# Merit System Protection Board Annual Report FY2022


**Members:**

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

**Bruce P. Martin**
***Executive Director***

**Prepared by:**

**Janice Curtis**
***Office Services Coordinator***

**Montgomery County, Maryland**
**Merit System Protection Board**
**100 Maryland Avenue, Room 113**
**Rockville, Maryland 20850**
**240-777-6620**

## TABLE OF CONTENTS

# FY 2022
# ANNUAL REPORT OF THE MONTGOMERY COUNTY MERIT SYSTEM PROTECTION BOARD

## COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

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

The Board members in Fiscal Year 2022 were:

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

## DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD

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

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

> Any employee under the merit system who is removed, demoted, or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall

establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

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

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

* * *

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

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

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

*  *  *

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

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

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

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

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

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

The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

# DISCIPLINARY ACTION OR TERMINATION

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

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

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

During fiscal year 2022 the Board issued the following decisions on appeals concerning disciplinary actions or termination.

# DISMISSAL

# CASE NO. 21-03

## FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the above-captioned appeal of Appellant.

## BACKGROUND

The discipline in this matter relates to an April 14, 2020, incident at the Montgomery County Detention Center (MCDC) in which Appellant allegedly lost his temper during a conversation with his supervisor and behaved in an insubordinate, hostile, and unprofessional manner. As a result of the settlement of a prior disciplinary matter, Appellant was subject to a Last Chance Settlement Agreement which prohibited him from engaging "in any behavior that involves yelling, harassing, or speaking in an aggressive, combative, or disrespectful tone with co-workers."

The Department of Correction and Rehabilitation (DOCR or Department) issued a Statement of Charges for Dismissal dated August 12, 2020. County Exhibit (CX) 1. On August 18, 2020, Appellant prematurely filed this appeal with the Board challenging the decision of the Department to dismiss him from his position as a Correctional Officer. The Board held Appellant's appeal in abeyance pending his submission of a Notice of Disciplinary Action (NODA).

On September 21, 2020, DOCR issued a Notice of Disciplinary Action - Dismissal to Appellant. CX 2. On September 24, 2020, DOCR issued an amended Notice of Disciplinary Action - Dismissal to Appellant, which was served on Appellant on September 25, 2020. CX 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); and §33-5(h) (negligent or careless in performing duties). CX 4.

In addition, Appellant was found to have violated DOCR Policy Number 3000-7 §VII(E)(2)(a) (compliance with orders); §VII(E)(9) (conduct unbecoming); and §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance). CX 5.

A hearing on the merits of the appeal was held on March 2nd and 3rd, 2021. The County was represented at the hearing by an Associate County Attorney, while Appellant was represented by attorney CS. On May 10, 2021, the parties submitted post hearing briefs containing proposed findings of fact and conclusions of law.

The hearing was conducted before Board Chair Harriet E. Davidson and Vice Chair Sonya Chiles, and they considered and decided the Appeal.[1] After hearing testimony and reviewing the exhibits and stipulations of the parties, the Board made the following factual findings.

[1] Former Board Member C. Scott Maravilla, who was appointed by the County Council effective February 9, 2021, and resigned March 16, 2021, and current Board Member Barbara S. Fredericks, who was appointed April 20, 2021, did not participate in the consideration of this decision.

## 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. Lieutenant DS
2. Corporal SN
3. Lieutenant DJ
4. Director AT (Director or AT)
5. Corporal MS (Appellant or MS)
6. Sergeant SA

Appellant Exhibits[2] (AX) 1 through 5 and County Exhibits[3] (CX) 1 through 20 were admitted into the record.

[2] Appellant's exhibits are as follows:

AX 1 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics, effective December 30, 2016.
AX 2 - Email from Appellant to AT, dated May 26, 2020.
AX 3 - Email from Appellant to MW, May 19, 2020
AX 4 - Letter from Appellant to AT, undated.
AX 5 - Video Surveillance of CPU Hallway, April 14, 2020.

[3] The County Exhibits are as follows:

CX 1 - Statement of Charges - Dismissal, August 12, 2020.
CX 2 - Notice of Disciplinary Action - Dismissal, September 21, 2020.
CX 3 - Amended Notice of Disciplinary Action - Dismissal, September 24, 2020.
CX 4 - Montgomery County Personnel Regulation, § 33.
CX 5 - DOCR Department Policy and Procedure 3000-7, Standards of Conduct/Code of Ethics.
CX 6 - MCGEO Collective Bargaining Agreement, Article 28 - Disciplinary Actions.
CX 7 - Shift Administrator's Investigative Report, June 25, 2020.
CX 8 - Video Surveillance of CPU Hallway, April 14, 2020.
CX 9 - Incident Report written by Lt. DJ, dated May 5, 2020.
CX 10 - Incident Report written by Ofc.SN, dated May 19, 2020.
CX 11 - Email from Appellant to Director AT, May 26, 2020
CX 12 - Email from Appellant to Deputy Warden MW, May 19, 2020
CX 13 - Ten-Day response from Appellant to Director AT, undated
CX 14 - Employee Training Schedule Report for Appellant.
CX 15 - Email Chain regarding Appellant's referral to the County's Employee Assistance Program ("EAP").
CX 16 - Last Chance Agreement, finalized January 8, 2019.
CX 17 - Statement of Charges - Ten (10) Day Suspension, January 5, 2018, Amended Notice of Disciplinary Action - Five (5) Day Suspension taken as Forfeiture of Leave and Last Chance Agreement, February 4, 2019, and Order Accepting Settlement Agreement, January 28, 2019.
CX 18 - Notice of Disciplinary Action - Five (5) Day Suspension, July 20, 2016, Alternative Dispute Resolution Settlement Conference Intake Form, and work status change documents, Statement of Charges June 14, 2016.
CX 19 - Statement of Charges - Dismissal dated July 22, 2020, Notice of Disciplinary Action dated September 21, 2020 and Amended Notice of Disciplinary Action September 24, 2020.
CX 20 - Notice of Administrative Leave with Pay, May 19, 2020.

The parties filed joint stipulations on February 17, 2021, which are set out in their entirety in a footnote.[4] The Board accepted the stipulations into the record. Hearing Transcript (Tr.) 7.

[4] The parties agreed to the following stipulations of fact:

**Director AT (background information only)**

- Director has been with DOCR for 28.5 years.
- Current Position: Director. Dir. AT has been in this role since August 2019, she was Acting Director from May 2019 to August 2019.
- Prior positions held in DOCR: Division Chief Community Corrections (PRC and Pre-Trial Divisions), Division Chief Pre-Trial Services, Unit Manager Pre-Release and Reentry Services, Work Release Coordinator (PRRS), Case Manager (PRRS) and Resident Supervisor (PRRS).
- As Director, she has complete oversight and decision-making authority for the Department of Correction and Rehabilitation and its complement of 541 employees.
- Disciplinary process:
    - The Warden usually assigns a Lieutenant or Captain to investigate a matter, though sometimes the Director may do so.
    - Once the investigation is complete, the investigative report is turned into the Deputy Warden ("DW") for review and recommendation for disciplinary action. The DW will then forward it to the Warden for review with recommendations from the DW. The Warden can ask additional questions. The Warden either agrees or disagrees with DW's recommendation then forwards the investigation and recommendations to the Director for review. The Director can then ask the investigator to conduct additional investigation. The Director either agrees with or disagrees with Warden's and DW's recommendations for disciplinary action.
    - The Director is the final decision maker on the level of discipline to be issued.
    - Once the level of discipline is determined, a Statement of Charges ("SOC") is written and served on the employee.
    - If the employee does not request Alternative Dispute Resolution ("ADR") and the employee does not provide a response within ten days that justifies a reduction in the discipline imposed, a Notice of Disciplinary Action ("NODA") is issued and served upon the employee.
    - These steps were followed in this matter.
- When determining the level of discipline, the Director takes the following factors into consideration:
    - Nature and gravity of the offense
    - Relationship of the misconduct to the employee's assigned duties and responsibilities
    - The employee's work record
    - Comparable discipline
    - Whether the employee should have been aware of the rules/procedures
    - Other relevant factors

**Deputy Warden MW (background information only)**

- Current title: Deputy Warden of Custody and Security for MCDC. DW [MW] has been in this position for the past 5 months and was the Acting Deputy Warden for one year prior to that.
- Has been with DOCR for over 27 years.
- Prior Positions held:
    - Captain/Professional Standards and Compliance Manager (included being DOCR's Internal Affairs Investigator) - 2 years;
    - Admin. Captain for MCDC - 2 years;
    - Shift Manager (Captain) for MCCF's #1 Shift - 1 year;
    - Shift Commander (Lieutenant) assigned to both MCCF and MCDC from 2009 - 2015;
    - Honor Guard Commander (additional position during my tenure as Lieutenant and Captain).
    - Correctional Officer
- DW [MW]'s duties include being responsible for the day-to-day management, leadership, and coordination of all criminal justice agencies and programs at the MCDC. MCDC is primarily responsible for the intake and processing of adult male and female offenders arrested within the County and has a facility capacity to accommodate approximately 200 inmates. Major program elements at the MCDC include the Central

Appellant has been employed as a Correctional Officer with DOCR since October 15, 2007. At the time of his dismissal he was serving as a Correctional Officer III, Corporal. On April 14, 2020, Appellant was assigned to the CPU Hallway post on the Third Shift at MCDC. Tr. 18.

While on duty at his CPU Hallway post Appellant received a personal phone call from his son and remained on the phone with members of his family for approximately 20 minutes. Tr. 163-64, 191-92. While Appellant was on the phone, Lieutenant DS came by the Hallway post while conducting his rounds. Tr. 18. Lieutenant DS uses rounds to convey information to the officers on a post and to receive a brief status report on conditions at that post. Tr. 19-20.

Appellant was on the phone when Lieutenant DS first came by the Hallway Post on his rounds of April 14, 2020. Tr. 19; Tr. 80. On the video surveillance of the CPU Hallway Post Appellant looks towards the door at the end of the hallway when Lieutenant DS enters, then turns

---

Processing Unit (processing over 15,000 offenders per year), Intake, Booking and Release, Pre-Trial Assessment, Records Management, Behavioral Health Screening and Assessment, Correctional Health Screening, Public Defender Interviews, interfacing with numerous law enforcement agencies, and critical daily support of all District Court Commissioner operations. This position leads in both on-the-floor management of line operation and public policy planning and development at every level of correctional operations in Montgomery County, MD.

- Responsibilities include:
    - Basic budget development and management;
    - Staff mentoring and supervision;
    - Security operations;
    - Managing program elements critical for the constitutional practice of correctional operation in the county/local correctional setting; and
    - Participating in the disciplinary process of employees assigned to MCDC.
- Training and Education: HS Diploma, United States Marine Corps (‘88-‘92), AA Degree from Frederick Community College (General Studies), Correctional Entrance-Level Training Program (State Academy) - 1993, Accelerated Police Academy with MCP - 1997 (trained in law, criminal investigation, crime scene preservation, evidence collection, criminal charging offenders, etc.), First Line Supervisor Training - 2006, First Line Administrator's Training-2015, Internal Affairs Investigation Training-2018. In addition, DW [MW] received countless correctional officer training hours during his tenure as a correctional officer.
- Responsibilities in the Disciplinary Process: DW [MW]’s role in the disciplinary process is to review all reports of the incident, to include incident reports (DCA-36), adjustment reports (DCA-71), Use of Force Check Lists, Shift Administrator’s Investigative Reports (SAIR), and Security Rounds reports. He will also review all evidence related to the incident, to include photographs, video surveillance footage, and physical evidence (*i.e*. clothing, weapons, etc.). Once he has reviewed all components of the incident, and all appear complete, he will write a recommendation as to the findings and forward his recommendations to the Warden for review. For the instant matter, DW followed this protocol.
- The Chain of Command between DW [MW] and Cpl. [MS]: Cpl. [MS] reports to his Lieutenant who reports to the Administrative Captain, who reports to Deputy Warden [MW]. There are Sergeants on Cpl. [MS]’s shift, but he does not directly report to them.

**Capt. BW**

- Captain [BW] is the Custodian of Records for the video surveillance system at MCDC and if called to testify, he would verify to the authenticity of the video surveillance footage found on CE 10 [CX 10].

**Other Facts**

- Cpl. [MS] was served in this matter with a Statement of Charges for Dismissal (CE 1**)** [CX 1], dated August 12, 2020 on August 13, 2020.
- Cpl. [MS] was served in this matter with an Amended Notice of Disciplinary Action for Dismissal (CE 4) [CX 4], dated September 24, 2020 on September 25, 2020.
- Cpl. [MS] has been employed with DOCR since October 15, 2007. He was most recently assigned to the Third Shift at MCDC.

to look straight ahead at the desk or wall. CX 8, 15:18:23.[5] Appellant did not get off the phone to acknowledge Lieutenant DS. Tr. 20; Tr. 81. Corporal SN and Lieutenant DS did, however, acknowledge each other. Tr. 19; Tr. 81; CX 8, 15:18:31-33. Appellant was still on the telephone facing forward when Lieutenant DS came back through the hallway and left. Tr. 81; CX 8, 15:20:50.

After Lieutenant DS completed his rounds he asked Appellant to come to his office. Tr. 24-25. Lieutenant DS testified that he wanted to find out if Appellant had been on a personal or work related call. Tr. 25. Lieutenant DS also wished to address Appellant's failure to acknowledge him during rounds. Lieutenant DS had advised during roll calls that officers on personal phone calls were expected to put the call on hold, or hang up, and acknowledge a Lieutenant doing rounds. Tr. 21-22; Tr. 59-61; Tr. 96. This is a standard procedure. Tr. 81; Tr. 86-87; Tr. 89; Tr. 96.

When Appellant came to his office, Lieutenant DS closed the door so that they could have a conversation in private. Tr. 26; Tr. 29; Tr. 75; Tr. 97. Appellant told Lieutenant DS that he had been on a personal call with his family. Tr. 26-27. Appellant then asked if he was forbidden to talk to his family. Tr. 27. Lieutenant DS told Appellant that if an officer needed to talk to a family member about something sensitive, they would be provided with an office so that they could have a private conversation. Tr. 27.

As Lieutenant DS tried to address the issue of personal calls at work Appellant became irritated and began raising his voice. Tr. 29-30. Due to Appellant's anger and refusal to engage in a civil conversation, Lieutenant DS sought to end the conversation and order Appellant to return to his post. Tr. 30-32. Appellant ignored several orders from Lieutenant DS to return to his post. Tr. 30-32; Tr. 100-01.

Lieutenant DJ was in her office across the hallway from the office of Lieutenant DS while he was meeting with Appellant. Tr. 97. Lieutenant DJ testified that shortly after Appellant began meeting with Lieutenant DS she heard Appellant's raised voice through the closed door. Tr. 98. She could hear Appellant say "I can talk to my family, you can't tell me I can't." Tr. 98.

Lieutenant DS opened the door to his office and told Appellant to return to his post. Tr. 31. Appellant did not immediately return to his post but instead continued to yell at Lieutenant DS, stating that he did not have to listen to Lieutenant DS. Tr. 100.

During this confrontation, Appellant pointed his finger in Lieutenant DS's face while yelling at him. Tr. 32; Tr. 100-01. Lieutenant DJ testified that she heard Appellant say to Lieutenant DS: "I don't have to listen to you," "you don't like me anyway," "who do you think you are," and "write me up." Tr. 100-01.

Lieutenant DJ came out of her office, placed her hand on Appellant's shoulder, and tried to get Appellant to leave by directing him towards the main hallway. Tr. 32-33; Tr. 101-02. Appellant stiffened up and Lieutenant DJ had to physically push him towards the exit. Tr. 67; Tr. 101-02. While doing so, Lieutenant DJ kept telling Appellant to calm down and return to his post. Tr. 33; Tr. 102-03. Appellant refused to obey her orders. Tr. 103. Finally, after multiple commands from both Lieutenants, Appellant returned to his post, yelling and speaking loudly as he went. Tr. 104.

[5] The video reflects both the military time of day and the elapsed time of the recording. We reference the time of day in this decision.

When Appellant arrived at his post in the Hallway CPU he was still angry and yelling about not being able to talk to his family on the phone. Tr. 82; Tr. 224; Tr. 229. He told Sergeant SA what had just occurred. Corporal SN told Appellant and Sergeant SA to go into the police room to have their discussion in private. Tr. 82; CX 10. Appellant and Sergeant SA went to the police room to have a private discussion. Tr. 227.

After Appellant and Sergeant SA spoke, Sergeant SA attempted to reduce the tension and resolve the conflict between Lieutenant DS and Appellant. Tr. 35-36. Lieutenant DS told Sergeant SA that he would have to write up Appellant. Tr. 36.

While Lieutenant DS and Sergeant SA were speaking, Lieutenant DJ called Appellant and asked him why he was not trying to speak to Lieutenant DS himself rather than having Sergeant SA do his bidding for him. Tr. 106-07. Lieutenant DS did not know Lieutenant DJ had called Appellant nor did he ask her to call Appellant. Tr. 108. Appellant went to Lieutenant DS and asked if he had called for him. Lieutenant DS said no, and Appellant left. Tr. 36.

Appellant was subsequently disciplined for his behavior during his encounters with Lieutenant DS and Lieutenant DJ and not due to his use of the telephone for personal reasons or for failing to acknowledge Lieutenant DS while on the phone. Tr. 64; Tr. 74; Tr. 156-57.

On January 10, 2019, Appellant and the County filed a settlement agreement with the Board resolving his appeal of a previous disciplinary suspension in MSPB Case No. 18-18. CX 16. As part of the agreement Appellant acknowledged that he would not engage in behavior that constituted "yelling, harassing, or speaking in an aggressive, combative, or disrespectful tone with co-workers," and that doing so would constitute cause for dismissal. CX 16. Appellant explicitly acknowledged that if the County issued a Notice of Disciplinary Action and proved that behavior in violation of the agreement occurred, he would be subject to dismissal. The Board found that the agreement was comprehensive, knowingly and freely made, fair, and that there was no evidence of bad faith or duress. *See* Order Accepting Settlement Agreement, MSPB Case No. 18-18 (January 28, 2019).[6]

## APPLICABLE LAW

**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: . . . (g) dismissal . . . .

[6] Because Appellant was not represented by counsel in MSPB Case No. 18-18, the Board reviewed the agreement to determine not only whether it was lawful on its face and freely entered into by the parties, but also whether it was fair, and that there was no evidence of agency bad faith or duress. The Board met with the parties on January 24, 2019, in order to obtain clarification as to the meaning of certain terms of the agreement, to ascertain whether both parties had the same understanding of the terms, and to verify that Appellant's agreement was knowing and voluntary. The Board reviewed the agreement with the parties and verified that Appellant understood all the operative terms. Although the Board urged the County to consider limiting the term of future Last Chance Agreements to one year, the order explicitly acknowledged that the term of this agreement was for three years. CX 17.

**§ 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**.

(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; . . .

(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:

2. Compliance with Orders:
a. Employees shall obey a superior's lawful order. . . .

9. Conduct Unbecoming:

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

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

10. Neglect of Duty/Unsatisfactory Performance:

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

## ISSUE

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. 18-07 (2019); 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").

### *Appellant's Testimony Lacked Credibility*

Appellant's testimony and that of other witnesses differ on certain key points, most notably the issue of whether Appellant was yelling or speaking in an aggressive, combative, or disrespectful tone with Lieutenant DS. Accordingly, the Board is obligated to consider and resolve the issue of credibility. As the Board has discussed in previous decisions, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 18-07 (2019); MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013), *citing Haebe v. Department of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002).

Appellant testified that he never raised his voice during his conversation with Lieutenant DS and that during the conversation he used hand gestures such as pointing that, although common in his culture, may be misinterpreted in the United States as disrespectful, aggressive, or intrusive. Tr. 174-75, 180, 196-98. Appellant specifically denied pointing at the face of Lieutenant DS. Tr. 197.

Lieutenant DS testified that Appellant was upset and raised his voice. Tr. 29-30. *See* Board Exhibit 1. Lieutenant DJ also testified that Appellant was yelling at Lieutenant DS in a voice so loud that she could clearly hear what he was saying through a closed door. Tr. 98. Both Lieutenant DS and Lieutenant DJ testified that Appellant pointed his finger in Lieutenant DS's face while yelling at him. Tr. 32; Tr. 100-01. Lieutenant DJ also testified that when Appellant finally started to return to his post he was yelling and speaking loudly as he went. Tr. 104.

Consistent with the testimony of the two Lieutenants, Corporal SN testified that Appellant was angry and yelling when he returned from his meeting with Lieutenant DS. Tr. 82. In a May 19, 2020, incident report Corporal SN wrote not long after the events at issue he also stated that "Upon his return to CPU [Appellant] appeared to be very upset yelling and screaming. . .". CX 10.[7]

There is no record evidence suggesting that Lieutenants DS and DJ, or Corporal SN, had any reason to be untruthful. The testimony of all three witnesses was consistent as to the material facts at issue. Further, they appeared sincere, and none of them displayed any indicia of deception

[7] Appellant's own witnesses, Sergeant SA, acknowledged that Appellant was upset and angry when he returned from his meeting with Lieutenant DS. Tr. 224, 227-29.

or dishonesty. For these reasons, and based on their demeanor, we find that Lieutenant DS was more credible than Appellant, as were Lieutenant DJ and Corporal SN.

Appellant's denial that he got angry, raised his voice, and pointed his finger at the face of his supervisor was contradicted by the credible testimony of several disinterested witnesses. Moreover, the Board had ample opportunity to directly observe the demeanor of Appellant during his testimony and to assess his credibility. The Board concludes that Appellant was defensive, defiant, evasive, and that his testimony was self-serving. For these reasons, we find that Appellant was not credible and view his testimony with considerable skepticism. MSPB Case No. 17-13 (2017); MSPB Case No. 10-04 (2010).[8]

***The County Has Proven the Charges Against Appellant***

The County charged that Appellant violated MCPR §33-5(c) (violates established policy or procedure); §33-5(e) (fails to perform duties in a competent or acceptable manner); and §33-5(h) (negligent or careless in performing duties). CX 4. In addition, Appellant was charged with violating DOCR Policy Number 3000-7 §VII(E)(2)(a) (compliance with orders); §VII(E)(9) (conduct unbecoming) and §VII(E)(10) (Neglect of Duty/Unsatisfactory Performance). CX 5.

On April 14, 2020, Lieutenant DS called Appellant to his office, asked about the personal telephone call Appellant was on while Lieutenant DS was doing rounds, and attempted to counsel Appellant on appropriate telephone protocol. Tr. 30. During the conversation Appellant became upset, loud, and angry. Tr. 31. Appellant began yelling and aggressively pointing his finger at the face of Lieutenant DS. Tr. 32. When Lieutenant DS and Lieutenant DJ attempted to deescalate the situation and repeatedly ordered Appellant to restrain his emotions, quiet down, and return to his assigned post Appellant failed to immediately and fully comply with their orders. Tr. 31-32; Tr. 100-03.

Appellant's angry and argumentative behavior with his supervisor was inappropriate and unprofessional. It was well within the authority of Lieutenant DS to discuss work-related behavior with a subordinate, advise him when the meeting was over, and to instruct Appellant to return to his duty post. Tr. 138. It was also appropriate for Lieutenant DJ to instruct Appellant to curtail his anger and return to his post.

The orders to calm down and return to his post were lawful and Appellant was required to comply. Instead of immediately complying with the orders to calm down and return to his post Appellant refused and continued to scream, argue, and be insubordinate to the two Lieutenants. Tr. 125.

We do not credit Appellant's denials that he raised his voice and became angry. We find it telling that Appellant admitted that after he received multiple commands to return to his post he

[8] Appellant's credibility is also called into question by his suggestion that he was misled about the contents of the Last Chance Agreement that resolved MSPB Case No. 18-18 in January 2019. On cross examination Appellant claimed that he was orally told that the agreement only had a one-year duration. Tr. 207. However, both the agreement and the Order Accepting Settlement Agreement explicitly say that the agreement had a three-year duration. CX 16, CX 17. Indeed, as noted previously, the Board met with Appellant and the County on January 24, 2019, specifically to ensure that Appellant understood the agreement and to confirm that his agreement was knowing and voluntary. CX 17. Appellant's credibility was further damaged when he began questioning the legitimacy of the Last Chance Agreement document entered into evidence, even though his attorney had acknowledged prior to, and again during the hearing, that the document was authentic. Tr. 209-10.

continued to argue and explain himself. Tr. 178-79, Tr. 198 ("I did not leave immediately because I was trying to explain something to him.").

We find that the County has proven by preponderant evidence that Appellant failed to comply with lawful orders in violation of DOCR Policy Number 3000-7 §VII(E)(2)(a), and thus is subject to discipline under MCPR §33-5(c) (violates any established policy or procedure).

When Appellant failed to control his anger as Lieutenant DS was trying to counsel him about personal telephone calls while on duty, and was loud, aggressive, and insubordinate, Appellant engaged in conduct unbecoming a correctional officer. DOCR Policy Number 3000-7, §VII(E)(9) ("Conduct unbecoming includes . . . 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…").[9]

Director AT testified that correctional officers have a duty to behave in a professional manner and to model appropriate behavior. Tr. 137. *See* DOCR Policy Number 3000-7 §IX ("An employee's attitude toward . . . supervisors . . has a profound impact on the morale of the staff and the visitors/defendants/inmates/residents/participants. . . Professionalism demands tact, courtesy, mutual respect, understanding and a willingness to make the effort to get along and work well with others." We agree that the Director's interpretation of "conduct unbecoming" is in harmony with the DOCR policies and that Appellant's behavior constituted conduct unbecoming a correctional officer. Discourteous and unprofessional behavior on the job violates accepted standards of conduct and may be the subject of discipline.

Appellant's behavior also constituted neglect of duty and unsatisfactory performance of his duties. DOCR Policy Number 3000-7 §VII(E)(10) ("Unsatisfactory performance is demonstrated by. . . the failure to take appropriate action in a situation deserving attention, or failure to conform to work standards established for the employee's . . . position."). Appellant did not obey a lawful order to calm down and return to his post when told to do so, and it required two superior officers to coax him into finally obeying. Appellant was not adhering to work standards which require correctional officers to follow lawful orders from a superior, exhibit professionalism, and handle conflict in a manner other than by expressing anger and aggressive, argumentative behavior. Tr. 138.

We find that the County has proven by preponderant evidence that Appellant engaged in conduct unbecoming a correctional officer in violation of DOCR Policy Number 3000-7, §VII(E)(9), and neglect of duty and unsatisfactory performance of his duties in violation of DOCR Policy Number 3000-7 §VII(E)(10). Appellant is thus subject to discipline under MCPR §33-5(e) (fails to perform duties in a competent or acceptable manner) and §33-5(h) (negligent or careless in performing duties).

[9] Generalized terms such as "conduct unbecoming" are common public employee discipline provisions. *See e.g.* COMAR 17.04.05.04B(3) (conduct that "would bring the State into disrepute"). In determining whether specific behavior constitutes "conduct unbecoming" we rely upon the term's ordinary meaning. *See Miles v. Department of the Army*, 55 M.S.P.R. 633, 637-38 (1992) (unbecoming conduct is "unattractive; unsuitable ... detracting from one's ... character, or reputation; [or] creating an unfavorable impression.").

***The Appropriate Level of Discipline is Dismissal***

As detailed above, the County has proven by a preponderance of the evidence the charges against Appellant. Having determined that the County proved its case by a preponderance of the evidence, the remaining question is the appropriate level of discipline.

The Director of DOCR was responsible for determining the appropriate level of discipline and testified as to the reasons she decided to dismiss Appellant. The Board found the Director to be familiar with the facts of the case and thoughtful in her analysis of the relevant factors she considered to reach her decision.

The record reflects that Appellant's disciplinary history is significant and relevant to these charges.[10] In 2014 he received a one-day suspension for yelling at a female co-worker. Tr. 204. Appellant also received a three-day suspension for arguing with a female officer in 2014. Tr. 205. In July 2016, Appellant was given a five-day disciplinary suspension for using excessive force when he pushed a teenaged member of the community out the front door of MCDC. CX 18; Tr. 205. Pursuant to the January 2019 Last Chance Agreement Appellant received a ten-day suspension for an incident in which he behaved in an aggressive and intimidating manner towards a DOCR nurse. CX 16, CX 17; Tr. 205-06.

While the Director testified that she focused on the two most recent suspensions in making her decision, Tr. 140, we note that the four disciplinary suspensions Appellant received were applied progressively, going from a one-day suspension to suspensions of three, five, and finally ten days. Just as importantly, all the prior disciplinary actions against Appellant were for incidents where he was unable to control his emotions and either acted in an aggressive and intimidating verbal manner or, in the 2016 case where he shoved a juvenile community member out of the door to the lobby of MCDC, where he used unjustified force. Tr. 140; CX 18.

The Director also considered a February 2020 incident in which Appellant lost his temper and deployed pepper spray against an inmate locked in a medical unit cell. Tr. 134; CX 19. That unauthorized and unnecessary use of force further demonstrated Appellant's inability to control his emotions while on the job. MSPB Case No. 21-01 (2021). We find that the Director appropriately considered the progressive discipline Appellant has received and properly concluded that dismissal was warranted.

In addition to the progressive discipline against Appellant, the evidence of record shows that Appellant was yelling at and speaking in an aggressive, combative, and disrespectful tone with Lieutenant DS. That behavior was in direct violation of the 2019 Last Chance Agreement. CX 16, ¶3. In the Last Chance Agreement Appellant expressly agreed that if he engaged in such behavior it would "constitute cause for dismissal under Section 33-5(c) of the Montgomery County Personnel Regulations." CX 16, ¶4. For this reason alone, Appellant is subject to dismissal.

We consider whether DOCR has consistently applied its disciplinary policies and dismissed other staff who have engaged in similar behavior. MCPR § 33-2(d)(3). To support an assertion that the Director failed to properly take into account comparable DOCR cases before

[10] Even without considering Appellant's significant prior discipline the County personnel regulations would allow the DOCR Director to eschew progressive discipline and move directly to dismissal. MCPR § 33-2(c)(2) ("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. . .").

making the decision to dismiss him from County employment Appellant must show that he and any comparison employees engaged in similar misconduct without differentiating or mitigating circumstances that would warrant distinguishing the misconduct or the appropriate discipline. MSPB Case No. 10-04 (2010), *citing Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009). Appellant made no such showing and Director AT testified that she could not identify any other comparable cases. Tr. 139.

We also consider whether Appellant has potential for rehabilitation and conclude that he does not. It is significant that Appellant has previously been subject to discipline for angry outbursts and threatening behavior. The numerous prior suspensions and the dismissal charges in MSPB Case No. 20-01 suggest that Appellant is unlikely to alter his unacceptable behavior. "Persistent misconduct despite being disciplined . . . justifies dismissal." MSPB Case No. 17-13 (2017).

Appellant has repeatedly demonstrated anger and self-control issues that would make him subject to discipline in any workplace, and especially ill-suited for a position involving the care and custody of individuals in a DOCR facility. For these reasons we conclude that Appellant lacks the potential for rehabilitation.[11]

Finding that the County has proven by a preponderance of the evidence that Appellant's behavior was unacceptable and in violation of County policies and regulations, we uphold all charges against him.

## ORDER

For the foregoing reasons, the Board **DENIES** the appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
July 13, 2021

[11] Appellant's claim that he was misled concerning the 2019 Last Chance Agreement when great care was taken to ensure that he fully understood and agreed to the terms of the agreement provides additional evidence of his inability to take personal responsibility for his actions.

# SUSPENSION

# CASE NO. 22-15

## FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant. On October 18, 2021, Appellant filed this appeal with the Board challenging the decision of the Montgomery County Department of Corrections and Rehabilitation (DOCR or Department) to suspend her for one (1) day from her Management Leadership Service (MLS) III position assigned to be the Records Manager.[1] The discipline was based on the County's allegations that Appellant had improperly approved certain Field Training Officer (FTO) compensation for employees who were ineligible to receive such pay, failed to investigate the legitimacy of the DOCR records office's FTO compensation practices in a timely manner and review the matter with her supervisor, and engaged in disagreements with and threatened disciplinary action against an employee under her supervision in the presence of another employee.

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

The Board has considered and decided the appeal.

## FINDINGS OF FACT

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

---

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

[2] Seven County Exhibits were admitted into the record. The County Exhibits are as follows:

CX 1 – Notice of Disciplinary Action, October 5, 2021
CX 2 – Montgomery County Personnel Regulations, Section 33
CX 3 -- Montgomery County Department of Correction and Rehabilitation, Departmental Policy and Procedure 3000-7
CX 4 – MCGEO Collective Bargaining Agreement Article 5
CX 5 – Montgomery County Payroll Records for DOCR Employee BC, January 1, 2018 - February 27, 2021
CX 6 – Montgomery County Payroll Records for DOCR Employee RJ, January 1, 2018 - February 27, 2021
CX 7 – Montgomery County Payroll Records for DOCR Employee GB, January 1, 2018 – February 27, 2021

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

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

After hearing testimony, reviewing the exhibits of each party,[3] and considering the stipulations of fact agreed to by the parties, the Board made the following factual findings.

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

Appellant was appointed to the position of Records Manager on June 8, 2020. Joint Stipulation 1, (March 15, 2022); Tr. 211. As Records Manager Appellant was responsible for oversight of intakes booked into the jail, monitoring inmate court dates, approving transports to the court, computing sentences, release dates, transfers to other facilities and supervision of the employees assigned to the records section. Tr. 29.

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

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

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

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

testified that while she raised the issue with Warden SM in the summer of 2020, Appellant did not treat it as a priority because the issue was not a priority for the Warden. Tr. 204-05.

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

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

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

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

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

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

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

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

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

Explaining the reasons for the level of discipline, Director AT stated that Appellant should have known the rules concerning FTO pay and immediately stopped the improper payments in 2020 due to her prior exposure to labor issues and extensive experience as a supervisor and an MLS manager. Tr. 34-35. The Director considered that Appellant's lack of action for eight months required the Department to recoup money from the ineligible employees who were paid. Tr. 36. She also noted that Appellant could have made the same inquiries about the FTO pay in 2020 instead of waiting until March 2021. Tr. 37.

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

## APPLICABLE LAWS AND POLICIES

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

**§ 33-1. Definition.**

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

**§ 33-2. Policy on disciplinary actions.**

> (a) ***Purpose of disciplinary actions***. A department director may take a disciplinary action against an employee to maintain order, productivity, or safety in the workplace. . .
>
> (c) ***Progressive discipline***.
>
> (1) A department director must apply discipline progressively by increasing the severity of the disciplinary action proposed against the employee in response to:

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

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

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

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

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

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

**§ 33-3. Types of disciplinary actions**.

(e) **Suspension**.

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

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

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

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

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

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

**VII. DEPARTMENT RULES FOR EMPLOYEES**

E. Specific Departmental Rules: . . .

9. Conduct Unbecoming:

a. No employee shall commit any act which constitutes conduct unbecoming a department employee occurring either within or outside of his/her place of employment. Conduct unbecoming

includes, but is not limited to any breach of the peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or stated in other Departmental policies, shall be considered conduct unbecoming an employee of this Department, and will subject the employee to disciplinary action by the Department.

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

10. Neglect of Duty/Unsatisfactory Performance:

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

## ISSUE

The following issue was heard and decided by the Board:

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

## ANALYSIS AND CONCLUSIONS

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

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

the Appellant was placed in the position was rectified because of her intervention. After a full investigation, the County recouped the improper recent overpayments from the employees in question.

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

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

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

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

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

Even were the charges concerning approval of timecards upheld, we could not uphold the level of discipline. Appellant had an unblemished disciplinary record over 22 years of increasingly responsible DOCR employment. Based on Appellant's recognition that the practice might be

flawed and her efforts to address the issue through the chain of command, this was not a circumstance involving "serious misconduct or a serious violation of policy or procedure" that would warrant bypassing progressive discipline. MCPR §33-2(c)(2).

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

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

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

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

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

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

## ORDER

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

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

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 9, 2022

# SUSPENSION / DEMOTION

# CASE NO. 21-11

## FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant.

## BACKGROUND

On November 30, 2020, the Montgomery County Department of Correction and Rehabilitation (DOCR or Department) issued an amended Notice of Disciplinary Action (NODA) – Fifteen (15) Day Suspension and Six (6) Month Rank Demotion to Appellant that was dated November 24, 2020. County Exhibit (CX) 3.[1] The NODA found that Appellant violated the

[1] Thirty-six County Exhibits were admitted into the record. The County Exhibits are as follows:

CX 1 - Statement of Charges, September 3, 2020
CX 2 - Notice of Disciplinary Action, November 19, 2020
CX 3- Amended Notice of Disciplinary Action, November 24, 2020
CX 4 - Notice of Non-Inmate Contact Memorandum, May 26, 2020
CX 5 - Notice of Return to Normal Duty (Name Correction), September 14, 2020
CX 6 - Investigative Report, completed August 5, 2020
CX 7 - Video of incident, May 20, 2020
CX 7A - Video of incident, screen shot
CX 7B - Video of incident, screen shot
CX 7C - Video of incident, screen shot
CX 7D - Video of incident, screen shot
CX 7E - Video of incident, screen shot
CX 7F - Video of incident, screen shot
CX 8 - Photos of Inmate CM's injuries
CX 9 - Inmate Medical & Dental Health Request Slip, May 20, 2020
CX 10 - Departmental Daily Log for May 20, 2020
CX 11 - Incident Report, DCA 36 by Appellant.
CX 12 - Incident Report, DCA 36 by Ofc. KK
CX 13 - Incident Report, DCA 36, by Ofc. KPM
CX 14 - Incident Report, DCA 36, by Lt. WR
CX 15 - Incident Report, DCA 36, by Sgt. DR
CX 16 - Report, DCA 36, by Ofc. JC
CX 17 - Incident Report, DCA 36, by Ofc. OV
CX 18 - Written Statement by Ofc. AA
CX 19 - Montgomery County Maryland Personnel Regulations, §33
CX 20 - Department of Correction and Rehabilitation Policy and Procedure 3000-7, Standard of Conduct/ Code of Ethics
CX 21 - Department of Correction and Rehabilitation Policy and Procedure 1300-10 Use of Force, Chemical Agents, and Restraints
CX 22 - Statement of Charges-Dismissal, May 29, 2018 and Alternative Dispute Resolution Conference Settlement with Last Chance Agreement
CX 23 - Notice of Disciplinary Action—Fifteen (15) Day Suspension and Three (3) Month Rank Demotion with a One (1) Year Last Chance Agreement, October 23, 2019
CX 24 - Statement of Charges-Dismissal, January 13, 2016
CX 25 - Notice of Disciplinary Action – Thirty (30) Day Suspension, Six (6) Month Rank Demotion, and Administrative Removal from ERT, September 11, 2020
CX 26 - Notice of Disciplinary Action-Dismissal, October 3, 2017

following provisions of the Department of Correction and Rehabilitation Policy and Procedures (DOCR Policy) 3000-7, Standard of Conduct/ Code of Ethics, §V(C) (Only such force as is necessary); §V(D) (personnel shall not strike or lay hands on an inmate except under limited circumstances); §VII(E)(14) (employees shall not make untruthful statements); DOCR Policy 1300-10, Use of Force, §V(A) (only supervisors may authorize use of force except in extreme emergencies); §III(F) (use of force shall be reported and documented). CX 20 & 21.

On November 30, 2020, Appellant filed this appeal with the Board challenging the decision of the Department to suspend and demote her.

On February 17, 2021, the parties appeared by video before the Board for a prehearing conference. Representing DOCR were two Associate County Attorneys. Appellant was present and represented by her attorney, AL. The purpose of the prehearing conference was to discuss settlement, identify the issues to be decided, identify any stipulations of fact to which the parties could agree, rule on proposed witnesses and exhibits, and establish dates for the merits hearing.

On Tuesday, April 13, 2021, less than a week before the scheduled merits hearing, Appellant's attorney filed a Notice of Withdrawal and advised that Appellant would be representing herself. The County emailed a request for confirmation that Appellant would be prepared to go forward with the hearing, and Appellant's attorney responded that Appellant "is ready to proceed on Monday."

The merits hearing was held on April 19 and 21, 2021, before Board Chair Harriet E. Davidson and Vice Chair Sonya E. Chiles. At the beginning of the first hearing day the Board confirmed that Appellant was able to proceed on her own without legal representation. Hearing Transcript (Tr.) 9. The Board has considered and decided the Appeal.[2]

## FINDINGS OF FACT

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

1. Officer JC
2. Officer OV
3. Sergeant KK
4. Sergeant DR
5. Lieutenant AM
6. Director AT (AT or Director)
7. Sergeant RL
8. Lieutenant KH
9. Sergeant MM
10. Sergeant CH
11. Warden SM
12. Appellant

---

CX 27 - Inmate CM Grievance
CX 28 - Injured Arrestee Report, DOCR, CPU, May 10, 2021
CX 29 - Initial Medical Screening Form, DCA-201, May 11, 2021
CX 30 - Video of incident, May 20, 2020, with viewing software

[2] Board Member Barbara S. Fredericks, who was appointed April 20, 2021, did not participate in the consideration of this decision.

After hearing testimony, reviewing the exhibits of each party,[3] and considering the stipulations of fact agreed to by the parties, the Board made the following factual findings.

Appellant has been a correctional officer with DOCR since January 9, 2017, and at the time of the May 20, 2020, incident was serving at the rank of Corporal. Tr. 383-84. Although she was temporarily reduced in rank, her rank was restored in June of this year. Tr. 384. At all times relevant this matter Appellant was assigned to work at the Montgomery County Correctional Facility (MCCF). CX 3.

On May 22 and 23, 2020, Inmate CM told correctional officers at MCCF that on May 20th she had been assaulted in her cell on the North 2-1 D pod by Appellant and Corporal AA. Tr. 37-39; CX 6, CX 16.

Sergeant KK testified that when Inmate CM arrived late in the evening of May 10, 2020 he noticed bruises on her inner left biceps and made a note of them in an Incident Report he filed. Tr. 85; CX 12. Sergeant KK said if he had seen other bruises, he would have included a mention of them. Tr. 85. An Injured Arrestee Report prepared during the intake process on May 10, 2020, contains notes made by a nurse in the medical unit, and those notes do not mention any other bruising. Tr. 86; CX 28. Similarly, the Initial Medical Screening report prepared on May 11, 2020, contains no indication of bruising on Inmate CM. CX 29. Sergeant RL testified that she "stripped out" Inmate CM the day of her admission and only recalled seeing bruises on her arms. Tr. 231.

On May 22, 2020, Officer JC noticed "a rather large, dark colored bruise" on Inmate CM's left arm and asked how it had happened. Tr. 37; CX 16. Inmate CM told Officer JC that two female officers had assaulted her in her cell, that she had written a grievance, but was afraid to give it to anyone. Tr. 37-38; CX 16. The inmate later provided a copy of the grievance, dated May 21, 2020, to Officer JC. Tr. 38. The grievance states that Appellant "+ (1) other African American female with black pony hair entered my cell for 'garbage', only to harass me, take away my food while I was eating, physically assaulted + battered me several times without any provocation + I did <u>not</u> fight back in self-defense." CX 27.

The next day, May 23rd, Inmate CM told a similar story to Officer OV and showed her the bruises. Tr. 65-66; CX 17. Although Inmate CM named Corporal AA as having assaulted her, she did not mention Appellant to Officer OV. Tr. 71, 77. Officer OV acknowledged that if Appellant had witnessed an assault by another officer, she would be obligated to file a report. Tr. 77 - 78. Sergeant DR, the immediate supervisor of Appellant on May 20th, also testified that if Appellant or Corporal AA had "put hands on" Inmate CM they should have reported the incident to him and

[3] Appellant Exhibits (AX) 1 through 5 and 7 through 12 were admitted into the record. Appellant's exhibits are as follows:

AX 1 - Annual Performance
AX 2 - Character References
AX 3 - Policies
AX 4 - Promotional File
AX 5 - Return to Duty
AX 7 - Incident Reports
AX 8 - Statement of Charges (2017)
AX 9 - MCPD Police Report, undated, as supplemented
AX 10 - Email from CG, February 3, 2021
AX 11 - Letter from AB, January 28, 2021
AX 12 - Statement of Charges, July 22, 2020; Statement of Charges, April 1, 2021

filed a report. Tr. 104-05, 119. Appellant's witnesses Sergeant CH and Sergeant MM also testified that the May 20th incident with Inmate CM involved "hands on" an inmate, was a use of force, and should have been reported to supervisors and documented in an incident report. Tr. 307-08; Tr. 280-81.

Lieutenant AM testified that Inmate CM told him that she was assaulted by the officers during dinner, and that dinner occurs during the 3:00 to 11:00 pm shift. Tr. 130-31. Inmate CM showed Lieutenant AM the grievance she had written and the bruises on her arm. Lieutenant AM told Inmate CM not to worry, he would identify the officers involved. Tr. 131. Lieutenant AM ordered a female correctional officer to take photos of the bruises on Inmate CM. Tr. 131, 135; CX 8.

Lieutenant AM checked the video surveillance tape and the log for the date and time the inmate said the incident occurred and was able to identify the officers involved as Appellant and Corporal AA. Tr. 132, 152. Based on what he saw on the video, Lieutenant AM determined that the officers were engaged in a use of force when Inmate CM was "dragged off her bed onto the floor." Tr. 133. Lieutenant AM further testified that the officers should have notified him of the use of force the day it happened and documented the episode in an Incident Report. Tr. 133, 136.

Appellant did not notify her supervisor that an incident with Inmate CM had occurred or enter a notation in the logbook. Tr. 129; CX 10. Nor did she write a report of the incident until May 26, 2020, after she was requested to do so by Lieutenant AM as a result of Inmate CM's grievance. Tr. 135-36, 396-97; CX 6, CX 11.

The County introduced the video of the North 2-1 pod where Inmate CM's cell was located and where the May 20, 2020, incident occurred. CX 7, CX 30.[4] The video surveillance clearly shows that Appellant and Corporal AA entered inmate CM's cell on May 20, 2020 and pulled Inmate CM off her bed and onto the floor. CX 7, CX 30, 5:14:55 to 5:15:11.[5]

On the video Corporal AA, wearing a white mask, proceeds up the stairs followed by Appellant, who was wearing a black mask. CX 7, CX 30, 5:14:47-55; Tr. 160-61; Tr. 277; Tr. 388. When Appellant and Corporal AA open the cell door Inmate CM is visible sitting cross-legged on her bed, with a food tray in her lap, still eating. Corporal AA enters the cell first, with Appellant initially standing by the door. CX 7, CX 30, 5:14:57 - 59.

Although the video does not have audio, it is evident that there is a discussion taking place between the officers and the inmate, with the inmate gesturing. CX 7, CX 30, 5:15:02. Suddenly, Corporal AA pulls the food tray out of the inmate's hands. CX 7, CX 30, 5:15:03.

Appellant had begun to leave the cell, but then turned around and came back inside. CX 7, CX 30, 5:15:06. Corporal AA then grabbed Inmate CM's wrist and began to pull the left arm of the inmate, who was still sitting on the bed cross-legged. CX 7, CX 30, 5:15:08. Appellant placed her left hand on the inmate's upper right arm. CX 7, CX 30, 5:15:09; Tr. 162. Appellant and Corporal AA then pulled the inmate forward off the bed. CX 7, CX 30, 5:15:09 – 10; Tr. 161-62. While sitting cross legged with her legs and feet still on the bed the inmate's upper body was suddenly pulled forward and onto the floor by the actions of Appellant and Corporal AA.

[4] CX 7 and CX 30 are the same video of the May 20, 2020, incident but CX 30 was submitted with software that contains the tools needed to more effectively view the content. *See* Tr. 321-22.

[5] The video counter shows the time of day on May 20, 2020. The video runs from 5:13:59 pm to 5:17:53 pm.

An investigation was conducted by Captain AN and she prepared an investigative report. CX 6; Tr. 328. The parties jointly stipulated that the report "is a fair and accurate representation of the conversations and observations [Captain AN] made during the course of the investigation." Stipulations, April 18, 2021. After conducting interviews, reviewing video, photographs, incident reports, and other pertinent information Captain AN concluded that Appellant had violated DOCR policy by failing to report the May 20 incident involving Inmate CM to her immediate supervisor and to document her actions. CX 6.

Director AT testified that she reviewed the investigative report, CX 6, and all related documentation, including the surveillance video. Tr. 158-60. Director AT stated that after reviewing the video and other evidence she disagreed with the investigator's findings regarding Appellant. Tr. 163. Specifically, Director AT believed that the investigator had missed the use of force by and untruthful statements of Appellant. Tr. 163.

Director AT also disagreed with level of discipline recommended by Warden SM and the Deputy Warden, a five-day suspension, and asked to meet with them to review the matter. Tr. 347, 404-05. In particular, the Director wanted an explanation of the differences from a similar case where two officers who engaged in an unauthorized use of force and failed to report it were dismissed. Tr. 405. In the end, based on Director AT's review of comparable cases, the discipline imposed on Appellant was different than that initially recommended by Warden SM. Tr. 408-09.

## APPLICABLE LAWS AND POLICIES

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

**§ 33-2. 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.

**§ 33-5. 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; . . .

**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.

**VII. DEPARTMENT RULES FOR EMPLOYEES**

E. Specific Departmental Rules:

14. Untruthful Statements:

Employees shall not make untruthful statements, either verbal or written.

**Montgomery County Department of Correction and Rehabilitation, Policy Number: 1300-10, Use of Force, Chemical Agents & Restraints,** effective December 30, 2016, (replacing policy of April 15, 2015), which provides, in relevant part:

**III. POLICY**

It is the policy of the MCDOCR that:

F. All incidents of use of force shall be reported, documented, and reviewed by the Deputy Warden of Custody and Security or designee .

**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.

## ISSUE

Was Appellant's suspension and six month rank demotion 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. 18-07 (2019); MSPB Case No. 17-13 (2017). *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").

### *Appellant's Testimony Lacked Credibility*

Appellant's testimony conflicts with the statements of Inmate CM, the testimony of the investigating officers, and the video evidence. Accordingly, the Board is obligated to consider and resolve the issue of credibility. As the Board has discussed in previous decisions, credibility is the quality that makes a witness or evidence worthy of belief. MSPB Case No. 18-07 (2019); MSPB Case No. 17-13 (2017); MSPB Case No. 13-03 (2013), *citing Haebe v. Department of Justice*, 288 F.3d 1288, 1300 n. 27 (Fed. Cir. 2002).

In the Incident Report Appellant filed on May 26 she stated that due to the inmate "reaching forward to take back the trash [Inmate CM] ended up sitting on the floor . . .". CX 11. Appellant also told the investigator that she had not put her hands on the inmate and that because she was reaching for the food tray the inmate just "ended up on the floor." Tr. 398; CX 6. When she testified at the hearing Appellant claimed that Inmate CM lunged forward while reaching for the food tray and fell to the floor. Tr. 372, 393. Appellant reiterated that claim during cross examination and admitted that her official report did not mention that the officers had touched the inmate. Tr. 397. Indeed, Appellant denies that she put hands on Inmate CM. Tr. 375, 402.

However, video evidence belies Appellant's claim that Inmate CM "ended up sitting on the floor" because she was reaching for her tray. CX 7, CX 30, 5:15:09 - 10. It is obvious that

Inmate CM did not fall off the bed and end up on the floor because she was reaching for her tray. Considering the clear video evidence, we cannot accept Appellant's version of events. MSPB Case No. 21-01 (2021), *citing Scott v. Harris,* 550 U.S. 372, 380-81 (2007) (where reliable video evidence is available, an interpretation promoted by a party that is not supported, or is contradicted, by the video should not be adopted). Moreover, contrary to Appellant's testimony, the version of events reflected in the grievance filed by Inmate CM and her statements to various officers is consistent with the video evidence. CX 27.[6]

Considering the contrary credible evidence, Appellant's visible behavior on the video, and Appellant's demeanor at the hearing, we find Appellant's testimony that she did not help pull Inmate CM off the bed and onto the floor unworthy of credence. We further find that Inmate CM was pulled off the bed and onto the floor by Corporal AA and Appellant.

Because we find Appellant's description of events contradicted by the video evidence and inconsistent with the testimony of a disinterested witness we conclude that Appellant's testimony is not worthy of credence. *See* MSPB Case No. 17-13. Moreover, the Board had ample opportunity to directly observe the demeanor of Appellant during her testimony and to assess her credibility. The Board concludes that Appellant's testimony was self-serving and not credible. For these reasons, we also view her testimony on other points with skepticism.

***Appellant's Use of Force Against an Inmate was Unnecessary, Unjustified, and Unauthorized***

There is no doubt that the May 20, 2020, incident constituted a use of force by Appellant and Corporal AA. The video evidence shows that both officers put hands on Inmate CM and forcefully pulled her off the bed and onto the floor. Appellant's efforts to suggest that Inmate CM somehow "ended up on the floor" after reaching out for her food tray are unpersuasive, contrary to the video evidence, and implausible. Indeed, even Appellant's own witnesses, Sergeant CH and Sergeant MM, testified that the May 20th incident with Inmate CM involved "hands on" an inmate, was a use of force, and should have been reported to supervisors and documented in an incident report. Tr. 307-08; Tr. 280-81. MSPB Case Nos. 15-12 & 15-13 (2016) ("a party is normally bound by the testimony of its own witness.").

DOCR strictly limits the use of force to circumstances where a correctional officer "reasonably believes such force is necessary to accomplish any of the following objectives:

1. protection of self or others;
2. protection of property from damage or destruction;
3. prevention of an escape;
4. recapture of an escapee;
5. prevention of a criminal act;
6. effect compliance with the rules and regulations when other methods of control are ineffective or insufficient; and/or
7. the prevention of the individual from self-inflicted harm."

DOCR Policy 1300-10 §III(A).

[6]While it is true that Inmate CM's statements are hearsay, reliable hearsay is admissible in an administrative proceeding. Montgomery County Code, § 2A-8(e). *See* MSPB Case No. 17-13 (2017) (documents and video evidence support the reliability of hearsay statements).

Under DOCR Policy 3000-7 §V(C), only such force as is necessary "to control an unruly" inmate may be used. DOCR Policy 3000-7 §V(D) provides that correctional officers "shall not strike or lay hands on" an inmate "except to defend themselves, to prevent an escape, to prevent serious injury or damage to person or property, to quell a disturbance, to search" an inmate "or to move an unruly or uncooperative inmate. . . ".

None of the circumstances listed in these polices were present during the incident of May 20, 2020. There was certainly no extreme emergency obviating the need for supervisory authorization. In the absence of an emergency, there was no valid reason for Appellant's failure to comply with the mandate in DOCR Policy 1300-10 §V(A) that she contact the Lieutenant supervising the shift in order to obtain authorization for "the use of physical force to either move or restrain an unruly or uncooperative inmate."

Inmate CM was locked in a cell eating dinner and not presenting a threat to others. There is no evidence in the record that she was engaged in self harm or was otherwise a danger to herself, that she was damaging or destroying property, or that she was trying to escape. Inmate CM's only misbehavior may have been her reluctance to hand over her dinner tray before she was finished eating and, perhaps, arguing with the correctional officers. Furthermore, it is clear from the video evidence that Inmate CM was not engaged in "unruly" behavior that might justify a correctional officer laying hands on her or the use of force.

We find that Appellant directly participated in the use of force to roughly pull Inmate CM off the bed and onto the floor, without justification or supervisory authorization. The County has proven by a preponderance of the evidence the charges against Appellant under DOCR Policy 3000-7, §V(C) (only such force as is necessary); §V(D) (personnel shall not strike or lay hands on an inmate except under limited circumstances); DOCR Policy 1300-10, Use of Force, §V(A) (only supervisors may authorize use of force except in extreme emergencies). CX 20 & 21. The County has thus shown that Appellant was in violation of MCPR §33-5(c) (violates any established policy or procedure). CX 19.[7]

***Appellant Failed to Report the Use of Force***

The video evidence leaves no doubt that Appellant and Corporal AA used force on Inmate CM when they pulled her off the bed. CX 7, CX 30. After participating in the use of force incident involving Inmate CM, Appellant failed to file the mandatory report or to advise either her supervising Sergeant or Lieutenant. Appellant only wrote a report of the incident after she was ordered to do so as a result of Inmate CM's allegations that she had been assaulted in her cell by Appellant and Corporal AA. Tr. 396-97; CX 11.

Appellant's failure to submit a report that is mandated by DOCR policy after participating in a use of force incident demonstrates a lack of candor and falls short of the integrity expected of a correctional officer charged with protecting the health and safety of inmates in County custody.

[7] While there was testimony and documentary evidence concerning the issue of whether Appellant was responsible for causing the bruises on Inmate CM that were visible in the photographs admitted as CX 8, the video evidence is ambiguous. Also, there is documentary evidence that CM arrived at the facility with bruises on her arm. There is no direct video evidence to support a conclusion that Appellant may have been involved in striking Inmate CM while she was on the floor. In any event, it is unnecessary for the Board to make a finding concerning the bruises. The County presented sufficient evidence to prove by a preponderance that Appellant participated in the unnecessary, unjustified, and unauthorized use of force that propelled Inmate CM from her bed and onto the floor.

We find that the County has proven by a preponderance of the evidence that Appellant violated DOCR Policy 1300-10, §III(F) (use of force shall be reported, documented) and §V(D) (staff involved in a use of force incident must submit a written report). CX 21. The County has thus shown that Appellant was in violation of MCPR §33-5(c) (violates any established policy or procedure). CX 19.

***Appellant Made Untruthful Statements***

When Appellant was instructed to file a report what she filed was untruthful. Appellant's report says that due to the inmate "reaching forward to take back the trash [Inmate CM] ended up sitting on the floor . . .". CX 11. Appellant reiterated that claim during cross examination and admitted that her official report did not mention that the officers had touched the inmate. Tr. 397. Appellant also told the investigator that she had not put her hands on the inmate and that after reaching for the food tray Inmate CM "ended up on the floor." Tr. 398; CX 6.

As discussed above, the video shows that Inmate CM did not fall to the floor or mysteriously end up there. She was grabbed by Appellant and Corporal AA and yanked off the bed onto the floor. Appellant's effort to characterize the inmate as having fallen off the bed onto the floor in her official report and statements to the investigator was false and misleading. We find that the County has proven by a preponderance of the evidence that Appellant made untruthful statements in violation of DOCR Policy 3000-7, §VII(E)(14) (employees shall not make untruthful statements, either verbal or written). CX 20. The County has thus shown that Appellant was in violation of MCPR §33-5(c) (violates any established policy or procedure). CX 19.

***Appellant Received the Appropriate Level of Discipline***

Appellant, as a correctional officer, is responsible for maintaining institutional security and for the custody and care of inmates. The County has proven by a preponderance of the evidence the charges against Appellant of using unjustified and unauthorized force against Inmate CM, failure to report the use of force, and making false statements during the investigation. Having determined that the County proved its case by a preponderance of the evidence, the remaining question is the appropriate level of discipline.

The Director of DOCR, who was the final decisionmaker and responsible for determining the appropriate level of discipline, testified that she disagreed with the findings in the investigative report because the investigator had missed Appellant's participation in the use of force and Appellant's untruthful statements. Tr. 163; CX 6. She then testified as to the reasons she decided to suspend Appellant and demote her in rank for six months. The Director detailed the factors she took into account when determining the proper level of discipline, including the nature and gravity of the offense, the relationship of the misconduct to the Appellant's assigned duties and responsibilities, Appellant's work record, whether Appellant should have been aware of the applicable rules and procedures, and comparable discipline. The Board found the Director to be thoughtful in her analysis of the relevant factors she considered to reach her decision.

The Director took into account the relationship of the misconduct to Appellant's duties and responsibilities, explaining that correctional officers are charged with the care and custody of inmates and thus expected to control situations involving inmates in a way that reduces the prospect of escalation. Tr. 168-69. On May 20, 2020, there was no urgency to recover the food trays and no emergency necessitating the actions taken. Tr. 169.

Director AT acknowledged Appellant's good work record, absence of prior discipline, and that she is reliable, dependable, and well-liked by her colleagues. Tr. 182, 410. Those factors were weighed against the seriousness and gravity of her misconduct and caused the Director to consider discipline short of dismissal. Tr. 411-12.

The Director explained that because Appellant's violations were grave and serious, she did not apply progressive discipline and even contemplated dismissal. Tr. 182, 405-11. In such cases, the County personnel regulations vest the DOCR Director with the discretion to eschew progressive discipline and move directly to dismissal. MCPR § 33-2(c)(2) ("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. . ."). After considering comparable cases, including those that resulted in dismissal, the Director decided that discipline short of dismissal was warranted, and Appellant was suspended for 15 days and demoted in rank for six months.

We consider whether DOCR has consistently applied similar discipline to other staff who have engaged in comparable behavior, a factor listed in MCPR § 33-2(d)(3). To challenge the level of her discipline Appellant must show that she was treated more harshly than comparison employees engaged in similar misconduct without differentiating or mitigating circumstances so as to warrant distinguishing the misconduct or the appropriate discipline. MSPB Case No. 18-07 (2019); MSPB Case No. 10-04 (2010), *citing Burton v. U.S. Postal Service*, 112 M.S.P.R. 115 (2009).

The Director testified about the comparable case that involved a sergeant who was dismissed for authorizing entry into a cell and the unnecessary, unjustified, and unauthorized use of force against an inmate, failed to report or document the use of force, and made untruthful statements to investigators, as in this matter. CX 26; Tr. 173-74. The Director considered the differences from this case in applying a lesser discipline, noting that the comparator case involved a sergeant, the use of handcuffs, and holding the inmate against the wall. Tr. 410.

The Director discussed the other comparable cases that she considered. One involved a May 29, 2018 Statement of Charges for dismissal that was resolved through a settlement agreement. CX 22.[8] In that case a correctional officer was justified in a use of force but then unjustifiably assaulted the inmate by punching him four times in the face. The officer then failed to properly document the use of force. After Alternative Dispute Resolution (ADR) the penalty was reduced to a 15-day suspension, removal from assignment to the Emergency Response Team (ERT), and a Last Chance Agreement.

A 2019 case in which a correctional officer struck an inmate four or five times by closing a food slot on his arm was also viewed as similar by the Director. CX 23. In that case, the officer did not notify a supervisor when the inmate refused to obey an order and did not accurately report the use of force. Tr. 177-78; CX 23. The original proposed discipline was a 30-day suspension and a six-month demotion, but the ADR process resulted in a settlement in which the parties agreed to a 15-day suspension, three-month rank demotion, and a Last Chance Agreement.

The Director also relied on a January 13, 2016, case that involved an unprovoked assault on an inmate being processed into the facility and resulted in the officer's dismissal. CX 24. The

[8] We have previously held that DOCR need not explain a difference in treatment when there is a settlement. MSPB Case No. 18-06 (2019).

officer's use of force was unnecessary and aggressive, and the officer made untruthful statements and attempts to get other officers to be untruthful in their reports. Tr. 178-79; CX 24.

The Director testified that she reviewed a September 11, 2020, NODA issued to an officer who used excessive force when they punched an inmate in the head and upper torso, along with kneeing the inmate in the upper torso while the inmate was in a holding cell. CX 25. After an agreement was reached during the ADR process the officer received a 30-day suspension, six-month rank demotion, and removal from the ERT. Tr. 180-81; CX 25.

We conclude that the Director properly considered these comparable cases in her analysis of the appropriate level of discipline for Appellant.

The Director also discussed two cases that Appellant suggested as comparable. Tr. 191-94. The July 22, 2020, Statement of Charges in the first case was for a two-day suspension for a correctional officer who unnecessarily was involved in a physical confrontation with an inmate due to the inmate refusing to leave his cell. AX 12. Unlike this case, the officer was not disciplined for assaulting the inmate. Rather, the discipline was for not backing off and avoiding a confrontation by leaving the cell and closing the cell door. Tr. 193. The Director noted that unlike the circumstances in this case, where the inmate was calmly sitting on her bed eating, the purpose of the interaction in the comparator case was to move the inmate from the cell. In this case the inmate made no violent or aggressive moves, whereas in the comparator case the officer merely put a hand on the shoulder of the inmate and the inmate escalated the situation. In this case Appellant and Corporal AA called their sergeant for backup when the inmate was uncooperative but did not wait for the sergeant to arrive before going hands on with the inmate. Moreover, in this case Appellant did not report the incident, which raised integrity questions. Tr. 204-07.

Finally, the Director testified that the second case Appellant raised was not comparable. Tr. 193. That case involved a Statement of Charges for a five-day suspension dated April 1, 2021. AX 12. In that case, the officer used force on a handcuffed inmate, took the inmate to the floor, and failed to render aid to the inmate. The discipline was not for the use of force, which was determined to be justified, but instead for not rendering aid to an inmate injured as a result of the use of force. Tr. 193-94. We find both cases Appellant proposed as comparable to be readily distinguishable from the instant case.

Finding that the County has proven by a preponderance of the evidence that Appellant's behavior was unacceptable and in violation of DOCR policies, and that the Director properly evaluated the factors set out in MCPR § 33-2(d), we uphold all charges against her and conclude that the discipline imposed was appropriate and consistent with law.

## ORDER

For the foregoing reasons, the Board **DENIES** the appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
July 28, 2021

# DENIAL OF EMPLOYMENT

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

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

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

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

During fiscal year 2022 the Board issued the following decisions on appeals concerning the denial of employment.

# CASE NO. 21-12

**FINAL DECISION**

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on December 10, 2020. The appeal, in the form of an email, specifically identified the County's decision that he "Did not meet screening criteria" for a Grade 18 Program Specialist I (Asian American Health Initiative/Community Health) position, announced as IRC46634.

The Board sent a letter that same day to acknowledge receipt of the appeal, "concerning denial of employment as a Program Specialist I (Asian American Health Initiative/Community Health) (IRC46634)," and setting a schedule for the County to respond and for Appellant to reply to the County.

On January 11, 2021, the County filed a response to the Appeal. The County's response addressed the issues raised in the Appeal and included three attached exhibits. County Exhibit 2 was the Affidavit of MD, Chief, Recruitment and Selection Division, Office of Human Resources (OHR).

Appellant filed replies to the County's submission on February 2, 4 and 9, 2021. In his replies Appellant noted that the affidavit submitted as County Exhibit 2 had misspelled his name, raising a question as to whether OHR had reviewed the correct applicant's files. Appellant also argued that there were inconsistencies in the way the County evaluated his work experience in this recruitment versus other recruitments where he was deemed well qualified.[1]

On February 25, 2021, the Board requested that the County address the misspelling and asked for additional information on recruitment IRC46634 and other recruitments.[2]

---

[1] Appellant has received the following Notifications of Nonselection:

IRC46634 –December 10, 2020 (subject of the appeal)
IRC45228 –December 2, 2020
IRC45268 –November 17, 2020
IRC45594 –October 6, 2020
IRC44367 –July 7, 2020
IRC44251 –June 15, 2020
IRC44073 –June 4, 2020
IRC46053- January 29, 2021 (after appeal filed)
IRC46713 –January 11, 2021 (after appeal filed)
IRC46413- Appellant deemed qualified after review but did not make the eligible list.

[2] The Board's February 25th request was as follows:

In a February 4, 2021, email Appellant noted that an affidavit (County Exhibit 2) submitted by the County states "I have reviewed the County's recruitment files for **[name]**" when Appellant's name is "[name]." The email refers to an argument on this issue he made on page 28 of his February 2, 2021, response to the County's opposition to his appeal.

The Board asks the County to confirm whether there is a recruitment file for a [name] and, if there are no records for a [name], submit a sworn statement attesting to that fact. If there are recruitment records for a [name], the County shall submit to the Board a sworn statement providing a full explanation of why that individual was mentioned in County Exhibit 2. If the County asserts that the correct recruitment records for Appellant were nevertheless reviewed, it shall provide sworn verification of that fact. In any event, the Board requests copies of all the recruitment records for Appellant and [name] that the County asserts were reviewed.

The County was asked to submit a sworn statement attesting to the fact that the correct recruitment records were reviewed. The County was also asked to respond to Appellant's assertions that there were inconsistencies in the evaluation of his education and experience and to provide specifically detailed documentation addressing the issues raised.

Because of the volume of material requested, the County was given an extension of time to provide the requested information and provided its responses on March 18 and 29, 2021. Appellant responded on March 20 and 21, 2021.

## FINDINGS OF FACT

Appellant applied for a Grade 18 Program Specialist I (Asian American Health Initiative/Community Health) position (IRC46634) on December 9, 2020. County Supplemental Response, (March 29, 2021), Attachment 1. On December 10, 2020, the County OHR reviewed Appellant's application, decided that he did not meet the minimum qualifications for the IRC46634 position, and he was thus deemed "not qualified." *Id.* That same day, Appellant filed an appeal challenging the County's decision not to select him for the IRC46634 because he "Did not meet screening criteria." Appeal Email, December 10, 2020, p. 2.

The minimum qualifications for the Program Specialist I (Asian American Health Initiative/Community Health) position were specified in IRC46634 as follows:

**IRC46634 minimum qualifications:**

**Experience:** One (1) year of professional experience managing or performing health programs administration, social services, and/or health education outreach.

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

---

The Board also requests that the County respond to Appellant's assertions that there have been inconsistencies in the evaluation of his education and experience. The County may also respond to any other issue raised by Appellant. In this regard, the County shall provide the following:

1. Copies of Appellant's application materials for IRC46634, including his resume and all other supporting application documents he submitted.
2. A sworn statement explaining the basis for the determination that Appellant "did not meet the minimum screening criteria for the position based on his years of work experience" for IRC46634.
3. A list of applicants for IRC46634 indicating which ones met the minimum qualifications, those who did not because of a lack of experience, the ratings and ranking of the qualified applicants, identification of those with priority consideration, and the selected applicant, if any.
4. The application materials and resumes of those applicants for IRC46634 who were deemed to have met the minimum screening criteria.
5. Copies of job postings and Appellant's application materials for all positions where Appellant was determined to meet the minimum qualifications.
6. A list of the dates Appellant was notified of nonselection for all positions.
7. For any position for which Appellant was sent a notice of nonselection within 10 working days prior to December 10, 2020:
    a. Copies of all job postings and Appellant's application materials;
    b. An explanation of why Appellant did not meet the minimum qualifications;
    c. If Appellant was deemed qualified and not interviewed, an explanation of the basis for that determination;
    d. If Appellant was deemed qualified and not interviewed or selected, provide an explanation of the reasons and the application materials and resume of the selected candidate, including whether the selectee was on priority consideration.

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

County Response, Attachment 1 (January 11, 2021); Corrected Affidavit of MD, Attachment 2 (March 16, 2021).

Appellant's application for the IRC46634 position was reviewed by an OHR Human Resources Specialist (OHR recruiter). County Supplemental Response, (March 29, 2021), Attachment 2, Affidavit of MS, (March 26, 2021). When reviewing Appellant's application for relevant experience the OHR recruiter used the following standard:

> [R]elevant experience means pertinent, applicable, appropriate, relevant, or related experience. It means having previous work experience that is related to the job opening. Relevant volunteer experience may also be credited if enumerated on resume. Relevant internship experience may be credited if enumerated on the resume. Internships that are part of a degree requirement/curriculum are not credited towards relevant experience. However, summer internships and internships where credit is not received may be considered, if relevant and related to the qualifications for the position.

Affidavit of MS, Attachment 2, ¶8.

Appellant received one month of experience credit for his work with the Emergency Assistance Relief Payment (EARP) Program. Attachment 2, ¶9; Appellant's Application Materials for IRC46634, County Supplemental Response, (March 29, 2021), Attachment 1, p. 5. The OHR recruiter also gave Appellant experience credit for the time Appellant stated that he was engaged in 10 hours per week of volunteer activity as a Youth Commissioner, Co-Chair of Opioid Abuse Sub-Committee, Montgomery County Commission on Children and Youth. Attachment 2, ¶9. Appellant indicated that he worked in this volunteer position for 10 hours per week from August 2016 to August 2017. Attachment 1, p. 8. The OHR recruiter credited Appellant with three months of work experience for the hours he claimed to have worked over the course of the year. Attachment 2, ¶9.[3]

The OHR recruiter determined that, at most, Appellant could only be legitimately credited with four months of the required professional experience managing or performing health programs administration, social services, or health education outreach. Attachment 2, ¶10.[4] The OHR recruiter also asked five other OHR Specialists to review Appellant's application. Attachment 2, ¶11.[5] The other five OHR Specialists confirmed that Appellant lacked the one year of professional experience required for the IRC46634 position. *Id.*

A careful review of Appellant's application does not reveal a combination of listed work or volunteer experience that would support crediting him with an additional eight months of professional experience managing or performing health programs administration, social services,

[3] The number of Appellant's claimed work hours for the year was 25% of a typical work year of 2080 hours.

[4] Appellant's application materials include his self-reported Preferred Criteria Self-Assessment (ProForm). Attachment 1, pp. 9-35. The OHR recruiter reviewed the information Appellant provided in his resume and the ProForm to assess his level of experience. Attachment 2, ¶6. ProForm includes preferred criteria but is only used to determine whether an applicant is "well-qualified" or "qualified," not whether an applicant meets the minimum criteria or is "not qualified."

[5] Because the OHR recruiter's affidavit contains a typographical error by listing the last two paragraphs as "10" we identify the second one as paragraph "11."

or health education outreach. Appellant's Application Materials for IRC46634, County Supplemental Response, (March 29, 2021), Attachment 1.

Appellant's educational background did meet the minimum qualifications for IRC46634, as he had earned a bachelor's degree from the University of Maryland, College Park, with a major in Government and Politics and a minor in Asian American Studies. Attachment 1, p. 6. Because IRC46634 required a bachelor's degree as an educational requirement, that same degree could not also have been used as a substitute for his lack of work experience. Attachment 1 to March 26, 2021, Supplemental Affidavit of MD, p. 4, Attachment 7 to County Supplemental Response, (March 29, 2021) ("if education can be substituted for work experience, the candidate **must** have completed at least the minimum required education level. Any degrees or certifications above the minimum may be substituted for any minimum work experience deficiency.") (emphasis in original); Appellant Response, (February 4, 2021), Attachment 3 ("Credit for one year of experience will be given for each relevant degree above a bachelor's degree level (second or additional bachelor's, master's and/or doctoral degree)"). *See* Corrected Affidavit of MD, Attachment 2 (March 16, 2021), ¶9, and Attachment 3 (Equivalencies for Education and Experience, Common Recruiting Terms, Disability Employment & Initiatives, Resume Preparation Tips, and FAQs). Appellant did not have additional academic credit or degrees that could be substituted to meet the minimum experience requirement for the IRC46634 position.

Appellant suggests that as an individual with a disability he was entitled to a Priority Consideration hiring preference under MCPR § 6-11(a). Priority Consideration is when a candidate is considered for a vacant position before others are considered. MCPR § 1-57. Priority Consideration does not guarantee appointment. *Id.* To be entitled to Priority Consideration an applicant must be rated in the highest rating category on the eligible list. MCPR § 6-11(b).[6]

Appellant did not receive a priority consideration hiring preference for IRC46634 because he was rated as "not qualified." Corrected Affidavit of MD, (March 16, 2021), ¶8. Appellant did receive priority consideration hiring preference for other vacancies where he was qualified for the positions and in the highest rating category. County Supplemental Response, (March 29, 2021), Attachments 5 & 6, (March 26, 2021). *See* Affidavit of EP, (March 25, 2021), ¶s 11 & 12.

An affidavit filed by the County in its initial response to this Appeal contained a single misspelling of Appellant's name as "[name]" when Appellant's name is spelled "[name]." Affidavit of MD, Chief, Recruitment and Selection Division, Office of Human Resources, County Exhibit 2 (January 8, 2021). That affidavit contained other references to Appellant in which his name was spelled correctly. In a subsequent affidavit MD acknowledged the typographical error in the spelling of Appellant's name and swore that she "never reviewed any recruitment files for [name]," and "that there is no record of a [name]" in the County OHR's recruitment files. Corrected Affidavit of MD, (March 16, 2021), ¶s 4 & 5. The County employee who drafted the original affidavit apologized and explained that it was a typographical error. Affidavit of DG, (March 15, 2021), ¶¶ 5 and 7. DG also noted that the affidavit he had prepared for MD had contained another unintentional typographical error involving the transposition of numbers. *Id.*, ¶6. There is no record evidence indicating that Appellant was in any way confused with another applicant.

[6] Appellant also suggested that as a person with severe disabilities he was entitled under MCPR § 6-15 to a Noncompetitive Appointment. However, as discussed below, the MSPB does not have jurisdiction to review that claim: "An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board." MCPR § 6-15(f).

## APPLICABLE CODE PROVISIONS AND REGULATIONS

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

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

**Montgomery County Personnel Regulations (MCPR), 2001 (As amended 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, July 17, 2018 and June 1, 2020), Section 1,** *Definitions,* which provides in pertinent part:

> **§ 1-58. Priority consideration:** Consideration of a candidate for appointment . . . to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment. . .

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

**§ 6-4. Reference and background investigation requirements; Review of applications**.

(a) (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.

(2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.

(3) All applicants and employees must comply with established reference and investigation requirements.

(b) The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if: . . .

(5) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; . . .

**§ 6-11. Priority consideration for initial appointment to a County merit system position.**

(a) Definitions

(1) Person with a disability: A person who:

(A) has a developmental disability, severe physical disability, or a psychiatric disability within the meaning of 5 C.F.R. 213.3102(u), the criteria for disability used by the Federal Office of Personnel Management for noncompetitive appointment to Federal merit system positions under its special hiring authority; and

(B) has been certified by the Maryland Department of Education Division of Rehabilitation Services or by an equivalent out-of-state vocational rehabilitation agency as meeting the definition of disability contained in (A) above. . . .

(b) Subject to persons who must be given priority under Section 6-10, the OHR Director must give priority consideration in the following order to persons who apply for initial appointment to a County merit system position in a normal competitive process and who are rated and placed in the highest rating category on the eligible list:

(1) a veteran with a disability;

(2) an equal preference for a veteran without a disability and for a person with a disability.

(c) To receive priority consideration under 6-11(b), an eligible applicant must apply for the preference on the application form and must provide the necessary certification or documentation within 14 calendar days after it is requested by OHR.

**§ 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.

**§ 6-15. Noncompetitive Appointment of Persons with Severe Disabilities to County Merit Positions.**

(a) A department director may noncompetitively appoint a qualified person to a County merit position if the individual: . . . (3) meets the minimum qualifications for the position; . . .

(f) Noncompetitive appointment under this section is the prerogative of management and not a right or entitlement of a person with a severe disability. An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board.

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

**§ 35-2. Right of appeal to MSPB.**

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

(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.

## ISSUE

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

## ANALYSIS AND CONCLUSIONS

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

*Appellant Did Not Meet the Minimum Qualifications for the Program Specialist I (Asian American Health Initiative/Community Health) position*

Appellant has filed one appeal with the Board. That appeal, concerning the Program Specialist I (Asian American Health Initiative/Community Health) position (IRC46634), is the only matter before us. Based on Appellant's allegations of bad faith and inconsistency in OHR's evaluation of his applications, including IRC46634, the Board reviewed other recruitments that had not been appealed to the Board. The Board sought to determine if there was merit to Appellant's allegations that OHR's evaluation of his qualifications for the position in IRC46634 was inconsistent with the way his qualifications were evaluated in other recruitments and whether there was any indication of irregularity. After careful review of the voluminous documentation, we see no impropriety in the evaluation of Appellant's qualifications for the IRC46634 position, and further find that the evaluation of his qualifications in other recruitments appears reasonable.

The Program Specialist I (Asian American Health Initiative/Community Health) position, IRC46634, required one year of specialized professional experience managing or performing health programs administration, social services, or health education outreach. Although Appellant was engaged in various volunteer activities with multiple organizations, his actual professional experience managing or performing health programs administration, social services, or health education outreach was significantly less than one year. Indeed, the affidavit of the OHR recruiter who evaluated Appellant's application for IRC46634 details the analysis used to conclude that "at most, Appellant could be credited with 4 months of professional experience." Affidavit of MS, Attachment 2, ¶10.

Our review of the documents submitted by the County supports the conclusion that Appellant did not have the professional work experience to meet the minimum experience qualifications for the IRC46634 position and was thus properly deemed "not qualified." County Supplemental Response, (March 29, 2021), Attachment 1.

Appellant did meet the minimum educational qualification for the IRC46634 position, which was a bachelor's degree. However, since Appellant lacked education beyond a bachelor's

degree, he had no additional education to substitute for the lack of professional experience. *See* Supplemental Affidavit of MD (March 29, 2021), Attachment 1, p. 4, ("if education can be substituted for work experience, the candidate **must** have completed at least the minimum required education level. Any degrees or certifications above the minimum may be substituted for any minimum work experience deficiency.") (emphasis in original); Appellant Response, (February 4, 2021), Attachment 3 ("Credit for one year of experience will be given for each relevant degree above a bachelor's degree level (second or additional bachelor's, master's and/or doctoral degree)"). The County provides information for applicants on the OHR website explaining the policy on Equivalencies for Education and Experience and followed those guidelines in this case. *See* MSPB Case No. 15-05 (2015) ("The Board expects the County to follow uniform guidelines, as published on its website and in the Personnel Regulations, when assessing the qualifications of candidates for County positions.").

Accordingly, we conclude that Appellant has failed to carry his burden of proving that the County's determination that he lacked the requisite experience for the position was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors.[7]

Appellant also raised the issue of his entitlement to a Priority Consideration hiring preference. To be entitled to Priority Consideration an applicant must be rated in the highest rating category on the eligible list. MCPR § 6-11(b). In the IRC46634 recruitment there were 19 applicants rated "well-qualified" and 22 rated as "qualified." Appellant was one of 33 applicants deemed "not qualified." County Supplemental Response, March 29, 2021, Attachment 8. Because Appellant was properly rated as "not qualified" he was not entitled to a Priority Consideration hiring preference.

The Board will not substitute its judgment for that of the hiring officials 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). In this case, unlike at least 41 other applicants, Appellant failed to meet even the minimum qualifications for the position.[8]

*Alleged inconsistencies in the evaluation of Appellant's experience*

Appellant suggests that the fact that he was deemed "qualified" or "well qualified" for some positions, but was rated as "not qualified" for IRC46634, demonstrates that the County is inconsistent in the way it evaluates his applications. *See e.g.,* Appellant Response, (February 4, 2021), pp. 3, 26; Appellant Email, December 7, 2020. Appellant was, for example, deemed "well-qualified" for the positions being recruited for in both IRC45268 and IRC45228, and "qualified" for those in IRC46413 and IRC46053. However, after careful analysis of the record of those recruitments we discerned that there was no inconsistency when the County determined that Appellant was not qualified for one position, yet was qualified or well qualified for other, different positions.

[7] The Board has held in previous cases that the County may rely on the information provided with the application itself, and that the Board will not reverse the County's decision based on subsequently provided information. MSPB Case No. 16-15 (2016); MSPB Case Nos. 15-14 and 15-23 (2015). To the extent that Appellant, as part of his Appeal, provided additional information that was not part of his application that information must be disregarded. In any event, we see nothing in the subsequently provided information that would justify altering our finding.

[8] We note that the selected applicant was demonstrably more qualified than Appellant, having substantial relevant experience far in excess of Appellant's and a Masters of Public Health. County Supplemental Response, (March 29, 2021), Attachment 10.

Unlike IRC46634, the positions for which Appellant was found qualified or well qualified did not require experience with health programs, social services, or health education outreach, the professional experience requirements that rendered Appellant not qualified for IRC46634. For example, IRC45268, a Program Manager II position in the Office of Racial Equity and Social Justice, Appellant was determined to be qualified because of his general experience in program management and coordination. Affidavit of EP, (March 25, 2021), ¶7. After review of his ProForm self-assessment he was found to be "well qualified," given priority consideration, and interviewed. *Id.*, ¶s 10 & 11. Appellant was not selected because the Office of Racial Equity and Social Justice interview panel decided he had insufficient experience with racial equity and social justice issues. Affidavit of EP, (March 25, 2021), ¶12; County Supplemental Response (March 29, 2021), Attachment 5.

For IRC45228, an Office Services Coordinator position with the Office of Human Rights, Appellant met the minimum qualifications in part because the position required four years of progressively responsible office support experience, but did not require experience with health programs, social services, or health education outreach, as was the case with IRC46634. Appellant was deemed "well qualified," received priority consideration, and was interviewed. The Human Rights Commission interview panel determined that Appellant lacked enough relevant experience and he was not selected. Supplemental Affidavit of MD (March 29, 2021), ¶6; County Supplemental Response (March 29, 2021), Attachment 6.[9]

The County's detailed explanations of the hiring process in IRC46634 as well as the other recruitments involving Appellant are reasonable and satisfactory. Appellant, who has the burden of proof, has not shown that the County's actions were in any way arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Nor has Appellant provided any evidence to support his belief that he was denied the appointment in IRC46634 for reasons other than those related to his qualifications. The County's explanation and *mea culpa* concerning the misspelling of his name seems sincere and truthful. That isolated typographical error does not suggest any illegality or that decisions were based on non-merit factors.

The County provided sworn statements and documents that satisfactorily prove that Appellant's application was not confused with that of another applicant and that the misspelling of his name in an affidavit was a typographical error. No other instances of OHR misspelling Appellant's name have been called to our attention. A typographical error does not justify a finding that the County acted improperly. *Cf.,* MSPB Case No. 19-13 (2019), *aff'd,* Circuit Court for Montgomery County, Case No. 470431-V (January 7, 2020).

To the extent Appellant alleges discrimination based on his national origin, Appellant's claims are outside of the Board's jurisdiction. *See* MCC § 27-19(a); MCPR § 35-2(d). MSPB Case No. 20-04 (2020); MSPB Case No. 18-05 (2018); MSPB Case No. 15-28 (2015); MSPB Case No. 15-04 (2015); MSPB Case No. 14-40 (2014). The County Code explicitly requires that appeals alleging discrimination prohibited by Chapter 27 of the Montgomery County Code must be filed

[9] The selected applicant was given the highest interview rating by the panel (Well Above Average) and had significant relevant experience. Our review of the record leads us to the conclusion that the selected applicant was unquestionably more qualified than Appellant. County Supplemental Response (March 29, 2021), Attachment 11.

with the Human Rights Commission. MCC § 33-9(c); MCPR § 35-2(d).

Finally, even if Appellant could make a viable case that he was qualified, the County has express discretion under MCPR § 6-15, Noncompetitive Appointment of Persons with Severe Disabilities. That regulation specifically states that such appointments are a "prerogative of management and not a right or entitlement." Moreover, the regulation specifically deprives the MSPB of jurisdiction to review the decision: "An individual may not file a grievance or appeal the denial of a noncompetitive appointment or nonselection to the Merit System Protection Board." MCPR § 6-15(f).

Based on the record evidence, the determination that Appellant lacked the qualifications required for IRC46634 was legitimate, and that there is no indication that action was based on any impermissible non-merit factor. The Board therefore concludes that Appellant has failed to meet his burden of showing that the County's decision was arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors.

**ORDER**

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of a Grade 18 Program Specialist I (Asian American Health Initiative/Community Health) (IRC46634).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
September 28, 2021

# CASE NO. 22-08

**FINAL DECISION**

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of Montgomery County's Office of Human Resources (OHR) Director to rescind a conditional offer of employment. The Appeal was officially filed September 27, 2021, and the County filed its response to the appeal (County Response) on October 27, 2021.[1] The Appellant did not exercise his right to make final comments in reply to the County's submission. The appeal was considered and decided by the Board.

**FINDINGS OF FACT**

Appellant applied for a position as a Firefighter/Rescuer I (Recruit) (IRC47834). County Exhibit (CX) 1. By letter dated August 4, 2021, Appellant was given a conditional offer of

[1]The appeal was filed by electronic mail on Friday, September 24, 2021, a date when the Merit System Protection Board offices are not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

employment with the Montgomery County Department of Fire and Rescue Services (MCFRS), contingent upon Appellant's successful completion of a pre-employment medical evaluation, including a drug and alcohol screening through urinalysis. CX 2 and CX 3; County Response, p. 1. On August 11, 2021, Appellant submitted to a pre-employment drug screen. CX 4. LabCorp, an independent laboratory tested the specimen and, on August 18, 2021, reported to the Fire and Rescue Occupational Medical Services that Appellant's specimen had tested positive for Cannabinoid, specifically Carboxy THC. CX 5; County Response, p. 1.

On August 19, 2021, Appellant was informed of the test results and the next day he requested a split specimen test. CX 6. Pursuant to Montgomery County Personnel Regulation (MCPR) Section 32, *Employee Drug and Alcohol Use and Drug and Alcohol Testing*, an applicant has a right to request a split specimen test when the laboratory for the initial urine specimen reports a verified positive test result. A split specimen test is a "laboratory test conducted by a second laboratory on the portion of the collected urine specimen that was frozen and stored." MCPR § 32-2(qq).

The laboratory report on the split specimen test conducted by Quest Diagnostics reconfirmed that Appellant's specimen was positive for Marijuana. CX 7; County Response, p. 2. On September 7, 2021, Dr. JS of the Fire Rescue Occupational Medical Services notified the MCFRS Fire Chief of Appellant's test results and rated Appellant "Not Fit for Duty." CX 4. On September 8, 2021, the Director of OHR notified Appellant that he did not meet the applicable medical requirements for a Firefighter position with MCFRS and that the conditional offer of employment was withdrawn. CX 8; County Response, p. 2.

## APPLICABLE CODE PROVISIONS AND REGULATIONS

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

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

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

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

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

**June 1, 2020), Section 35**, *Merit System Protection Board Appeals, Hearings and Investigations*, which states in applicable part:

**§ 35-2. Right of appeal to MSPB.**

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

**Montgomery County Personnel Regulations, 2001, (As amended October 21, 2008, July 12, 2011, July 24, 2012, June 30, 2015 and September 27, 2017), Section 32,** *Employee Drug and Alcohol Use and Drug and Alcohol Testing.*

**§ 32-2. Definitions.**

(bb) ***Illegal drug***: A controlled substance that is illegal to possess under local, state, or Federal law.

* * *

(qq) ***Split Specimen Test***: The laboratory test conducted by a second laboratory on the portion of the collected urine specimen that was frozen and stored. The applicant or employee has a right to request a "split specimen test" if the test of the primary specimen produces a verified positive test result, or a verified adulterated or substituted test result.

**§ 32-3(a) Drug and alcohol prohibitions that apply to job applicants and County employees.**

(1) An applicant for an HPR, Public Safety, FMCSA Safety-Sensitive, or FTA Safety-Sensitive position must not:

(A) have, at the time a urine specimen is given for a drug test, an illegal drug in the applicant's body above the established cutoff levels for the drug . . .

**§ 32-3(f) Drug/alcohol designations of County positions.**

(4) All nonsupervisory and supervisory positions in the following occupational series are Public Safety positions: . . . (C) Firefighter/Rescuer. . .

**§ 32-3(h) Drug and alcohol testing of job applicants and employees.**

***(3) Pre-employment drug testing.***

(C) The County conducts pre-employment drug tests on all applicants for: . . . (ii) Public Safety positions not covered by (3)(B) above. . .

***(14) Substances tested.***

(B) For drug testing under County authority, the laboratory must test specimens for the following drugs or their metabolites: . . . (iv) cannabinoids (marijuana) . . .

***(19) Consequences of a verified positive drug test result or an alcohol test result of 0.02 or higher.***

(A) A department director must not select a job applicant who has a verified positive drug test result.

## ISSUE

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

## ANALYSIS AND CONCLUSIONS

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

The County conducts pre-employment drug tests on all applicants for public safety positions, a category that expressly includes Firefighter/Rescuer positions. MCPR § 32-3(a)(1)(A), § 32-3(f)(4)(C), and § 32-3(h)(3)(C)(ii). The Personnel Regulations provide that public safety applicants must not "have, at the time a urine specimen is given for a drug test, an illegal drug in the applicant's body above the established cutoff levels for the drug." MCPR § 32-3(a)(1)(A). The County Personnel Regulations define an "illegal drug" as "[a] controlled substance that is illegal to possess under local, state, or Federal law." MCPR § 32-2(bb). The list of illegal drugs under the employee and applicant drug use and testing regulation specifically includes "cannabinoids (marijuana)." MCPR § 32-3(h)(14)(B)(iv).

Under legislation enacted in 2014, the use or possession of less than 10 grams of marijuana has been decriminalized in Maryland. *Lewis v. State*, 470 Md. 1, 9 (2020). However, even though such use under Maryland law is a civil offense and not a crime, it is still unlawful and punishable by fine. Maryland Code Ann., Criminal Law, § 5-601 and § 5-601.1.[3] Moreover, marijuana remains an illegal drug under Federal law as a Schedule I Controlled Dangerous Substance, and its use is punishable by incarceration and monetary fines. 21 U.S.C.S. § 812(c). Marijuana is unquestionably still an illegal drug under State and Federal law and the County Personnel Regulations.

The record reflects that Appellant was properly notified that his offer of employment was contingent upon meeting the County's medical standards for employment, including a "drug/alcohol screening." CX 3. When Appellant's urine specimen produced a positive drug result he availed himself of the opportunity to have the split specimen tested. CX 4, 5 and 6. The split specimen was tested by a different independent laboratory and the positive result was confirmed. CX 7. The results were reviewed by a Fire and Rescue Occupational Medical Services doctor who certified the verified positive test and concluded that Appellant was "Not Fit For Duty." CX 4.

[2] There is no allegation or any evidence that the County's actions were based on political affiliation, failure to follow announced examination and scoring procedures, or non-merit factors.

[3] We note that Appellant has made no claim that he used marijuana for medical purposes.

Accordingly, the conditional offer of employment was then rescinded because under MCPR § 32-3(h)(19)(A), a "department director must not select a job applicant who has a verified positive drug test result."

Other than his unsupported allegation "that the tests were somehow in error," Appellant has provided no basis or proof to explain the positive test results. He simply states that the tests were somehow in error and asks for retest.[4]

Appellant alleges that he was not allowed to submit another urine specimen for retest. The County correctly argues that Board precedent holds that there is no obligation for the County to allow submission of a new specimen and a retest. MSPB Case Nos. 18-13 & 18-20 (2018).

Appellant has not carried his burden of proving that the County's decision was arbitrary and capricious, illegal, or based on nonmerit factors. The Board finds that the County acted properly and reasonably in rescinding the conditional offer of employment to Appellant based on his verified positive drug tests. Accordingly, the OHR Director's decision was not arbitrary, capricious, or otherwise unlawful.

**ORDER**

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from his nonselection for the position of Firefighter/Rescuer I (Recruit) (IRC47834).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
February 7, 2022

[4] In this regard it is notable that Appellant did not reply to the County's submission despite reminders from Board staff that he had the opportunity to do so.

# GRIEVANCES

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

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

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

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

During fiscal year 2022 the Board issued the following grievance decisions.

# CASE NO. 22-01

## FINAL DECISION

Appellant, the widow of a Police Officer, filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on July 12, 2021, challenging the Chief Administrative Officer's (CAO's) determination that her application for survivor service-connected ("line of duty") death benefits under the County Employees' Retirement System (ERS) law should be denied.[1] Appellant seeks service-connected death benefits based on the tragic October 14, 2019, suicide of the Officer, which she contends was caused by a work-related injury he suffered in 2009.

On August 25, 2021, the County filed a response to the appeal. The County's response addressed the issues raised in the appeal and included six attached exhibits. Appellant filed a reply to the County's submission on September 15, 2021 and included 17 exhibits. The Board has carefully considered and decided the appeal.

## FINDINGS OF FACT

The Officer received a serious injury as a result of work-related training in 2009. Appellant Exhibit (AX) 8; AX 12; AX 15, p. 35.[2] After extensive Workers' Compensation litigation, the County does not now dispute that the Officer's 2009 injury and illness were a result of work-related activity. As counsel for the County conceded during that litigation: "The ship sailed as far as the causal relationship of [the Officer's] illness. It was determined that somehow during that training the bacteria invaded his body and made him very ill." *Workers' Compensation Commission Hearing Transcript*, July 30, 2014, AX 11, p. 39.

In that 2009 training incident the Officer contracted a MRSA infection and suffered necrotizing fasciitis, septic shock, organ failure, and cardiac arrest. He was hospitalized for two months and underwent multiple surgical procedures. After a difficult recovery, the Officer was

[1] Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue interpretations of the County's retirement statute.

[2] Seventeen Appellant Exhibits were admitted into the record. The Appellant Exhibits are as follows:

AX 1 - Workers' Compensation Committee (WCC) Employee's Claim, 4/14/10
AX 2 - WCC form Contesting Issues, 4/22/10
AX 3 - Transcript of Maryland Workers' Compensation Commission hearing, 12/2/10
AX 4 - Montgomery County Dept. of Police Investigative Report, 8/4/09
AX 5 - Dr. G's IME Report, 3/11/10
AX 6 - WCC Award of Compensation, 12/15/10
AX 7 - WCC Request for Modification by Claimant's Attorney, 12/15/10
AX 8 - WCC Order, 12/9/11
AX 9 - Montgomery County's Petition for Judicial Review, 12/29/11
AX 10 - Circuit Court Order of Remand, 4/22/13
AX 11 - Transcript of WCC hearing, 7/30/14
AX 12 - WCC Award of Compensation, 8/8/14
AX 13 - Montgomery County's Pretrial Statement, 1/28/15
AX 14 - Circuit Court Order, 6/26/15
AX 15 - Transcript of Circuit Court hearing, 6/17/15
AX 16 - Corporal F Memorandum, 8/1/11
AX 17 - Letter from Dr. X, 1/20/20

eventually able to return to duty. County Exhibit (CX) 5.[3] Regrettably, the Officer died by suicide in his patrol car on October 14, 2019. CX 2.

Five years earlier, on August 8, 2014, the Workers Compensation Commission (WCC) had issued an award of compensation to the Officer for a permanent partial disability and disfigurement of 35% of the right shoulder, both feet (peripheral edema), hernia, cardiomyopathy, low back, sleep apnea, and disfigurement to the head, neck, abdomen, under right arm/axillary region, and buttocks. CX 1. In 2015 the Circuit Court upheld the 35% permanent partial disability award but reversed the disfigurement award. AX 14. The WCC specifically found no urologic impairment, and neither the WCC nor the Court issued an award for psychological injuries.

When Appellant filed for a service-connected death benefit the CAO was required to make a determination whether the Officer's death was service-related using the criteria to determine a service-connected disability. Montgomery County Code, §33-46, §33-56(a); *See* MSPB Case No. 11-03 (2010). The CAO asked the County Disability Review Panel (DRP) to review the Officer's medical records and provide him with information and recommendations to assist his decision making. CX 5. The DRP consisted of four medical doctors, one of whom (Dr. RH) is a psychiatrist.[4]

In its July 24, 2020, report the DRP found that the Officer's psychiatric/psychological treatment history was "sporadic" and that there was no documentation of evaluation or treatment for depression during the July 21, 2013 to March 10, 2019, time frame. CX 5, pp. 2-3. The DRP report Part F, Diagnoses/Treatment/Prognosis, does note "History of depression" and "History of marital problems pre-existing 2009 injury." CX 5, p. 57.

The DRP determined that because there was insufficient medical documentation to establish that the Officer's death by suicide was causally related to the injury at work in 2009, it could not support a finding that he was eligible for service or non-service disability retirement. CX 5, pp. 3-4. The DRP explained that the "medical records presented are insufficient to establish a nexus between the injury of 2009 and the self-inflicted gunshot wound in 2019." The DRP found:

> After reviewing the medical record in its entirety, the Panel is unable to determine whether or not [the Officer's] tragic suicide on 10/14/19 is causally related to the injury at work on 6/18/09. [The Officer] was working full duty on 10/14/19 and had been working full duty since 2011. . . The medical records presented are insufficient to establish a nexus between the injury of 2009 and the self-inflicted gunshot wound in 2019. While the Panel acknowledges the medical diagnoses detailed above, there is insufficient information to causally link the remote injury in 2009 to the tragic suicide ten years later in 2019. Due to insufficient information, the Panel opines

[3]Six County Exhibits were admitted into the record. The County Exhibits are as follows:

CX 1 - Workers' Compensation Commission Award of Compensation, 8/8/14
CX 2 - CAO's Decision Letter, 7/1/21
CX 3 - Function Code 1151, Line-of-Duty Deaths, effective date 7/15/98
CX 4 - Police Officer III Classification
CX 5 - Report of Disability Review Panel (DRP), 7/24/20
CX 6 – Officer's Combined Psychological Records

[4] In 2009 the County Council made various amendments to the disability retirement law. One of the amendments modified the qualifications and selection procedures for members of the DRP to require that the CAO appoint 4 impartial, unbiased medical doctors, including specialists, from a list provided by one or more impartial medical organizations of doctors. Montgomery County Code, §33-43(c).

> that the Applicant had not met the Montgomery County Code requirements detailed below. Thus, the member ***was not eligible for service or non-service-connected disability retirement***, and therefore, ***denial of service and non-service-connected disability retirement*** is recommended by the Panel.

CX 5, pp. 3-4 (emphasis in original).

The DRP concluded that the medical record was insufficient to meet the eligibility requirements for service-connected death benefits and recommended that the request be denied. CX 5, pp. 4, 7.

On July 1, 2021, the CAO sent a letter to Appellant explaining why he did not consider the Officer's death to be service-related under Montgomery County Code §33-46 so as to entitle Appellant to service-connected death benefits. CX 2.

The Board carefully reviewed the medical documentation and summaries in Part E of the DRP report, CX 5, pp. 11-56, and the psychological records. CX 6. The items most pertinent to our assessment of causality between the 2009 injury and the 2019 death were the following.

As part of the hiring process for employment as a police officer with the Montgomery County Police Department the Officer underwent physical and psychological evaluation. The November 3, 2005, Pre-placement medical history recorded that the Officer's "height was 73 inches [6' 1"] and weight 291 pounds (BMI 38.4, heavily overweight)." A November 2, 2005, Psychological Screening of the Officer found "no serious psychopathology, personality disorder, current substance abuse, or vulnerability to stress-related disability." CX 5, p. 11.

From June 18, 2009, after his injury, to December 13, 2010, there were various medical reports related to the 2009 injury and treatment. Those medical reports contained no discussion of psychological issues. CX 5, pp. 11-25.

A March 11, 2010, Independent Medical Evaluation (IME) (Dr. JG) indicated that the 2009 injury and "secondary problems involving the brain, legs, and sacral decubitus region" were "due to exposure that occurred at work." AX 5, p. 2; CX 5, p. 15. The IME made no mention of psychological issues.

During a September 6, 2011, Stress Management Team counseling session with CW, Ph.D., that the Officer and his wife attended, the Officer's wife "said that she is probably 'mourning' the loss of a much more engaged and active husband" and that "she misses the way things were before husband became ill" as a result of the 2009 injury. CX 6, p. 29. During the session, the Officer complained that his wife "basically does not understand what he is going through." CX 6, p. 30. Dr. CW noted that the Officer reported concerns about his marriage, depression, and sleep difficulties. CX 5, pp. 25-26; CX 6, pp. 29-30. The Officer also acknowledged that he had been struggling with his weight before the 2009 injury. CX 6, p. 29.

During a September 20, 2011, individual therapy session with Dr. CW, the Officer related that he was becoming more active and feeling less depressed, and that his depression was 3 or 4 on a scale of 1-10 with 10 being the most severe. CX 5, p. 26; CX 6, p. 31.

From December 15, 2012 to July 19, 2013, there were various medical reports for treatment and tests. None of them made mention of the Officer's possible psychological issues. CX 5, p. 26.

In a July 20, 2013, psychiatric evaluation, psychiatrist Dr. PS found that "the proximate cause of [ the Officer's] Major Depressive Disorder and being sterile was the incident on June 20,

2009." CX 6, p. 16. Dr. PS noted that there was no indication of suicidal ideations. CX 5, p. 31; CX 6, p. 10. The DRP specifically took into account Dr. PS's evaluation:

> On 7/20/13 Dr. [PS] performed a Psychiatry evaluation. Dr. [PS] diagnosed [the Officer] with Major Depression related to the injury at work on 6/18/09. At the time of the evaluation, Dr. [PS] noted that [the Officer] was not suicidal.

CX 5, p.3. The DRP further observed that between July 21, 2013, and March 10, 2019, there was no medical "documentation of evaluation and/or treatment for depression." CX 5, p. 3. Our review of the record, as discussed below, confirms the DRP's statement.

A July 25, 2013, Family Medicine IME (Dr. JL) makes no mention of psychological issues. CX 5, p. 38. An August 8, 2013 IME (JG) also makes no mention of psychological issues and suggests that the Officer's sterility and impotence were not related to the 2009 injury. CX 5, p. 41.

A June 18, 2014, Occupational Medicine IME (Dr. GK) notes the July 20, 2013, PS psychiatric evaluation, but makes no finding of impairment regarding the Officer's mental health. The IME further says that the infertility and low testosterone conditions were not related to the 2009 injury. CX 5, pp. 42-47. A July 28, 2014, follow up Occupational Medicine IME Addendum (GK) contains no finding of impairment due to mental health issues. CX 5, pp. 48-49.

March 11, 2019, Stress Management Team client information and notes by OS, Ph.D., say that the Officer and his wife related that they have had "various problems that collectively led to a decline in the quality of their marital relationship" over the previous 10 years and that the "relationship appreciably declined" after the 2009 injury. CX 6, p. 24. During the session the Officer and his wife told Dr. OS that their "marital problems surfaced at an earlier point." *Id*. The document suggests that the history of depression dated back to the 2009 injury. *Id*. Although therapy was recommended, the Officer denied suicidal ideations. CX 5, p. 51; CX 6, p. 24.

A March 21, 2019, Office note (Dr. FW) makes no mention of psychological issues. CX 5, pp. 51-52. The next month, on April 19, 2019, the Officer participated in an individual therapy session with Dr. OS. During the session the Officer told Dr. OS that he was "coming around now . . . feeling better and less irritated." CX 6, p. 25. He attributed his improvement to changes in medication and Dr. OS advised him to seek help if his depressive symptoms reemerge. *Id.* With respect to his marital issues, the Officer said that his wife was "not speaking to me. I feel lost." *Id.* The Officer and his wife were to continue couples therapy. CX 6, p. 25; CX 5, p. 52.

On May 17, 2019, a Family Medicine IME (JL) concluded that the Officer's heart condition was worsening but made no mention of psychological issues. CX 5, p. 53. An August 28, 2019, Occupational Medicine IME (GK) also makes no mention of psychological issues. CX 5, p. 56.

Six weeks later, on October 14, 2019, the Officer died by suicide. CX 5, p. 56-57.

The record before this body includes two additional documents submitted by Appellant to suggest a causal link between the 2009 injury and the Officer's mental health.

The first is an August 1, 2011, memorandum from the Officer's Acting Supervisor indicating that he "has observed tangible changes in PO3 [name] and his performance over the last few years; including but not limited to the onset of the infection that very nearly cost him his life." AX 16. The supervisor strongly urged a fitness for duty evaluation of "both physical and emotional/mental aspects." AX 16, p. 4. The emphasis of the memo is on the Officer's apparent physical limitations, but it also mentions "serious concerns regarding . . . mental, emotional, and

physical health." The memo also says there are "significant concerns regarding PO3 [name]'s officer Safety skills, physical acumen, and emotional health. These concerns are due to a pattern of self-destructive behavior and the apparent lack of concern coupled with the inability to protect himself and his fellow officers." *Id*. The memo is not an expert medical opinion or diagnosis drawing a causal link between the 2009 accident and the Officer's mental or emotional health condition in 2011, let alone 2019.

The second document is a January 20, 2020, letter from the Officer's sister, who is a licensed psychologist. Doctor X's letter gives her opinion that since the 2009 injury the Officer "suffered from obvious signs of depression." AX 17. Doctor X also stated that she told their family that he was at high risk for suicide.

## APPLICABLE CODE PROVISIONS AND REGULATIONS

**Montgomery County Code, § 33-46. Death benefits and designation of beneficiaries.**

(a) *Beneficiary death benefits of an active member whose death is not service connected*. Upon the death of a member under circumstances not covered by subsection (b), the designated beneficiary must receive a death benefit payment equal to:

(1) member contributions, including picked-up contributions, with credited interest, or a spouse's, or domestic partner's, and children's benefit as provided in subsection (e); plus

(2) 50 percent of average final earnings if the member was a member of the employees' retirement system of the state of Maryland as of August 15, 1965, and became a member of the employees' retirement system of the County on or before December 31, 1966, or such later agency entrance date without a break in service, and who is not on leave without pay except for authorized leave without pay for illness.

(b) *Spouse's, or domestic partner's, and children's benefits of a member whose death is service connected*.

* * *

(2) The Chief Administrative Officer must pay death benefits to the spouse or domestic partner and child of a Group F or G member as if the member had been receiving a service-connected disability pension on the date of the member's death and had selected a joint and survivor pension option of 100 percent of the amount payable to the member, if:

(A) the Group F or G member died while employed by the County; and

(B) the employing department, a beneficiary, or another person submits satisfactory proof to the Chief Administrative Officer that the member's death:

(i) resulted from injuries the employee received in the line of duty or was directly attributable to the inherent hazards of the duties the employee performed; and

(ii) was not due to the employee's willful negligence.

**Montgomery County Code, § 33-56. Interpretations.**

> (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any . . . 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.
>
> * * *
>
> (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.

## ISSUE

Is the Chief Administrative Officer's determination that the Officer's death was not service-connected correct?

## ANALYSIS AND CONCLUSIONS

Montgomery County Code (MCC) § 33-46(b) provides that a spouse is entitled to death benefits as if the member had been receiving a service-connected disability pension on the date of the member's death if the member's death (i) resulted from injuries received in the line of duty *or* was directly attributable to the inherent hazards of the job; *and* (ii) was not due to the employee's willful negligence. It is undisputed that Appellant is eligible for *non-service*-connected death benefits under MCC § 33-46(a).

Appellant has the burden to prove by a preponderance of the evidence that the Officer's death was the result of injuries received in the line of duty or directly attributable to the inherent nature of the job and that it was not due to his willful negligence. *See* MSPB Case No. 14-05 (2013); MSPB Case No. 91-27 (1993). The County contends that under Maryland tort law suicide is a superseding or intervening act that breaks the chain of causation between the 2009 work related injury and the 2019 death. Appellant correctly argues that the Board need not look to wrongful death tort law cases as this appeal must be resolved by interpretation of the County death benefits statute.

Thus, the Board must determine if the medical evidence supports a finding that the Officer's 2019 death resulted from the injuries he received 10 years before in the training accident. "When there is a possible intervening cause, or death occurs substantially after the injury . . . the question of causal relationship between the injury and the death is largely factual." 1 Maryland Workers' Compensation Handbook, § 12.02 (2021). If the Board finds a causal relationship between the 2009 injury and the Officer's 2019 death the Board must then determine whether he was willfully negligent.

The County ERS statute is similar to other federal, state, and local laws utilizing the same standard.[5] Cases interpreting those similar statutes, as well as the Workers' Compensation law

[5] *See, e.g.,* Md. Code Ann., State Pers. & Pens. § 29-203(b)(1): "This subsection applies only to an individual who dies while employed as a member of the Law Enforcement Officers' Pension System:
(i) without willful negligence by the member; and
(ii) with death arising out of or in the course of the actual performance of duty."

(which has an exclusion for willful or intentional behavior),[6] therefore provide useful guidance for the Board's analysis.

***Did the Suicide Take Place While the Officer Was Acting in the Line of Duty?***

The County argues that the self-inflicted gunshot wound did not occur while the Officer was acting in the line of duty. An injury is in the line of duty if it occurs in the actual performance of a duty or if it arose out of or in the course of the actual performance of a duty. Injury caused by any other means is not in the line of duty. *Fire & Police Employees' Retirement System of Baltimore v. Middleton*, 192 Md. App. 354, 360 (2010), *citing Marsheck v. Board of Trustees of the Fire & Police Employees' Ret. Sys*., 358 Md. 393, 410 (2000).

The County cites a State law that, while not controlling, provides guidance as to when a police officer is acting in the line of duty. Md. Code Ann., Pub. Safety § 3-507(a)(2) ("'Death in the line of duty' means the death of a law enforcement officer occurring while the officer is acting in the officer's official capacity while on duty or while the officer is off duty but performing activities that are within the scope of the officer's official duties.").

Appellant does not appear to contend that the fatal injuries the Officer received when he shot himself occurred while he was acting in the line of duty. Instead, Appellant argues that suicide is an inherent hazard of police work. That standard would not require that the death occur while the officer was acting in the line of duty.

The Board finds that when the Officer died by suicide he was not engaging in police work or performing any of his official duties. While he was in his patrol car at the time, the death by suicide certainly was not authorized or in furtherance of any County or police business. Under the facts of this case, we conclude that the Officer's death by suicide was not an act that occurred in the line of duty. This finding does not, of course, address whether the suicide was a *result* of an injury received in the line of duty in 2009.

***Directly Attributable to the Inherent Hazards of the Duties***

In addition to claiming that the 2019 suicide was a result of the 2009 injuries received in the line of duty Appellant suggests that law enforcement is "an extremely high stress field" and suicide is an inherent hazard of police work and thus "directly attributable to the inherent hazards of the duties the employee performed." MCC § 33-46(b)(2)(B)(i). Appellant cites to studies finding a disturbingly high suicide rate among first responders, including, police officers but admits that there is no authority for the proposition that suicide is directly attributable to the inherent hazards of the job.

Whether or not there is medical evidence to support Appellant's position that the Officer's death by suicide resulted from the 2009 injury, for suicide to be considered "directly attributable to the inherent hazards" of police work would require the Board to conclude that suicide is essentially an occupational disease. The MSPB has interpreted the phrase "directly attributable to the inherent hazards of the duties the employee performed" in the County Code by looking to the Maryland Workers' Compensation Act for guidance. MSPB Case Nos. 11-03 & 11-04 (2010) (Relying on the presumption in Md. Labor and Employment Article, § 9-503(a), to find that a firefighter's death from heart disease was directly attributable to the inherent hazards of the duties he performed).

[6] Md. Code Ann., Labor & Employment Article, § 9-506.

Unlike cardiac disease, the Workers' Compensation Act does not expressly provide a presumption for stress related conditions arising out of police work. The Act "requires proof of the existence of a "disease" *plus* evidence that the risk of the disease is *due* to the nature of the employment in which the hazards of the disease *actually exist, and* that it is reasonable that the employment and not outside forces caused the disease." (emphasis in original). 1 Maryland Workers' Compensation Handbook § 8.13. *See* Md. Code Ann., Lab. & Empl. § 9-502.

Appellant has not provided sufficient medical evidence, similar to that expected in cases involving physical injury, that extreme stress amounting to a mental health condition exists as a hazard of police work and that the "disease" was contracted because of the hazards of the employment. *King v. Board of Educ*., 354 Md. 369, 381 (1999) (transportation assistant job found not to have inherent hazards of mental illness); *Means v. Baltimore County*, 344 Md. 661, 670 (1997) (factual determination required for claim that Post-Traumatic Stress Disorder is related to employment as paramedic; there must be sufficient proof to establish that the mental condition was caused by the employment).

***Was there Willful Negligence?***

The County argues that even if the Board concludes that the Officer's suicide was a result of his 2009 injury and thus could be considered in the line of duty, his wife is not entitled to service-connected death benefits because his suicide was "willful negligence."[7] We reject the County's argument.

In *Thomas v. State Retirement & Pension System*, 420 Md. 45, 55-56 (2011), the Court of Appeals interpreted the phrase "willful negligence" in the context of a State disability retirement statute using language similar to the County provision at issue. Under Md. Code Ann., State Personnel & Pensions Article, § 29-111(b)(1), to qualify for special disability benefits a Maryland State Police retiree must be "totally and permanently incapacitated for duty arising out of or in the course of the actual performance of duty without willful negligence by the member."

In its analysis of Maryland law, the *Thomas* court expressly adopted the North Carolina Supreme Court's definition of "willful negligence," which the *Thomas* court further found was consistent with New Jersey's statutory definition. 420 Md. at 55.[8] The court quoted the North Carolina Supreme Court's decision in *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (N.C. 1929), where that court stated that "'willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, . . . or which is imposed on the person by operation of law.'" *Id*. at 37-38. *See* MSPB Case No. 96-04 (1996), adopting the construction of "willful neglect" in *Singer Co., Link Simulation Sys. Div. v. Balt. Gas & Elec. Co*.,

[7] As discussed above, the Montgomery County Code, § 33-46(b)(2)(B)(ii), requires that for a service-connected death benefit the employee's death must not be due to the employee's willful negligence.

[8] The court said, at 420 Md. at 55:

> We agree with and adopt the above quoted definition of willful negligence, which is consistent with New Jersey's statutory definition of that term. Like Maryland, New Jersey's police officers and firefighters are eligible to receive "accidental disability retirement" benefits only if their disabilities were not the result of their willful negligence.

79 Md. App. 461, 479-80 (1989) (the phrase "'willful neglect'" suggests intentional, conscious, or known negligence - a knowing disregard of a plain or manifest duty.").[9]

The County argues that under Maryland law suicide is a deliberate, intentional, and independent superseding or intervening act, relying on *Sindler v. Litman*, 166 Md. App. 90, 112-13 (2005), a wrongful death tort case. Appellant contends that this is not a tort case but rather a matter of statutory construction. Appellant has the better argument. Specifically, MCC § 33-46(b)(2)(B) provides that Appellant is entitled to service-connected death benefits if the Officer's death resulted from injuries received in the line of duty and was not due to his willful negligence. Nothing in the statute suggests that if there is causation, *i.e*., the suicide is a result of the 2009 injury, that a principle of tort law breaks that chain of causation.

The tort law "suicide rule" in *Sindler* is rooted in the concept that suicide is so extraordinary or unexpected that it is not reasonably foreseeable as a matter of law. This notion that because suicide is an unforeseeable consequence of a party's negligence, and thus a superseding cause of death, is logically inapplicable to this case. Neither the County's Employee's Retirement System law nor the Workers' Compensation Act require a determination that the County as an employer is a tortfeasor responsible for the Officer's death. Instead, they are remedial statutes designed to provide compensation and benefits under statutorily established circumstances. Essentially both are insurance.[10]

The "suicide rule" espoused in *Sindler* is also inconsistent with the Workers' Compensation Act, which the MSPB has looked to for guidance. "Self-inflicted injuries such as suicides may form the basis for a compensable claim when it has been proven that the self-destructive act flowed as a natural consequence of an initially compensable injury." 1 *Maryland Workers' Compensation Handbook* § 6.05 (2020). *See Young v. Hartford Accident & Indemnity Co*., 303 Md. 182, 191 (1985) ("A suicide attempt is not always an intervening cause which breaks the nexus between the accidental injury and the injury suffered in the suicide attempt."); *Baber v. John C. Knipp & Son*s, 164 Md. 55 (1933) (compensation possible if claimant's mental derangement and subsequent suicide were causally related to an industrial injury); *Baltimore & Ohio R.R. Co. v. Brooks*, 158 Md. 149 (1930) (recognizing compensability when there is sufficient evidence that emotional disorder and subsequent suicide were causally related to an initial accidental injury).

Appellant persuasively urges the Board to use a "chain of causation" test to determine if the Officer's death was the result of the 2009 injury and not willful negligence. Although there is no Maryland case directly on point, there are cases which appear to support the chain of causation test. *See, e.g., Baber v. John C. Knipp & Sons* 164 Md 55 (1933) (chain-of-causation test favorably quoted but not specifically adopted). And, as noted above, the Court of Appeals has adopted New Jersey and North Carolina interpretations of "willful negligence" in the context of state disability statutes. *See Kahle v. Plochman, Inc*., 85 N.J. 539, 546 (1981) (death by suicide 10 years after injury was not intentional and was compensable under the workers' compensation law where there was "extreme pain and despair, of such severity as to override normal rational judgment."); *Petty v. Associated Transp., Inc*., 276 N.C. 417, 428 (1970) ("an employee who becomes mentally

[9] For a recent New Jersey court's explanation of its statute, *see In re N.J.A.C. 17:2-6.5*, 468 N.J. Super. 229, 242 (Super. Ct. App. Div. 2021) ("willful negligence" consists of conduct which manifests a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result).

[10] *Cf., Jutzi-Johnson v. United States*, 263 F.3d 753, 756 (7th Cir. 2001).

deranged and deprived of normal judgment as the result of a compensable accident and commits suicide in consequence does not act wilfully. . .").

As we have explained above, the "suicide rule" espoused in *Sindler* is not applicable in this appeal. The Officer's death by suicide did not by operation of law constitute a superseding or intervening act, nor is there evidence that it was willful negligence. We review this appeal using the chain of causation test.

***Did the 2019 Suicide Result From the 2009 Injury?***

The 2009 training incident injuries were in the line of duty. The WCC determined that the 2009 incident was a work-related injury. The issue now is whether the Officer's 2019 death by suicide "resulted from" the 2009 line of duty injury.

The chain of causation rule advocated by Appellant requires her to show that a preponderance of the evidence would support a finding that there was an unbroken chain of causation between the training injury suffered by the Officer and his death by suicide 10 years later. *See Kahle v. Plochman, Inc*., 85 N.J. at 548 ("Petitioner must prove by a preponderance of the expert medical evidence that there was an unbroken chain of causation between the compensable injury, the employee's disturbance of mind, and her ultimate suicide.").

After reviewing the medical documentation, the four medical experts serving on the DRP found that the medical evidence was insufficient to support a finding that the 2019 suicide resulted from the injuries that occurred 10 years earlier in 2009. CX 5, pp. 2-4.

Some of the medical records in the DRP's report included findings of depression associated with the 2009 injury. For example, Dr. CW noted in September 2011 that the Officer was having concerns about his marriage, depression, and sleep difficulties related to the 2009 injury. CX 5, pp. 25-26; CX 6, pp. 29-30. The DRP acknowledged that in 2013 Dr. PS diagnosed the Officer with depression that was related to the 2009 injury. CX 5, p. 3. But the DRP deemed it notable that during the nearly six years between Dr. PS's 2013 evaluation and March 10, 2019, there was no medical "documentation of evaluation and/or treatment for depression." *Id*.

The DRP also pointed to medical evidence that other issues could have been the cause of the Officer's depression. In fact, the depression was never found to include suicidal ideation or behavior by a medical professional treating or evaluating the Officer. In addition, the most recent evaluation addressed that issue. It pointed to the fact that on March 11, 2019, Dr. OS discussed the marital problems of Appellant and the Officer which had surfaced before the 2009 injury, but became worse after the 2009 injury, as well as the history of depression following the 2009 injury. But Dr. OS also specifically noted that the Officer was not suicidal. CX 6, p. 24. In fact, after an April 19, 2019 session Dr. OS stated that the Officer was "feeling better and less irritated" but still concerned because his wife was not communicating with him and had become more distant. There was also discussion of the Officer's weight problem. CX 6, p. 25.

Although the record reflects that the Officer had suffered from depression, the severity of his condition is not clear. And while the 2009 injury was undeniably and understandably a factor in that condition, there are also other reasons found in the medical record for his depression. For example, he was morbidly obese and had long standing marital problems. CX 5, pp. 11, 51, 57; CX 6, pp. 10, 29. Those issues were aggravated by the 2009 injury, but the record also reflects that

he struggled with his weight[11] and marital problems before the 2009 injury, and that he was only evaluated and treated for depression sporadically for many years. CX 5, p. 2.

Although a determination of a causal connection between the 2009 injury and the Officer's 2019 death by suicide is factual in nature, a proper evaluation requires that the Board consider expert medical opinions. It is true that expert medical testimony is not always required where a causal connection is clearly apparent. However, in this case death occurred substantially after the injury, there was evidence of possible intervening causes, and there are not consistent indications in the voluminous medical record linking depression of the kind that would be the basis for a suicide to the earlier injury. We thus conclude that the causal link between the 2009 injury and the 2019 suicide is not clearly apparent, thus making medical testimony necessary to a finding of a causal link. *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 368 (2013) (where a causal connection between physical injuries and psychological harm "is neither clearly apparent, nor within the 'common experience, knowledge, or observation of laymen'. . . expert testimony is necessary"), *citing Vance v. Vance*, 286 Md. 490, 503 (1979) ("in instances where there is a significant temporal lapse between the disability and the negligent act . . . proof of causation must be by expert testimony"). As demonstrated above, clear medical evidence to support such a finding is lacking in this case.

While there is evidence that the Officer suffered from depression as a result of the 2009 injury, there is insufficient expert medical evidence that his mental state in 2019 was due to the 2009 injury, or that at the time of the suicide his mental disorder was of such severity as to override rational judgment. This body cannot find information which would cause it to disagree with the ultimate findings of medical professionals who reviewed the complete medical record.

The additional evidence in the record provided by Appellant does not support overturning the CAO's decision which was based on the evaluation of the DRP. Although Doctor X, the Officer's sister, suggested a connection between the 2009 injury and the Officer's 2019 death by suicide, even she had to acknowledge the limited evidence of his depression: "I strongly believe that [the Officer] likely experienced far more physical, cognitive, and emotional problems than we knew about and that his undiagnosed, untreated depression ultimately killed him." AX 17. Notwithstanding her personal insights, the views concerning causation expressed in Doctor X's letter are plainly speculative and cannot be considered as expert medical opinion. Moreover, Doctor X's views must be given less weight than those of the doctors who evaluated and treated the Officer and upon whom the DRP relied because, as she acknowledges, "I obviously cannot provide a completely objective clinical opinion" concerning her brother. AX 17.

Given the length of time between the injury and the suicide, and the fact that the Officer had returned to duty full time some eight years before his suicide, expert medical opinions of a causal connection between the 2009 injury and the suicide are essential to support a finding that there is an entitlement to the benefits requested. The medical evidence that does exist does not support a finding of a causal connection between the 2009 injury and the 2019 suicide. Moreover, the record lacks evidence that the Officer suffered from severe depression, was in constant significant or unbearable pain, or had suicidal ideation. It is also significant that there is little indication that the Officer sought treatment for depression, other than the fact that he participated in marriage counseling and an occasional individual therapy session. Significantly, neither the

[11] For example, Dr. CW noted that the Officer admitted that he had been struggling with his weight before the 2009 injury. CX 6, p. 29.

Workers' Compensation Commission nor the Circuit Court made a finding that there was a compensable psychiatric injury as a result of the 2009 infection.

A finding that the Officer's death by suicide was in the line of duty because it was a result of the 2009 injury would require that the Board reject the expert medical findings of the DRP and conclude that a preponderance of the medical evidence supports the causal link ("resulted from injuries . . . received in the line of duty") between the 2009 injury and the 2019 suicide. We are unable to reach that conclusion and must find that the preponderance of medical evidence does not support a finding required by law that there is a causal connection between the 2009 injury and the Officer's 2019 death by suicide.

We thus find that the CAO and the DRP appropriately found insufficient medical evidence that the Officer's tragic suicide was a result of his on-the-job injury ten years before.

**ORDER**

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** the appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
March 10, 2022

# CASE NO. 22-07

**FINAL DECISION**

Appellant, an Assistant Chief with the Montgomery County Fire and Rescue Service (MCFRS), filed a grievance appeal with the Merit System Protection Board (Board or MSPB) on September 22, 2021, challenging the September 2, 2021, decision of the County's Chief Labor Relations Officer dismissing his COVID-19 differential pay appeal as untimely.

The County submitted a response to the appeals on October 25, 2021. (County Response). Appellant filed a response to the County's submission November 16, 2021. (Appellant Response).

The Appeal was reviewed and considered by the Board.

**FINDINGS OF FACT**

On March 5, 2020, the Governor issued a proclamation declaring a state of emergency and catastrophic health emergency in response to the COVID-19 pandemic. Appellant's Exhibit (AX) F, pp. 4, 31, 35. The Governor's emergency declaration was renewed on March 17th and numerous times thereafter as the devastating pandemic continued. However, the Montgomery County Executive did not officially declare a state of emergency. *Id.*

On April 3, 2020, the County entered into agreements with three unions, including the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), providing for COVID-19 differential compensation. County

Exhibit (CX) A. *See* CX B. The agreements provided for additional COVID-19 compensation for bargaining unit members retroactive to March 29, 2020. The additional compensation was to be paid for the duration of the declared state of emergency related to COVID-19. CX A.

The Agreement with IAFF provided that hours worked from March 29, 2020, were to be compensated at the rate of $10 per hour, except for those hours teleworked. CX A. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX B.

Appellant is an MCFRS management level employee at the rank of Assistant Chief and not a member of the IAFF bargaining unit covered by the collective bargaining agreement or the April 3, 2020, agreement concerning COVID-19 differential pay. AX A; CX A. On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the Management Leadership Service (MLS), the Police Leadership Service (PLS), and the fire rescue services management. AX K; CX D, pp. 10 & 22. The timekeeping guidance memorandum was revised on April 11, 2020.AX L; CX D, pp. 12-23.

Eighty-three non-bargaining unit public safety management employees, including 23 fire rescue services management employees, filed grievances seeking COVID-19 differential pay in 2020. AX 1. After their grievances were denied at Steps 1 and 2 of the grievance procedure the 23 MCFRS employees filed appeals with the MSPB between late January and early March 2021. On July 19, 2021, settlements were reached between those appellants and the County. AX F.

Appellant in this case filed his grievance on August 23, 2021, 35 days after the July 19, 2021, settlement agreements. Appellant's Response, p. 3; AX G; CX C. On his grievance form Appellant asserted that he had recently learned of grievances filed by other MCFRS managers and claimed that he too should receive the same COVID-19 differential pay as IAFF bargaining unit members and other MCFRS employees had. CX C.

In his Step 1 grievance response the Fire Chief indicated that he agreed that Appellant should receive the COVID-19 differential pay but stated that he did not have the authority to grant Appellant's requested relief due to written direction given by the Chief Administrative Officer (CAO). AX E.

## APPLICABLE LAW AND POLICY

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

**§34-9. Grievance procedure.**

***(a) Time limit for filing a grievance***.

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

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

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

. . .

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

***(b) Technical and procedural review of grievances.***

. . .

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

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

(B) was timely filed; and

(C) otherwise complies with this section.

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

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

. . .

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

## ISSUE

Did Appellant file a timely grievance? If so, is he entitled to COVID-19 differential pay?

## ANALYSIS AND CONCLUSIONS

The timeliness of the grievance filed by Appellant on August 23, 2021, is the sole issue of this appeal. There was no consideration or determination by the CAO or the Chief Labor Relations Officer on the merits of Appellant's grievance.[1]

COVID-19 front facing differential pay began March 29, 2020 and ended on February 14, 2021. Starting March 26, 2020, OHR distributed a timekeeping guidance memorandum. AX J. The

[1] Although MCPR §34-1(b) defines a CAO's designee as "an OLR staff member or other individual designated by the CAO," the decision issued by the OLR Chief does not state that the OLR Chief was acting as the CAO's Step 2 designee. Under the personnel regulations, direct appeals to the MSPB from OLR Chief decisions are limited to grievability (MCPR §34-6(b)) and harassment or retaliation (MCPR §34-7). Such direct appeals do not expressly include the OLR Chief's timeliness determination. *But see* MSPB Case No. 07-01 (2006). We also note that a decision of the OLR Chief regarding denial of official time to prepare a grievance is "final", suggesting that if the MCPR provisions were supposed to include timeliness determinations by the OLR Chief as final the MCPR would say so. MCPR §34-3(g). Nevertheless, the MSPB will permit the OLR Chief's decision to be appealable to the Board under these circumstances. The OLR Chief's decision told Appellant that his next step was to appeal to the MSPB. We have no interest in penalizing Appellant for following those instructions. *See* MSPB Case No. 17-16 (2017) ("We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.").

guidance memorandum was sent to County management employees every two weeks and contained language specifically stating that MCFRS management employees were not eligible for COVID front facing pay. CX D; AX L.

As an Assistant Chief Appellant is a high-level MCFRS manager. His duty assignment is with the Division of Human Resources in the MCFRS Office of Administrative Services. Appellant's Response, p. 3. Appellant argues that the April 11, 2020, timekeeping guidance "was not acknowledged by me or specifically sent to MCFRS Managers as notice." Appellant's Response, p. 3. Appellant's carefully worded statement does not, however, assert that he was unaware of the memorandum in April 2020.

However, it makes no difference whether Appellant received the timekeeping guidance memorandum on April 11, 2020. We do not believe that as an Assistant Chief with the MCFRS Division of Human Resources Appellant was oblivious to his lack of COVID-19 differential pay, or that bargaining unit employees were receiving the additional pay, for well over a year. Given the number of MCFRS managers who were aware of the differential pay program in 2020 and filed grievances, and the fact that Appellant was an Assistant Chief in MCFRS Human Resources, it strains credulity to believe that from April 2020 through February 2021 Appellant knew nothing of the timekeeping guidance or was unaware that he was not receiving COVID-19 differential pay while bargaining unit employees were receiving the additional pay. We find that well before the program ended in February 2021 Appellant knew, or should have known, that bargaining unit employees were receiving COVID-19 differential pay and that he was not. Appellant filed his grievance on August 23, 2021, over six (6) months after the COVID-19 differential pay program had already ended, significantly more than 30 days after Appellant knew or should have known of the basis for a grievance.

Appellant also asserts that he "was not made aware until August of 2021, that the County entered into some settlement discussions" when he "discovered some pay inequity had occurred when a request for a supplemental [appropriation] was submitted by County Executive" on July 29, 2021. Appellant's Response, p. 4; AX F. Appellant's contention appears to be that the settlements with those MCFRS managers who filed grievances in 2020 became a triggering event for the grievance procedure's time limits. Appellant appears to base this contention on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy**." (emphasis added). However, longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. Settlement of an appeal by one group of employees and not including other employees who were not parties to the litigation in the settlement does not constitute a change in policy. Nor can it be considered a "grievable act." For example, in MSPB Case No. 01-07 (2001) the Board held:

> As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use as knowledge of another employee's grievance an alternate operating date from which the time to file a grievance runs. (*See* MSPB Case No. 89-02, the Appeal of . . . ; MSPB Case No. 97-11, the Appeal of . . . et. al; MSPB Case No. 98-04, the Appeal of . . . ; MSPB Case No. 99-21, the Appeal of . . . ; and MSPB Case No. 00-05, the Appeal

> of . . . In all of these cases, the Board ruled that the complaints were not timely filed.

*See* MSPB Case No. 22-13 (2022). *See also* MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Furthermore, this Board has held that settlement agreements involving other employees may not be used even in an analysis of whether employees in similar positions have received comparable discipline for comparable behavior. MSPB Case No. 19-16 (2019); MSPB Case No. 18-06 (2019). Underlying those decisions was a respect for the public policy in favor of compromise and settlement, and a recognition that not taking into account settlements as part of a consideration of otherwise similar situations is necessary to avoid a chilling effect on the settlement of disputes. MSPB Case No. 22-13 (2022). *See Bergh v. Department of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir.) *cert. denied*, 479 U.S. 950 (1986) (rejecting a disparate treatment claim based on an agency's settlement with other employees).

That policy is similarly applicable to grievances. MSPB Case No. 22-13 (2022). Indeed, the County and the settling MCFRS managers expressly agreed that "the terms of this Agreement do not constitute a precedent or practice." AX 1, p. 5. *See* Advisory Committee Notes to Fed Rules Evid R 408 ("it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. [t]his . . . situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.").[2]

Nor may Appellant claim that there is a continuing violation. It is true that a "time limitation may be waived . . . if the otherwise untimely allegation is part of a 'continuing violation,' *i.e.*, a related series of acts, at least one of which occurred within the limitations period." MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February 2021. Appellant's grievance was filed on August 23, 2021, six months after the end of the COVID-19 differential pay policy. Accordingly, we must find that the grievance does not allege and meet the standard for a continuing violation. MSPB Case No. 22-13 (2022). *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

Finally, we note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that "[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process." §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 ("The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it."). However, the record indicates that unlike the MCFRS managers who filed their grievances in 2020, before the end of the program, and then settled their grievance appeals and received COVID-19 differential pay in 2021, Appellant simply did not file a timely grievance. There is no evidence in the record suggesting that

[2] Maryland Rule 5-408 is comparable to Federal Rule of Evidence 408.

the MCFRS managers who filed grievances in 2020 and settled with the County had access to different or better information about the COVID-19 differential pay issue. In essence, by not filing a grievance until six months after the COVID-19 differential pay program ended Appellant waived his rights to claim COVID-19 pay while many of his MCFRS management colleagues chose to grieve and assert their rights while the program was still in effect. Appellant has not provided any justification for late filing that would constitute "good cause" for the Board to exercise its authority to extend the time limit for the initial filing of a grievance.

**ORDER**

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 22-07 be and hereby is **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
April 18, 2022

# CASE NO. 22-12

**FINAL DECISION**

Appellant, a Battalion Chief with the Montgomery County Fire and Rescue Service (MCFRS), filed a grievance appeal with the Merit System Protection Board (Board or MSPB) on October 4, 2021,[1] challenging the September 16, 2021, decision of the County's Chief Labor Relations Officer (CLRO) dismissing his COVID-19 differential pay appeal as untimely.[2]

The County submitted a response to the appeal on November 3, 2021. (County Response). Appellant filed a response to the County's submission on December 9, 2021. (Appellant Response).

The Appeal was reviewed and considered by the Board.

**FINDINGS OF FACT**

On April 3, 2020, the County entered into agreements with three unions, including the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), providing for COVID-19 differential compensation. County Exhibit (CX) A. The agreements provided for additional COVID-19 compensation for bargaining unit members retroactive to March 29, 2020. The additional compensation was to be paid for the

[1] The appeal was submitted electronically on Thursday, September 30, 2021, at 5:22 p.m., a time when the Merit System Protection Board (MSPB or Board) office was not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

[2] Although Appellant filed a grievance on August 24, 2021, the CLRO's decision was erroneously dated August 23, 2021. The decision was signed September 3, 2021, but the County's Response indicates that it was sent to Appellant on September 16th.

duration of the state of emergency related to COVID-19 that was declared by the State of Maryland. CX A.

The Agreement with IAFF provided that hours worked from March 29, 2020, were to be compensated at the rate of $10 per hour, except for those hours teleworked. CX A. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX B.

Appellant is an MCFRS management level employee at the rank of Battalion Chief and not a member of the IAFF bargaining unit covered by the collective bargaining agreement or the April 3, 2020, agreement concerning COVID-19 differential pay. CX A. On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the Management Leadership Service (MLS), the Police Leadership Service (PLS), and the fire rescue services management. CX D, pp. 10 & 22. The timekeeping guidance memorandum was revised on April 11, 2020. CX D, pp. 12-23.

Appellant's August 24, 2021, grievance form asserts that he had recently learned of grievances filed by other MCFRS managers and claims that he too should receive the same COVID-19 differential pay as IAFF bargaining unit members. CX C, p. 4, ("I recently became aware that many of my colleagues filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. I am an operational Battalion Chief for MCFRS, and I believe that I am entitled to receive Front-Facing pay just as the IAFF members who work in the same capacity have."). Appellant's Response also suggests that he is entitled to the COVID-19 differential pay because volunteer fire chiefs have received additional pay.

## APPLICABLE LAW AND POLICY

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

> **§34-9. Grievance procedure.**
>
> ***(a) Time limit for filing a grievance***.
>
> (1) A grievance may be dismissed by the OLR Chief if it is not filed within 30 calendar days after:
>
> (A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; or
>
> (B) the date on which the employee received notice, if notice of an action is specifically required by these Regulations.
>
> . . .
>
> (6) The OLR Chief may extend the time limits stated in the grievance procedure for compelling reasons. The OLR Chief must give the parties prompt notice of an extension.
>
> ***(b) Technical and procedural review of grievances.***
>
> . . .
>
> (5) The OLR Chief must review the grievance and decide if the grievance:

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

(B) was timely filed; and

(C) otherwise complies with this section.

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

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

. . .

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

## ISSUE

Did Appellant file a timely grievance? If so, is he entitled to COVID-19 differential pay?

## ANALYSIS AND CONCLUSIONS

The timeliness of the grievance filed by Appellant on August 24, 2021, is the sole issue of this appeal. There was no consideration or determination by the CAO or the Chief Labor Relations Officer on the merits of Appellant's grievance.[3]

COVID-19 front facing differential pay began March 29, 2020 and ended on February 14, 2021. The guidance memorandum sent to County management employees contained language specifically stating that MCFRS management employees were not eligible for COVID front facing pay. CX D. As a Battalion Chief Appellant is a high-level MCFRS manager, and he does not assert that he was unaware of the guidance memoranda in April 2020.

We find that well before the program ended in February 2021 Appellant knew, or should have known, that bargaining unit employees were receiving COVID-19 differential pay and that he was not. Appellant filed his grievance on August 24, 2021, over six (6) months after the COVID-19 differential pay program had already ended, significantly more than 30 days after Appellant knew or should have known of the basis for a grievance.

Appellant's grievance form does state that he "recently" became aware that other employees had filed grievances. His Appeal Form requests that he be provided with the same relief

[3] Although MCPR §34-1(b) defines a CAO's designee as "an OLR staff member or other individual designated by the CAO," the decision issued by the OLR Chief does not state that the OLR Chief was acting as the CAO's Step 2 designee. Under the personnel regulations, direct appeals to the MSPB from OLR Chief decisions are limited to grievability (MCPR §34-6(b)) and harassment or retaliation (MCPR §34-7). Such direct appeals do not expressly include the OLR Chief's timeliness determination. *But see* MSPB Case No. 07-01 (2006). We also note that a decision of the OLR Chief regarding denial of official time to prepare a grievance is "final", suggesting that if the MCPR provisions were supposed to include timeliness determinations by the OLR Chief as final the MCPR would say so. MCPR §34-3(g). Nevertheless, the MSPB will permit the OLR Chief's decision to be appealable to the Board under these circumstances. The OLR Chief's decision told Appellant that his next step was to appeal to the MSPB. We have no interest in penalizing Appellant for following those instructions. *See* MSPB Case No. 17-16 (2017) ("We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.").

as other employees who filed earlier grievances and settled with the County. Appellant appears to base this contention on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy**." (emphasis added). However, longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. Settlement of an appeal by one group of employees and not including other employees who were not parties to the litigation in the settlement does not constitute a change in policy. Nor can it be considered a "grievable act." For example, in MSPB Case No. 01-07 (2001) the Board held:

> As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use as knowledge of another employee's grievance an alternate operating date from which the time to file a grievance runs. (*See* MSPB Case No. 89-02, the Appeal of . . . ; MSPB Case No. 97-11, the Appeal of . . . et. al; MSPB Case No. 98-04, the Appeal of . . . ; MSPB Case No. 99-21, the Appeal of . . . ; and MSPB Case No. 00-05, the Appeal of . . . In all of these cases, the Board ruled that the complaints were not timely filed.

*See* MSPB Case No. 22-13 (2022). *See also* MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Furthermore, this Board has held that settlement agreements involving other employees may not be used even in an analysis of whether employees in similar positions have received comparable discipline for comparable behavior. MSPB Case No. 19-16 (2019); MSPB Case No. 18-06 (2019). Underlying those decisions was a respect for the public policy in favor of compromise and settlement, and a recognition that not taking into account settlements as part of a consideration of otherwise similar situations is necessary to avoid a chilling effect on the settlement of disputes. MSPB Case No. 22-13 (2022). *See Bergh v. Department of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir.) *cert. denied*, 479 U.S. 950 (1986) (rejecting a disparate treatment claim based on an agency's settlement with other employees). That policy is similarly applicable to grievances. MSPB Case No. 22-13 (2022).

Nor may Appellant claim that there is a continuing violation. It is true that a "time limitation may be waived . . . if the otherwise untimely allegation is part of a 'continuing violation,' *i.e.*, a related series of acts, at least one of which occurred within the limitations period." MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February 2021. Appellant's grievance was filed on August 24, 2021, six months after the end of the COVID-19 differential pay policy. Accordingly, we must find that the grievance does not allege and meet the standard for a continuing violation. MSPB Case No. 22-13 (2022). *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

Finally, we note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that "[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process." §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 ("The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it."). However, the record indicates that unlike the MCFRS managers who filed their grievances in 2020, before the end of the program, and then settled their grievance appeals and received COVID-19 differential pay in 2021, Appellant simply did not file a timely grievance. There is no evidence in the record suggesting that the MCFRS managers who filed grievances in 2020 and settled with the County had access to different or better information about the COVID-19 differential pay issue. In essence, by not filing a timely grievance Appellant waived his rights to claim COVID-19 pay while many of his MCFRS management colleagues chose to grieve and assert their rights while the program was still in effect. Appellant has not provided any justification for late filing that would constitute "good cause" for the Board to exercise its authority to extend the time limit for the initial filing of a grievance.

**ORDER**

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 22-12 be and hereby is **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
April 18, 2022

# CASE NO. 22-13

**FINAL DECISION**

Appellants are management employees of the Montgomery County Fire and Rescue Service (MCFRS). They have filed grievance appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County's Chief Labor Relations Officer dismissing their COVID-19 differential pay appeals as untimely.[1] By Order dated October 4, 2021, the Board consolidated MSPB Case Nos. 22-04, 22-06, 22-09, 22-10, and 22-11 and required that the consolidated appeals be docketed and referenced as MSPB Case No. 22-13.[2]

The County submitted a response to the appeals on November 1, 2021. (County Response). Appellants filed a response to the County's submission on December 20, 2021. (Appellants' Response). The Appeal was reviewed and considered by the Board.

[1] COVID-19 differential pay was available to certain County employees from March 2020 until February 14, 2021. "Front facing" work was that which involved physical interaction with the public that could not be performed with appropriate social distancing.

[2] The Appellants are Battalion Chief (Case No. 22-04), Division Chief (Case No. 22-06), Assistant Chief (Case No. 22-09), Division Chief (Case No. 22-10), and Battalion Chief (Case No. 22-11).

## FINDINGS OF FACT

On March 5, 2020, the Governor issued a proclamation declaring a state of emergency and catastrophic health emergency in response to the COVID-19 pandemic. Appellants' Exhibit (AX) 1, p. 4. The Governor's emergency declaration was renewed on March 17th and numerous times thereafter as the devastating pandemic continued. However, the Montgomery County Executive did not officially declare a state of emergency. *Id.*

On April 3, 2020, the County entered into agreements with three unions, including the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), providing for COVID-19 differential compensation. County Exhibit (CX) A. *See* CX B. The agreements provided for additional COVID-19 compensation for bargaining unit members retroactive to March 29, 2020. The additional compensation was to be paid for the duration of the declared state of emergency related to COVID-19. CX A.

The Agreement with IAFF provided that hours worked from March 29, 2020, were to be compensated at the rate of $10 per hour, except for those hours teleworked. CX A. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX B.

All Appellants are MCFRS management level employees, *i.e.*, at the rank of Battalion Chief or above, and are not members of the IAFF bargaining unit covered by the collective bargaining agreement or the April 3, 2020, agreement concerning COVID-19 differential pay. AX 1; CX A & C. On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the Management Leadership Service (MLS), the Police Leadership Service (PLS), and the fire rescue services management. CX D, pp. 10 & 22. The timekeeping guidance memorandum was revised on April 11, 2020. *Id.*, pp. 12-23.

Eighty-three non-bargaining unit public safety management employees, including 23 fire rescue services management employees, filed grievances seeking COVID-19 differential pay. AX 1. After their grievances were denied at Steps 1 and 2 of the grievance procedure the 23 MCFRS employees filed appeals with the MSPB between late January and early March 2021. On July 19, 2021, settlements were reached between those appellants and the County. AX 1.

Appellants in this case each filed their grievances within 30 days of the July 19, 2021, settlement agreements, but five to six months after the end of the program under which they claim they are entitled to a pay differential.[3] On their grievance forms all five Appellants asserted that they are entitled to the pay differential based on their assertions that they had only recently learned of grievances filed by other MCFRS managers and claim that they too should receive the same COVID-19 differential pay as other MCFRS employees, who had filed their grievances in 2020:

1. MSPB Case No. 22-04 ("I recently became aware that many of my colleagues filed a grievance to overturn the incorrect and unfairly applied

[3] Two of the Appellants learned of the pending settlement earlier and filed their grievances about a week prior to the settlement being executed. Appellants' Response, p. 4, n. 3. The grievance in MSPB Case No. 22-11 was filed on July 11, 2021, and Case No. 22-04 on July 13, 2021. The other grievances were filed after July 19. The grievance in Case No. 22-10 was filed on August 5, 2021, Case No. 22-06 on August 10, 2021, and Case No. 22-09 on August 19, 2021. CX C; Appellants' Response, p. 4.

decision to deny differential pay related to the COVID-19 pandemic. I am an operational Battalion Chief for MCFRS and I believe that I am entitled to receive Front-Facing pay just as the IAFF members who work in the same capacity have.") CX C, p. 20.

2. MSPB Case No. 22-06 ("I am aware that many FRS Chief Officers filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. I am a Division Chief for MCFRS and believe I am entitled to receive Front-facing pay just as the IAFF members and FRS Chief Officers who work in the same capacity have, or will be, based on the recent grievance settlement.") CX C, p. 16.
3. MSPB Case No. 22-09 ("I have just become aware that many FRS Chief Officers filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. . . I am requesting relief in the form of COVID-19 differential pay equal to all others working in FRS from the first date I was eligible. . .") CX C, p. 8.
4. MSPB Case No. 22-10 ("I have just become aware that many FRS Chief Officers filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. . . I am requesting relief in the form of COVID-19 differential pay equal to all others working in FRS from the first date I was eligible. . .") CX C, p. 12.
5. MSPB Case No. 22-11 ("I recently became aware that many of my colleagues filed a grievance to overturn the incorrect decision to deny differential pay related to the COVID-19 pandemic. . . I am requesting relief in the form of COVID-19 differential pay comparable to all others working in FRS Operations. . ."). CX C, p. 4,

In his Step 1 grievance responses the Fire Chief indicated that he agreed that Appellants should receive the COVID-19 differential pay, but stated that he did not have the authority to grant the requested relief due to direction given by the Chief Administrative Officer (CAO). AX 3.

Appellants note that the settlement agreements of the prior COVID appeals were discussed publicly during Montgomery County Council meetings, including a November 30, 2021, session. Appellants' Response, p. 4. *See* AX 4.

## APPLICABLE LAW AND POLICY

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

**§34-9. Grievance procedure.**

***(a) Time limit for filing a grievance***.

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

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

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

* * *

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

***(b) Technical and procedural review of grievances.***

(1) An employee must submit a written grievance on the OLR-approved grievance form (Appendix Q) and must provide the information requested on the form.

* * *

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

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

(B) was timely filed; and

(C) otherwise complies with this section.

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

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

* * *

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

* * *

***(e) Steps of the grievance procedure.*** The following table shows the 3 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

| STEPS OF THE GRIEVANCE PROCEDURE | | |
|---|---|---|
| **Step** | **Individual** | **Responsibility of individual*** |
| **1** | **Employee** | Present job-related problem informally to immediate supervisor. |
| | | If unable to resolve the problem, submit a written grievance on appropriate grievance form to immediate supervisor within 30 calendar days. |
| | | If the grievance is based on an action taken or not taken by OLR, submit the written grievance to the OLR Chief. |
| | **Department Director** | Give the employee a written response within 15 working days after the written grievance is received. |
| **2** | **Employee** | If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OLR within 10 calendar days after receiving the department's response. |
| | **CAO's Designee** | Must meet with the employee, employee's representative, and department director's designee within 30 calendar days to attempt to resolve the grievance. |
| | **Employee and Dept. Director** | Present information, arguments, and documents to the CAO's designee to support their positions |
| | **CAO's Designee** | If unable to resolve the grievance, must provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition. |
| | **CAO** | Must give the employee and department a written decision within 45 calendar days after the Step 2 meeting. |
| **3** | **Employee** | If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received. |
| | **MSPB** | Must review the employee's appeal under Section 35 of these Regulations |
| * **At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.** | | |

*  *  *

***(k) Limit on relief.***

(1) A grievant must not receive relief in a grievance from a date more than one year before the grievance was filed.

(2) If a grievance involves a continuing violation, the grievant is only entitled to relief going back 30 days before the grievance was filed.

(3) The above restrictions on relief are not intended to limit the remedial authority of the MSPB under Section 33-14(c) of the County Code.

**§34-10. Appeal of a grievance decision.**

(a) An employee with merit system status may appeal a grievance decision issued by the CAO to the MSPB under Section 35 of these Regulations.

(b) A probationary or temporary employee may not appeal a grievance decision by the CAO to the MSPB.

(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.

**MCPR §35-2. Right of appeal to MSPB.**

(b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

## ISSUE

Did the Appellants file timely grievances? If so, are they entitled to COVID-19 differential pay?

## ANALYSIS AND CONCLUSIONS

The timeliness of the grievances filed by Appellants is the sole issue of these consolidated appeals. There was no consideration or determination by the CAO or the Chief Labor Relations Officer on the merits of Appellants' grievances.[4]

COVID-19 front facing differential pay began March 29, 2020, and ended on February 14, 2021. Starting in early April 2020, OHR distributed a timekeeping guidance memorandum. The guidance memorandum was sent to County management employees every two weeks. CX D. The memorandum contained language specifically stating that MCFRS management employees were not eligible for COVID front facing pay. Appellants do not deny receiving the timekeeping guidance memoranda. Appellants also do not suggest that they were unaware that MCFRS

[4] Although MCPR §34-1(b) defines a CAO's designee as "an OLR staff member or other individual designated by the CAO," the decisions issued by the OLR Chief do not state that the OLR Chief was acting as the CAO's Step 2 designee. Under the personnel regulations, direct appeals to the MSPB from OLR Chief decisions are limited to grievability (MCPR §34-6(b)) and harassment or retaliation (MCPR §34-7). Such direct appeals do not expressly include the OLR Chief's timeliness determination. *But see* MSPB Case No. 07-01 (2006). We also note that a decision of the OLR Chief regarding denial of official time to prepare a grievance is "final," suggesting that if the MCPR provisions were supposed to include timeliness determinations by the OLR Chief as final the MCPR would say so. MCPR §34-3(g). Nevertheless, the MSPB will permit the OLR Chief's decisions to be appealable to the Board under these circumstances. The OLR Chief's decisions told Appellants that their next step was to appeal to the MSPB. We have no interest in penalizing the Appellants for following those instructions. *See* MSPB Case No. 17-16 (2017) ("We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.").

bargaining unit employees were receiving the additional COVID-19 pay between March 29, 2020 and February 14, 2021, or that Appellants were not receiving the differential pay.

Appellants filed grievances asserting their entitlement to the differential pay between five (5) and six (6) months after the program had already ended, significantly more than 30 days after Appellants knew or should have known of the basis for a grievance.

Appellants admit that they filed their grievances only after learning that the earlier grievance appeals of other MCFRS management employees were ultimately settled. Appellants argue that the County's decision to settle with these other employees and give them COVID-19 differential pay was a grievable act. Appellants' Response, p. 5. They appear to base this contention on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy." (***emphasis added)*. Appellants argue that under this interpretation, the relevant date to calculate the time limit for filing a grievance was July 19, 2021, when the settlements became public.

The allegations seem to characterize the settlements as a change in County policy. Appellants argue that these settlements somehow amounted to new County policy when they became public during Council hearings on the settlements, and that the County was somehow admitting that all employees may have been entitled to emergency pay. Settlement of an appeal by one group of employees and not including other employees who were not parties to the litigation in the settlement does not constitute a change in policy. Nor can it be considered a "grievable act."

Longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. For example, in MSPB Case No. 01-07 (2001) the Board held:

> As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use as knowledge of another employee's grievance an alternate operating date from which the time to file a grievance runs. (*See* MSPB Case No. 89-02, the Appeal of . . . ; MSPB Case No. 97-11, the Appeal of . . . et. al; MSPB Case No. 98-04, the Appeal of . . . ; MSPB Case No. 99-21, the Appeal of . . . ; and MSPB Case No. 00-05, the Appeal of . . . In all of these cases, the Board ruled that the complaints were not timely filed.

*See also* MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Furthermore, this Board has held that settlement agreements involving other employees may not be used even in an analysis of whether employees in similar positions have received comparable discipline for comparable behavior. MSPB Case No. 19-16 (2019); MSPB Case No. 18-06 (2019). Underlying those decisions was a respect for the public policy in favor of compromise and settlement, and a recognition that not taking into account settlements as part of a consideration of otherwise similar situations is necessary to avoid a chilling effect on the settlement of disputes. *See Bergh v. Department of Transportation*, 794 F.2d 1575, 1577 (Fed.

Cir.) *cert. denied*, 479 U.S. 950 (1986) (rejecting a disparate treatment claim based on an agency's settlement with other employees).

That policy is similarly applicable to grievances. Indeed, the County and the settling MCFRS managers expressly agreed that "the terms of [their] Agreement do not constitute a precedent or practice." AX 1, p. 5. *See* Advisory Committee Notes to Fed Rules Evid R 408 ("it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. [t]his . . . situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.").[5]

With regard to the treatment of continuing violations, it is true that a "time limitation may be waived . . . if the otherwise untimely allegation is part of a 'continuing violation,' *i.e*., a related series of acts, at least one of which occurred within the limitations period." MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February 2021. The earliest of the grievances was filed in July 2021, five months after the end of the COVID-19 differential pay policy.[6] Accordingly, we must find that the grievances do not allege and meet the standard for a continuing violation. *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

Finally, we note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that "[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process." §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 ("The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it."). However, the record indicates that unlike the MCFRS managers who filed their grievances in 2020, before the end of the program, and then settled their grievance appeals and received COVID-19 differential pay in 2021, Appellants simply did not file timely grievances. There is no evidence in the record suggesting that the MCFRS managers who filed grievances in 2020 and settled with the County had access to different or better information about the COVID-19 differential pay issue. In essence, by not filing grievances until many months after the COVID-19 differential pay program ended Appellants waived their rights to claim COVID-19 pay while many of their colleagues chose to grieve and assert their rights while the program was still in effect. Appellants have not provided any justification for late filing that would constitute "good cause" for the Board to exercise its authority to extend the time limits for the initial filing of a grievance.

**ORDER**

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-13 be and hereby is **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to

[5] Maryland Rule 5-408 is comparable to Federal Rule of Evidence 408.
[6] The grievance in MSPB Case No. 22-11 was filed on July 11, 2021. CX C.

Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
April 18, 2022

# CASE NO. 22-16

## FINAL DECISION

Appellant, an Assistant Chief with the Montgomery County Fire and Rescue Service (MCFRS), filed a grievance appeal with the Merit System Protection Board (Board or MSPB) on October 18, 2021,[1] challenging the October 6, 2021, decision of the County's Chief Labor Relations Officer (CLRO) dismissing his COVID-19 differential pay appeal as untimely.

The County filed a response to the appeal on November 17, 2021. (County Response). Appellant filed a response on December 16, 2021. (Appellant Response).

The Appeal was reviewed and considered by the Board.

## FINDINGS OF FACT

On April 3, 2020, the County entered into agreements with three unions, including the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), providing for COVID-19 differential compensation. County Exhibit (CX) A. The agreements provided for additional COVID-19 compensation for bargaining unit members retroactive to March 29, 2020. The additional compensation was to be paid for the duration of the state of emergency related to COVID-19 that was declared by the State of Maryland. CX A.

The Agreement with IAFF provided that hours worked from March 29, 2020, were to be compensated at the rate of $10 per hour, except for those hours teleworked. CX A. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX B.

Appellant is an MCFRS management level employee at the rank of Assistant Chief and not a member of the IAFF bargaining unit covered by the collective bargaining agreement or the April 3, 2020, agreement concerning COVID-19 differential pay. CX A. On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the Management Leadership Service (MLS), the Police Leadership Service (PLS), and the fire rescue services management. CX D, pp. 10 & 22. The timekeeping guidance memorandum was revised on April 11, 2020. CX D, pp. 12-23. During the

[1] The appeal was submitted electronically on Saturday, October 16, 2021, a date when the Merit System Protection Board (MSPB or Board) office was not open. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

COVID-19 pandemic the timekeeping guidance was issued biweekly to all department managers. Appellant's Response, p. 1.

Appellant admits that the April 9, 2020, timekeeping guidance and subsequent guidance memoranda specifically stated that public safety managers such as Appellant were not eligible for COVID-19 differential pay. Appellant's Response, p. 1.

Appellant's September 15, 2021, grievance form asserts that he had recently learned of grievances filed by other MCFRS managers and claims that he too should receive the same COVID-19 differential pay as IAFF bargaining unit members. CX C, p. 3, ("On August 26, 2021, I learned that the County's Executive Branch. . . asked the County Council for a supplemental appropriation for the purpose providing $10/hour COVID Pay for more than 100 County managers, including more than 20 MCFRS uniformed managers.). *See* Appellant's Appeal Form, p. 2 ("I learned on August 26, 2021 that the majority of MCFRS uniformed managers had a settlement agreement with the County Executive. . .").

In his Step 1 grievance response the Fire Chief indicated that he agreed that Appellant should receive the COVID-19 differential pay but stated that he did not have the authority to grant Appellant's requested relief due to written direction given by the Chief Administrative Officer (CAO). Attachment to Appellant's Response.

## APPLICABLE LAW AND POLICY

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

**§34-9. Grievance procedure.**

***(a) Time limit for filing a grievance***.

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

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

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

. . .

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

***(b) Technical and procedural review of grievances.***

. . .

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

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

(B) was timely filed; and

(C) otherwise complies with this section.

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

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

. . .

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

## ISSUE

Did Appellant file a timely grievance? If so, is he entitled to COVID-19 differential pay?

## ANALYSIS AND CONCLUSIONS

The timeliness of the grievance filed by Appellant on September 15, 2021, is the sole issue of this appeal. There was no consideration or determination by the CAO or the Chief Labor Relations Officer on the merits of Appellant's grievance.[2]

COVID-19 front facing differential pay began March 29, 2020 and ended on February 14, 2021. The guidance memorandum sent to County management employees contained language specifically stating that MCFRS management employees were not eligible for COVID front facing pay. CX D. As an Assistant Chief Appellant is a high-level MCFRS manager, and he admits that he was aware of the guidance memoranda issued biweekly starting on April 9, 2020.

We find that well before the program ended in February 2021 Appellant knew that bargaining unit employees were receiving COVID-19 differential pay and that he was not. Appellant filed his grievance on September 15, 2021, over seven (7) months after the COVID-19 differential pay program had already ended, significantly more than 30 days after Appellant knew or should have known of the basis for a grievance.

Appellant's grievance form states that he became aware that other MCFRS management employees had filed grievances and settled with the County on August 26, 2021. In Appellant's Response he argues that the grievance time limits should run not from when he became aware that the COVID-19 differential pay was being denied to MCFRS managers like him, but rather from when he found out that MCFRS managers who had filed grievances challenging the policy had reached a settlement with the County to receive such pay. His grievance and Appeal Form request

[2] Although MCPR §34-1(b) defines a CAO's designee as "an OLR staff member or other individual designated by the CAO," the decision issued by the OLR Chief does not state that the OLR Chief was acting as the CAO's Step 2 designee. Under the personnel regulations, direct appeals to the MSPB from OLR Chief decisions are limited to grievability (MCPR §34-6(b)) and harassment or retaliation (MCPR §34-7). Such direct appeals do not expressly include the OLR Chief's timeliness determination. *But see* MSPB Case No. 07-01 (2006). We also note that a decision of the OLR Chief regarding denial of official time to prepare a grievance is "final", suggesting that if the MCPR provisions were supposed to include timeliness determinations by the OLR Chief as final the MCPR would say so. MCPR §34-3(g). Nevertheless, the MSPB will permit the OLR Chief's decision to be appealable to the Board under these circumstances. The OLR Chief's decision told Appellant that his next step was to appeal to the MSPB. We have no interest in penalizing Appellant for following those instructions. *See* MSPB Case No. 17-16 (2017) ("We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.").

that he be provided with the same relief as the MCFRS management employees who filed earlier grievances and settled with the County.

Appellant appears to base this contention on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy**." (emphasis added). However, longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. Settlement of an appeal by one group of employees and not including other employees who were not parties to the litigation in the settlement does not constitute a change in policy. Nor can it be considered a "grievable act." For example, in MSPB Case No. 01-07 (2001) the Board held:

> As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use as knowledge of another employee's grievance an alternate operating date from which the time to file a grievance runs. (*See* MSPB Case No. 89-02, the Appeal of . . . ; MSPB Case No. 97-11, the Appeal of . . . et. al; MSPB Case No. 98-04, the Appeal of . . . ; MSPB Case No. 99-21, the Appeal of . . . ; and MSPB Case No. 00-05, the Appeal of . . . In all of these cases, the Board ruled that the complaints were not timely filed.

*See* MSPB Case No. 22-13 (2022). *See also* MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Furthermore, this Board has held that settlement agreements involving other employees may not be used even in an analysis of whether employees in similar positions have received comparable discipline for comparable behavior. MSPB Case No. 19-16 (2019); MSPB Case No. 18-06 (2019). Underlying those decisions was a respect for the public policy in favor of compromise and settlement, and a recognition that not taking into account settlements as part of a consideration of otherwise similar situations is necessary to avoid a chilling effect on the settlement of disputes. MSPB Case No. 22-13 (2022). *See Bergh v. Department of Transportation,* 794 F.2d 1575, 1577 (Fed. Cir.) *cert. denied*, 479 U.S. 950 (1986) (rejecting a disparate treatment claim based on an agency's settlement with other employees). That policy is similarly applicable to grievances. MSPB Case No. 22-13 (2022).

Nor may Appellant claim that there is a continuing violation. It is true that a "time limitation may be waived . . . if the otherwise untimely allegation is part of a 'continuing violation,' *i.e.*, a related series of acts, at least one of which occurred within the limitations period." MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February 2021. Appellant's grievance was filed on September 15, 2021, seven months after the end of the COVID-19 differential pay policy. Accordingly, we must find that the grievance does not allege and meet the standard for a continuing violation. MSPB Case No. 22-13 (2022). *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation

requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

Finally, we note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that "[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process." §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 ("The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it."). However, the record indicates that unlike the MCFRS managers who filed their grievances in 2020, before the end of the program, and then settled their grievance appeals and received COVID-19 differential pay in 2021, Appellant simply did not file a timely grievance. There is no evidence in the record suggesting that the MCFRS managers who filed grievances in 2020 and settled with the County had access to different or better information about the COVID-19 differential pay issue. In essence, by not filing a grievance until seven months after the COVID-19 differential pay program ended Appellant waived his rights to claim COVID-19 pay while many of his MCFRS management colleagues chose to grieve and assert their rights while the program was still in effect. Appellant has not provided any justification for late filing that would constitute "good cause" for the Board to exercise its authority to extend the time limit for the initial filing of a grievance.

**ORDER**

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 22-16 be and hereby is **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
April 18, 2022

# CASE NO. 22-19

**FINAL DECISION**

Appellant, an Assistant Chief with the Montgomery County Fire and Rescue Service (MCFRS), filed a grievance appeal with the Merit System Protection Board (Board or MSPB) on November 18, 2021,[1] challenging the October 13, 2021, decision of the County's Chief Labor Relations Officer (CLRO) dismissing her COVID-19 differential pay appeal as untimely.

[1] The appeal was submitted electronically on November 17, 2021, after the MSPB office was closed for the day. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

The County filed a response to the appeal on December 21, 2021. (County Response). Appellant's due date for a reply was January 17, 2022. 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

On April 3, 2020, the County entered into agreements with three unions, including the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), providing for COVID-19 differential compensation. County Exhibit (CX) A. The agreements provided for additional COVID-19 compensation for bargaining unit members retroactive to March 29, 2020. The additional compensation was to be paid for the duration of the state of emergency related to COVID-19 that was declared by the State of Maryland. CX A.

The Agreement with IAFF provided that hours worked from March 29, 2020, were to be compensated at the rate of $10 per hour, except for those hours teleworked. CX A. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX B.

Appellant is an MCFRS management level employee at the rank of Assistant Chief and not a member of the IAFF bargaining unit covered by the collective bargaining agreement or the April 3, 2020, agreement concerning COVID-19 differential pay. CX A. On April 9, 2020, the County Office of Human Resources (OHR) issued a timekeeping guidance memorandum that provided for COVID-19 differential pay to certain unrepresented employees, but not for higher level management employees such as those in the Management Leadership Service (MLS), the Police Leadership Service (PLS), and the fire rescue services management. CX D, pp. 10 & 22; Appeal Form, p. 2 ("At the onset of the COVID-19 differential, the OHR director made a clear statement that management was not eligible for the additional COVID-19 compensation."). The timekeeping guidance memorandum was revised on April 11, 2020. CX D, pp. 12-23.

Appellant's September 20, 2021, grievance form asserts that when she learned of the settlement of grievances filed by other MCFRS managers she concluded that denying her the same COVID-19 differential pay would be arbitrary and capricious. CX C, p. 2. *See* Appellant's Appeal Form, p. 2 ("[O]n August 26, 2021, I discovered that a segment of FRS managers filed a grievance and that a settlement was reached that provided the $10/hr compensation but only for those that filed the initial grievance, not for all FRS managers.").

## APPLICABLE LAW AND POLICY

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

**§34-9. Grievance procedure.**

***(a) Time limit for filing a grievance***.

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

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

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

. . .

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

***(b) Technical and procedural review of grievances.***

. . .

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

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

(B) was timely filed; and

(C) otherwise complies with this section.

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

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

. . .

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

## ISSUE

Did Appellant file a timely grievance? If so, is she entitled to COVID-19 differential pay?

## ANALYSIS AND CONCLUSIONS

The timeliness of the grievance filed by Appellant on September 20, 2021, is the sole issue of this appeal. There was no consideration or determination by the CAO or the Chief Labor Relations Officer on the merits of Appellant's grievance.[2]

[2] Although MCPR §34-1(b) defines a CAO's designee as "an OLR staff member or other individual designated by the CAO," the decision issued by the OLR Chief does not state that the OLR Chief was acting as the CAO's Step 2 designee. Under the personnel regulations, direct appeals to the MSPB from OLR Chief decisions are limited to grievability (MCPR §34-6(b)) and harassment or retaliation (MCPR §34-7). Such direct appeals do not expressly include the OLR Chief's timeliness determination. *But see* MSPB Case No. 07-01 (2006). We also note that a decision of the OLR Chief regarding denial of official time to prepare a grievance is "final", suggesting that if the MCPR provisions were supposed to include timeliness determinations by the OLR Chief as final the MCPR would say so. MCPR §34-3(g). Nevertheless, the MSPB will permit the OLR Chief's decision to be appealable to the Board under these circumstances. The OLR Chief's decision told Appellant that her next step was to appeal to the MSPB. We have no interest in penalizing Appellant for following those instructions. *See* MSPB Case No. 17-16 (2017) ("We do not fault Appellant for acting on the inaccurate direction from OHR and incorrectly appealing directly to the MSPB instead of to the CAO. While the Board could remand this matter to the CAO for consideration at Step 2 of the grievance

COVID-19 front facing differential pay began March 29, 2020 and ended on February 14, 2021. The guidance memorandum sent to County management employees contained language specifically stating that MCFRS management employees were not eligible for COVID front facing pay. CX D. As an Assistant Chief Appellant is a high-level MCFRS manager, and she admits that she was aware from the timekeeping guidance that she was not eligible for COVID-19 differential pay: "I do not deny that, based on written guidance from the County's OHR director in the early days of the pandemic, I understood that Public Safety Mangers would not be eligible to receive onsite COVID differential pay." CX C, p. 2.

We find that well before the program ended in February 2021 Appellant knew that bargaining unit employees were receiving COVID-19 differential pay and that she was not. Appellant filed her grievance on September 20, 2021, over seven (7) months after the COVID-19 differential pay program had already ended, significantly more than 30 days after Appellant knew or should have known of the basis for a grievance.

Appellant's grievance form states that she became aware that other MCFRS management employees had filed grievances and settled with the County on August 26, 2021. In Appellant's Response she argues that the grievance time limits should run not from when she became aware that the COVID-19 differential pay was being denied to MCFRS managers like her, but rather from when she found out that MCFRS managers who had filed grievances challenging the policy had reached a settlement with the County to receive such pay. Her grievance requests that she be provided with the same relief as the MCFRS management employees who filed earlier grievances and settled with the County. "Once the determination to compensate *some* managers was made, *all* managers should have been included." CX C, p. 2 (emphasis in original).

Appellant appears to base this contention on MCPR § 34-4(d), which provides that an employee may file a grievance if the employee was adversely affected by the alleged "improper, inequitable or unfair application of the compensation **policy**." (emphasis added). However, longstanding Board precedent expressly rejects the theory that obtaining knowledge of another employee's grievance or settlement may serve as a triggering event for grievance filing time limits. Settlement of an appeal by one group of employees and not including other employees who were not parties to the litigation in the settlement does not constitute a change in policy. Nor can it be considered a "grievable act." For example, in MSPB Case No. 01-07 (2001) the Board held:

> As to the contention that the September 2000 receipt of information regarding a similar case serving as a "triggering event" for a denial that occurred in September 1999, the Board has ruled consistently that an employee cannot use as knowledge of another employee's grievance an alternate operating date from which the time to file a grievance runs. (*See* MSPB Case No. 89-02, the Appeal of . . . ; MSPB Case No. 97-11, the Appeal of . . . et. al; MSPB Case No. 98-04, the Appeal of . . . ; MSPB Case No. 99-21, the Appeal of . . . ; and MSPB Case No. 00-05, the Appeal of . . . In all of these cases, the Board ruled that the complaints were not timely filed.

process, the undisputed facts confirm that the grievance was not filed in a timely manner. Thus, a remand would be pointless and a disservice to both Appellant and the County.").

*See* MSPB Case No. 22-13 (2022). *See also* MSPB Case No. 00-05 (2000) ("an employee cannot use the knowledge of another employee's grievance as an alternative operative date from which the time for filing a grievance runs.").

Furthermore, this Board has held that settlement agreements involving other employees may not be used even in an analysis of whether employees in similar positions have received comparable discipline for comparable behavior. MSPB Case No. 19-16 (2019); MSPB Case No. 18-06 (2019). Underlying those decisions was a respect for the public policy in favor of compromise and settlement, and a recognition that not taking into account settlements as part of a consideration of otherwise similar situations is necessary to avoid a chilling effect on the settlement of disputes. MSPB Case No. 22-13 (2022). *See Bergh v. Department of Transportation,* 794 F.2d 1575, 1577 (Fed. Cir.) *cert. denied*, 479 U.S. 950 (1986) (rejecting a disparate treatment claim based on an agency's settlement with other employees). That policy is similarly applicable to grievances. MSPB Case No. 22-13 (2022).

Nor may Appellant claim that there is a continuing violation. It is true that a "time limitation may be waived . . . if the otherwise untimely allegation is part of a 'continuing violation,' *i.e*., a related series of acts, at least one of which occurred within the limitations period." MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February 2021. Appellant's grievance was filed on September 20, 2021, seven months after the end of the COVID-19 differential pay policy. Accordingly, we must find that the grievance does not allege and meet the standard for a continuing violation. MSPB Case No. 22-13 (2022). *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

Finally, we note that the OLR Chief may extend time limits in the grievance procedure, MCPR § 34-9(a)(6), and that "[t]he OLR Chief or CAO may reconsider issues of timeliness or grievability at any stage of the grievance process." §34-9(b)(9). This Board has the same authority. *See* MSPB Case No. 06-03 (August 16, 2006), p. 7 ("The Board exercises the same authority as the OHR Director [now OLR Chief] and the CAO to consider issues of timeliness or grievability of any grievance or amended grievance that is before it."). However, the record indicates that unlike the MCFRS managers who filed their grievances in 2020, before the end of the program, and then settled their grievance appeals and received COVID-19 differential pay in 2021, Appellant simply did not file a timely grievance. There is no evidence in the record suggesting that the MCFRS managers who filed grievances in 2020 and settled with the County had access to different or better information about the COVID-19 differential pay issue. In essence, by not filing a grievance until seven months after the COVID-19 differential pay program ended Appellant waived her rights to claim COVID-19 pay while many of her MCFRS management colleagues chose to grieve and assert their rights while the program was still in effect. Appellant has not provided any justification for late filing that would constitute "good cause" for the Board to exercise its authority to extend the time limit for the initial filing of a grievance.

## ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 22-19 be and hereby is **DENIED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
April 18, 2022

# 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 2022, the Board issued the following dismissal decisions.

# DISMISSAL FOR MOOTNESS

# CASE NO. 22-14

**ORDER OF DISMISSAL**

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on October 14, 2021.

The County filed a response to the appeal on November 15, 2021, and Appellant filed a response on December 6, 2021. On December 7, 2021, Appellant emailed the Board with certain procedural questions. The Board's Executive Director responded by email shortly thereafter. The next day Appellant submitted an email indicating that she wished to withdraw her appeal. The Board's Executive Director responded to Appellant by providing additional information on appeal procedures and asking Appellant to confirm if she still wished to withdraw her appeal. On December 14, 2021, Appellant emailed the Board thanking the Executive Director for the additional information and stating that she nevertheless still wished to withdraw her appeal.

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

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-14 be and hereby is **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement,* and MCPR, §35-18, *Appeals to court of MSPB decisions,* within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
December 15, 2021

# CASE NO. 22-17

**ORDER OF DISMISSAL**

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on October 25, 2021, and submitted an incomplete copy of a notice of nonselection. The Board emailed a letter to Appellant that same day advising her that for the MSPB to proceed with processing her appeal a complete copy of the notification of nonselection must be provided. Montgomery County Personnel Regulations (MCPR), §35-4(d)(3). The letter requested that she provide a complete copy of the notification of nonselection within 15 working days. MCPR, §35-8(c). Appellant was further advised that her appeal had been given the above captioned case number, but that the MSPB would stay its processing of the appeal until receipt of the necessary documentation. Finally, Appellant was told that failure to provide the MSPB with the requested document might result in dismissal of her appeal. MCPR, §35-7(b).

When Appellant did not submit the requested documentation or otherwise contact the Board after 15 working days Board staff emailed Appellant on November 18, 2021, resending the October 25th letter and reminding her of the missed deadline.[1] Appellant responded by email stating "I provided all the documents I received." Board staff then sent an email seeking clarification: "You were only provided with the last page of the letter?"

In her response Appellant said, "I thought I uploaded the entire email I received" and then indicated that she wished to withdraw her appeal: "At this time I will respectfully withdraw my appeal as given this entire process, I am no longer interested in working for this organization. Thank you for your time addressing this matter."

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. 21-02 (2020); MSPB Case No. 17-18 (2017). Moreover, the Board may dismiss this matter for failure to comply with established appeal procedures and due to Appellant's failure to prosecute her case. MCPR, § 35-7(b).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-17 be and hereby is **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
November 22, 2021

[1] The November 18th mail said the following:

> On October 25 you were sent the attached letter requesting that you "provide a complete copy of the notification of nonselection within 15 working days." It has been over 15 working days and we have not received the complete nonselection letter. As you were previously advised, failure to submit the requested document may result in dismissal of your appeal.
>
> Please email or call us if you have any questions.

# DISMISSAL FOR TIMELINESS

# CASE NO. 21-113

**ORDER OF DISMISSAL**

Appellant, a Resident Supervisor II with the Department of Correction and Rehabilitation, received a Notice of Termination on April 8, 2021. The Notice of Termination advised Appellant: "You have a right to file grievance, pursuant to MCPR section 34, within 30 days or you may file an appeal to the Merit System Protection Board, pursuant to MCPR section 35, within 10 (ten) days."[1]

At 9:36 p.m. on Friday, May 14, 2021, a day and time when the Merit System Protection Board (Board) office is closed, Appellant filed an appeal on the Board's website challenging the termination. The appeal was deemed received on Monday, May 17, 2021, the Board's next business day. Under the applicable personnel regulations, Appellant had ten (10) working days to file an appeal. The Appeal was filed twenty-nine (29) working days after receipt of the Notice of Termination.

The County moved to dismiss the appeal as untimely on August 5, 2021. Appellant was entitled to respond to the County's motion by August 16th under Montgomery County Personnel Regulations (MCPR), §35-11(a)(4). Having received no response from Appellant, on August 18, 2021, the Board issued a Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why the appeal regarding his termination should not be dismissed as untimely.

Appellant provided a timely response to the Show Cause Order in which he asked that his appeal not be dismissed because he "acted in good faith when I filed unknowing of the Merit Board's filing deadline." Appellant provided the following explanation:

> 1. My initial response to my termination was filed as a grievance based on what I knew about filing a grievance within the time period of thirty (30) days allotted to do so. I met that deadline when I filed my grievance.
>
> 2. I requested assistance from the Union on filing a grievance, but that assistance never came. Since I had to meet the 30 days deadline to file, I went ahead and did the best that I could and filed what I thought was a grievance. ***(Please see attached email sent to the Union requesting assistance to file a grievance.)***
>
> 3. After filing what I thought was a grievance, I was contacted by the Merit Board and given direction to file an appeal in a particular format per the Board's requirements, which I did. I at no time intended not to meet the Merit Board's filing deadline.

Appellant Memorandum in Response to Show Cause Order. (emphasis in original).

Under the Montgomery County Personnel Regulations Appellant had ten (10) working days to file a direct appeal to the Board challenging his termination. MCPR, § 35-3(a)(2) ("An

[1] MCPR refers to the Montgomery County Personnel Regulations.

employee has 10 working days to file an appeal with the MSPB in writing after the employee: . . . (2) receives a notice of termination"). It is undisputed that Appellant received the Notice of Termination on April 8, 2021. The appeal to the MSPB was thus due on April 20th, but was not filed electronically until 9:36 p.m. on Friday, May 14, 2021, a day and time when the Board's office is closed.

The Board has held on many occasions that appeals or pleadings filed after Board office hours and on days the office is closed are considered to have been officially received the next Board business day. *See* MSPB Case No. 20-06 (2020); 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 May 17, 2021, 19 working days late.[2]

At no time was the Appellant "given direction to file an appeal" with the Board. Regarding Appellant's argument that his appeal to the MSPB is the filing of a grievance, he is in error. The Notice of Termination clearly advised Appellant that he had a choice of filing a direct appeal to the MSPB within ten working days or a grievance within 30 days. This was also clearly explained to Appellant in a May 17, 2021, letter from the Board's Executive Director.[3] There is nothing in the record suggesting that Appellant was ever told by a County employee that a direct appeal to the MSPB was the same as a grievance. In any event, he still filed late as his deadline for filing a grievance was May 10 and he appealed to the Board on May 17.

If instead Appellant means that his email with the union indicates that he did file a grievance, then he appears to have failed to exhaust administrative remedies by appealing to the CAO at Step 2, and there is no record that there was a CAO's written decision that could properly be appealed to the Board. MSPB Case No. 15-28 (2015). *See Public Service Commission v. Wilson*, 389 Md. 27, 89 (2005).[4]

In the past, the Board has not waived the 10-day period for filing an appeal without good cause, and we have not been provided with good cause why we should do so here. *See* MSPB Case No. 20-06 (2020) (11 working days after receipt); MSPB Case No. 19-27 (2020) (11 working days after receipt); MSPB Case No. 14-43 (2014) (23 working days after receipt).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 21-113 be, and hereby is, dismissed because it was not filed within the time limits specified in MCPR § 35-3(a).

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed

---

[2] The Board's website provides notice of the official office hours and specifically advises that appeals filed outside of those hours will be considered as filed the next official workday. 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."

[3] The letter stated: "To file a grievance appeal, a grievance must be filed at Step 1, appealed at Step 2 to the Chief Administrative Officer (CAO), and a copy of the CAO's Step 2 decision must be submitted to the Board with the appeal. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2)."

[4] We note that any claim Appellant may wish to assert that the union failed to comply with its duty of fair representation is not within the MSPB's jurisdiction. MSPB Case No. 16-05 (2016) ("the County Labor Relations Administrator, not the Board, has jurisdiction over duty of fair representation disputes between County employees and their exclusive bargaining representatives. *See* Montgomery County Code, § 33-104(a)(2), (c); § 33-109(b), (c)").

under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
August 26, 2021

# DISMISSAL ON MULTIPLE GROUNDS

# CASE NO. 22-02

**ORDER OF DISMISSAL**

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 4, 2021 and submitted a copy of a Notice of Termination by email on August 12. The Board then emailed a letter to the County and Appellant on August 12 advising the County that its prehearing submission was due on September 14 and that Appellant's prehearing submission was due on October 6, 2021.

The County filed its prehearing submission on September 9. When Appellant did not timely file his prehearing submission or otherwise contact the Board, Board staff emailed Appellant on October 7, 2021, notifying him of the missed deadline, attaching the August 12 letter, and asking that Appellant advise the Board in writing if he no longer wished to pursue his appeal. After receiving no response, Board staff twice telephoned Appellant on October 11 at the number he had provided and left a voicemail message requesting that Appellant contact the Board's office. On October 13, the Associate County Attorney for this appeal sent an email to the Board, copying Appellant, stating that she had not received a prehearing submission. That same day Board staff sent another email to Appellant requesting a response. On October 14, Board staff left Appellant yet another telephone voicemail message requesting a response.

When the Board received no response from Appellant it issued an October 18, 2021, Show Cause Order requiring Appellant to provide a prehearing submission or other explanation by October 21. The Order advised that "absent the proper filing of a prehearing submission, the Board will dismiss his appeal." Board staff again telephoned Appellant on October 19 and left a voicemail message advising him that the Show Cause Order had been emailed to him and urging him to check his email and respond. On October 25, 2021, in a final effort to obtain a response, Board staff again emailed Appellant. To date, Appellant has not filed a prehearing submission, responded to the multiple emails and telephone voicemail messages from the Board, or contacted the Board in any manner.

Appellant has not responded to the Show Cause Order even though it advised Appellant 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 would dismiss his appeal.

Thus, because Appellant has not provided the prehearing submission or an explanation for that failure, or responded to multiple emails, telephone calls, and a Show Cause Order, the Board must dismiss this matter for failure to comply with established appeal procedures and due to Appellant's failure to prosecute his case. Montgomery County Personnel Regulations, § 35-7(b). *See* MSPB Case Nos. 19-19 & 19-26 (2019); MSPB Case Nos. 19-24 & 19-25 (2019).

Accordingly, it is hereby **ORDERED** that the prehearing conference scheduled for November 3, 2021, is cancelled and the appeal in Case No. 22-02 be and hereby is **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review

may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
October 26, 2021

# CASE NO. 22-33

**ORDER OF DISMISSAL**

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on February 22, 2022[1]. Appellant's Appeal Form and the documents he submitted indicate that Appellant was promoted to a Management Leadership Service III position with the Alcohol Beverage Services Department (ABS). However, Appellant wishes to challenge the salary level he was offered.

Appellant was advised by letter from the Board's Executive Director on February 22, 2022, that if he wishes to challenge his salary, a grievance must be filed at Step 1, appealed at Step 2 to the Chief Administrative Officer (CAO), and a copy of the CAO's Step 2 decision be submitted to the Board. Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2).

When Appellant did not file his documentation or otherwise contact the Board, on April 6, 2022, a second request for documents was emailed to Appellant, attaching the February 22 letter, and informing Appellant that if he wishes to file an appeal to the MSPB over his salary he must first follow the grievance procedure. The letter also requested that Appellant let the Board's Executive Director know whether he will be providing the information requested in the February 22nd letter, or if he wishes to withdraw his appeal. The letter stated that failure to provide the MSPB with a copy of a notification of nonselection, a CAO's grievance decision, or other satisfactory explanation may result in dismissal of the appeal.

When the Board received no response from Appellant it issued an April 19, 2022, Show Cause Order requiring Appellant to provide a statement of such good cause as exists for why he has failed to file the required documentation. Appellant filed a statement on April 25, 2022.[2] The County filed a response on May 11, 2022.

***Failure to exhaust administrative remedies***

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 1 of the grievance procedure provides that an employee shall initially file a grievance with the employee's immediate supervisor. Step 2 requires that "within 10 calendar days after receiving

[1] The appeal was filed by electronic mail on Thursday, February 17, 2022, after MSPB office hours. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

[2] Appellant's response was filed by electronic mail on Friday, April 22, 2022, at 4:20 p.m., a date that the Board's office was not open.

the department's response" an employee may file the grievance with the CAO. MCPR §34-9(e). A grievance appeal to the MSPB may be filed within 10 working days after the CAO's Step 2 decision is received by the employee. MCPR §34-9(e); §35-3(a)(3). Appellant did not avail himself of either of the first two steps of the grievance procedure but, rather, is attempting to go directly to Step 3, an appeal to the MSPB.

It is a well-established principle of labor law that an employee must normally exhaust any contractual or administrative grievance procedures. MSPB Case No. 20-14 (2020); MSPB Case No. 15-28 (2015). *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

An employee's failure to exhaust the grievance procedure may be excused if the employer has repudiated the grievance procedures or if exhausting the procedures would be futile. MSPB Case No. 15-28 (2015). *See, e.g., Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 370 U.S. 524, 262-63, 266-67 (1962) (exhaustion of grievance procedure excused due to employer repudiation of grievance procedures); *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969) (excusing failure to follow grievance procedure as doing so would be futile).

Since there is no indication in this case that the County has repudiated the grievance procedure, it appears that the only exception to the principle of exhaustion that Appellant claims is futility. Appellant's argument that exhausting the grievance process would have been futile rests entirely on the fact that the CAO made the decision on Appellant's promotional salary level and is the final decision maker at Step 2. However, we cannot conclude that pursuing the grievance procedure would be a pointless exercise simply because the CAO may have made a decision on Appellant's salary level and would be the Step 2 decision maker in a grievance appeal. *See* MSPB Case No. 15-28 (2015) (No futility where CAO made a transfer decision appellant wished to challenge).

The record contains no basis to conclude that the CAO or his designees have a personal bias against Appellant, or that they would be unable to assess a Step 2 grievance fairly and objectively because the CAO's designee made a decision concerning Appellant's appropriate salary level upon his promotion. MSPB Case No. 15-28 (2015) ("Without more, such as evidence that the CAO has suggested that he is unwilling to or incapable of evaluating Appellant's grievance on the merits, we cannot conclude that pursuing the grievance procedure would be a pointless exercise."). *See Public Service Commission v. Wilson*, 389 Md. 27, 92 (2005) (No presumption that Chair of the PSC, who initially fired an employee, would be biased in an administrative appeal of the employee's subsequent firing); *Dearden v. Liberty Med. Ctr., Inc.*, 75 Md. App. 528, 534 (1988) (fact that an employee's complaint is against the official in the highest leadership position does not excuse a failure to invoke and exhaust the grievance procedure). Indeed, the CAO and his designees are entitled to a presumption of honesty and integrity. MSPB Case No. 17-23 (May 8, 2017). *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Maryland Insurance Commissioner v. Central Acceptance Corp*., 424 Md. 1, 24 (2011); *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397, 410 (1999).

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. MSPB Case No. 20-14 (2020); MSPB Case No. 15-28 (2015). *See Public Service Commission v. Wilson*, 389 Md. 27, 89 (2005). This does not preclude Appellant from filing an appeal with the Board after he has exhausted his administrative remedies. We will not speculate whether any grievance Appellant files or has filed would be timely.

***The Board Lacks Jurisdiction Over Appellant's Discrimination Claim***

To the extent Appellant is complaining of employment discrimination based on race, color, gender, age, and disability, the MSPB does not have jurisdiction. Appellant may file discrimination complaints with the County Human Relations Commission, the Maryland Commission on Civil Rights, or the United States Equal Employment Opportunity Commission, however, claims of discrimination prohibited by Chapter 27 of the Montgomery County Code may not be filed with the MSPB. MCPR, § 35-2(d). MSPB Case No. 10-04 (2009) ("the Board is not empowered to hear claims of discrimination prohibited by Chapter 27 of the Montgomery County Code. *See* MCPR, Section 35-2(d))." *See* MCPR § 5-4(b)(1), which provides that an employee alleging discrimination "may not file a grievance under Section 34 . . . or an appeal under Section 35 [with the MSPB], unless the alleged violation is related to a disciplinary action, termination, or involuntary resignation." MSPB Case No. 15-28 (2015).

For the above discussed reasons the Board must dismiss this matter due to Appellant's failure to exhaust administrative remedies, and because the Board lacks jurisdiction. MCPR § 35-7(c) & (e). Accordingly, it is hereby **ORDERED** that the appeal in Case No. 22-33 be and hereby is **DISMISSED**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 1, 2022

# RECONSIDERATION

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

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

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

During fiscal year 2022 the Board issued the following decision on a request for reconsideration of a Final Decision.

# CASE NO. 20-17

**DECISION ON COUNTY'S REQUEST FOR RECONSIDERATION**

On June 23, 2021, the Montgomery County Merit System Protection Board (MSPB or Board) issued a final decision in Appellant's appeal of her dismissal from County employment. The Board rescinded Appellant's dismissal, reinstated her without back pay, and reduced the discipline to a 45-day suspension.

The County filed a motion requesting reconsideration on July 6, 2021. The County requested that the Board reinstate Appellant's dismissal, arguing that although the Board had found that the County had met its burden of proof it did not "discuss the full extent of the possible consequences the Department faced because of the Appellant's actions." The County argues that its potential exposure to liability is significant due to Appellant's actions.

In the alternative the County asks the Board to increase Appellant's suspension from 45 days to 6 months. The County argues that the more severe penalty is "more appropriate" and that the 45-day suspension "sets a bad precedent."

Finally, in the event the Board does not reinstate the dismissal, the County asks that the Board amend the language in the Order concerning required training for Appellant. The County "requests the Board amend Part 5 of the Order to include a 90-day deadline for Appellant to become proficient in NextGen and define proficiency as being able to manage NextGen independently and enter all notes into NextGen, within 48 hours of interacting with the patient, with no errors." The County then states that this amendment would be consistent with the County Department of Health and Human Services "policies on NextGen."

Appellant filed a response to the County's request on July 13, 2021, arguing that reconsideration was not appropriate because the County did not allege that there were new facts which were not reasonably available at the time of the hearing or that the Board's decision contained any obvious error. Appellant suggests that if the Board reconsiders the penalty imposed on her that it would be more appropriate to reinstate her with full backpay, perhaps with a reduction for the 45-day suspension.

On July 13, 2021, the County filed a Reply to Appellant's Opposition to Motion for Reconsideration, objecting to the portion of Appellant's response that requests that she be granted backpay. The County argues that Appellant's suggestion is an untimely request for reconsideration of the Board's decision, having been filed more than ten days after the Board's final decision of June 23, 2021.

The County urges the Board to reinstate Appellant's dismissal because the Board did not "discuss the full extent of the possible consequences the Department faced," arguing that its potential exposure to liability is significant due to Appellant's actions. Because of the alleged exposure to liability the County faces, the County argues that a more severe penalty is "more appropriate" and that the 45-day suspension "sets a bad precedent." However, the County's reconsideration request concedes, and the record reflects, that DHHS has no clear idea of what records and exactly how many of them, are missing. Unrelated to Appellant's behavior, the failures of DHHS management may play a significant role in any potential liability.

Indeed, our decision expressly found that the County was not blameless: "Notwithstanding Appellant's recordkeeping shortcomings, we find that DHHS and HCH are responsible for

inadequate, if not haphazard, recordkeeping procedures. . .". Final Decision, MSPB Case No. 20-17 (2021), p. 13. The responsibility for any liability is at least shared by DHHS management. Rather than focus solely on Appellant's missteps, we strongly urge DHHS to take immediate steps to implement improved patient and client recordkeeping practices and procedures.

Importantly, the County does not allege any error of law. Nor does it identify any Board findings that are unsupported by the record. The County is not asserting that there is any new and material evidence or legal argument that was not available when the record closed. The County is simply disagreeing with the Board's judgment concerning the severity of the penalty.

The Board sees no basis for reconsidering its decision on the level of penalty. The Final Decision fully explains the Board's reasoning for concluding that while a significant sanction is justified, dismissal is not.

Finally, the County requests that the Board amend "the Order to include a 90-day deadline for Appellant to become proficient in NextGen and define proficiency as being able to manage NextGen independently and enter all notes into NextGen, within 48 hours of interacting with the patient, with no errors." The County states that this amendment would be consistent with the County Department of Health and Human Services "policies on NextGen." However, the County does not call the Board's attention to anything in the record supporting that assertion. The County's suggestion that the Board's order define proficiency to include the entry of notes into NextGen within 48 hours of interacting with a patient also seems inconsistent with the record evidence that Appellant was given a designated day each week to enter notes into NextGen.

In the absence of record evidence supporting the County's assertions concerning the NextGen policies the County is essentially requesting that the Board supplement the record with unsworn factual statements made in its motion for reconsideration. When deciding on a request for reconsideration the Board will only consider new and material evidence that, despite due diligence, was not available when the record closed. MSPB Case No. 12-11 (2012). The County does not contend that the information concerning DHHS policies on standards for entering notes into NextGen constitutes new and material evidence that was unavailable despite due diligence when the record closed. If the County wished for the Board to consider the DHHS NextGen policies in making its decision, those polices should have been introduced by the County before the record was closed.

Since we decline to reconsider the penalty in this matter, we need not decide whether the alternative argument made by Appellant in her opposition to the County's motion is timely. We view Appellant's argument as only applying "[i]f there were any reconsideration of the Board's penalty assessment."

For the foregoing reasons, the Board **DENIES** the motion for reconsideration and declines to reconsider its Final Decision in this matter.

For the Board
July 14, 2021

# MOTIONS

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

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

In addition to those in other topic areas and routine motions made during the normal course of an appeal, the following are examples of decisions on motions the Board issued during an appeal proceeding in fiscal year 2022.

# CASE NO. 21-36

**ORDER**

On June 28, 2021, the County filed a Motion for Appropriate Relief asking that this appeal be dismissed with prejudice, or in the alternative, that Appellant be prohibited from presenting witnesses and exhibits in any future hearing. The County argues that Appellant has failed to comply with various Board deadlines for the filing of her complete prehearing submission.

The County notes that when Appellant missed the June 1 due date for the filing of her prehearing submission, she was given an extension until June 7. When Appellant did not file her submission on June 7, Board staff attempted to contact her by email and telephone. On June 9, Appellant provided several exhibits, but none of the other requirements of a prehearing submission. The Board's Executive Director emailed Appellant to specify the Board's expectations for a prehearing submission.[1]

On June 10, 2021, the Board's Office Services Coordinator conveyed to Appellant the Board's directive that she file a proper submission by the end of the day or request a postponement of the Prehearing Conference, which had been scheduled for June 22.[2] On June 11 the Prehearing Conference was postponed and Appellant was directed to file her complete prehearing submission, including the hard copies and witness list, by close of business June 24.

---

[1] The June 9 email read as follows:

> Thank you for submitting the various documents and the video last night. The Board's Hearing Procedures require that you identify and label your exhibits: "Appellant will place his/her exhibits in a 3-ring binder. Each exhibit must be labeled and tabbed. Appellant will label his/her exhibits as A. Ex. 1, A. Ex. 2, etc." Please provide the identifications and labels for your exhibits electronically today and the four binders with hard copies of the exhibits promptly thereafter.
>
> To complete your prehearing submission, please also provide the following:
>
> 1. List of the names and addresses of any witnesses you wish to call and a brief summary of their testimony;
>
> 2. List of those witnesses for which you want a subpoena;
>
> 3. The time you estimate will be required for you to present your case.
>
> You should provide certification that you have copied the County's representative with copies of any correspondence or documents you submit to the Board. Did you provide copies of the two emails and attachments to [Associate County Attorney]?
>
> If you have any questions please contact [Office Services Coordinator] by email or telephone at 240-777-6620.

[2] The June 10 email stated:

> The Board is requesting organization of your documents as well as a list of your witnesses and a brief summary of their testimony, also copied to the County, by **5:00 PM today**. If you need more time, please submit a written request to the Board to postpone the prehearing conference which is currently scheduled for June 22 at 12:00 PM. The Board will want to know whether the County consents or objects to a postponement. Please refer to Section 35 of the Montgomery County Personnel Regulations for guidance on prehearing procedures, specifically § 35-11 (a)(2). The County's prehearing submission, which was emailed and mailed to you on May 10, also serves as an example of what is required.

On June 29, 2021, Appellant emailed and indicated that she had sent hard copies of her prehearing submission by interoffice mail on June 25, 2021.

The Board's Executive Director advised Appellant by email on June 28 that she could respond to the County's motion prior to the Prehearing Conference, which had been rescheduled for July 7, 2021. Appellant was also advised that she should be prepared at the conference to explain the reasons she may not have complied with the Board's prehearing submission requirements.[3]

On July 1, 2021, the Board received a handwritten list of the last names of witnesses and the eight exhibits previously emailed. The exhibits were now labeled with exhibit numbers.

On July 6, 2021, the County filed a Supplemental Motion for Appropriate Relief, again detailing Appellant's failures to comply with the Board's prehearing submission requirements.

At the July 7 Prehearing Conference, the Board heard argument from the County and Appellant concerning the County motions. The Board has taken into consideration the arguments made by both parties, the shortcomings of Appellant's filings, and the fact that Appellant is proceeding *pro se*. We find Appellant's argument that she has been working double shifts due to a shortage of correctional officers, and has difficulty accessing her mobile phone or computer during her various shifts, sufficient to constitute good cause under MCPR § 35-11(a)(3).

For these reasons and those stated at the Prehearing Conference the County motions are **DENIED**.

As discussed at the Prehearing Conference, on or before **Wednesday**, **July 14, 2021**, Appellant shall electronically file the following with the Board, with copies to the County:

1. A list of the full names, work addresses, and telephone numbers of witnesses she wishes to call;
2. A brief summary of the testimony she expects each witness to provide;
3. The witnesses for whom she may require subpoenas; and
4. An estimate of the time Appellant will require to present her case.

Appellant shall provide an original and three (3) hard copies of the above submissions to the Board, and one (1) copy to the County Attorney, by U.S. Mail, County interoffice mail, or personal delivery. The Board cautions Appellant that although it has been lenient to this point it is our expectation that

[3] The June 28 email explained:

> Under the County personnel regulations you have 10 days to respond to the County's Motion for Appropriate Relief before the Board rules. MCPR §35-11(a)(4). Since the motion was submitted on a day the MSPB was closed it is deemed to have been filed today. That means your deadline to file a response is July 8, the day after the prehearing conference. You may, of course, submit a written response prior to the prehearing conference. The Board will likely address the motion at the prehearing conference and give you an opportunity to respond. The Board may rule at the prehearing or take the matter under advisement and rule after the hearing.
>
> With regard to your prehearing submission, including your witness list, please be aware that under MCPR § 35-11(a)(3), "Requests, after stated deadlines, to call witnesses or to use documentation not contained in the prehearing submission may be granted only on good cause shown." Accordingly, at the prehearing conference you should be prepared to explain the reasons that you may not have fully complied with the Board's prehearing submission requirements.

she will adhere to the Board's requirements and deadlines going forward. Failure to comply with those requirements may result in dismissal of the appeal or other sanctions under the rules.

In response to Appellant's submission the County may file objections and amend its Prehearing Submission, including proposed witnesses and exhibits, on or before **Wednesday, July 21, 2021.**

The parties are strongly urged to conduct good faith settlement negotiations to resolve this matter without further litigation and provide a status update to the Board on those negotiations by **Monday, July 19.**

A continuation of the Prehearing Conference will take place on **Thursday, July 29, 2021** at 1:00 pm. Zoom login information will be provided separately.

The parties acknowledged that they may be able to agree to stipulations and avoid the need for some testimony. The parties shall submit written joint stipulations of fact to the Board prior to the Prehearing Conference.

For the Board
July 7, 2021

# CASE NO. 22-05

### ORDER DENYING APPELLANT'S STAY REQUEST

On September 9, 2021, Appellant, a supervisor with the Montgomery County Office of Animal Services (OAS), received a Notice of Disciplinary Action (NODA) demoting her from her position as an Inspection and Enforcement Supervisor, Grade 23, to a Customer Services Representative II (Dispatcher), Grade 16. The demotion is apparently scheduled to begin on Sunday, September 26, 2021. On September 16, 2021, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB), and on September 21, 2021, she requested a stay of the demotion pending the outcome of a hearing on the merits before this Board.

Appellant raises numerous reasons for requesting the stay. Those reasons include: She has had positive evaluations and is well qualified for her current position; she was not trained to handle the transition of the OAS from being part of the Department of Police to being an independent agency; that she has been denied due process; that the discipline was not imposed promptly; that the factual underpinnings for the discipline are vague, unsupported and inaccurate; that a similarly situated male employee was treated differently; that the action is unfair, unprofessional and vindictive in that she will be serving directly with and sometimes subordinate to those who complained about her; that she fears retaliation and discrimination; that she will suffer emotional distress; and that the demotion will cause substantial financial hardship and significant inconvenience in meeting her family obligations.

The County filed a response opposing the stay request on September 23, 2021.

Pursuant to Montgomery County Personnel Regulations (MCPR), §35-6(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. However, in prior decisions the Board has said that it will not grant a stay request absent a showing of irreparable harm or extraordinary circumstances. We find that the issues raised by Appellant's arguments may be resolved during the Board's regular processing of the Appeal and do not state

extraordinary circumstances or demonstrate harm that cannot be remedied should the Board find for Appellant on the merits.

Appellant will receive due process through the Board's hearing procedures, where the merits of relevant arguments concerning her performance and qualifications, the appropriate level of discipline, or the treatment of similarly situated employees may be addressed. So too with any issues concerning the fairness of the process, timeliness of the discipline, or the adequacy of the charges. Regarding the potential that Appellant may suffer emotional distress or other health effects, and inconvenience in the scheduling of her family obligations, Appellant may request appropriate accommodations from OAS and the Occupational Medical Services unit of the Office of Human Resources. The Board is sympathetic but cannot say that the suggestion that those possible outcomes may occur shows irreparable harm or extraordinary circumstances.

With regard to Appellants fear of retaliation and discrimination, the Board trusts that OAS management, OHR, and the Office of the County Attorney will take appropriate and necessary steps to investigate and promptly ensure that such unacceptable behavior by other employees will not take place, or will be quickly and satisfactorily resolved.

As to financial hardship, this Board has consistently held that financial loss does not constitute irreparable harm where monetary relief will make an employee whole, including in a demotion case. MSPB Case No. 05-07 (2005) (demotion). *See* MSPB Case No. 13-07 (2013) (suspension); MSPB Case No. 09-10 (2009) (dismissal); MSPB Case No. 08-12 (2008) (suspension). *See also Sampson v. Murray*, 415 U.S. 61, 84, 89-92 (1974) (loss of earnings and reputation is not irreparable harm in government personnel cases); *In re Frazier*, 1 MSPR 280, 282 (1979) ("It is well settled that in order to enjoin an agency's taking of a personnel action, the affected employee must show irreparable harm; and where monetary relief will make an employee whole, no irreparable harm exists.").

**ORDER**

For the reasons discussed above, the Board finds that any harm to Appellant caused by her demotion may adequately be addressed should Appellant ultimately prevail on the merits.

Accordingly, the Board **DENIES** Appellant's request for a stay.

For the Board
September 24, 2021

# 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 FY22, eight agreements and one supplemental enforcement decision were entered into the record.

# CASE NO. 21-33

**ORDER ACCEPTING SETTLEMENT AGREEMENT**

Appellant is an Assistant Chief with the Montgomery County Fire and Rescue Service (MCFRS) who filed an appeal with the Merit System Protection Board (Board or MSPB) challenging a decision of the County's Chief Administrative Officer denying him COVID-19 differential pay.

On July 19, 2021, the parties notified the Board that they had reached a settlement in the above captioned matter and requested that the Board stay further proceedings pending approval of funding for the agreement by the Montgomery County Council. On December 14, 2021, the Montgomery County Council unanimously approved a supplemental appropriation funding 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). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement agreement;
3. That the appeal in MSPB Case No. 21-33 be and hereby is **DISMISSED** as settled; and
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
December 15, 2021

# CASE NO. 21-35

**ORDER ACCEPTING SETTLEMENT AGREEMENT**

On February 16, 2021, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to the decision of the Department of Alcohol Beverage Services to terminate Appellant from a Liquor Store Clerk I position.

On July 7, 2021, the parties notified the Board that they had entered into a settlement agreement and, the next day, they filed with the Board a fully executed settlement agreement resolving the appeal.

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). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the agreement is lawful on its face and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has paid Appellant the full sum agreed to and otherwise fully implemented the terms of the settlement agreement;
3. That the appeal in MSPB Case No. 21-35 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
July 12, 2021

# CASE NO. 21-36

**ORDER ACCEPTING SETTLEMENT AGREEMENT**

On February 22, 2021, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to the decision of the Department of Correction and Rehabilitation to discipline Appellant for misconduct.

On August 2, 2021, the parties notified the Board that they had entered into a settlement agreement and, on August 16, 2021, they filed with the Board a fully executed settlement agreement resolving the appeal.

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). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has carefully reviewed the settlement agreement and notes that the agreement is lawful on its face and that the agreement was freely entered into by the parties. MSPB Case No.

19-18 (2019); *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 45 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has complied with the terms of the agreement regarding the rescinding of certain discipline, providing backpay, the removal of documents from County files, the reissuing of agreed upon disciplinary notices, and otherwise fully implemented the terms of the settlement agreement;
3. That the appeal in MSPB Case No. 21-36 be and hereby is **DISMISSED** as settled; and,
4. That the Board will retain jurisdiction over any disputes that may arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
August 18, 2021

# CASE NO. 21-110

## ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellants, 45 Police Leadership Service (PLS) employees of the Montgomery County Department of Police (MCPD), filed appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County's Chief Administrative Officer (CAO) denying them COVID-19 differential pay. On March 22, 2021, the Board ordered consolidation of the grievance appeals of 44 MCPD employees. The consolidated case was docketed and referenced in all subsequent pleadings as MSPB Case No. 21-110. On August 25, 2021, the consolidation order was amended to include a 45th appeal, that of appellant in MSPB Case No. 22-03.[1]

On October 6, 2021, the parties notified the Board that they had a reached a tentative agreement to resolve the consolidated appeals and stated that once they agreed to final written language they would request that the consolidated appeal be stayed so that the Montgomery County Council may consider a supplemental appropriation to fund the settlement. On October 28, 2021, the parties indicated that they were close to a final agreement but still negotiating certain details regarding some of the individual appellants. The parties jointly requested that the Board temporarily stay further proceedings pending final resolution of the settlement negotiations. The Board granted a stay on October 28.

On November 23, 2021, the parties filed a fully executed settlement agreement with the Board and requested that the Board stay further proceedings pending approval of funding for the agreement by the Montgomery County Council. On December 14, 2021, the Montgomery County Council unanimously approved the appropriation funding the settlement agreement.

[1] The 45 consolidated appeals are MSPB Case Nos. 21-38 through 21-45, 21-47 through 21-54, 21-56 through 21-72, 21-74 through 21-76, 21-80, 21-83, 21-84, 21-86 through 21-89, 21-104, and 22-03.

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). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellants are represented by counsel, and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 30 calendar days of this Order the County provide the Board with written certification, copied to Appellants, that it has fully implemented the terms of the settlement agreement;
3. That the appeals consolidated in MSPB Case No. 21-110 be and hereby are **DISMISSED** as settled;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
December 15, 2021

# CASE NO. 21-111

**ORDER ACCEPTING SETTLEMENT AGREEMENT**

Appellants in the above listed grievance appeal are employees of the Montgomery County Sheriff's Office (MCSO). They have filed appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County's Chief Administrative Officer denying them COVID-19 differential pay. On March 22, 2021, the Board consolidated MSPB Case Nos. 21-91 through 21-103, 21-105, and 21-106. The consolidated case was docketed and referenced in all subsequent pleadings as MSPB Case No. 21-111.

On July 6, 2021, the parties notified the Board that they had reached a settlement in the above captioned matter and requested that the Board stay further proceedings pending approval of funding for the agreement by the Montgomery County Council. The Board granted the request and entered a Stay Order on July 6, 2021. On July 21, 2021, the parties filed a fully executed settlement agreement with the Board. On December 14, 2021, the Montgomery County Council unanimously approved a supplemental appropriation funding 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). Pursuant to Montgomery

County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellants are represented by counsel, and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 30 calendar days of this Order the County provide the Board with written certification, copied to Appellants, that it has fully implemented the terms of the settlement agreement;
3. That the appeals consolidated in MSPB Case No. 21-111 be and hereby are **DISMISSED** as settled;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
December 15, 2021

# CASE NO. 21-114

## ORDER ACCEPTING SETTLEMENT AGREEMENT

Appellants are employees of the Montgomery County Fire and Rescue Service (MCFRS) who filed appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County's Chief Administrative Officer denying them COVID-19 differential pay. On May 20, 2021, the Board consolidated MSPB Case Nos. 21-13 through 21-32, 21-34, and 21-77. The consolidated case was docketed and referenced in all subsequent pleadings as MSPB Case No. 21-114.

On July 19, 2021, the parties notified the Board that they had reached a settlement in the above captioned matter and requested that the Board stay further proceedings pending approval of funding for the agreement by the Montgomery County Council. On December 14, 2021, the Montgomery County Council unanimously approved a supplemental appropriation funding 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). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellants are represented by counsel, and that the agreement

was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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 30 calendar days of this Order the County provide the Board with written certification, copied to Appellants, that it has fully implemented the terms of the settlement agreement;
3. That the appeals consolidated in MSPB Case No. 21-114 be and hereby are **DISMISSED** as settled;
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
December 15, 2021

# CASE NO. 22-05

**ORDER ACCEPTING SETTLEMENT AGREEMENT**

On September 16, 2021, Appellant filed an appeal with the Merit System Protection Board (Board or MSPB). Appellant is a supervisor with the Montgomery County Office of Animal Services (OAS) who is challenging her demotion.

After filing their prehearing submissions, the parties notified the Board on December 15, 2021, that they were close to reaching a settlement and requested that the Board postpone the prehearing conference that was scheduled for that same day. The Board agreed to postpone the prehearing conference until January 10, 2022. On January 10th the Board convened the prehearing conference. During the prehearing conference the Board granted a request by the parties for a recess so that they could meet separately in an effort to finalize settlement discussions. After the parties met, they indicated that they were close to a resolution but were not able to finalize an agreement that day. The Board scheduled the prehearing conference to resume on January 25, 2022 and instructed the parties to provide a settlement update and certain other filings by January 13th. On January 12th the parties notified the Board that they had reached a final settlement and, on January 13, 2022, they filed a fully executed settlement agreement.

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

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that Appellant is represented by competent counsel, and that the agreement was freely entered into by the parties. MSPB Case No. 19-18 (2019); *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** that:

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant and her counsel, that it has fully implemented the terms of the settlement agreement;
3. The prehearing conference scheduled for January 25, 2022, is canceled;
4. The appeal in MSPB Case No. 22-05 be and hereby is **DISMISSED WITH PREJUDICE** as settled; and
5. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
January 19, 2022

# CASE NO. 22-18

## ORDER ACCEPTING SETTLEMENT AGREEMENT

On November 8, 2021, Appellant filed the above captioned appeal with the Merit System Protection Board (MSPB or Board). The appeal pertains to the decision of the Office of Consumer Protection to suspend Appellant for three (3) days.

On December 2, 2021, the County notified the Board that a settlement agreement had been reached in the above captioned matter. On December 6, 2021, the parties filed a fully executed settlement agreement with the Board resolving the appeal.

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). Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the MSPB retains jurisdiction to interpret and enforce the terms of the settlement agreement.

The Board has reviewed the settlement agreement carefully and notes that the settlement agreement is lawful on its face, that the agreement was freely entered into by the parties, and that Appellant was represented by counsel and is himself an attorney and a member of the Maryland Bar. MSPB Case No. 19-18 (2019); *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 30 calendar days of this Order the County shall provide the Board with written certification, copied to Appellant, that it has fully implemented the terms of the settlement;
3. That the appeal in MSPB Case No. 22-18 be and hereby is **DISMISSED** as settled; and
4. That the Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
December 7, 2021

# CASE NO. 20-08

**SUPPLEMENTAL 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 September 25, 2015, settlement agreement filed with the Board in MSPB Case No. 15-24.[1] 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).

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

In her 2019 enforcement request Appellant alleged that the County breached the 2015 settlement agreement by failing to remove certain documents from her personnel file and by failing to provide her with the proper salary and benefits.

On June 8, 2020, the Board issued a Decision Concerning Enforcement of Settlement Agreement denying Appellant's request for enforcement. Appellant then filed a petition for judicial review in the Circuit Court for Montgomery County.

The Circuit Court issued an opinion and order remanding the matter to the MSPB. *[Appellant] v. Montgomery County*, Civil Case No. 482732-V, MSPB Case No. 20-08 (December 23, 2021). The Court:

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

[1]In 2015 the Department of Police had issued a Notice of Disciplinary Action seeking to dismiss Appellant from her Management Leadership Service (MLS) III position as Chief of Financial and Grants Management. After the merits hearing before the Board the parties reached a settlement.

2. affirmed the Board's ruling that *res judicata* barred Appellant's claim for paid time off (PTO) that had been rescinded before the Board issued its decision in MSPB Case No. 16-06 in December 2015;

3. reversed the Board's ruling that *res judicata* barred Appellant's claim for PTO not granted after the Board issued its decision in MSPB Case No. 16-06;

4. reversed the Board's ruling that Appellant's claims were untimely; and

5. affirmed the Board's decision that the County did not materially breach the Agreement regarding (a) the contents and maintenance of confidential personnel files, and (b) the proper calculation of Appellant's cost of living adjustments.

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

On February 7, 2022, the Board issued a scheduling order asking the parties to brief the two issues remanded by the Circuit Court. Appellant filed a brief on March 8, 2022, the County filed a response on March 28th, and Appellant filed a reply brief on April 11th. The Board then considered and decided the enforcement request.

***The County Failed to Grant PTO In January 2016 and Thereafter***

It is undisputed that Appellant was denied PTO after the settlement agreement went into effect.

***Failure to Grant PTO Was a Material Breach of the Agreement***

Under the 2015 settlement agreement Appellant was demoted to a Grade 25 Program Manager position but her salary and benefits were frozen at her MLS III level for 4 years. 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.

Appellant alleges that the County breached the agreement by giving her sick and annual leave instead of PTO.

## APPLICABLE LAW AND REGULATIONS

**Montgomery County Personnel Regulations (MCPR), 2001 (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, July 17, 2018, and June 1, 2020),** *Section 1, Definitions,* which provides, in pertinent part:

> **§ 1-49.** ***Paid time off (PTO)***: A type of leave granted to MLS employees in the Retirement Savings Plan that may be used as sick or annual leave.

**Montgomery County Personnel Regulations, 2001 (as amended July 12, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and July 17, 2018),** *Section 16, Annual Leave,* which states in applicable part:

> **§ 16-12. Paid time off (PTO) and annual leave.** PTO is a type of leave granted to MLS employees who are members of the Retirement Savings Plan or the Guaranteed Retirement Income Plan.
>
> **(a)** ***Crediting and accumulation of PTO. An employee who is granted PTO*****:**
>
> (1) does not earn annual leave;
>
> (2) must be credited with:
>
> (A) 140 PTO hours at the beginning of the leave year if a full-time employee;
>
> (B) 140 PTO hours at the beginning of the 14th pay period of the leave year if a full-time employee;
>
> (C) a prorated number of PTO hours at the beginning of the leave year and at the beginning of the 14th pay period, if a part-time employee; and
>
> (3) may accumulate PTO without limit;
>
> **(c)** ***Use of PTO*****.** PTO may be used for the same reasons as annual leave. . .
>
> **(d)** ***Conversion of annual leave to PTO for certain MLS employees. . .***
>
> (3) If an MLS employee who receives PTO leaves the MLS position and is promoted, demoted, or reassigned to a non-MLS merit system position, the CAO must:
>
> (A) allow the employee to retain and use the unused PTO hours that the employee had accumulated before the current leave year and a prorated share of the unused PTO hours for the current leave year; and
>
> (B) allow the employee to earn annual leave from the effective date of the employee's promotion, demotion, or reassignment to a non-MLS position. . . .

## ANALYSIS

It is Appellant's burden to prove by a preponderance of the evidence that there was a material breach of the settlement agreement. MSPB Case No. 16-06 (2015).

### *Timeliness*

The County's brief includes a timeliness argument the Circuit Court specifically rejected. The County posits no compelling reason for why the Board should or could disregard the Circuit Court's ruling. Accordingly, the timeliness argument must be rejected by the Board.

### *Failure to Grant PTO Was a Breach of the Agreement*

Under the 2015 settlement agreement Appellant was demoted to a Grade 25 Program Manager position, but her salary and benefits were frozen at her MLS III level for 4 years. Paragraph A of the Settlement Agreement provides, in part:

> [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. . . . Moreover, the parties agree that the "redline freeze" acts as a floor for salary and benefits. . .

Appellant alleges that the County breached the settlement agreement by giving her sick and annual leave instead of PTO. The County argues that the agreement does not provide that Appellant would earn PTO in a General Salary Schedule (GSS) Grade 25 position. County Brief in Opposition, p. 2. The County suggests that "[i]f PTO was contemplated as a benefit during negotiations, specific language would have been included in the Settlement documents to overcome the Personnel Regulations and strict adherence to Benefit designations and distinctions between a GSS and MLS employee." County Brief in Opposition, p. 5. The County's position is unpersuasive.[2]

In considering Appellant's first breach of contract claim concerning parking the Board found that the agreement term "benefits" was broad enough to include free parking even though we also concluded that under the facts there was no material breach. MSPB Case No. 16-06 (2015).

Here we find no difficultly in concluding that the term "benefits" as used repeatedly in the agreement is broad enough to include leave benefits. *Merryman v. Univ. of Balt.,* 473 Md. 1, 29 (2021) ("It is clear that holiday leave is a fringe benefit because it is a benefit, other than wages, received by an employee from an employer."). *See Marren v. DOJ,* 50 M.S.P.R. 369, 373 (1991) ("Annual leave provided by law is a benefit"); *Greenspan v. Dep't of Veterans Affairs*, 94 M.S.P.R. 247, 252 (2003) (same). *C.f.,* Maryland Labor and Employment Article, § 3-1201(d)(2) ("'Employment benefits' includes . . . sick leave, annual leave . . .") (wage & hour law); 2 C.F.R. § 200.431(a) ("Fringe benefits include, but are not limited to, the costs of leave (vacation, family-related, sick or military) . . .") (Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards); 41 C.F.R. § 60-20.6(b) ("'fringe benefits' includes, but is not

[2] While we gather that the County's position is that providing Appellant with PTO after she left an MLS position would have been contrary to MCPR § 16-12(d)(3), the retention of Appellant's MLS "salary and benefits" was expressly part of the settlement agreement. At a minimum the agreement required that Appellant be given PTO or the additional annual leave necessary to match the amount of PTO leave to which she was entitled.

limited to, . . . leave; and other terms, conditions, and privileges of employment.") (OFCCP nondiscrimination regulations).

As an MLS employee Appellant was entitled to PTO under which an employee may use the leave for any purpose (*e.g.*, as sick or annual leave). MCPR § 1-49. PTO is requested and approved like any other leave. Full-time employees like Appellant are credited with 140 hours of PTO at the beginning of the leave year and another 140 hours of PTO in July of each year. There is no limit to the number of PTO hours that may be carried over from one leave year to the next, but upon separation from County service the maximum payout is 600 hours. MCPR § 16-12(e).

The County provided an affidavit and documents indicating that upon her demotion Appellant had 310.8 hours of accrued PTO. During the four years after the settlement Appellant used both her accrued PTO leave and the annual and sick leave she earned as a GSS Grade 25. County Opposition (December 19, 2019), Exhibit H, Affidavit of HB, ¶s 9 & 10. *See* MCPR § 16-12(d)(3). Appellant did not earn both types of leave at the same time. When Appellant was reinstated pursuant to the agreement, she was initially 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 County then rescinded 64.57 hours of PTO that reflected the portion of time after the settlement agreement was signed on September 25, 2015, until the end of the year. During that time, she was given annual and sick leave as a non-MLS, GSS Grade 25 employee.

We find that for the period from January 1, 2016, until the end of the four years Appellant was entitled under the settlement agreement to a "redline freeze" of her MLS salary and benefits. Providing Appellant with annual and sick leave instead of PTO was a breach of the agreement.

***Failure to Grant PTO Was a Material Breach of the Agreement***

To demonstrate a material breach Appellant must show that she has "been deprived of [a] benefit which she reasonably could have expected from the Settlement Agreement. . .". MSPB Case No. 16-06 (2015). A material breach is one that relates to a matter of vital importance and goes to the essence of the contract. *Id*.

Whether or not a breach is material is usually a question of fact. *Barufaldi v. Ocean City*, 196 Md. App. 1, 23 (2010) *aff'd mem*., 434 Md. 381 (2013):

> A breach is material when it "is such that further performance of the contract would be 'different in substance from that which was contracted for'." *Dialist, supra*, 42 Md. App. at 178 (1979) (*quoting Traylor v. Grafton*, 273 Md. 649, 687, 332 A.2d 651 (1975), *in turn quoting Speed, supra*, 153 Md. at 661). Ordinarily, this is a question of fact. *See Speed, supra*, 153 Md. at 661-62 ("Whether a given breach is material or essential, or not, is a question of fact'' (*quoting Williston on Contracts*, sec. 866)). There are instances, however, when the issue is so clear that it may be decided as a matter of law. *Id*. at 662.

Whether there was a material breach in this case depends, in part, on the actual difference in benefits between PTO and normal leave for that time. Appellant alleges that the "difference can be quantified as leave valued at $6,223.65." Appellant's Reply Brief, p. 5. Appellant persuasively argues that the amount at issue is significant enough that it must be considered "material."

Appellant calculates that the amount of PTO that should have been granted to Appellant minus her actual leave usage would result in a PTO balance of 94.57 hours, and that her average

pay rate for that time period was $65.81, for a total of $6,223.65. Appellant's Brief, p. 7; Appellant's Response (February 3, 2020), p. 10.

However, we find Appellant's calculation to be in error. The 94.57 figure includes a claim for the 64.57 hours of rescinded PTO that the Circuit Court concluded was barred by *res judicata* plus the 30-hour difference between the PTO Appellant should have earned from January 2016 until July 2019 (1,120) and the annual/sick leave she actually used (1,090). At the $65.81 hourly rate Appellant proposes the 30-hours are worth $1,974.30.

The County argues that there is no material breach because Appellant received annual and sick leave. The County does not address Appellant's claim that she would have had additional hours of leave or make any argument concerning the correct figure for PTO not granted after December 31, 2015.

We find that the PTO was a material benefit of the agreement and that the nearly $2,000 of lost leave is significant. We thus hold that the County's failure to grant PTO was a material breach of the Agreement.

Appellant has also requested that the agreement be reinstated and extended for an additional four-year period. Given that the breach is limited to the loss of PTO and that most of that leave was offset by Appellant's earning of and using annual and sick leave, reinstating and extending the settlement agreement for another four years would be excessive. Granting Appellant's proposed relief would provide that to which Appellant is not entitled, *i.e.*, the MLS salary and benefits for an additional four years.

**ORDER**

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant's request to enforce the terms of the settlement agreement regarding Paid Time Off benefits from January 1, 2016, to October 19, 2019, is **GRANTED**, and that the County shall pay Appellant the 30 hour difference between the PTO Appellant should have earned from January 2016 until July 2019 (1,120) and the annual/sick leave she used (1,090) at Appellant's rate of pay on October 19, 2019, or her current rate of pay, whichever is higher, and in no event less than $1,974.30.

Although Appellant has not prevailed on all of her claims, because the Board has found in favor of Appellant on the issue of PTO 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 incurred. Montgomery County Code, § 33-14(c), provides the Board with remedial authority to "[o]rder the County to reimburse or pay *all or part of the employee's reasonable attorney's fees*." *See* MSPB Case No. 15-27 (2017); MSPB Case No. 13-02 (2013); MCPR § 35-16(a)(9).

Appellant shall 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 this decision of the Merit System Protection Board, pursuant to Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review

may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
June 15, 2022

# SHOW CAUSE ORDERS

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

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

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

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

The following is an example of a show cause order issued in fiscal year 2022.

# CASE NO. 22-02

**SHOW CAUSE ORDER**

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on August 4, 2021 and submitted a copy of a Notice of Termination by email on August 12. The Board then emailed a letter to the County and Appellant on August 12 advising the County that its prehearing submission was due on September 14 and that Appellant's prehearing submission was due on October 6, 2021.

The County filed its prehearing submission on September 9. When Appellant did not timely file his prehearing submission or otherwise contact the Board, on October 7, 2021, Board staff emailed Appellant notifying him of the missed deadline, attaching the August 12 letter, and asking that Appellant advise the Board in writing if he no longer wished to pursue his appeal. After receiving no response, Board staff twice called Appellant on October 11 and left a voicemail message requesting that Appellant contact the Board's office. On October 13, the Associate County Attorney for this appeal sent an email to the Board, copying Appellant, stating that she had not received a prehearing submission. That same day Board staff sent another email to Appellant requesting a response. On October 14, Board staff left Appellant another voicemail message requesting a response. To date, Appellant has not filed a prehearing submission, responded to the multiple emails and telephone voicemail messages from the Board, or contacted the Board in any way.

For the above reasons, the Board hereby **ORDERS** Appellant to provide a statement of such good cause as exists for why he has failed to file the required prehearing submission. The statement shall be filed on or before close of business **October 21, 2021**, with a copy served on the County. The County shall have the right to file a response on or before **October 25, 2021**.

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. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

For the Board
October 18, 2021

# ATTORNEY'S FEE REQUESTS

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

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

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

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

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

The Board did not issue any attorney's fee decisions during fiscal year 2022.

# OVERSIGHT

The Board is required to perform certain oversight functions.

***Personnel Regulation Review.*** Pursuant to the County Charter, § 404, and the Montgomery County Code, § 33-7(a), the MSPB has long engaged in the prior review of proposed personnel regulations. In fiscal year 2022 the Board reviewed and commented on the following proposed personnel regulations:

1) Executive Regulation 13-21 - Employee Drug and Alcohol Use and Drug and Alcohol Testing
2) Executive Regulation 14-21 - Adding an Official Holiday
3) Executive Regulation 16-21 - Disposition of Accumulated Sick Leave
4) Executive Regulation XX-21 - Family Sick Leave Waiver
5) Executive Regulation 1-22 - MCPR Sunset Date
6) Executive Regulation 12-22 - Sunset Extension

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

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

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

In fulfilling this mandate during fiscal year 2022, the Board reviewed and, where appropriate, provided comments on the following new class creations:

1) Registered Psychology Associate (Series)

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

In fiscal year 2022 the MSPB reviewed three requests for extensions of temporary promotions and denied two of them.