's base salary.

(b) A department director must award a one-time 20-year longevity/performance increment of 2 percent of base salary to an employee in a position on the General salary schedule if the employee has:

- (1) a base salary equal to the maximum salary of the pay range; and
- (2) has 20 years of actual County service; and
- (3) received an annual overall performance rating of Highly Successful Performance or Exceptional Performance for the 2 most recent consecutive years.

(c) An employee is eligible to receive only one 20-year longevity/performance increment.

(d) Awarding longevity/performance increments to promoted employees.

(1) When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's prior base salary before the promotional increase is added; or,

(B) if (A) does not apply, then the employee may be eligible to receive a 2% longevity/performance increment as outlined in Section 12-9(b); however,

(C) whether (A) or (B) applies, the employee's new base salary cannot exceed the maximum salary of the new pay range.

(2) When an employee receives a promotion from a non-bargaining unit position to a bargaining unit position:

(A) the 20-year longevity/performance increment is added to the employee's base salary before the promotional increase is added;

(B) the new base salary cannot exceed the maximum salary of the new pay range; however,

(C) if the employee's new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.

(3) When an employee receives a promotion from a bargaining unit position to a non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's base salary before the promotional increase is added;

(B) the employee is eligible to receive a 2% longevity/performance increment under Section 12-9(b); and,

(C) the employee's new base salary cannot exceed the maximum salary of the new pay range.

(e) An employee who has a 20 year longevity/performance increment and who:

(1) transfers from a non-bargaining unit position to another non-bargaining unit position, the longevity/performance increment remains the same;

(2) transfers from a non-bargaining unit position to a bargaining unit position is eligible to receive a bargaining unit 20-year longevity increment as provided in the respective collective bargaining agreement; or,

(3) transfers from a bargaining unit position to a non-bargaining unit position:

(A) the longevity/performance increment is added to the employee's base salary except when the employee's base salary exceeds the maximum salary of the non-bargaining unit pay range; then,

(B) the employee's base salary must be reduced to the maximum salary of the pay range.

Montgomery County Personnel Regulations, § 27. Promotion, (as amended June 30, 2015), which provides, in applicable part:

§ 27-2. Types of promotion.

(a) **Competitive promotion.** Prior to making the final selection for promotion, the department director must ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

§ 27-3. Compensation for a promotion. A department director must compensate an employee for a promotion as described in Section 10-5(c).

§ 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.

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

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

(a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy; . . .

(c) improper, inequitable, or unfair act in the administration of the merit system . . .

(d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential . . .

§ 34-10. Appeal of a grievance decision.

(c) A written grievance decision must include information about:

(1) how the employee may appeal the decision to the next step of the grievance procedure or file an appeal with the MSPB, if applicable; and

(2) the time limits for appealing the grievance to the next step, or to the MSPB.

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

§ 35-3. Appeal period.

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:
 - (3) receives a written final decision on a grievance. . . .

§ 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.

ANALYSIS AND CONCLUSIONS

Appellant is challenging the County’s application of the longevity and performance increment rules after her September 18, 2016, appointment to a Grade 25 Public Safety Emergency Communications Manager position.

The parties dispute the issue of whether Appellant was placed in the higher-level position by reclassification or promotion. The County submitted affidavits, the job posting, and other documentation to support its position that Appellant was competitively promoted to the higher-level position. CX 17 - 21.

Appellant left position number 013339 when she was promoted from a Grade 24 Public Safety Operations Manager to position number 018058 as a Grade 25 Public Safety Emergency Communications Manager. CX 2 and 3. This further supports the County’s position, as a promotion involves the assignment of an employee to a higher level position while a reclassification entails a change in the classification of a position. *See* MCPR § 1-63, § 9-4(f).

Appellant asserts that although she was required to apply and submit a resume in response to the IRC 22436 vacancy posting the promotional process was not competitive and she did not serve a probationary period. Appellant’s Supplemental Response, p. 1.

Appellant suggests that notwithstanding the August 19, 2016, promotion letter (CX 3, CX 18), “the letter like every step in this process was just part of the technical process required of the four (4) Public Safety Shift Operations Managers.” Appellant’s Supplemental Response, p. 1. Appellant admits that she was told that she would have to re-apply for her current position “since it was technically a promotion.” *Id.* Appellant further notes that the application for a promotion to Public Safety Emergency Communications Manager was limited to candidates who were in Public Safety Communications Shift Operations Manager positions. *Id.* There is, however, nothing improper about a promotional recruitment process that is limited to certain County employees with those qualifications. MCPR § 6-2(a)(3) (“may restrict the vacancy to some or all County employees”). The County properly established and provided the required announcements of the competitive promotional qualifications and the rating process. *See* MCPR § 6-2(a)(2); § 6-5(a) & (b); § 27-2(a). *See* MSPB Case Nos. 19-22 and 19-27 (2020).

As there is a complete absence of any evidence supporting Appellant’s view that she was reclassified rather than promoted, we must conclude that she was promoted. *See* MSPB Case Nos.

19-22 and 19-27 (2020). Accordingly, we examine the application of the longevity increment regulations to her promotion.⁷

Under MCPR § 12-9, if an employee has reached the maximum salary for their grade, has high performance ratings, and has at least 20 years of service, they may be eligible for a “longevity increment.” A longevity increment provides for a salary 2% above the grade maximum. MCPR § 12-9(a) further provides that the longevity increment is a “one-time increase to an employee’s base salary.” The regulation also specifies that “[a]n employee is eligible to receive only one 20-year longevity/performance increment.” MCPR § 12-9(c). It is undisputed that Appellant received a longevity increment to her salary effective November 9, 2008.

The longevity increment regulation states that when a non-bargaining unit employee who is receiving the longevity increment (such as Appellant) is promoted the new base salary is the maximum of the new grade:

When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position: . . . the employee’s new base salary cannot exceed the maximum salary of the new pay range.

MCPR § 12-9(d)(1)(C).⁸ Similarly, the compensation regulations also provide that “[a] department director must ensure that an employee’s base salary following promotion is not . . . more than the maximum salary for the new pay grade or pay band.” MCPR § 10-5(c)(1)(A).⁹ Appellant was promoted to the maximum salary for Grade 25. CX 3, CX 18.

Appellant alleges that she received less than a full 5% salary increase upon her 2016 promotion. Appellant’s Supplemental Response, p. 2. However, she was not entitled to receive the full 5% promotional increase set forth in § 10-5(c)(1)(B) because it is expressly limited to the maximum of the salary grade in both § 10-5(c)(1)(A) and § 10-5(a). Thus, the 5% promotional increase rule does not override the salary grade maximum limitation.

⁷ To the extent Appellant may allege that she has also been the victim of age discrimination, the Board lacks the authority to adjudicate claims of discrimination under these circumstances. MCC §27-19; MCPR §35-2(d). *See* MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance “employment matters for which another forum is available to provide relief.” MCC §33-12(b). Appellant unquestionably had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 93-25 (1993) (Interpreting §33-12(b)’s “another forum available” limitation as applying to discrimination claims). *See also* MCPR §5-4(b)(1) (An employee alleging discrimination “may not file a grievance under Section 34 of these Regulations or an appeal under Section 35, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation.”).

⁸ Significantly, while MCPR § 12-9(d)(1)(C) specifically prohibits an employee such as Appellant who is promoted from a non-bargaining unit position to another non-bargaining unit position from receiving a salary above the grade maximum, another subsection of the regulation, § 12-9(d)(2)(C), specifically allows an employee promoted from a non-bargaining unit position to a *bargaining unit position* to get the longevity increment: “if the employee’s new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.”

⁹ The promotional regulation governing compensation specifically provides that the compensation regulations are to be applied: “§ 27-3. **Compensation for a promotion.** A department director must compensate an employee for a promotion as described in Section 10-5(c).”

More importantly, after receiving a longevity increase in 2008 Appellant received two undisputed promotions in 2009 and 2015. Either one of those two promotions would have required the end of a longevity increment added to her salary. At the time of her promotion in 2016, Appellant properly received a salary increase to the maximum salary for Grade 25. CX 3 and CX 18. Because Appellant had received a “one-time” longevity increment in 2008, she was certainly not entitled to another longevity increment upon her 2016 promotion.

Accordingly, because Appellant had received a “one-time” longevity increment in 2008, upon her 2009, 2015, and 2016 promotions she was properly denied another longevity increment. MCPR § 12-9(d)(1)(C). *See* MSPB Case Nos. 19-22 and 19-27 (2020).

Appellant has not met her burden of proof that the County’s application of the longevity increment regulation was arbitrary and capricious or in violation of an established procedure. MCPR § 34-9(d)(2). On this record the Board finds that Appellant’s appeal lacks merit and must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-21 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*, an appeal 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 6, 2020

CASE NO. 19-22

FINAL DECISION

Appellant, an employee of the Montgomery County Department of Police (Department), filed the above captioned grievance appeal with the Merit System Protection Board (Board or MSPB) challenging the County’s decision to deny her longevity pay after she went from a Grade 22 Public Safety Communications Supervisor to a Grade 23 Police Communications Supervisor position.¹

Appellant filed a grievance concerning the denial of longevity pay on August 15, 2018 and appealed the Step 1 denial of her grievance to the Chief Administrative Officer (“CAO”). The CAO issued a Step 2 decision denying her appeal and on March 11, 2019, Appellant filed this appeal.²

¹As will be discussed below, whether Appellant was promoted or reclassified is a primary source of contention between the parties.

²The CAO’s Step 2 decision was dated February 4, 2019, but Appellant’s appeal states that it was received by her on March 6, 2019. The County has not asserted that Appellant received the Step 2 CAO decision prior to March 6 or that

The County filed a response to the appeal on April 10, 2019 (County Response), and on April 24, 2019, Appellant filed a reply titled Rebuttal to County Response (Appellant's Rebuttal).

After reviewing the submissions of the parties, on July 9, 2019, the Board requested that the County provide further information and clarification.³

The County filed its Supplemental Response on August 1, 2019. Appellant filed a reply to the County's Supplemental Response on August 21, 2019 (Appellant's Supplemental Response).

The Appeal was reviewed and considered by the Board.⁴

FINDINGS OF FACT

Appellant was serving as a Grade 22 Public Safety Communications Supervisor when she received a longevity increase to her salary on June 7, 2009. County Exhibit (CX) 1.⁵ The longevity

the appeal is untimely. Without evidence in the record to the contrary, we will accept that Appellant did receive the decision on March 6 and that the March 11 appeal was thus filed in a timely manner.

³ Specifically, the Board asked for:

a full explanation and appropriate documentation . . . to support the County's position that the Appellant in the above appeal was promoted rather than having her position reclassified. . . whether the higher-level position was posted and if there were other applicants. The Board would also like an explanation of the significance of the notation at the end of the Class Specification for Public Safety Emergency Communications Supervisor (Grade 23, Code No. 103092): "Formerly Titled: Public Safety Communications Supervisor." Does this indicate that OHR reallocated the class from one pay grade to another or the creation of a new class under MCPR §9-3(b)? Is the Public Safety Communications Supervisor classification (Grade 22, Code No. 003093) still in use? If not, will the classification be eliminated?

⁴ At the end of his term of office, the Board's former Chair, Michael J. Kator, ceased to participate in the consideration or decision of this appeal. This decision is being issued by Board members Harriet E. Davidson and Angela Franco. Member Sonya Chiles, who took office on January 1, 2020, did not participate in the consideration of this Appeal.

⁵ The County's initial response included two exhibits. The County's Supplemental response included affidavits not marked as exhibits and attachments to the affidavits using the same exhibit numbering as in the initial response. To reduce confusion, we have identified the County's exhibits as follows.

CX 1 – Personnel Action Form, June 26, 2009

CX 2 – Letter confirming promotion, October 19, 2016

CX 3 – Affidavit of PD, August 1, 2019

CX 4 – Memorandum re New Occupational Class Series Creation – Public Safety Emergency Communications Specialists, December 29, 2015

CX 5 – Classification Action Form, May 13, 2016

CX 6 – Memorandum re Public Safety Emergency Communications Position Series, October 20, 2014

CX 7 – Memorandum re Classification of Public Safety Emergency Communications Specialists, October 7, 2015

CX 8 – Proposed Class Specification, Public Safety Emergency Communications Specialist I

CX 9 – Proposed Class Specification, Public Safety Emergency Communications Specialist II

CX 10 – Proposed Class Specification, Public Safety Emergency Communications Specialist III

CX 11 – Proposed Class Specification, Public Safety Emergency Communications Specialist IV

CX 12 – Proposed Class Specification, Senior Public Safety Emergency Communications Specialist

CX 13 – Proposed Class Specification, Public Safety Emergency Communications Supervisor

CX 14 – Proposed Class Specification, Public Safety Emergency Communications Manager

CX 15 – Quantitative Evaluation System (QES III) Factor Evaluation Sheets

CX 16 – Affidavit of JA, August 1, 2019

CX 17 – Letter confirming promotion, October 19, 2016

CX 18 – Vacancy Posting, IRC 23182

CX 19 – Applicant Listing, IRC 23182

increment is a one-time 2% increase to an employee's base salary. Montgomery County Personnel Regulations (MCPR), § 12-9(a) and (b). Appellant was eligible for the longevity increment because she had over 20 years of County service, was at the maximum salary of the Grade 22 pay range, and had received annual performance ratings of Highly Successful or Exceptional for at least two years. MCPR § 12-9(b).

In 2015 and 2016 the County engaged in a process to create new occupational classifications for public safety communications specialists. CX 3. On December 29, 2015, the County submitted a request to the Board concerning the creation of a new occupational classification series for Public Safety Emergency Communications Specialist. CX 4.⁶ In accordance with MCPR, § 9-3(b)(3), the Board reviewed the proposal and had no comments or objections to the creation of the new Public Safety Emergency Communications Specialist classification series.

After the new Public Safety Emergency Communications classifications were created, the Department conducted a recruitment for various positions, including Public Safety Emergency Communications Supervisor. The recruitment for the Grade 23 position was posted on September 27, 2016, and applications were due by October 11, 2016. CX 16 and CX 18. Appellant submitted an application for the promotion. CX 16 and CX 19.

Appellant applied for the position by submitting a resume, was required to undergo a medical examination by the County's Occupational Medical Services unit, and received an October 19, 2016, letter advising her of her "promotion to the full-time position of Public Safety Emergency Communications Supervisor, Grade 23." CX 2, CX 17, CX 20; County Response, p. 3. Furthermore, Appellant was required to serve a promotional probationary period. CX 2.

Appellant was promoted effective October 30, 2016, from a Grade 22 Public Safety Communications Supervisor to a Grade 23 Public Safety Emergency Communications Supervisor position. CX 2, CX 16, and CX 17.

Upon her promotion of October 30, 2016, Appellant received a salary increase to the maximum salary for Grade 23. CX 2 and CX 17. Because Appellant had received a "one-time" longevity increment in June 2009, she was denied another longevity increment upon her 2016 promotion. Appeal Form, p. 2; County Response, p. 3; County Supplemental Response, p. 2

ISSUE

Did Appellant demonstrate by a preponderance of the evidence that the County Chief Administrative Officer erred when he found that denial of longevity pay was not arbitrary, capricious, or discriminatory, or in violation of a law, regulation, or policy?

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations, § 1, Definitions, (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), provides in pertinent part:

CX 20 – Appellant Resume

⁶ We note that in a February 18, 2016, memorandum to the Board the County's request was amended in a way that is not material to this appeal.

§ 1-62. Promotion: The formal assignment of an employee to a position:

- (a) in a higher-graded occupational class; or
 - (b) on a different salary schedule accompanied by an increase in salary.
- The reclassification or reallocation of a position to a higher-graded occupational class under Section 9 of these Regulations is not a promotion.

Montgomery County Personnel Regulations, § 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), which provides, in applicable part:

§ 6-2. Announcement of open jobs.

- (a) The OHR Director:
 - (1) must announce and electronically post notice of vacant positions that are open for competition among qualified candidates;
 - (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;
 - (3) may announce a vacancy to the general public or may restrict the vacancy to some or all County employees;

§ 6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion. . . .
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

Montgomery County Personnel Regulations, § 10, Employee Compensation, (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015), which provides, in relevant part:

§ 10-5. Salary-setting policies.

- (a) **General.** A department director must ensure that an employee's base salary does not exceed the pay rate or range for the pay grade or pay band assigned to the employee's class, unless the department director:
 - (1) demoted the employee because of reduction-in-force or disability under Section 10-5(d); or
 - (2) reclassified or reallocated the employee's position to a lower pay grade or pay band under Section 10-5(f). . . .
- (c) **Salary on promotion.**
 - (1) **Compensation for a regular (non-temporary) promotion.**

(A) A department director must ensure that an employee's base salary following promotion is not less than the minimum or more than the maximum salary for the new pay grade or pay band.

(B) A department director must give a merit system employee who is promoted at least a 5 percent increase in base salary

Montgomery County Personnel Regulations, § 12, Service Increments, (as amended January 18, 2005, February 14, 2006, December 11, 2007, October 21, 2008, July 12, 2011, and June 30, 2015), which provides, in applicable part:

§ 12-2. Eligibility for service increment.

(c) Any employee who is eligible to receive a service increment and whose position is reclassified or reallocated to a higher pay grade is still eligible to receive a service increment on the effective date of the position's reclassification or reallocation. In this case, the OHR Director must change the employee's service increment date to the effective date of the reclassification or reallocation of the employee's position.

§ 12-9. Twenty-year longevity/performance increment.

(a) A 20-year longevity/performance increment is a one-time increase to an employee's base salary.

(b) A department director must award a one-time 20-year longevity/performance increment of 2 percent of base salary to an employee in a position on the General salary schedule if the employee has:

- (1) a base salary equal to the maximum salary of the pay range; and
- (2) has 20 years of actual County service; and
- (3) received an annual overall performance rating of Highly Successful Performance or Exceptional Performance for the 2 most recent consecutive years.

(c) An employee is eligible to receive only one 20-year longevity/performance increment.

(d) Awarding longevity/performance increments to promoted employees.

(1) When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's prior base salary before the promotional increase is added; or,

(B) if (A) does not apply, then the employee may be eligible to receive a 2% longevity/performance increment as outlined in Section 12-9(b); however,

(C) whether (A) or (B) applies, the employee's new base salary cannot exceed the maximum salary of the new pay range.

(2) When an employee receives a promotion from a non-bargaining unit position to a bargaining unit position:

(A) the 20-year longevity/performance increment is added to the employee's base salary before the promotional increase is added;

(B) the new base salary cannot exceed the maximum salary of the new pay range; however,

(C) if the employee's new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.

(3) When an employee receives a promotion from a bargaining unit position to a non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's base salary before the promotional increase is added;

(B) the employee is eligible to receive a 2% longevity/performance increment under Section 12-9(b); and,

(C) the employee's new base salary cannot exceed the maximum salary of the new pay range.

(e) An employee who has a 20 year longevity/performance increment and who:

(1) transfers from a non-bargaining unit position to another non-bargaining unit position, the longevity/performance increment remains the same;

(2) transfers from a non-bargaining unit position to a bargaining unit position is eligible to receive a bargaining unit 20-year longevity increment as provided in the respective collective bargaining agreement; or,

(3) transfers from a bargaining unit position to a non-bargaining unit position:

(A) the longevity/performance increment is added to the employee's base salary except when the employee's base salary exceeds the maximum salary of the non-bargaining unit pay range; then,

(B) the employee's base salary must be reduced to the maximum salary of the pay range.

Montgomery County Personnel Regulations, § 27. Promotion, (as amended June 30, 2015), which provides, in applicable part:

§ 27-2. Types of promotion.

(a) **Competitive promotion.** Prior to making the final selection for promotion, the department director must ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

§ 27-3. Compensation for a promotion. A department director must compensate an employee for a promotion as described in Section 10-5(c).

§ 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.

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

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

(a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy; . . .

(c) improper, inequitable, or unfair act in the administration of the merit system . . .

(d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential . . .

ANALYSIS AND CONCLUSIONS

Appellant is challenging the County's application of the longevity and performance increment rules after her October 30, 2016, appointment to a Grade 23 Public Safety Emergency Communications Supervisor position.

The parties dispute the issue of whether Appellant was placed in the higher-level position by reclassification or promotion. The County submitted affidavits, the job posting, and other documentation to support its position that Appellant was competitively promoted to the higher-level position. CX 16, CX 17 and CX 18. Moreover, Appellant provided further proof that she was promoted by submitting an April 19, 2019, printout of her salary history that explicitly states that on “30-Oct-2016” she received a “Promotion.” Appellant Exhibit (AX) 5.⁷ Moreover, two documents submitted by Appellant, one of which she labeled as “Reclassification Outcome,” expressly states to the contrary that the Grade 23 Public Safety Emergency Communications Supervisor position requires “Competitive Promotion.” AX 3 and 11. Significantly, Appellant concedes that she was required to apply for a promotion and submit a resume. Appellant’s Rebuttal, p. 8; Appellant’s Supplemental Response, p. 3. Appellant asserts that the promotional process was “just semantics for paperwork purposes,” but has not, however, provided any evidence indicating that she was reclassified rather than promoted. Appellant’s Rebuttal, p. 8.

Nevertheless, Appellant suggests that the promotional process was somehow a sham because eligibility for a promotion was limited to candidates who were “current Public Safety Communications Supervisors.” Appellant’s Supplemental Response, p. 4; CX 18. There is, however, nothing improper about a promotional recruitment process that is limited to certain County employees with those qualifications. MCPR § 6-2(a)(3) (“may restrict the vacancy to some or all County employees”). The County properly established and provided the required announcements of the competitive promotional qualifications and the rating process. *See* MCPR § 6-2(a)(2); § 6-5(a) & (b); § 27-2(a).

As there is a complete absence of any evidence supporting Appellant’s view that she was reclassified rather than promoted we must conclude that she was promoted. Accordingly, we examine the application of the longevity increment regulations to her promotion.⁸

⁷Appellant included eleven unnumbered attachments to her April 24, 2019, Rebuttal and her August 21, 2019, Supplemental Response. To reduce confusion, we will identify those attachments as Appellant Exhibits (AX) as follows:

AX 1 – CAO Step 2 decision, February 4, 2019

AX 2 – Email re Individual Position Classification Studies (June box), June 3, 2016

AX 3 – Position Series Evaluation Requirements, January 4, 2018 (partial page)

AX 4 – Montgomery County 9-1-1 Emergency Communications Center Standard Operating Procedure, ADM 1.40 Career Development, February 12, 2018

AX 5 – Appellant salary history with salary amounts, April 19, 2019

AX 6 – County General Salary Schedules, FY 2019

AX 7 – Appellant salary history without salary amounts, April 15, 2019

AX 8 – MCPR excerpts

AX 9 – ECC Consolidation Executive Steering Committee PowerPoint, March 7, 2019

AX 10 – Vacancy Posting, IRC 23182 (highlighted)

AX 11 – Position Series Evaluation Requirements, January 4, 2018 (full page)

⁸ To the extent Appellant is alleging that she has also been the victim of age discrimination, such claims are outside of the Board’s jurisdiction. The Board lacks the authority to adjudicate claims of discrimination under these circumstances. MCC §27-19; MCPR §35-2(d). *See* MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance “employment matters for which another forum is available to provide relief.” MCC §33-12(b). Appellant unquestionably had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 93-25 (1993) (Interpreting §33-12(b)’s “another forum available” limitation as applying to discrimination claims). *See also* MCPR §5-4(b)(1) (An employee alleging

Under MCPR § 12-9, if an employee has reached the maximum salary for their grade, has high performance ratings, and has at least 20 years of service, they may be eligible for a “longevity increment.” A longevity increment provides for a salary 2% above the grade maximum. MCPR § 12-9(a) further provides that the longevity increment is a “one-time increase to an employee’s base salary.” The regulation also specifies that “[a]n employee is eligible to receive only one 20-year longevity/performance increment.” MCPR § 12-9(c). It is undisputed that Appellant received a longevity increment to her Grade 22 salary on June 7, 2009.

The longevity increment regulation states that when a non-bargaining unit employee who is receiving the longevity increment (such as Appellant) is promoted the new base salary is the maximum of the new grade:

When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position: . . . the employee’s new base salary cannot exceed the maximum salary of the new pay range.

MCPR § 12-9(d)(1)(C).⁹

Similarly, the compensation regulations also provide that “[a] department director must ensure that an employee’s base salary following promotion is not . . . more than the maximum salary for the new pay grade or pay band.” MCPR § 10-5(c)(1)(A).¹⁰ While Appellant may be displeased that she did not receive a full 5% salary increase upon promotion, she was not entitled to receive one because the 5% promotional increase set forth in § 10-5(c)(1)(B) is expressly limited to the maximum of the salary grade in both § 10-5(c)(1)(A) and § 10-5(a). Thus, the 5% promotional increase rule does not override the salary grade maximum limitation.

Accordingly, because Appellant had received a “one-time” longevity increment in 2009, upon her October 30, 2016 promotion she received a pay increase to the maximum salary for Grade 23 but was properly denied another longevity increment. MCPR § 12-9(d)(1)(C).

Appellant has not met her burden of proof that the County’s application of the longevity increment regulation was arbitrary and capricious or in violation of an established procedure. MCPR § 34-9(d)(2). On this record the Board finds that Appellant’s appeal lacks merit and must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-22 be and hereby is **DENIED**.

discrimination “may not file a grievance under Section 34 of these Regulations or an appeal under Section 35, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation.”).

⁹ Significantly, while MCPR § 12-9(d)(1)(C) specifically prohibits an employee such as Appellant who is promoted from a non-bargaining unit position to another non-bargaining unit position from receiving a salary above the grade maximum, another subsection of the regulation, § 12-9(d)(2)(C), specifically allows an employee promoted from a non-bargaining unit position to a *bargaining unit position* to get the longevity increment: “if the employee’s new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.”

¹⁰ The promotional regulation governing compensation specifically provides that the compensation regulations are to be applied: “§ 27-3. **Compensation for a promotion.** A department director must compensate an employee for a promotion as described in Section 10-5(c).”

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
March 24, 2020

CASE NO.19-27

FINAL DECISION

Appellant, an employee of the Montgomery County Department of Police (Department), filed the above captioned grievance appeal with the Merit System Protection Board (Board or MSPB) challenging the County's decision to deny her longevity pay after she went from a Grade 24 Public Safety Shift Operations Communications Manager to a Grade 25 Public Safety Emergency Communications Manager position on September 18, 2016.¹

Appellant filed a grievance concerning the denial of longevity pay on August 13, 2018 and appealed the Step 1 denial of her grievance to the Chief Administrative Officer ("CAO"). The CAO issued a Step 2 decision denying her appeal that was dated March 15, 2019, however, Appellant's appeal states that the decision was received by her on April 23, 2019.

On May 8, 2019, Appellant filed this appeal. The County filed a response to the appeal on June 10, 2019. (County Response). The County did not dispute Appellant's assertion that she received the CAO Step 2 decision on April 23, 2019. County Response, p. 2. On July 1, 2019, Appellant filed a reply. (Appellant's Response).

After reviewing the submissions of the parties, on July 9, 2019, the Board requested that the County provide further information and clarification.² The County filed a Supplemental Response on August 1, 2019. Appellant filed a reply to the County's Supplemental Response on August 20, 2019. (Appellant's Supplemental Response).

¹As will be discussed below, whether Appellant was promoted or reclassified is a primary source of contention between the parties.

² Specifically, the Board asked for:

a full explanation and appropriate documentation . . . to support the County's position that the Appellant in the above appeal was promoted rather than having her position reclassified. The Board would like to know whether the higher-level position was posted and if there were other applicants. The Board would also like an explanation of the significance of the notation at the end of the Class Specification for Public Safety Emergency Communications Manager (Grade 25, Code No. 103091): "Formerly Titled: Public Safety Communications Shift Operations Manager." Does this indicate that OHR reallocated a class from one pay grade to another or the creation of a new class under MCPR §9-3(b)? Is the Public Safety Communications Shift Operations Manager classification (Grade 24, Code No. 003092) still in use? If not, will the classification be eliminated?

The Appeal was reviewed and considered by the Board.³

FINDINGS OF FACT

Appellant was serving as a Grade 24, Public Safety Communications Shift Operations Manager when she received a longevity increase to her salary, effective January 6, 2008. Appellant Exhibit (AX) 14.⁴ The longevity increment is a one-time 2% increase to an employee's base salary. Montgomery County Personnel Regulations (MCPR), § 12-9(a) and (b). Appellant was eligible for the longevity increment because she had over 20 years of County service, was at the maximum salary of the Grade 24 pay range, and had received annual performance ratings of Highly Successful or Exceptional for at least two years. MCPR § 12-9(b).

In 2015 and 2016 the County engaged in a process to create new occupational classifications for public safety communications specialists. County Exhibits (CX) 5 - 16.⁵ On

³ At the end of his term of office, the Board's former Chair, Michael J. Kator, ceased to participate in the consideration or decision of this appeal. This decision is being issued by Board members Harriet E. Davidson and Angela Franco. Member Sonya Chiles, who took office on January 1, 2020, did not participate in the consideration of this Appeal.

⁴ Appellant included seventeen unnumbered attachments to her July 1, 2019, Response and four lettered exhibits with her August 20, 2019, Supplemental Response. To reduce confusion, we will identify those attachments as Appellant Exhibits (AX) as follows:

- AX 1 – Appendix Q Grievance Form, August 13, 2018
- AX 2 – Response to County Grievance, October 2, 2018
- AX 3 – Core HR email re longevity, October 19, 2018
- AX 4 – Appellant Step 2 Response to County Greivance/Longevity Memorandum to CAO, October 19, 2018
- AX 5 – OHR's responses to Appellant request for additional details of the six longevity occurrences February 2, 2019
- AX 6 – CAO's Step 2 grievance decision, March 15, 2019
- AX 7 – Emails re typo in name on Step 2 Response, May 8, 2019
- AX 8 – Appellant payslip, September 30, 2016
- AX 9 – Appellant payslip, October 14, 2016
- AX 10 – Appellant position/salary history, June 5, 1984 to August 6, 2017
- AX 11 – Personnel Action Form, August 17, 2008
- AX 12 – Personnel Action Form, March 18, 2007
- AX 13 – Personnel Action Form, July 8, 2007
- AX 14 – Personnel Action Form, January 6, 2008
- AX 15 – Personnel Action Form, July 10, 2005
- AX 16 – Personnel Action Form, February 5, 2006
- AX 17 – Personnel Action Form, June 7, 2009

Appellant Supplemental Response Exhibits:

- AX A – Core HR email re longevity, October 19, 2018
- AX B – Emails re GSS Longevity Compensation, May 22, 2018
- AX C – Master List DOH/Seniority
- AX D – FY19 Salary Schedules

⁵ The County's initial response included three exhibits. The County's Supplemental response included affidavits not marked as exhibits, attachments to the affidavits using the same exhibit numbering as in the initial response, and references in the affidavits to exhibits not identified by number. To reduce confusion, we have identified the County's exhibits as follows.

- CX 1 – Personnel Action Form, printed September 27, 2016
- CX 2 – Promotional appointment letter, August 19, 2016
- CX 3 – Appellant Salary History, printed May 29, 2019
- CX 4 – Affidavit of PD, August 1, 2019

December 29, 2015, the County submitted a request to the Board concerning the creation of a new occupational classification series for Public Safety Emergency Communications Specialist. CX 5.⁶ In accordance with MCPR, § 9-3(b)(3), the Board reviewed the proposal and had no comments or objections to the creation of the new Public Safety Emergency Communications Specialist classification series.

After the new Public Safety Emergency Communications classifications were created, the Department conducted a recruitment for various positions, including Public Safety Emergency Communications Manager. The recruitment notice for the Grade 25 positions (IRC22436) was posted on July 11, 2016, and applications were due by July 25, 2016. CX 19. Appellant submitted an application for the promotion. CX 20 and CX 21.

Although Appellant argues that she was reclassified and not promoted, the County points out that Appellant applied for the position by submitting a resume and received an August 19, 2016, letter advising of her “promotion to the full-time position of Public Safety Emergency Communications Manager, Grade 25.” CX 2, CX 18; County Response, p. 3. Furthermore, Appellant was required to serve a promotional probationary period, CX 2, CX 18, and both the Personnel Action Form of August 31, 2016, and her salary history indicate a “promotion” effective September 18, 2016. CX 1, CX 3. *See* Affidavit of JA, ¶15. CX 17.

Upon her promotion of September 18, 2016, Appellant received a salary increase to the maximum salary for Grade 25. CX 2, CX 3, CX 18. Because Appellant had received a “one-time” longevity increment in 2008, she was denied another longevity increment upon her 2016 promotion. County Response, pp. 2-3; AX 5, AX 6.

ISSUE

Did Appellant demonstrate by a preponderance of the evidence that the County Chief Administrative Officer erred when he found that denial of longevity pay was not arbitrary, capricious, or discriminatory, or in violation of a law, regulation, or policy?

CX 5 – Memorandum re New Occupational Class Series Creation – Public Safety Emergency Communications Specialists, December 29, 2015

CX 6 – Classification Action Form, May 13, 2016

CX 7 – Memorandum re Public Safety Emergency Communications Position Series, October 20, 2014

CX 8 – Memorandum re Classification of Public Safety Emergency Communications Specialists, October 7, 2015

CX 9 – Proposed Class Specification, Public Safety Emergency Communications Specialist I

CX 10 – Proposed Class Specification, Public Safety Emergency Communications Specialist II

CX 11 – Proposed Class Specification, Public Safety Emergency Communications Specialist III

CX 12 – Proposed Class Specification, Public Safety Emergency Communications Specialist IV

CX 13 – Proposed Class Specification, Senior Public Safety Emergency Communications Specialist

CX 14 – Proposed Class Specification, Public Safety Emergency Communications Supervisor

CX 15 – Proposed Class Specification, Public Safety Emergency Communications Manager

CX 16 – Quantitative Evaluation System (QES III) Factor Evaluation Sheets

CX 17 – Affidavit of JA, August 1, 2019

CX 18 – Promotional appointment letter, August 19, 2016

CX 19 – Vacancy Posting, IRC 22436

CX 20 – Applicant Listing, IRC 22436

CX 21 – Appellant resume

⁶ We note that in a February 18, 2016, memorandum to the Board the County’s request was amended in a way that is not material to this appeal.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations, § 1, Definitions, (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, and February 23, 2016), provides in pertinent part:

§ 1-62. Promotion: The formal assignment of an employee to a position:

- (a) in a higher-graded occupational class; or
- (b) on a different salary schedule accompanied by an increase in salary. The reclassification or reallocation of a position to a higher-graded occupational class under Section 9 of these Regulations is not a promotion.

Montgomery County Personnel Regulations, § 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), which provides, in applicable part:

§ 6-2. Announcement of open jobs.

- (a) The OHR Director:
 - (1) must announce and electronically post notice of vacant positions that are open for competition among qualified candidates;
 - (2) must include in a vacancy announcement information about job duties, minimum qualifications, any multilingual requirements, the rating process including the rating criteria, and other requirements for the position;
 - (3) may announce a vacancy to the general public or may restrict the vacancy to some or all County employees;

§ 6-5. Competitive rating process.

- (a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion. . . .
- (b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website a description of the competitive rating process and rating criteria that will be used to create the eligible list.

Montgomery County Personnel Regulations, § 10, Employee Compensation, (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, March 9, 2010, July 12, 2011, July 23, 2013, and June 30, 2015), which provides, in relevant part:

§ 10-5. Salary-setting policies.

- (a) *General.* A department director must ensure that an employee's base salary does not exceed the pay rate or range for the pay grade or pay band assigned to the employee's class, unless the department director:

(1) demoted the employee because of reduction-in-force or disability under Section 10-5(d); or

(2) reclassified or reallocated the employee's position to a lower pay grade or pay band under Section 10-5(f). . . .

(c) ***Salary on promotion.***

(1) ***Compensation for a regular (non-temporary) promotion.***

(A) A department director must ensure that an employee's base salary following promotion is not less than the minimum or more than the maximum salary for the new pay grade or pay band.

(B) A department director must give a merit system employee who is promoted at least a 5 percent increase in base salary

Montgomery County Personnel Regulations, § 12, Service Increments, (as amended January 18, 2005, February 14, 2006, December 11, 2007, October 21, 2008, July 12, 2011, and June 30, 2015), which provides, in applicable part:

§ 12-2. Eligibility for service increment.

(c) Any employee who is eligible to receive a service increment and whose position is reclassified or reallocated to a higher pay grade is still eligible to receive a service increment on the effective date of the position's reclassification or reallocation. In this case, the OHR Director must change the employee's service increment date to the effective date of the reclassification or reallocation of the employee's position.

§ 12-9. Twenty-year longevity/performance increment.

(a) A 20-year longevity/performance increment is a one-time increase to an employee's base salary.

(b) A department director must award a one-time 20-year longevity/performance increment of 2 percent of base salary to an employee in a position on the General salary schedule if the employee has:

(1) a base salary equal to the maximum salary of the pay range; and

(2) has 20 years of actual County service; and

(3) received an annual overall performance rating of Highly Successful Performance or Exceptional Performance for the 2 most recent consecutive years.

(c) An employee is eligible to receive only one 20-year longevity/performance increment.

(d) Awarding longevity/performance increments to promoted employees.

(1) When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's prior base salary before the promotional increase is added; or,

(B) if (A) does not apply, then the employee may be eligible to receive a 2% longevity/performance increment as outlined in Section 12-9(b); however,

(C) whether (A) or (B) applies, the employee's new base salary cannot exceed the maximum salary of the new pay range.

(2) When an employee receives a promotion from a non-bargaining unit position to a bargaining unit position:

(A) the 20-year longevity/performance increment is added to the employee's base salary before the promotional increase is added;

(B) the new base salary cannot exceed the maximum salary of the new pay range; however,

(C) if the employee's new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.

(3) When an employee receives a promotion from a bargaining unit position to a non-bargaining unit position:

(A) the 20-year longevity increment is added to the employee's base salary before the promotional increase is added;

(B) the employee is eligible to receive a 2% longevity/performance increment under Section 12-9(b); and,

(C) the employee's new base salary cannot exceed the maximum salary of the new pay range.

(e) An employee who has a 20 year longevity/performance increment and who:

(1) transfers from a non-bargaining unit position to another non-bargaining unit position, the longevity/performance increment remains the same;

(2) transfers from a non-bargaining unit position to a bargaining unit position is eligible to receive a bargaining unit 20-year longevity

increment as provided in the respective collective bargaining agreement; or,

(3) transfers from a bargaining unit position to a non-bargaining unit position:

(A) the longevity/performance increment is added to the employee's base salary except when the employee's base salary exceeds the maximum salary of the non-bargaining unit pay range; then,

(B) the employee's base salary must be reduced to the maximum salary of the pay range.

Montgomery County Personnel Regulations, § 27. Promotion, (as amended June 30, 2015), which provides, in applicable part:

§ 27-2. Types of promotion.

(a) **Competitive promotion.** Prior to making the final selection for promotion, the department director must ensure that an applicant's qualifications are evaluated under the competitive rating process specified in Section 6-5 of these Regulations.

§ 27-3. Compensation for a promotion. A department director must compensate an employee for a promotion as described in Section 10-5(c).

§ 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.

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

§ 34-4. Reasons for filing a grievance. An eligible employee, as described in Section 34-2, may file a grievance if the employee was adversely affected by an alleged:

(a) violation, misinterpretation, or improper application of a law, rule, regulation, procedure, or policy; . . .

(c) improper, inequitable, or unfair act in the administration of the merit system . . .

(d) improper, inequitable, or unfair application of the compensation policy and employee benefits, which may include salary, a pay differential . . .

§ 34-10. Appeal of a grievance decision.

(c) A written grievance decision must include information about:

(1) how the employee may appeal the decision to the next step of the grievance procedure or file an appeal with the MSPB, if applicable; and

(2) the time limits for appealing the grievance to the next step, or to the MSPB.

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

§ 35-3. Appeal period.

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

(3) receives a written final decision on a grievance. . . .

§ 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.

ANALYSIS AND CONCLUSIONS

Appellant's Appeal is Untimely.

The County does not dispute that Appellant received the CAO's Step 2 decision on April 23, 2019 but does move to dismiss the appeal as untimely. County Response, p. 2. Appellant has the responsibility to establish that the appeal was filed in a timely manner, *i.e.*, the burden of proof on the issues of timeliness and jurisdiction. MSPB Case No. 18-16 (2018); MSPB Case No. 17-16 (2017).

The regulation governing the time limits for appeals to the MSPB, MCPR § 35-3(a), provides that "[a]n employee has 10 working days to file an appeal with the MSPB in writing after the employee: . . . (3) receives a written final decision on a grievance. . .". Appellant received unambiguous notification of this requirement. Pursuant to MCPR § 34-10(c), the CAO's decision contained a notice regarding Appellant's right to appeal to the MSPB, including an explicit explanation of the time limits:

If the Grievant is not satisfied with the CAO response, she may appeal this action in accordance with Section 35 of the Personnel Regulations by noting an appeal to the Merit System Protection Board (MSPB) within 10 working days of the date that she received this notice. The MSPB's office hours are Monday - Thursday, 9:30 a.m. - 3:00 p.m. Appeals filed outside of those hours will be considered officially filed the next MSPB business day. An online appeal form is available at the MSPB's web address found below www.montgomerycountymd.gov/mspb/.

CAO decision, p. 3.

To have filed a timely appeal ten (10) working days from the date she admittedly received the CAO's decision on April 23rd Appellant should have filed with the Board on May 7. However, notwithstanding the clear notice provided in the CAO decision, Appellant filed her appeal on May 8, eleven (11) working days after receipt.

MCPR § 35-7(a) provides that the MSPB “may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.” While the Board may waive filing time limits for good cause shown, the Board generally does not waive the 10-day appeal filing limit. MSPB Case No. 10-20 (2010) (appeal filed four working days late untimely). Appellant has provided no persuasive argument for why the Board should waive the time limit in this case.

Appellant does not deny that she filed her appeal late. *See* Appellant Exhibit (AX) 7, email exchange of May 8, 2019, (“I understand that this is beyond the 10 working days. . .”). Appellant justifies her late filing by suggesting that the CAO's decision contained a typographical error in her name that she attempted to resolve without response from the County. Appellant's Response, p. 2. Although the CAO's decision, which is the form of a memorandum, was correctly addressed “TO: [STD], Public Safety Emergency Communications Manager” the first sentence references “[JTD]” as the grievant.” The rest of the document refers to Appellant as “Ms. [D].”

While we appreciate Appellant's desire that her first name be corrected in the document, we fail to see why a clear typographical error the second time her full name was used in the document would somehow nullify the CAO's decision, or how it excuses Appellant's failure to respect the time limits established in law. Just as an obvious typographical error may not be wielded as a sword against the County, an Appellant may not use it as a shield against her procedural responsibilities. *See* MSPB Case No. 19-13 (2019), *aff'd*, Circuit Court for Montgomery County, Case No. 470431-V (January 7, 2020).

Accordingly, we find that the Appeal was filed in an untimely manner.

Appellant Has Not Shown That the County Violated the Longevity Increment Rules

Appellant is challenging the County's application of the longevity and performance increment rules after her September 18, 2016, appointment to a Grade 25 Public Safety Emergency Communications Manager position.

The parties dispute the issue of whether Appellant was placed in the higher-level position by reclassification or promotion. The County submitted affidavits, the job posting, and other documentation to support its position that Appellant was competitively promoted to the higher-level position. CX 16, CX 17 and CX 18. Appellant asserts that although she was required to apply and submit a resume in response to the IRC 22436 vacancy posting the promotional process was not competitive and she did not serve a probationary period. Appellant's Supplemental Response, p. 2. Appellant has not, however, provided any evidence indicating that she was reclassified rather than promoted.

Nevertheless, Appellant suggests that the promotional process was “orchestrated by the County to satisfy the administrative processes associated with Consolidation, and the reclassification that resulted from it.” Appellant's Supplemental Response, pp. 2-3. Appellant alleges that the “County set up a faux administrative process” because the application for a promotion to Public Safety Emergency Communications Manager was limited to candidates who

were in Public Safety Communications Shift Operations Manager positions. Appellant Supplemental Response, p.2. There is, however, nothing improper about a promotional recruitment process that is limited to certain County employees with those qualifications. MCPR § 6-2(a)(3) (“may restrict the vacancy to some or all County employees”). The County properly established and provided the required announcements of the competitive promotional qualifications and the rating process. *See* MCPR § 6-2(a)(2); § 6-5(a) & (b); § 27-2(a). *See* MSPB Case No. 19-22 (2020).

As there is a complete absence of any evidence supporting Appellant’s view that she was reclassified rather than promoted, or that she underwent “a hybrid status change that was part promotion and part re-classification,” Appellant’s Supplemental Response, p. 2, we must conclude that she was promoted. Accordingly, we examine the application of the longevity increment regulations to her promotion.⁷

Under MCPR § 12-9, if an employee has reached the maximum salary for their grade, has high performance ratings, and has at least 20 years of service, they may be eligible for a “longevity increment.” A longevity increment provides for a salary 2% above the grade maximum. MCPR § 12-9(a) further provides that the longevity increment is a “one-time increase to an employee’s base salary.” The regulation also specifies that “[a]n employee is eligible to receive only one 20-year longevity/performance increment.” MCPR § 12-9(c). It is undisputed that Appellant received a longevity increment to her Grade 24 salary on January 6, 2008.

The longevity increment regulation states that when a non-bargaining unit employee who is receiving the longevity increment (such as Appellant) is promoted the new base salary is the maximum of the new grade:

When an employee is promoted from a non-bargaining unit position to another non-bargaining unit position: . . . the employee’s new base salary cannot exceed the maximum salary of the new pay range.

MCPR § 12-9(d)(1)(C).⁸ Similarly, the compensation regulations also provide that “[a] department director must ensure that an employee’s base salary following promotion is not . . . more than the

⁷ To the extent Appellant may allege that she has also been the victim of age discrimination, such claims are outside of the Board’s jurisdiction. The Board lacks the authority to adjudicate claims of discrimination under these circumstances. MCC §27-19; MCPR §35-2(d). *See* MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). Indeed, the Montgomery County Code expressly provides that an employee may not pursue as a grievance “employment matters for which another forum is available to provide relief.” MCC §33-12(b). Appellant unquestionably had available to her other avenues to resolve allegations of discrimination, such as the United States Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, and the Montgomery County Office of Human Rights. *See* MSPB Case No. 93-25 (1993) (Interpreting §33-12(b)’s “another forum available” limitation as applying to discrimination claims). *See also* MCPR §5-4(b)(1) (An employee alleging discrimination “may not file a grievance under Section 34 of these Regulations or an appeal under Section 35, unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation.”).

⁸ Significantly, while MCPR § 12-9(d)(1)(C) specifically prohibits an employee such as Appellant who is promoted from a non-bargaining unit position to another non-bargaining unit position from receiving a salary above the grade maximum, another subsection of the regulation, § 12-9(d)(2)(C), specifically allows an employee promoted from a non-bargaining unit position to a *bargaining unit position* to get the longevity increment: “if the employee’s new base salary is equal to the maximum salary of the new pay range, then the employee may be eligible to receive a bargaining unit longevity increment as stipulated in the respective collective bargaining agreement.”

maximum salary for the new pay grade or pay band.” MCPR § 10-5(c)(1)(A).⁹ Appellant was promoted to the maximum salary for Grade 25. CX 2, CX 3, CX 18.¹⁰

Accordingly, because Appellant had received a “one-time” longevity increment in 2008, upon her September 18, 2016 promotion she received a pay increase to the maximum salary for Grade 25 but was properly denied another longevity increment. MCPR § 12-9(d)(1)(C). *See* MSPB Case No. 19-22 (2020).

Appellant has not met her burden of proof that the County’s application of the longevity increment regulation was arbitrary and capricious or in violation of an established procedure. MCPR § 34-9(d)(2). On this record the Board finds that Appellant’s appeal lacks merit and must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-27 be and hereby is **DENIED** on the merits and because it was untimely filed.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
March 26, 2020

⁹ The promotional regulation governing compensation specifically provides that the compensation regulations are to be applied: “§ 27-3. **Compensation for a promotion.** A department director must compensate an employee for a promotion as described in Section 10-5(c).”

¹⁰ It appears that Appellant received less than a full 5% salary increase upon promotion, CX 3, however she was not entitled to receive one because the 5% promotional increase set forth in § 10-5(c)(1)(B) is expressly limited to the maximum of the salary grade in both § 10-5(c)(1)(A) and § 10-5(a). Thus, the 5% promotional increase rule does not override the salary grade maximum limitation.

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 2020, the Board issued the following dismissal decisions.

DISMISSAL FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

CASE NO. 20-13

ORDER OF DISMISSAL

Appellant officially filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on March 2, 2020, alleging a denial of a promotion by the Department of Health and Human Services (DHHS).¹ On the appeal form Appellant stated that the date he received the Department's notice of denial was February 20, 2020. Appellant did not include the notice of denial when filing his appeal.

In a nonselection/nonpromotion appeal, Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3), requires that "a copy of the notification of nonselection/nonpromotion must be provided." Accordingly, by letter dated March 2, 2020, the Board stayed the processing of the appeal and requested submission of a copy of the notification of denial. Appellant responded by email stating that it would be "impossible to provide" the notice. Appellant's email further explained:

The position was filled via promotion but the issue is that the job was never posted. Though a competitive promotion, management gift wrapped this position to an employee without going through the proper process.

There was no selection or interview process thus no "copy of the notification of nonselection/nonpromotion" by myself or any other employee is going to exist.

Nevertheless, because Appellant had not submitted a copy of a notice of denial of employment pursuant to MCPR § 35-4(d)(3), the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why his appeal should not be dismissed for failure to comply with Board procedures regarding notice or for failure to exhaust administrative remedies. In response, on March 10, 2020, Appellant provided a copy of a February 20, 2020, email announcing the appointment of a Ms. RM as an Income Assistance Program Specialist III in the DHHS Germantown office.

The County filed a Response to Show Cause Order Requesting Dismissal on March 16, 2020, arguing that the February 20 email submitted by Appellant was not a notice of nonselection/nonpromotion, as required by MCPR § 35-4(d)(3). The County points out that "Appellant's allegations are not that he was not selected for the position, but rather, he was not able to apply in the first place because the County used an expired qualified/well-qualified list, allegedly in violation of established procedures, that he was not on."

MCPR § 34-4 provides, in part: "An eligible employee . . . may file a grievance if the employee was adversely affected by an alleged:

¹ The appeal was submitted online Friday, February 28, 2020. Because the MSPB offices are not open on Fridays, the appeal was officially considered received the next business day, Monday, March 2, 2020. *See* MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015).

(c) improper, inequitable, or unfair act in the administration of the merit system, which may include . . . promotional action that was arbitrary and capricious or in violation of established procedures . . .

The County grievance procedure is designed to promote dispute resolution “at the lowest level” under “specific and reasonable time limits for each level or step.” MCPR § 34-3(a). The time within which to file a grievance is 30 calendar days after the date on which an employee knew or should have known of the occurrence or action on which the grievance is based, or the date on which he received a notice specifically required by the County regulations. MCPR § 34-9(a)(1). Step one of the grievance procedure provides that an employee shall initially file a grievance with the employee’s immediate supervisor. Step two requires that “within 10 calendar days after receiving the department’s response” an employee may file the grievance with the CAO. MCPR §34-3(e). A grievance appeal to the MSPB may be filed within 10 working days after the CAO’s step two decision is received by the employee. MCPR §34-3(e); §35-3(a)(3).

While Appellant has alleged that a promotion occurred as a result of the County failing to follow proper procedures, Appellant does not contend that he applied for the prior promotional opportunity that resulted in an eligible list being created and, according to him, improperly extended. We fail to see how Appellant can maintain a nonselection/nonpromotion direct appeal to the MSPB when he was never an applicant for the position. Instead, Appellant’s proper recourse is to file a grievance concerning the promotional process at issue. *See* MCPR § 27-4(a).

Appellant’s failure to file a grievance and to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust his administrative remedies that must result in the dismissal of this appeal. *See* MSPB Case No. 15-28 (2015). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies and is dissatisfied with the CAO’s decision.

Appellant has filed a second appeal concerning his allegations of an improper promotional process, which we docketed as MSPB Case No. 20-14. In that appeal he is asking the Board to review the failure of the CAO to respond to his generalized request for an interpretation of a regulation. In our letter acknowledging that appeal we suggested to Appellant that the regulation concerning Interpretations of Personnel Regulations specifically provides that while an “employee may not grieve or appeal a written CAO interpretation,” an employee may file a grievance under MCPR § 34 or file an appeal with the MSPB under § 35 “over an action taken on the basis of a CAO interpretation if another provision of these Regulations allows the employee to grieve or appeal the action.” MCPR § 2-3(c)(2).

For the reasons set out above, it is hereby **ORDERED** that the appeal in Case No. 20-13 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 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
March 18, 2020

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 19-29

ORDER OF DISMISSAL

Appellant, an employee of the County Department of Transportation (DOT), Division of Highway Services (DHS), filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on June 5, 2019, concerning an alleged denial of a promotion to a Work Force Leader II position. Because the appeal did not include a copy of a formal notification of non-promotion, by letter dated June 6, 2019, the Board stayed the processing of the appeal and requested submission of a copy of a notification of nonselection as required by Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3). On June 12, 2019, Appellant submitted additional documents concerning his application. However, while Appellant alleged that in meetings with his supervisor and an individual in the DHS Human Resources division he was verbally told that he had been removed from the Well Qualified list and placed on the Qualified list, Appellant did not submit a written notification of nonpromotion.

On July 9, 2019, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause for why the appeal regarding his application for a promotion should not be dismissed as premature. Appellant was advised that, absent the filing of the required statement and a finding by the Board that there was good cause for the filing of his appeal prior to a denial of the promotion, the Board would dismiss this appeal. The statement was due on or before close of business July 18, 2019. To date, Appellant has not filed a statement of good cause.

In previous cases this Board has held that where an appellant has been deemed “Qualified” for a position and placed on an eligible list, but no selection has been made, the Board lacks jurisdiction over the appeal because no denial of employment or a promotion has occurred. MSPB Case No. 17-01 (2016); MSPB Case No. 14-41 (2014); MSPB Case No. 14-16 (2014); MSPB Case No. 14-14 (2014). A denial of employment or promotion that would permit an appeal occurs when the County determines that an applicant does not meet the minimum qualifications for a position or has been specifically provided with official notice that the applicant will not receive further consideration for a position. MSPB Case No. 14-41 (2014); MSPB Case No. 14-12 (2014).

After being given the opportunity, Appellant has not provided an explanation for why the appeal regarding his application for a promotion should not be dismissed as premature. Thus, because Appellant cannot be deemed to have been denied a promotion, the Board must dismiss this matter because it lacks jurisdiction over the appeal. MCPR § 35-7(c).¹

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-29 be and hereby is **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to

¹ Appellant may file a new appeal with the Board should he not be selected for the Work Force Leader II position. See MSPB Case No. 14-16 (2014).

Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
July 31, 2019

CASE NO. 20-05

ORDER OF DISMISSAL

Appellant, a licensed pharmacist, filed this appeal alleging a denial of employment by WorkSource Montgomery. The appeal was submitted online to the Merit System Protection Board (MSPB) on Tuesday, September 10, 2019, at 7:48 p.m., after MSPB office hours. Accordingly, the appeal is considered to have been officially received by the Board on September 11, 2019, the next Board business day.

Appellant alleges that he was accepted by WorkSource Montgomery into a workforce development program under the Workforce Innovation and Opportunity Act (WIOA). Appellant states that he received training in resume writing and interview techniques in early March 2019. Appellant contends that on March 14, 2019, he met with a Career Advisor and the Director of the WorkSource Montgomery Adult and Dislocated Worker and Youth Program. Appellant claims that at the meeting the WorkSource personnel “endeavored to coerce/bully/subjugate me to accept, to be trained into a different trade or non-pharmacy job through the WIOA.” There is no indication that Appellant applied for or was denied a County merit system position.

On September 17, 2019, an acknowledgement letter was sent to Appellant and the County, establishing a schedule for the County and Appellant to submit information and complete documentation concerning the appeal. Because it appeared that to the extent Appellant was appealing a denial of employment, it was by an entity that was not part of County government, the letter also advised Appellant that:

[T]he MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. Indeed, it is not clear that WorkSource Montgomery has merit system employees or even that it is a County agency. In consideration of this, if you wish to withdraw your appeal please advise the Board as soon as possible.

The County submitted a Motion to Dismiss on October 23, 2019, asserting that the MSPB lacked jurisdiction. Appellant’s reply was due on November 14, 2019, but no reply or other pleading has been filed with the MSPB to date.

This Board’s jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep’t of the Army*, 67

M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See* Montgomery County Personnel Regulations (MCPR), § 35-7(c) (“The MSPB must dismiss an appeal if it determines it lacks jurisdiction.”). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Montgomery County Code (MCC) grants the MSPB jurisdiction over appeals from applicants for employment in a merit system position with the County. MCC § 33-9(c) (“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.”); MCPR § 6-14 (“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”). Thus, the MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. MSPB Case No. 19-02 (2018); MSPB Case No. 09-08 (2009).

Merit system employees are defined by the Montgomery County Code, § 33-6, as “All persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law.” *See* MCPR § 1-39.

Pursuant to MCC § 15A-9(a), the “Council must designate, by resolution . . . a single nonprofit corporation which complies with all requirements of this Article as the County’s Workforce Development Corporation.” One of the requirements of that statutory provision is that the designated Workforce Development Corporation must “not [be] an instrumentality of the County.” MCC § 15A-11(a)(2). In 2015, Montgomery County Council Resolution 18-295 (October 20, 2015) designated WorkSource Montgomery, Inc., as the County’s Workforce Development Corporation.

It is undisputed that Appellant is appealing the alleged actions of WorkSource Montgomery, and that WorkSource Montgomery, Inc., is a private, non-profit corporation. The appeal alleges that WorkSource Montgomery refused to assist Appellant in obtaining employment as a pharmacist. There is no claim that any County merit system position was in any way implicated or that any County agency was involved. We therefore conclude that WorkSource Montgomery is a corporate entity separate from Montgomery County Government and that Appellant was not applying for or denied a merit system position with the County government.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant’s appeal. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-05 is dismissed for lack of jurisdiction.¹

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
December 3, 2019

¹ Board Member Michael J. Kator did not participate in the consideration, preparation, or adoption of this decision.

CASE NO. 20-07

ORDER OF DISMISSAL

Appellant filed this appeal concerning denial of employment as a temporary/seasonal Recreation Assistant VI, Development, Grade S6, with the Montgomery County Department of Recreation (Department or County). The appeal letter was received by the Merit System Protection Board (MSPB or Board) on October 14, 2019. The Board docketed the appeal as MSPB Case No. 20-07, but advised Appellant by letter dated October 15, 2019, that it would stay processing of the appeal until she provided a copy of a notification of non-selection. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(3).

After receipt of Appellant's notification of non-selection, an acknowledgement letter was sent to Appellant and the County on November 4, 2019, establishing a schedule for the parties to submit information and complete documentation concerning the appeal.

The County submitted a response on December 9, 2019, asserting that the appeal was untimely and should be dismissed for lack of jurisdiction. The County response also argued that the denial of employment was appropriate on the merits. To date, Appellant has not submitted a reply or other pleading, or otherwise communicated with the Board.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995).

As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See* MCPR, § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction."). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Appeal is Untimely

Under the Montgomery County personnel regulations Appellant had ten (10) working days to file an appeal challenging the denial of employment. MCPR, § 35-3(b). It is undisputed that by letter dated September 20, 2019, apparently emailed to her on September 23, Appellant was notified by the County that her provisional job offer was rescinded. Appellant submitted a copy of the letter to the Board and did not dispute that she received the email containing the letter on September 23rd.

This Appeal was filed with the Board on October 14, 2019, fifteen (15) working days after Appellant received the notice of non-selection. In the past the Board has not waived the 10-day period for filing an appeal in non-selection cases, and there is no basis for it to do so here. MSPB Case No. 14-43 (2014). Accordingly, Appellant's appeal must be dismissed as untimely.

Non-Merit System Position

The Montgomery County Code (MCC) grants the MSPB jurisdiction over appeals from applicants for employment in merit system positions with the County. MCC § 33-9(c) (“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.”); MCPR § 6-14 (“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”). Thus, the MSPB only has jurisdiction over appeals from applicants for employment in County merit system positions. MSPB Case No. 19-02 (2018); MSPB Case No. 16-02 (2015); MSPB Case No. 09-08 (2009).

However, Appellant applied for a temporary, seasonal position. This is reflected by the placement of Recreational Assistant positions on the Seasonal Salary Schedule and the fact that Appellant was asked to complete the Report of Pre-Placement Medical History for Temporary Employees form. CX 2.

While the County submission notes that the Recreational Assistant position is temporary/seasonal, it fails to raise the issue of the Board’s lack of jurisdiction over decisions concerning employment or promotion to non-merit system positions. Nevertheless, the Board is always obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). We are thus compelled to address our jurisdiction *sua sponte*.

The County Council has not delegated to the MSPB authority to hear matters involving temporary, seasonal non-merit system employees. MSPB Case No. 18-17 (2018); MSPB Case No. 13-08 (2013). As there is no dispute that Appellant is appealing her non-selection for a temporary, seasonal position that is not in the merit system we conclude that Board lacks jurisdiction over this appeal.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over Appellant’s appeal because it is untimely and because it concerns the selection process for a non-merit system position. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-07 is dismissed for lack of jurisdiction.

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
February 10, 2020

DISMISSAL FOR MOOTNESS

CASE NO. 19-04

ORDER OF DISMISSAL

On August 6, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the decision of the Department of Transportation, Division of Transit Services, to suspend him for three (3) days. The discipline was based on the County's allegation that on March 9, 2018, Appellant was driving a County Ride-On bus and illegally passed a school bus operated by the Montgomery County Public Schools that had its stop sign extended.

On January 16, 2019, a hearing on the merits was held before the Board. Appellant indicated during the hearing that he had requested a trial in District Court to contest the citation issued for a school bus monitoring civil violation under Transportation Article (TR), § 21-706. *See* TR § 21-706.1; Montgomery County Code, § 31-9B. At the end of the January 16 hearing the parties asked that this case be stayed pending resolution of Appellant's District Court trial. Further, the County represented to the Board that Appellant's suspension would be rescinded if Appellant was found by the District Court not to have violated TR § 21-706.

On January 17, 2019, the Board issued an order holding this appeal in abeyance pending final adjudication of Appellant's school bus monitoring citation in the District Court. The order required that within five (5) working days from the date of the District Court's ruling Appellant was to advise the Board of the outcome of that case, in writing. When over six (6) months had passed without a satisfactory explanation concerning the status of the District Court case the Board, on August 8, 2019, lifted the stay and ordered a transcript of the hearing.

While the Board was still considering the appeal on the merits it received an October 1, 2019, email from Appellant stating that he had prevailed in District Court. The next week the County advised the Board that it had confirmed that the District Court had found that Appellant had not violated Transportation Article, § 21-706. On November 26, 2019, the County filed a motion to dismiss based on mootness, attesting that Appellant's discipline had been rescinded and providing documentation that he had received full backpay.

Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-7(d), the Board may dismiss an appeal if the appeal becomes moot. Under longstanding Board precedent, an appeal must be dismissed as moot where an agency completely rescinds the action appealed. *See, e.g.*, MSPB Case No. 17-27 (2017); MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014); MSPB Case No. 12-06 (2006); MSPB Case No. 10-12 (2010). The County has demonstrated to the Board that it has fully rescinded the action appealed and made Appellant whole.

Accordingly, the Board hereby **ORDERS**:

1. That within 14 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully rescinded the disciplinary suspension of

Appellant and removed all documents pertaining to Appellant's suspension from his personnel records; and

2. That the appeal in Case No. 19-04 be and hereby is **DISMISSED** as moot;

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*, an appeal 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 9, 2019

CASE NO. 20-09

ORDER OF DISMISSAL

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on January 27, 2020, appealing a denial of employment as a Principal Administrative Aide with the County Department of Corrections and Rehabilitation (DOCR).

On May 8, 2020, Appellant emailed the Board and requested that her appeal be withdrawn. Appellant explained that the reason for her request was that she had been hired by the County in a different position and she was happy with her new position. Appellant stated that she is therefore no longer interested in the position with DOCR.

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. 17-18 (2017); MSPB Case No. 17-11 (2017). *See* MCPR §35-7(b) (Board may dismiss an appeal if the appellant fails to prosecute the appeal).

Accordingly, for the above reasons, the Board hereby **ORDERS** that the above-captioned appeal be **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 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
May 11, 2020

DISMISSAL FOR FAILURE TO PROSECUTE OR COMPLY WITH APPEAL PROCEDURES

CASE NO. 19-19 & 19-26

ORDER OF DISMISSAL

On March 4, 2019, Appellant, an employee of the Department of Correction and Rehabilitation, filed an appeal of a disciplinary action. The Merit System Protection Board (Board or MSPB) docketed the appeal as MSPB Case No. 19-19. On April 8, 2019, Appellant filed a second appeal, docketed as MSPB Case No. 19-26. Because it appeared that both appeals involve the same dismissal based on the same events, by order dated May 28, 2019, the Board consolidated the above captioned appeals and established that his Prehearing Submission was due on July 18, 2019.

Having not received Appellant's Prehearing Submission, on July 24, 2019, the Board wrote to Appellant instructing him to file the Prehearing Submission on or before close of business July 31, 2019. Appellant was advised that if he did not file the Prehearing Submission the Board may dismiss his appeal for failure to prosecute the appeal or to comply with established appeal procedures. Montgomery County Personnel Regulations, § 35-7(b). On July 31 Appellant contacted the Board by telephone and requested an extension. By letter dated August 1, 2019, the Board granted an extension to August 8, 2019 and told Appellant to provide a full explanation of why he had missed the previous deadlines. Appellant was expressly advised that there would be no further extensions and that if he did not file the Prehearing Submission by the deadline the Board may dismiss his appeal for failure to prosecute or to comply with established appeal procedures. To date Appellant has not filed the Prehearing Submission or responded in any way to the Board's August 1 letter. On August 12, 2019, the County filed a Motion to Dismiss.

Appellant has been repeatedly notified that, absent the proper filing of a Prehearing Submission, and a finding by the Board of good cause for his failure, the Board would dismiss his appeals. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015). To date, Appellant has not filed his prehearing submission or provided a satisfactory explanation for his failure to do so.

For the above reasons, the Board hereby **ORDERS** that the above captioned appeals be **DISMISSED** for failure to prosecute or to comply with established appeal procedures.

For the Board
August 14, 2019

CASE NOS. 19-24 & 19-25

ORDER OF DISMISSAL

Appellant, an employee of the Department of Correction and Rehabilitation, filed the above captioned appeals with the Merit System Protection Board (Board or MSPB) on March 27, 2019. Upon receipt of a Notice of Disciplinary Action (NODA) for each case, Appellant was advised by separate letters dated April 8, 2019, that the County's Prehearing Submissions were due on May 9, 2019, and that his Prehearing Submissions in each case were due on May 30, 2019.

The County filed its Prehearing Submissions on May 9, however Appellant did not file anything by May 30. Having received no Prehearing Submissions or other contact from Appellant, on June 4, 2019, the Board wrote to Appellant asking him to promptly file his Prehearing Submissions. The letter also asked that Appellant advise the Board in writing if he no longer wished to pursue his appeals. The letter warned that, absent a response, the Board may dismiss his appeal for failure to prosecute the appeal or comply with established appeal procedures. Montgomery County Personnel Regulations (MCPR), § 35-7(b).

Having received no response from Appellant to the Board's June 4 letter, the Board issued a Show Cause Order on June 20, 2019. The order required Appellant to provide, by July 3, 2019, a statement of such good cause as exists for why this case should not be dismissed. Appellant has not responded to the Show Cause Order even though it advised Appellant that absent a finding by the Board of good cause for his failure, the Board would dismiss his appeal.

Thus, because Appellant has not provided the Prehearing Submission, or responded to requests from the Board and a Show Cause Order, the Board shall 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); 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 appeals in Case Nos. 19-24 and 19-25 be and hereby are **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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
July 9, 2019

CASE NO. 19-28

ORDER OF DISMISSAL

Appellant filed the above captioned appeal of his dismissal with the Merit System Protection Board (Board or MSPB) on May 16, 2019. Since then, Appellant's participation in the Appeal has been sporadic.

In the Summer of 2019, the Board made multiple requests for Appellant to file a timely prehearing submission. When Appellant failed to file the required submission or otherwise contact the Board he was sent a July 23, 2019, letter asking him to file his prehearing submission, provide a written explanation for missing the deadline, and asking Appellant to advise the Board in writing if he no longer wished to pursue his appeal. The letter warned that absent a response the Board would dismiss his appeal for failure to prosecute the appeal or comply with established appeal procedures. Montgomery County Personnel Regulations (MCPR), § 35-7(b).

When Appellant failed to respond to the July 23 letter the Board issued a Show Cause Order on August 8, 2019. Appellant responded to the Show Cause Order and the case continued. A prehearing conference was held on October 23, 2019, and a hearing was scheduled for January 8, 2020.

On January 3, 2020, Appellant requested a postponement of the hearing so that he could travel to and participate in a job interview in South Carolina. By letter dated January 6, 2020, the Board postponed the hearing. On January 15, 2020, Board staff contacted the parties to obtain dates they were available for a hearing in April. By email dated January 20, Appellant indicated that he was now working in South Carolina and unable to participate in a hearing the first three weeks of April. Appellant further stated that if the hearing was the last week in April, he would try to obtain permission from his supervisor and travel to Maryland. On January 27, 2020, the Board's Executive Director emailed Appellant asking:

If you still wish to pursue your appeal the Board will need to schedule the hearing in May. Please provide the dates you are available.

I gather from your prior email that you are living and working in South Carolina. Please update your contact information with the Board so that correspondence will reach you in a timely manner.

If you wish to withdraw your appeal please advise the Board.

When there was no response from Appellant the Executive Director sent another email on February 6:

I don't believe I have received a response to my previous email (see below). Please provide the requested dates of availability or advise us if you wish to withdraw your appeal.

After receiving no response to the Board's emails of January 27 and February 6, 2020, the Board issued a Show Cause Order on February 27, 2020, requiring Appellant to provide a statement of such good cause as exists for why the appeal should not be dismissed for failure to prosecute. The statement was to be filed on or before close of business March 11, 2020.

To date, no statement has been filed and Appellant has not communicated in any way with the Board.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 19-28 be and hereby is **DISMISSED** for failure to comply with the Board's appeal procedures and for failure to prosecute. MCPR § 35-7(b). *See* MSPB Case No. 18-23 (2018); MSPB Case No. 15-19 (2015); MSPB Case No. 09-07 (2009).

For the Board
March 16, 2020

CASE NO. 20-02

ORDER OF DISMISSAL

Appellant filed the above captioned grievance appeal with the Merit System Protection Board (Board or MSPB) on July 18, 2019. The Board docketed the appeal as MSPB Case No. 20-02, but advised Appellant by letter dated July 22, 2019, that it would stay processing of the appeal until she provided a copy of a Chief Administrative Officer (CAO) decision on her grievance appeal. Montgomery County Personnel Regulations (MCPR), § 35-2(b), § 35-4(d)(2).

After receiving no response to the Board's July 22 letter, on August 1, 2019, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why the appeal should not be dismissed for lack of jurisdiction and failure to comply with the Board's appeal procedures. The statement was to be filed on or before close of business August 8, 2019, with a copy served on the County.

To date no statement has been filed, and Appellant has not communicated in any way with the Board.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-02 be and hereby is **DISMISSED** for failure to comply with the Board's appeal procedures and for failure to prosecute. MCPR § 35-7(b).

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*, an appeal may be filed with the Circuit Court for Montgomery County, Maryland County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
August 21, 2019

CASE NO. 20-15

ORDER OF DISMISSAL

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on March 10, 2020, seeking to appeal from the decision of the Department of Liquor

Control to terminate him from his position. The appeal form required Appellant to “Attach a copy of the Disciplinary Action or Notice of Termination.” On the appeal form Appellant stated that he received a notice of denial of employment on “Thursday, June 6, 2019.” Appellant did not attach a copy of a Notice of Termination or the June 6, 2019 notice.

On March 11, 2020, the Board acknowledged receiving the appeal and advised Appellant’s attorney that she must “provide a copy of the Notice of Termination and other relevant documents within 15 working days,” citing Montgomery County Personnel Regulations (MCPR), § 35-8(c). The MSPB stayed its processing of the appeal until receipt of the required documentation.

By email dated March 26, 2020, Appellant submitted a copy of a Notice of Proposed Termination that was dated April 30, 2019. On March 30, the Board sent another letter to Appellant’s attorney advising her that the Board could not proceed with processing the appeal until it had received a Notice of Termination. The letter further advised:

Please understand that a Notice of Proposed Termination is not the same as a Notice of Termination. *See* Montgomery County Personnel Regulations (MCPR), § 29-4. Until the County issues a Notice of Termination, the MSPB lacks jurisdiction over your client’s appeal. MCPR § 29-7(a); § 35-2(a); § 35-3(a)(2).

If the MSPB does not receive a copy of the required documentation, *i.e.*, a Notice of Termination, an order dismissing your client’s case without prejudice may be issued. If the appeal is dismissed without prejudice your client would be able to refile once a Notice of Termination is issued.

On April 7, 2020, Appellant’s attorney sent an email to the Board asking, “What is done in cases where the Agency never issues the Notice of Termination?” The Board’s Executive Director responded to Appellant’s attorney as follows, in part:

As explained in our letters, the Board does not appear to have jurisdiction until the County actually seeks to terminate your client, and the appeal may be premature. In the absence of a Notice of Termination the Board may dismiss the appeal without prejudice. Your client may also withdraw his appeal until such time as the County takes action against him. If your legal analysis leads you to believe that the Board may nevertheless assert jurisdiction, you may file an appropriate pleading and the Board will take it and any County response into consideration.

You may wish to contact the Office of the County Attorney or the Office of Human Resources to discuss the situation and the impact on your client.

Appellant’s attorney responded by seeking further clarification:

My client was terminated as a county employee but was never provided with the actual Notice of Termination. I gather that you are saying that he needs to try to get that document from the county or have them issue one before he can open his case? I just want to clarify. He is not on payroll and all of his benefits including insurance coverage stopped some time ago - all evidence that he is no longer employed. My question was more literal regarding someone that never received the actual Notice of termination but is in fact terminated; the employer failed to issue the termination notice among other things. I interpret your response being that my client should try to get a Notice from the HR or Office of County Attorney.

The Board's Executive Director answered by telling Appellant's attorney the following:

I am not suggesting a specific course of action on your part. As I said in the email, an employee may appeal after receiving a notice of termination, but "if your legal analysis leads you to believe that the Board may nevertheless assert jurisdiction, you may file an appropriate pleading and the Board will take it and any County response into consideration."

Having heard nothing further from Appellant or his attorney, on April 29, 2020, the Board issued a Show Cause Order requiring Appellant to provide a Notice of Termination or a statement of such good cause as exists for why one could not be provided. The Notice of Termination or statement was to be filed on or before close of business May 12, 2020. Appellant was advised that absent the filing of the required documents and statement the Board would dismiss this appeal.

To date no statement has been filed, and neither Appellant nor his attorney have communicated in any way with the Board.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-15 be and hereby is **DISMISSED**, without prejudice, for failure to comply with the Board's appeal procedures and for failure to prosecute. MCPR § 35-7(b).

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 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
June 5, 2020

DISMISSAL FOR UNTIMELINESS

CASE NO. 20-06

ORDER OF DISMISSAL

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on September 19, 2019, appealing a denial of a promotion to a Supervisory Therapist position with the County Department of Health and Human Services.¹ The County filed a response moving to dismiss the appeal as untimely and opposing it on the merits. Appellant's due date for a reply to the County submission was November 18, but to date she has not submitted a response or otherwise communicated with the Board.

Appellant received notification of non-selection on September 3, 2019. The appeal was thus due on September 17 but was electronically filed through the Board's website on September 18 at 5:02 p.m. Montgomery County Personnel Regulations (MCPR) §35-3(b). Appellant has provided no explanation, justification, or excuse for the late filing.

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995).

As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). *See* MCPR, § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction."). *See also Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

The Appeal is Untimely

Under the Montgomery County personnel regulations Appellant had ten (10) working days to file an appeal challenging the denial of employment. MCPR, § 35-3(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").

It is undisputed that Appellant received notification of non-selection on September 3, 2019. The appeal was thus due on September 17 but was not filed electronically until after 5:00 p.m. on September 18. The Board's official office hours are 9:30 a.m. to 3:00 p.m. The Board's website

¹ Member Sonya Chiles, who took office on January 1, 2020, did not participate in the consideration of this Appeal.

provides notice of the office hours and specifically advises that appeals filed outside of those hours will be considered as filed the next official work day.²

The Board has held on many occasions that appeals or pleadings filed after Merit System Protection Board office hours are considered to have been officially received the next Board business day. *See* MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015). Accordingly, we find that the appeal in this matter was officially received by the Board on September 19. Appellant has provided no explanation, justification, or excuse for her late filing.

In the past the Board has not waived the 10-day period for filing an appeal in non-selection cases, and we have not been provided with any reason for us to do so here. MSPB Case No. 14-43 (2014). *See* MSPB Case No. 09-07 (2009) (“Appellant is reminded that the Board’s hours of operation are 9:30 a.m. to 3:00 p.m. Thus, any filing must be received by the Board before 3:00 p.m. . . . or it will be deemed untimely.”).

Moreover, while we need not reach the merits of the County’s promotional decision due to the late filing of the appeal, the Board has reviewed the evidence of record and, as an alternative basis for its decision, finds that Appellant did not meet her burden of proving that the promotional action was arbitrary and capricious or in violation of an established procedure.

The Board will not substitute its judgment for that of the selecting official unless the appellant demonstrates that her qualifications were plainly superior to those of the selectee. Here the County’s documentation indicates that the selected candidate is well qualified, and that the interview panel reasonably concluded that the selected applicant performed better in the job interviews and was the superior candidate. Thus, the Board sees no basis for overturning the agency decision.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 20-06 be and hereby is dismissed for lack of jurisdiction because it was untimely filed. Furthermore, Appellant has failed to meet her burden of proof on the merits of her claim.

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*, an appeal 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 5, 2020

² The homepage of the Board’s website, found at <https://www.montgomerycountymd.gov/mspb/>, states: “The MSPB’s office hours are Monday - Thursday, 9:30 a.m. - 3:00 p.m. Appeals filed outside of those hours will be considered officially filed the next MSPB business day.”

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 2020, the Board issued the following decisions on requests for reconsideration of preliminary matters.

CASE NO. 20-01

ORDER DENYING MOTION FOR RECONSIDERATION

On November 14, 2019, the County Department of General Services (DGS or County) filed a Motion for Summary Judgment or, in the Alternative, Strike Appellant's Witnesses. By order dated December 4, 2019, the Merit System Protection Board (Board or MSPB) denied the motion. On December 11, 2019, the County filed a Motion to Reconsider Order Denying Motion for Summary Judgment or, in the Alternative, Strike Appellant's Witnesses. Appellant filed an opposition to the motion to reconsider on December 12, 2019.

Montgomery County Personnel Regulation (MCPR) § 35-11(a)(5) provides, in part, that "Any request to the MSPB to reconsider its ruling on a preliminary matter . . . must be filed within 5 calendar days from the date of the ruling."

As the Board's decision was issued on December 4 and sent by mail and email, the due date for the County's motion to be filed was December 9.¹ The County's motion to reconsider the Board's December 4 ruling was thus filed after the due date set forth in the regulations.

Accordingly, the County's motion for reconsideration is **DENIED** as untimely.²

The Board's Prehearing Order required the parties to provide the Board with an update on the status of any settlement negotiations by December 12, 2019. Because the hearing has been rescheduled the parties shall instead provide the settlement status update to the Board by **January 7, 2020**.

For the Board
December 12, 2019

CASE NO. 20-01

ORDER DENYING RECONSIDERATION AND GRANTING ALTERATION OF HEARING DATE

On January 7, 2020, the Appellant, through counsel, filed a motion for reconsideration of the Board's January 6, 2020, Scheduling Order setting a hearing date and granting the County an extension of three weeks to provide documents concerning employees similarly situated to

¹ The County's motion was filed electronically at 4:04 PM. The Board has repeatedly held that pleadings received after MSPB office hours may thus be considered to have been officially received the next Board business day. *See* MSPB Case Nos. 17-14 and 17-16 (2017); MSPB Case Nos. 15-16, 15-17, and 15-28 (2015); MSPB Case No. 09-07 (March 5, 2009) ("Appellant is reminded that the Board's hours of operation are 9:30 a.m. to 3:00 p.m. Thus, any filing must be received by the Board before 3:00 p.m. on March 9, 2009 or it will be deemed untimely."). Indeed, the MSPB website warns: "The MSPB's office hours are Monday - Thursday, 9:30 a.m. - 3:00 p.m. Appeals filed outside of those hours will be considered officially filed the next MSPB business day."

² We note that a request for reconsideration of a *final* decision may be filed within 10 calendar days. MCPR § 35-17(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"); Montgomery County Code, § 2A-10(f) ("any request for . . . reconsideration shall be filed within ten (10) days from a final decision").

Appellant who failed drug tests yet were not dismissed. Appellant's counsel also sought an alteration of the hearing date due to a conflict with another case he is litigating out of state. The County response, filed on that same day, consented to alteration of the hearing date and opposed reconsideration of the Board's January 6 order. Appellant filed a short reply suggesting that the County should provide documents supporting its initial motion for extension of time to provide the comparator information.

The Board finds no reason to doubt the representations of the County attorneys or to reconsider its January 6, 2020 order. Accordingly, the Appellant's motion for reconsideration is **DENIED**. The motion to alter the date of the hearing is **GRANTED**.

The hearing is hereby set for **March 30, 2020**, starting at 8:30 a.m. in the Council Office Building, 100 Maryland Avenue, Rockville, Maryland, in the Fourth Floor Capital Crescent Trail Conference Room. If necessary, the hearing will continue **March 31, 2020** at 8:30 a.m. in the Fourth Floor Capital Crescent Trail Conference Room.

The parties shall provide the Board with an update on the status of any settlement negotiations by **March 9, 2020**.

For the Board
January 16, 2020

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 may be filed at any time during a proceeding. The opposing party is given ten (10) calendar days to respond. MCPR § 35-11(a)(4). The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning or end of the hearing, rule on the motion.

During fiscal year 2020 the Board issued the following decision on motions filed during the course of an appeal proceeding.

MOTION TO DISMISS

CASE NO. 17-25

ORDER DENYING MOTION TO DISMISS AND LIFTING STAY

On April 17, 2017, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB), challenging her dismissal from a position with the Department of Health and Human Services. The parties requested and were granted several extensions of time for the filing of prehearing submissions so that they could jointly seek a court order permitting the release of child welfare records to Appellant's attorney and the MSPB. The County filed its prehearing submission on June 22, 2017, and Appellant was granted an extension of time to file her prehearing submission. On July 21, 2017, the County requested that the case be stayed because of the need for further investigation that might result in additional charges. Appellant filed her prehearing submission on July 24 and consented to the County's request for a stay. On July 24, 2017, the Board granted the stay.

On December 6, 2017, the County advised the Board that it had decided not to bring additional charges against Appellant. The Board lifted the stay on December 14, 2017, the parties submitted amended and supplemental prehearing submissions, and a prehearing conference was held on March 6, 2018. A prehearing order was issued on March 14, 2018, scheduling the merits hearing for June 18 to 20, 2018.

On May 9, 2018, the parties filed a joint response to the prehearing order and requested a postponement of the hearing because the parties believed that continued discussions might resolve the dispute. On May 10, 2018, the Board granted a postponement so that the parties could pursue settlement. The parties then jointly requested that the appeal be held in abeyance pending the outcome of mediation or alternative dispute resolution (ADR). On July 5, 2018, Board agreed to hold the appeal in abeyance pending notification from the parties that the case has been settled or that ADR efforts had been exhausted without success.

The Board requested and was provided with several status updates from the parties over the ensuing months. In response to the Board's July 1, 2019, status update request the County represented that since the previous status update the County had "not received any additional communication from opposing counsel regarding availability" for mediation. The Board asked for Appellant's response to the County's statement but did not receive an immediate reply. On July 3, 2019, the County filed a Motion to Dismiss alleging that Appellant had failed to prosecute her appeal because for a significant amount of time she was unresponsive and not available to participate in mediation. On July 15, 2019, Appellant filed an opposition to the Motion to Dismiss noting that the County had requested several postponements, a stay had been entered, and that Appellant had been "gravely ill." By email reply to the Board's July 1 status inquiry Appellant also indicated that she was now prepared to move forward with mediation.

Even assuming for the purposes of the County's motion that the lengthy delays in conducting mediation may have largely been attributable to Appellant, the Board was not advised

that there was a problem, there was a stay order in place, and neither party requested that the stay be lifted. Under these circumstances the Board cannot conclude that Appellant has failed to prosecute the appeal.

The Board does find that there has been too much delay in resolution of this matter and will lift the stay and schedule the merits hearing. The parties are, of course, still free to engage in settlement negotiations and mediation.

Accordingly, it is hereby **ORDERED** that the County's motion to dismiss is **DENIED**, and the July 5, 2018, Order Granting Stay is **RESCINDED** and the stay lifted.

The Board will notify the parties of the dates for the merits hearing.

For the Board
August 6, 2019

MOTION IN LIMINE

CASE NO. 18-27

ORDER DENYING MOTION IN LIMINE

On December 2, 2019, the County filed a Motion in Limine seeking to exclude testimony concerning the availability of positions prior to December 7, 2017, the date on which Appellant was given a 90-day period of priority consideration as a reasonable accommodation.

Appellant opposed the County's motion, arguing that in 2016 there were positions available for which she was qualified, but the County failed to provide the reasonable accommodation she requested. Appellant points to documentary evidence suggesting that in September 2016 Dr. SS of the County Occupational Medical Services unit indicated that Appellant's request was supported by medical documentation and that she should be given priority consideration.

We believe that Appellant should be able to present testimony concerning these facts so that the Board may weigh their probative value and relevance. Once witness testimony is presented at the hearing the County may object to evidence it believes to be irrelevant to the issues before the Board and to make such arguments on the merits consistent with that position.

The Board hereby **DENIES** the County's Motion in Limine and will permit Appellant's presentation of evidence concerning the issues of priority consideration, available positions, and the medical opinions of Dr. S beginning from September 2016 forward.

For the Board
April 16, 2020

MOTION FOR SUMMARY DECISION

CASE NO. 20-01

ORDER DENYING MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO STRIKE

On November 14, 2019, the County Department of General Services (DGS or County) filed a Motion for Summary Judgment or, in the Alternative, Strike Appellant's Witnesses. Appellant filed an opposition on December 2, 2019.

The County argues that because Appellant failed a random drug test and was a Federal Transit Administration Safety Sensitive employee, Montgomery County Personnel Regulation (MCPR), § 32-5(i), required that he must be dismissed from County employment. The County further contends that the regulation not only applied to the Director of DGS, but also to the Board, which is also obligated to impose the penalty of dismissal.

The Montgomery County Code, Administrative Procedures Act, § 2A-7(d), provides that a motion for summary decision may be granted if the Board finds that: "(1) there is no genuine issue of material fact to be decided at the hearing; and (2) the moving party is entitled to prevail as a matter of law." We are unpersuaded that the Board is completely without authority to consider the appropriate level of discipline or whether any discipline is warranted. The Montgomery County Code, § 33-7(a) provides that "The remedial and enforcement powers of the Board . . . must be exercised by the Board as needed to rectify personnel actions found to be improper." The County has not satisfactorily addressed the law on inadvertent ingestion of cannabis products. Moreover, the County has not provided information concerning the alleged unequal punishment of two specifically identified similarly situated employees and, if true, whether differential treatment of Appellant would be improper. In our view there remain genuine issues of material fact to be decided and that the County is not entitled to prevail as a matter of law. Accordingly, we find that summary decision is not appropriate.

The Board's Prehearing Order required the County to provide Appellant and the Board with any relevant reports, papers, and documents concerning any other similarly situated employees who failed drug tests yet were not dismissed. The County shall provide that information to Appellant and the Board by **January 7, 2020**. The disclosure by the County shall include the two individuals specifically identified by Appellant.

The County's motion for summary decision is **DENIED**. The County's motion in the alternative to strike Appellant's witnesses is also **DENIED**. While the Board approves Appellant's witnesses, at the merits hearing the County may object to specific testimony on the basis of relevance.

The hearing in this matter, currently scheduled for December 19, 2019, is **POSTPONED** and will be continued in February 2020 on a date to be determined. No later than **January 7, 2020**, the parties shall jointly provide the Board with a list of available dates for the hearing in February 2020. The parties shall also discuss stipulations and submit written joint stipulations of fact, if any, to the Board by **January 21, 2020**.

For the Board
December 4, 2019

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 FY20, the Board issued a decision concerning a petition to enforce a settlement agreement and two agreements were entered into the record.

CASE NO. 20-08

DECISION CONCERNING ENFORCEMENT OF SETTLEMENT AGREEMENT

On October 16, 2019, Appellant filed a Complaint with the Merit System Protection Board (Board or MSPB) seeking to enforce the terms of a settlement agreement (Appellant's Enforcement Request). Appellant alleged that the County had failed to comply with the September 25, 2015, settlement agreement filed with the Board by the parties in MSPB Case No. 15-24. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15, the Board had 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).

Appellant now alleges that the County breached the settlement agreement by failing to remove certain documents from her personnel file, including those concerning the settlement and original discipline against her, and by failing to provide her with the proper salary and benefits. In addition to the Complaint filed on October 16, 2019, on November 22, 2019, Appellant filed an Amended Complaint and exhibits.¹ On December 19, 2019, the County filed its response, which it titled "Employer's Opposition to Appellant's Complaint of Breach of Contract" (County Opposition).²

On January 13, 2020, Appellant's attorney filed a Notice of Withdrawal from this matter. The next day Appellant's current attorney filed a Notice of Appearance and a motion for extension of time to file Appellant's response to the County's Opposition. The Board granted the extension, and on February 3, 2020, Appellant filed "Appellant's Response to County's Opposition to Appellant's Complaint for Breach of Contract" (Appellant Response).³

The Board has reviewed the record and considered the arguments of the parties.

¹ The following exhibits filed with the Amended Complaint will be designated as Appellant Exhibits (AX).

- A. Settlement Agreement, September 25, 2015.
- B. Email from JB to Appellant, March 22, 2016.
- C. Email from MT to Appellant, October 4, 2017.
- D. Email from LM to Appellant, October 14, 2015.

² The following exhibits filed with the County Opposition will be designated as County Exhibits (CX).

- A. Settlement Agreement, September 25, 2015.
- B. Order Accepting Settlement Agreement, September 30, 2015.
- C. Position Description, Grade 25 Program Manager II, Division of the Controller.
- D. Letter from Appellant's attorney to County, September 16, 2019.
- E. Letter from County Attorney to Appellant's attorney, September 20, 2019.
- F. Affidavit of Custodian of Records, OHR, undated.
- G. Decision Concerning Enforcement of Settlement Agreement, December 17, 2015.
- H. Affidavit of MCtime Program Manager with Appellant leave records, undated.

³ The following exhibits filed with Appellant's Response will be designated as Appellant Exhibits (AX).

1. Settlement Agreement, September 25, 2015.
2. Affidavit of Appellant, February 2, 2020.
3. Letter from Appellant's attorney to County, April 21, 2016.
4. Letter from County Attorney to Appellant's attorney, May 27, 2016.

FINDINGS OF FACT

Appellant was employed by the Montgomery County Police Department in the Management and Budget Division as a Manager 3 at the M-3 salary level.⁴ For reasons not pertinent to this enforcement action the Police Department dismissed Appellant from County employment. Appellant appealed her dismissal and the Board held an evidentiary hearing. Before a decision was rendered Appellant and the County agreed to a settlement. The Board accepted the Settlement Agreement and retained jurisdiction over any disputes concerning the interpretation or enforcement of the Settlement Agreement. MSPB Case No. 15-24.

The Settlement Agreement provides, in part:

- A. [Appellant] will be placed in a Grade 25 position within the Department of Finance as a Program Manager II with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years, from October 19, 2015 to October 19, 2019. The COLA for FY16 is to be implemented as though [Appellant] had been continuously employed during the period of her separation. The parties intend that the Settlement Agreement results in no break in service for [Appellant]. Moreover, the parties agree that the “redline freeze” acts as a floor for salary and benefits, but [Appellant] is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to.
- B. After four (4) years on October 19, 2019, [Appellant]’s salary shall be the top of grade for the position she occupies if the position she occupies is below an M-3. However, at the conclusion of 4 years, on October 19, 2019, if [Appellant] occupies an M-3 position, her salary shall not be less than her former M-3 salary on October 19, 2019.
- C. The Employer agrees to pay [Appellant] back pay from February 26, 2015 through October 19, 2015. [Appellant] will receive the FY 16 COLA effective July 12, 2015. The employer will deduct all applicable payroll deductions (including local, state and federal taxes), Retirement contributions and Health benefits coverage at the time of her separation. The Employer will make the employers retirement contributions, as well as investment earnings on the employee and employer contributions retroactively to February 26, 2015. The Employer will perform under this subsection within two weeks of the final signature on the Settlement Agreement.
- D. [Appellant] will provide documentation to the Employer of the date of commencement of her COBRA health benefits and the exact monthly premium that she has paid since her termination on February 26, 2015. The Employer agrees to reimburse [Appellant] the entire amount [Appellant] paid for COBRA.
- E. The Employer agrees to issue a written reprimand for unsatisfactory performance. Said written reprimand will remain in her personnel file until

⁴ Parts of these findings of fact are derived from the findings of fact contained in our decision of December 17, 2015, in MSPB Case No. 16-06 (2015).

February 26, 2016. On February 26, 2016 the written reprimand will be removed from [Appellant]'s personnel file. The employee is entitled to file a written rebuttal which shall also remain in the personnel file until February 26, 2016.

- F. The Employer agrees to pay attorney's fees in the amount of \$12,130.00. No further action will be sought for reimbursement of any additional attorney's fees related to this matter. . . .
- J. The Office of the County Attorney shall maintain in a secure and confidential file the original of this Settlement Agreement and Release for a period of 5 years from the date of execution.

Pursuant to the Settlement Agreement Appellant was reinstated to County employment on October 19, 2015. Appellant was placed in a Grade 25 Program Manager II position with the County Department of Finance with a work location in the Executive Office Building (EOB). Appellant also received backpay and attorney's fees.

On November 4, 2015, Appellant filed a motion with the Board to enforce the settlement agreement, claiming that the County had breached the agreement by not giving her assigned parking in the EOB. The Board ruled on December 17, 2015, that there was no breach of the settlement agreement. MSPB Case No. 16-06 (2015).

After Appellant was reinstated on October 19, 2015, "the County rescinded 64.57 hours of PTO." Affidavit of Appellant, AX 2, ¶ 4. Appellant submitted a document that explains the reason the PTO hours were rescinded. AX 4. PTO is credited to MLS employees on January 1 and July 1 of each year. Appellant's Response, pp. 6-7. When Appellant was reinstated pursuant to the Settlement Agreement, she was credited with the full 140 hours of PTO she would have earned on July 1, 2015, had she not been dismissed. Payslips reflecting Appellant's salary and the treatment of her leave were issued in October before Appellant filed MSPB Case No. 16-06 on November 5, 2015. AX 3 (April 21, 2016, letter to the County from her then attorney and copies of payslips). Those payslips show the restoration of Appellant's backpay and leave. The November 13, 2015, payslip clearly shows that her PTO balance was, in the words of Appellant's then attorney, "reduced and replaced with annual leave and sick leave as Grade 25 benefits." AX 3. The amount of PTO that was rescinded reflected the portion of time after the Settlement Agreement was signed on September 25, 2015, for which the County believed she was not entitled to PTO as she was no longer an MLS employee under the agreement. AX 4, p. 2.

Appellant also raised questions concerning the calculation of her salary and benefits in a March 21, 2016, email to the Director of the Department of Finance. Amended Complaint, Exhibit B. In response, the Director advised Appellant that she was eligible for the Cost of Living Adjustment (COLA) given to a Grade 25 employee. The Director specifically addressed the Settlement Agreement, noting that under the terms of the agreement her salary was to be "frozen at the *former* M3 salary and benefits." (emphasis in original). He went on to say he was "not sure what" Appellant meant by referencing her compensation and benefits as an M3.

Subsequently, on October 4, 2017, Appellant received confirmation by email that her COLA was being "calculated using the Grade 25 maximum salary rather than" at an MLS III salary. Amended Complaint, p. 4, ¶20; AX C.

The Settlement Agreement, ¶E, specifically addressed the written reprimand that was to be placed in Appellant's personnel file:

The Employer agrees to issue a written reprimand for unsatisfactory performance. Said written reprimand will remain in her personnel file until February 26, 2016. On February 26, 2016 the written reprimand will be removed from [Appellant]'s personnel file. The employee is entitled to file a written rebuttal which shall also remain in the personnel file until February 26, 2016.

The term "personnel file" was not used anywhere else in the Settlement Agreement. However, in the only other provision of the agreement addressing the content of a file ¶J provided that: "The Office of the County Attorney shall maintain in a secure and confidential file the original of this Settlement Agreement and Release for a period of 5 years from the date of execution."

On May 28 and August 26, 2019, Appellant reviewed her personnel file. CX F, ¶11. Appellant found that it contained the Settlement Agreement, Notice of Disciplinary Action for her dismissal, and Appellant's Appeal to the Maryland State Unemployment Insurance agency. Amended Complaint, ¶12, pp. 2-3.

Appellant asserts that her inability to successfully compete for a promotion is the result of the Settlement Agreement being seen by various hiring authorities. Appellant's view is speculative as she has not provided any evidence to support her theory and the affidavit of the custodian of records indicates that Appellant is the only person who has reviewed her personnel file. CX F, ¶14. The custodian also avers that Appellant's personnel file does not contain the written reprimand. CX F, ¶13. *See* Complaint, ¶15.

Appellant suggests that it was improper for certain County employees to have had access to copies of the Settlement Agreement as the original was to be kept by the Office of the County Attorney in a confidential file under ¶J of the agreement. Appellant specifically names the following individuals as improperly having access to the Settlement Agreement: JB, LM, SS, and MD, referencing a March 22, 2016, email from JB. Amended Complaint, ¶14 and AX B. The copy of the email filed with the Board as AX B consists of only one page and omits the text of the email Appellant sent on March 21, 2016, at 12:49 pm to LM. The text of the March 22 reply from JB states that LM "referred your question to me."

The April 21, 2016, letter from Appellant's attorney states that Appellant "has attempted to clarify benefits due and owing to her under the Settlement Agreement with her immediate supervisor, [LM], Controller. She has also attempted to clarify benefits due and owing to her with the Director of the Department of Finance, [JB]." AX 3.

Thus, it appears clear that the involvement of JB and LM in reviewing the Settlement Agreement was necessary for the proper implementation of the agreement and, at least in part, necessitated by inquiries made to them by Appellant herself.

Finally, we note that as the Director of OHR, SS, was a signatory to the agreement and that MD is a high level manager in OHR, an agency with responsibility for addressing personnel issues.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Merit System Law, Section 33-14. Hearing Authority of Board, which states in applicable part,

- (c) **Decisions.** . . .The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:
 - (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;
 - * * *
 - (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

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

§ 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:
 - (2) change in position status, grade, work schedule, working conditions, and benefits;
 - * * *
 - (8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale;
 - (9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.

ISSUE

Has the County acted in compliance with the Settlement Agreement?

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute and regulation. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, Blakehurst Lifecare Community v. Baltimore County,*

146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board’s jurisdiction is only over actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep’t of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

Montgomery County regulations specifically provide that the MSPB may interpret and enforce a settlement agreement. MCPR §35-15(a). Further, the Settlement Agreement specifically recognized the Board’s authority to retain jurisdiction over County compliance with all aspects of the settlement agreement. Settlement Agreement, ¶ M.

Accordingly, the Board has jurisdiction over Appellant’s Enforcement Request and continues to have the authority to interpret and enforce the Settlement Agreement. MSPB Case No. 16-06 (2015).

Appellant Has the Burden of Proof

It is well established that a settlement agreement is a contract between the parties. MSPB Case No. 16-06 (2015); MSPB Case No. 10-01 (2009); MSPB Case No. 08-14 (2008). In construing and enforcing the Settlement Agreement this Board must thus apply basic principles of contract law.

It is a settled principle of Maryland contract law that the party seeking to enforce a contract has the burden of proof. MSPB Case No. 16-06 (2015) *citing Bd. of Trustees, Cmty. Coll. of Baltimore Cty. v. Patient First Corp.*, 444 Md. 452, 471-72 (2015); *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001); *Glen Alden Corp. v. Duvall*, 240 Md. 405, 422 (1965); *The Fischer Org., Inc. v. Landry's Seafood Restaurants, Inc.*, 143 Md. App. 65, 75 (2002)). The U.S. Merit System Protection Board also adheres to the same principle. MSPB Case No. 16-06 (2015) *citing Leeds v. U.S. Postal Serv.*, 108 M.S.P.R. 113 (2008); *Kolassa v. Department of the Treasury*, 59 M.S.P.R. 151, 154 (1993).

Thus, Appellant has the burden of proving by a preponderance of the evidence of record that there was a contractual obligation and that there was a material breach of that duty. MSPB Case No. 16-06 (2015); APA, §2A-10(b).

Appellant’s Claims that are Barred by Res Judicata

Certain claims raised in this enforcement action are 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.⁵

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).

⁵ Although it does not appear that the County raised the issue of *res judicata*, we do so *sua sponte*. *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*).

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

In both MSPB Case No. 16-06 and this matter Appellant challenged the propriety of her parking assignment in a garage other than the one in the EOB. Appellant may not now relitigate in this case the same claims she raised in 2015. Because the claim regarding parking in the EOB presented in this case is identical to that determined in Case No. 16-06, the parties are the same, and there was a final decision by the Board, the elements of *res judicata* are satisfied.

Appellant’s claim that she should have received PTO instead of annual and sick leave was not asserted in the 2015 enforcement action. If Appellant could have raised that claim in 2015 it too may be barred by *res judicata*. MSPB Case No. 14-38 (2014); *Colandrea*, 361 Md. at 392.

In an affidavit filed in this enforcement action Appellant acknowledges that when she was reinstated pursuant to the Settlement Agreement in October 2015, “the County rescinded 64.57 hours of PTO.” AX 3, ¶ 4. Appellant also submitted a document that explains the reason the PTO hours were rescinded. AX 4. PTO is credited to MLS employees on January 1 and July 1 of each year. Appellant’s Response, pp. 6-7. When Appellant was reinstated pursuant to the Settlement Agreement, she was credited with the full 140 hours of PTO she would have earned on July 1, 2015, had she not been dismissed prior to that date. The amount of PTO that was rescinded reflected the portion of time after the Settlement Agreement was signed on September 25, 2015, for which the County believed she was not entitled to PTO.⁶

Payslips reflecting Appellant’s salary and the treatment of her leave were issued in October before she filed MSPB Case No. 16-06 on November 5, 2015. AX 3 (April 21, 2016, letter to the County from her then attorney and copies of payslips). The November 13, 2015, payslip clearly shows that her PTO balance was, in the words of Appellant’s then attorney, “reduced and replaced with annual leave and sick leave as Grade 25 benefits.” AX 3. Appellant received that payslip while her settlement agreement enforcement action was still pending. However, Appellant made no effort to advise the Board that she believed the County had violated the settlement agreement with regard to leave benefits at any time during the month before the Board decided MSPB Case No. 16-06 on December 17, 2015. As we noted in our December 17, 2015, decision: “Other than the failure to provide her with parking in the EOB garage, Appellant makes no allegation that the County failed to fulfill any of its obligations under the Settlement Agreement or that any other provision of the Settlement Agreement was breached by the County.”

Under County law and Board procedures Appellant had the opportunity to seek to amend her Motion to Interpret and Enforce the Terms of a Settlement Agreement to include the leave benefits claim. Montgomery County Code, Administrative Procedures Act (APA), § 2A-7(c) (“Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, . . . motions to amend . . . submissions to the hearing authority. . . shall be made promptly”); APA § 2A-7(h)(7) & (10); MCPR § 35-10(f)(4) & (10); MCPR § 35-11(a)(4). *Cf.* Md. Rule 2-341(c) (“An amendment may seek to . . . (1) change the nature of the action or defense. . .

⁶ There are 26 weeks from July 1 and December 31. The 12 weeks from September 25 to December 31 constitute 46.15% of the full 26 weeks. Pro rating 46.15% of the 140 hours of PTO is 64.61 hours. The minor discrepancy from Appellant’s admission that 64.57 hours of PTO that were actually rescinded is presumably due to a difference in the precise method the County used for the calculation.

(3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended . . . Amendments shall be freely allowed when justice so permits.”).

Thus, because Appellant had a reasonable opportunity to raise the leave benefits issue with the Board as part of her 2015 enforcement action, that claim is barred by the doctrine of *res judicata*. MSPB Case No. 14-38 (2014). This is true even if the claim arose after she filed the enforcement action but well before the decision was issued.

Maryland courts have approved the principles enunciated in *Restatement (Second) of Judgments*, § 24 (1982). *Kent County Board of Education v. Bilbrough*, 309 Md. 487, 499 (1987). Comment (a) to *Restatement* § 24 explains that the term “claim” includes “all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions),” and further states that because litigants have “considerable freedom of amendment” the “law of *res judicata* now reflects the expectation that parties who are given the capacity to present their ‘entire controversies’ shall in fact do so.”

Consistent with this principle courts have concluded that a party has a responsibility to amend or supplement claims even after the action has been filed, and that even the denial of leave to amend may result in a claim being barred by *res judicata* in a subsequent case. *Gonsalves v. Bingel*, 194 Md. App. 695, 716-21 (2009).⁷ See *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 817 (6th Cir. 2010) (“plaintiff has a duty to supplement her complaint with related factual allegations that develop ‘during the pendency of’ her state suit or have them barred by *res judicata*”); *Havercombe v. Dep’t of Education*, 250 F.3d 1, 8-9 (1st Cir. 2001) (“given that the general rule in the federal courts is to liberally permit amendments where justice so requires, his failure to . . . amend has foreclosed him from bringing . . . [the claims] at all. . . he has only himself to blame for not . . . amending his complaint . . .”); *Monterey Plaza Hotel Ltd. P’ship v. Local 483*, 215 F.3d 923, 928 (9th Cir. 2000) (“the doctrine of *res judicata* bars the relitigation of all events which occurred prior to entry of judgment, and not just those acts that happened before the complaint was filed. . .”).

We find that Appellant, a thirty year County employee with competent counsel, knew or should have known shortly after her reinstatement, and while her prior settlement enforcement action was pending with the Board, that her PTO hours were rescinded because the County had determined that she was no longer entitled to the MLS leave benefits. Because Appellant had a reasonable opportunity to litigate her leave benefits claim in the 2015 enforcement action she is barred by *res judicata* from pursuing it now. MSPB Case No. 14-38 (2014).

Appellant Claims that are Untimely

Although a settlement enforcement action does not have a strict statutory time period within which it must be filed, an action alleging breach of a settlement agreement must be filed within a reasonable time after the party seeking enforcement becomes aware of the breach, and the reasonableness of the time period depends on the circumstances of each case. *Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1335 (Fed. Cir. 2002) (citing *Adamcik v. U.S. Postal*

⁷The obligation to amend a complaint to include additional claims is also consistent with longstanding Maryland law requiring breach of contract actions to include all possible claims under the entire contract. *Gonsalves v. Bingel*, 194 Md. App. 695, 715 (2010); *Dugan v. Anderson*, 36 Md. 567, 584-85 (1872) (“It is an ancient and familiar rule of law that only one action can be maintained for the breach of an entire contract, and the judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding.”).

Service, 48 M.S.P.R. 493, 496 (1991); *Eagleheart v. United States Postal Service*, 110 M.S.P.R. 642 (2009).⁸

This “reasonable time” standard is also compelled by the doctrine of laches. *See Poett v. Merit System Protection Board*, 360 F.3d 1377, 1384 (Fed. Cir. 2004) (“The ‘reasonable time’ requirement for filing a petition for enforcement of a settlement agreement is conceptually similar to the defense of laches.”); *United States EEOC v. Lockheed Martin Global Telecommunications, Inc.*, 514 F. Supp. 2d 797, 801 (D. Md. 2007) (“In a laches determination, a lack of diligence exists where the plaintiff delayed inexcusably or unreasonably in filing suit.”).

Appellant received biweekly payslips in October and November 2015, four years before filing this enforcement action. A reasonably prudent employee would have reviewed the payslips to confirm that they correctly reflected the salary and benefits required under the Settlement Agreement. The November 13, 2015, payslip leaves no doubt that per the agreement Appellant had been demoted to “Grade 25,” that her PTO leave balance had changed, and that she was now earning annual and sick leave. AX 3.

Indeed, Appellant raised the issue with the County in a letter from her attorney dated April 21, 2016 and received a reply from the County in a letter dated May 27, 2016. Appellant’s Response, p. 7; AX 3 & 4. In that letter her attorney acknowledged that the November 13, 2015, payslip shows that her PTO balance was, in his words, “reduced and replaced with annual leave and sick leave as Grade 25 benefits.” AX 3. Appellant thus knew or should have known on November 13, 2015, that the County was treating her as a Grade 25 non-MLS employee for leave purposes. *Brown v. MSPB*, 86 F. App’x 421, 422 (Fed. Cir. 2004) (leave and earnings statements provide sufficient notice of alleged breach of a settlement agreement).

However, Appellant apparently did nothing further to contest her leave status until filing this enforcement action. For over three years she used the PTO leave balance and annual and sick leave benefits credited to her by the County without further complaint. AX 2, ¶5; CX H.

This enforcement action was filed October 16, 2019, over 3 ½ years after Appellant raised the leave issue in her April 21, 2016 letter and four years after receiving payslips reflecting the leave treatment. AX 3. The letter from Appellant’s attorney demonstrates that 3 ½ years before filing this enforcement action Appellant was aware of the pay and leave issues she now raises in this matter. Under the facts of this case a delay of that length certainly cannot be considered “reasonable.” In our view, having done nothing to enforce the agreement as she understood its terms for almost four years, Appellant’s claim is untimely.

Appellant also alleges that the County used an incorrect COLA calculation for salary adjustments. The Settlement Agreement, ¶A, provides that Appellant “will be placed in a Grade 25 position . . . with a redline freeze in her former M-3 salary and benefits (determined at the rate

⁸ Were this not a settlement enforcement action, Appellant’s disputes with the County over salary and leave benefits may have been appropriate for the grievance procedure. The County grievance procedure is designed to promote dispute resolution under “specific and reasonable time limits for each level or step”. MCPR §34-3(a). Step one of the grievance procedure provides that an employee shall initially file a grievance with the employee’s immediate supervisor within 30 days after the employee “knew or should have known of the occurrence or action on which the grievance is based.” MCPR § 34-9(a)(1)(A). Thus, under County law, 30 days is considered a “reasonable time limit” within which to challenge an employment action. *See MSPB Case No. 11-08 (2011)* (grievance filed 5 years after employee knew of pay inequity was untimely).

of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years . . . the parties agree that the “redline freeze” acts as a floor for salary and benefits, but [Appellant] is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to.”

Appellant raised questions concerning the calculation of her salary and benefits in a March 21, 2016, email to the Director of the Department of Finance. Amended Complaint, Exhibit B. In response, the Director advised Appellant that she was eligible for the COLAs given to a Grade 25 employee. The Director specifically addressed the Settlement Agreement, noting that under the terms of the agreement her salary was to be “frozen at the *former* M3 salary and benefits.” (emphasis in original). He went on to say he was “not sure what you mean” by Appellant’s reference to her compensation and benefits as an M3.

October 4, 2017, Appellant received confirmation by email that her COLA was being “calculated using the Grade 25 maximum salary rather than” at an MLS III salary. Amended Complaint, p. 4, ¶20; AX C. As the COLA issue was raised for the first time in the Amended Complaint, it appears that Appellant waited over two years after being told how the COLA was calculated to seek enforcement of the agreement. We conclude that a two-year delay is not reasonable and Appellant’s COLA claim is therefore untimely.

Appellant Has Failed to Demonstrate a Breach of the Settlement Agreement

Appellant contends that a proper interpretation of the Settlement Agreement required the County to purge Appellant’s personnel file of documents related to the settlement, the disciplinary dismissal, and, because it indicates that she was dismissed, her unemployment insurance appeal. Accordingly, Appellant demands that the County remove from Appellant’s personnel file all copies of the Settlement Agreement, NODA, and unemployment insurance claim records. In its opposition brief the County argues that there is no provision in the Settlement Agreement requiring that documents concerning the dismissal matter and settlement may not be in her personnel file.

The only provisions in the Settlement Agreement addressing files say that: (1) the Office of the County Attorney was to maintain a secure and confidential file with the Settlement Agreement until September, 2020; and (2) the written reprimand would be (and apparently was) removed from Appellant’s personnel file February 26, 2016.

We see no reason the Settlement Agreement should remain in Appellant’s personnel file now that over four years have elapsed since its execution. Paragraph A of the Settlement Agreement provided that the “redline freeze” on Appellant’s salary level would expire on October 19, 2019. Paragraph B provided that on October 19, 2019, Appellant’s salary would be at the top of her pay grade if she was below the M-3 level.⁹ These conditions are no longer in effect and we can see no other contractual language that would necessitate maintenance of the agreement in her personnel file.

It is also our view that the dismissal NODA should not have been maintained in the personnel file after the County agreed to demote Appellant, substitute a written reprimand for unsatisfactory performance, reinstate Appellant with backpay, and pay attorney’s fees.

⁹ Paragraph B also required that if Appellant was in an M-3 position her salary would not be less than her former M-3 salary on October 19, 2019. Since Appellant remains at a Grade 25 this provision was not triggered.

Furthermore, once the dismissal was rescinded and Appellant reinstated with backpay the unemployment insurance case information was not appropriate for the personnel file.¹⁰

Although Appellant and the County agreed to a demotion from M-3 (MLS III) to a Grade 25 position, reinstatement with backpay, a written reprimand, and attorney's fees the Settlement Agreement does not expressly say that the dismissal NODA was rescinded or that references and documents concerning the NODA must be expunged. For those reasons, we do not find that there has been a material breach of the Settlement Agreement.

While we find it unusual that the Settlement Agreement did not include an express expungement requirement or even a neutral reference provision, for the reasons discussed above we strongly urge the County to promptly remove copies of the Settlement Agreement, dismissal NODA, and unemployment insurance case information from both the electronic and paper versions of Appellant's personnel file.

Appellant argues that it "would have been nonsensical for the parties to agree that the original Agreement be kept confidential, yet allow for copies to be liberally distributed within the County and kept in Appellant's personnel file." Appellant's Response, at p. 13. We do not find that the County "liberally distributed" the Settlement Agreement.

From the evidence in the record it appears more likely that the County employees who had access to copies of the Settlement Agreement were engaged in carrying out their job duties. JB and LM were involved in the proper implementation of the agreement and in responding to inquiries made to them by Appellant. The April 21, 2016, letter from Appellant's attorney admits that Appellant "has attempted to clarify benefits due and owing to her under the Settlement Agreement with her immediate supervisor, [LM], Controller. She has also attempted to clarify benefits due and owing to her with the Director of the Department of Finance, [JB]." AX 3. Moreover, we see nothing inappropriate with the Director of OHR, a signatory to the agreement, and one of her high level personnel managers having knowledge of the terms of the agreement.

It is true that personnel files are confidential, MD Code Ann., General Provisions Article, § 4-311. However, even to the extent the Settlement Agreement itself is considered a personnel record, that does not prevent the sharing of personnel records with employees who are charged with personnel administration responsibilities to the extent necessary for those employees to carry out their legitimate responsibilities. *See 86 Opinions of the Attorney General* 94 (2001).

Appellant also assumes that she was passed over for other positions because hiring managers somehow found out about the original charges against her and the settlement. However, Appellant has not provided any evidence supporting her theory, and the County provided a sworn affidavit averring and a document showing that Appellant was the only person to have looked at her personnel file.

Finally, although we have already determined that Appellant's COLA claim is time barred we wish to briefly discuss the merits of Appellant's allegation that the County used an incorrect COLA calculation because it was based on that used for a General Salary Scale employee at Grade 25. The Settlement Agreement, ¶A, provides that Appellant "will be placed in a Grade 25 position . . . with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years . . . the parties agree that the "redline freeze" acts as a floor for salary and benefits, but [Appellant] is entitled to

¹⁰ We do not address what records may be maintained by the Office of the County Attorney.

any additional COLA, raises or benefits that she, or all county employees, become entitled to.” (emphasis added).

Appellant’s response acknowledges that under the agreement Appellant was demoted from MLS III to a Grade 25 Program Manager position but notes that her salary and benefits would be frozen at her MLS III level (and act as a floor) for 4 years. We see nothing in the language of the Settlement Agreement suggesting that the “redline freeze” would somehow entitle Appellant to receive a COLA as an MLS employee when she had been “placed in a Grade 25 position” and her “former M-3 salary” was to be frozen. Rather, it is clear that the redline freeze of her former M-3 salary served “as a floor for salary and benefits,” not an entitlement to future COLAs.

Having failed to carry her burden of proving that the County breached the Settlement Agreement, Appellant’s complaint seeking enforcement must be denied.

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant’s complaint seeking to enforce the Settlement Agreement be, and in its entirety is, hereby **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 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
June 8, 2020

Appellant filed a petition for judicial review of this decision on July 7, 2020 (Circuit Court Civil Action No. 482732-V).

CASE NO. 17-25

ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board) on April 17, 2017, challenging her dismissal from a Child Welfare Services Adoption Unit Supervisor position with the Department of Health and Human Services.

The parties requested and were granted multiple extensions and postponements as they addressed various prehearing issues. After a prehearing conference resolved most prehearing issues a hearing on the merits was scheduled to begin on June 18, 2018. The hearing was postponed at the joint request of the parties and subsequently the parties jointly requested that the appeal be held in abeyance pending the outcome of mediation or alternative dispute resolution (ADR). The Board agreed to hold the appeal in abeyance pending notification from the parties that the case had been settled or that ADR efforts had been exhausted without success. Having seen no progress, on August 6, 2019, the Board lifted the stay and scheduled the merits hearing to begin on March 17, 2020. On March 16, 2020, the parties notified the Board that they had agreed to settle and requested

that the Board postpone the hearing. The Board granted the joint request to postpone the hearing pending written confirmation of the settlement. On May 6, 2020, the parties were advised that if a final settlement had not been reached and filed with the Board by May 18 the Board would set the case in for a hearing. On May 20 the Board scheduled the merits hearing to begin on June 22, 2020.

On June 19, 2020, the parties filed a fully executed settlement agreement with the Board resolving the appeal. 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 finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf., Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.; McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That within thirty (30) working 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, and that the Board will be advised of any unavoidable delays;
3. That the appeal in Case No. 17-25 be and hereby is **DISMISSED** as settled, with prejudice;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
June 22, 2020

CASE NO. 19-11

ORDER ACCEPTING SETTLEMENT AGREEMENT

On October 8, 2018, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to Appellant's dismissal from the Department of Liquor Control.¹ On July 29, 2019, the parties filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel

¹ Effective July 1, 2019, the Department of Liquor Control was renamed as Alcohol Beverage Services. Laws of Maryland 2019, Chapter 673.

Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board finds that it has jurisdiction to accept the settlement agreement into the record. MCPR § 35-15; MSPB Case No. 17-12 (2017); MSPB Case No. 16-10 (2016); MSPB Case No. 15-24 (2015). *Cf.*, *Pleshaw v. OPM*, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by counsel, and that the agreement was freely entered into by the parties. *Id.*; *McGann v. Department of Housing and Urban Development*, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the settlement agreement into the record.

Accordingly, the Board hereby **ORDERS**:

1. That the settlement agreement filed by the parties in this matter be entered into the Board's records;
2. That within thirty (30) working 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. That the appeal in Case No. 19-11 be and hereby is **DISMISSED** as settled, with prejudice;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
August 1, 2019

STAYS

Pursuant to Section 35-6(b) of the Montgomery County Personnel Regulations, the Board is empowered on its own motion or pursuant to a request by an appellant to issue a stay if it finds the reasons for said stay are proper and just.

The following is an example of a stay order issued in fiscal year 2020.

CASE NO. 18-27

ORDER GRANTING STAY

Appellant through her attorney, SLK, has filed a motion to a stay proceedings in the above captioned matter for sixty (60) days so that Appellant may get a loan to pay Ms. K's attorney's fees. Ms. K represents that if the stay is not granted she will withdraw from the case and Appellant may be required to proceed *pro se*. The County opposed the motion, noting correctly that the hearing is next week, there is no showing of any reason the motion could not have been made sooner, witnesses are under subpoena and have arranged their schedules to attend, and last year the Board accommodated Appellant by postponing the original prehearing conference when her previous counsel withdrew from representation that morning.

The Board recognizes that another delay in this case will constitute an inconvenience for all concerned. However, we must also weigh the likelihood that Appellant may not be able to adequately pursue her appeal without effective representation. We err on the side of Appellant's need for counsel. As we do not believe we have the authority of a court to compel Ms. K's continued representation, we reluctantly **ORDER** that the proceedings in this appeal be and hereby are **STAYED** for sixty (60) days.

Hearing Date

The hearing in this matter will be set for two days during the period from February 24 to March 12, 2020. The parties shall provide the Board with any dates during that time period in which counsel or key witnesses have actual conflicts by **January 9, 2020**. To facilitate scheduling of this administrative proceeding the Board is prepared to accept witness testimony by way of sworn affidavit and deposition.

Stipulations

The parties shall discuss stipulations and submit written joint stipulations of fact, if any, to the Board by **February 10, 2020**.

Settlement

The Board again urges the parties to seriously consider engaging in settlement discussions to resolve this matter without litigation and offers to assist the parties in that endeavor through referrals to potential mediators.

The parties shall provide the Board with a written update on the status of settlement negotiations by **February 10, 2020**. The update should, of course, omit any detail as to the substance of the discussions.

For the Board
December 4, 2019

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 2020.

CASE NO. 19-28

SHOW CAUSE ORDER

Appellant filed the above captioned appeal of his dismissal with the Merit System Protection Board (Board or MSPB) on May 16, 2019. Appellant was advised by a letter from the Board dated May 20, 2019, that his prehearing submission was due on July 15, 2019. Appellant did not file his prehearing submission by the due date.

On July 18, 2019, Appellant called the Board's offices and spoke to the Office Services Coordinator (OSC) about requesting an extension because he said he had "mixed up" the due date. The OSC told Appellant that an extension request should be in writing and could be emailed to the MSPB. She also suggested that Appellant contact the County Attorney's Office to determine if they would consent to an extension.

Having received no prehearing submission or other contact from Appellant, on July 23, 2019, the Board wrote to Appellant asking him to file his prehearing submission and provide the Board with a written explanation for why the initial deadline was missed, no later than July 29, 2019. The letter also asked that Appellant advise the Board in writing if he no longer wished to pursue his appeals. The letter warned that absent a response the Board may dismiss his appeal for failure to prosecute the appeal or comply with established appeal procedures. Montgomery County Personnel Regulations (MCPR), § 35-7(b).

To date, Appellant has not filed his prehearing submission, responded to the Board's July 23 letter, or otherwise contacted the Board.

For the above reasons, the Board hereby **ORDERS** Appellant to file a prehearing submission and provide a statement of such good cause as exists for why he has failed to timely file the required prehearing submission. The statement shall be filed on or before close of business **August 8, 2019**, with a copy served on the County. The County shall have the right to file a response on or before **August 14, 2019**.

Appellant is hereby notified that, absent the proper filing of a prehearing submission, and a finding by the Board of good cause for his failure to timely file the prehearing submission, the Board will dismiss his appeal. MCPR § 35-7(b); MSPB Case No. 19-17 (2019); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

For the Board
August 1, 2019

ATTORNEYS 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 Order regarding attorney’s fees during fiscal year 2020.

CASE NO. 19-23

ORDER ACCEPTING WITHDRAWAL OF PETITION

On May 6, 2020, the Merit System Protection Board (Board or MSPB) issued a Final Decision and Order in Appellant's appeal of a two-day suspension. Because the Board mitigated the penalty to a one-day suspension the Order provided that the County would be responsible to pay reasonable attorney fees and costs. The Board's Order further stated that because the appellant had only partially prevailed the Board would only award a portion of the fees. MSPB Case No. 15-27 (2017); MSPB Case No. 13-02 (2013).

Appellant filed a Petition for Attorney's Fees on May 27, 2020. On June 2, 2020, the County sent an email advising the Board that the attorney's fees issue had been settled. On June 3, 2020, the Board responded and requested that Appellant's attorney file a brief signed statement with the Board confirming that he agreed that the attorney's fee issue has been settled, withdrawing the petition, and acknowledging that in the event of a dispute the interpretation and enforcement of the agreement may be brought to the Board pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15. Appellant's attorney filed a letter on June 4, 2020, confirming the settlement, withdrawing the petition, and acknowledging the availability of MCPR § 35-15 for interpretation and enforcement of the settlement.

The Board is satisfied that Appellant's request to withdraw her Petition for Attorney's Fees is knowing and voluntary. Accordingly, the Board hereby **ORDERS**:

1. That Appellant's Petition for Attorney's Fees is withdrawn at her request;
2. That MSPB Case No. 19-23 is closed; and
3. That the Board retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement regarding attorney's fees.

For the Board
June 17, 2020

OVERSIGHT

Pursuant to statute, the Board performs certain oversight functions. Section 33-11 of the Montgomery County Code 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 2020, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) Crime Analyst (Series)
- 2) Accountant /Auditor Supervisor (Series)
- 3) Labor Relations Specialist (Series)