Merit System Protection Board Annual Report FY2024

Members:

Barbara S. Fredericks, *Chair*
Sonya E. Chiles, *Vice Chair*
Treava Hopkins-Laboy, *Associate Member*

Edward E. Haenftling, Jr.
Executive Director

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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 2024 were:

Barbara S. Fredericks	Chair
Sonya E. Chiles	Vice Chair
Treava Hopkins-Laboy	Associate Member (Appointed January 30, 2024)
Harriet E. Davison	Chair (until December 2023)

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[1] 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[2] and Remote Hearing Procedures[3], both of which are available on the Board's website. After the hearing, the Board prepares and issues a written decision.

During fiscal year 2024 the Board issued the following decision on an appeal concerning a disciplinary action.

[1] See https://www.montgomerycountymd.gov/MSPB/AppealForm.html.
[2] See https://www.montgomerycountymd.gov/mspb/hearing-procedures.html.
[3] See https://www.montgomerycountymd.gov/mspb/remote-hearing-procedures.html.

CASE NO. 22-36

FINAL DECISION

This appeal involves the removal of Appellant from both the Board of Directors (BOD) and the membership rolls of the Bethesda Fire Department (BFD).

The Board has considered and decided the appeal.

PROCEDURAL BACKGROUND

On April 28, 2022, Appellant filed this appeal challenging the decision of the BFD Board of Directors to dismiss him as an active member of the BFD and as a member of the BFD Board of Directors. The BFD issued eight charges against Appellant which we summarize as follows: (1) Job Abandonment and Insubordination; (2) Failure to Act on Emergency Medical Technician (EMT) Training Concerns and Making Discriminatory Remarks; (3) Failure to Ensure Proper Training; (4) Acting Outside the Scope of Authority; (5) Failure to Report Vehicle Damage and Take Steps Necessary to Address the Situation; (6) Use of Tobacco in a Vehicle of the BFD; (7) Failure to Act in Good Faith as a Corporate Director; and (8) Improper Use of a Fictitious Social Security Number for a Volunteer.[1] Appellant also sought reimbursement for the value of various items he alleged to have purchased for the BFD.

The parties filed prehearing submissions and on August 31, 2022, the parties appeared by video before the Merit System Protection Board (MSPB or Board) for a prehearing conference.

At the prehearing conference the BFD argued that the MSPB did not have jurisdiction over Appellant's removal from the BFD Board of Directors but does have jurisdiction over Appellant's removal as a member of the BFD. A Prehearing Order was issued by the Board on September 7, 2022, scheduling the merits hearing and addressing various matters such as discovery, exhibits, and witnesses. The order also asked the parties to brief the jurisdictional issues, and on October 13, 2022, the Board issued an order finding that it did not have jurisdiction over Appellant's removal from the BFD Board of Directors. The Board further held that because Appellant was considered by BFD to be a volunteer firefighter or rescuer the Board has jurisdiction to hear Appellant's appeal of his dismissal as a volunteer firefighter or rescuer. The Board also determined that it had jurisdiction to resolve a claim by Appellant for reimbursement of the value of certain items he had purchased for BFD. This claim was resolved by the parties after settlement discussions. Day 1 Tr. 22-24; Affidavit of Appellant, November 9, 2022; Appellant Email, November 9, 2022.

FINDINGS OF FACT

The Board held a merits hearing on October 24 and 26, 2022, hearing testimony from nine witnesses, including Appellant. The following witnesses testified and are identified by their initials, or as "Appellant," elsewhere in this decision:

1. BFD Fire Chief (VE)
2. BFD Secretary (BC)
3. BFD Treasurer (JP)

[1] The charges are detailed in a memorandum of February 22, 2022, (BFD Exhibit 1) and in BFD's submission dated June 1, 2022, (received June 7, 2022).

4. BFD Vice President (JM)
5. Appellant (MK)
6. Former BFD Member (RM)
7. Former BFD Board Member (GD)
8. Former BFD Board Member (JPM)
9. Retired Personnel Information Management System (PIMS) manager, MCFRS division of volunteer services (RB)

On April 8, 2022, the BFD issued a notice of removal to Appellant. BFD Exhibit 1.[2] There were eight (8) charges against Appellant, outlined in a charging memorandum dated February 22, 2022. BFD Exhibit 1.

After hearing testimony and reviewing the exhibits[3] the Board made the following factual findings.

Appellant has volunteered with the BFD since 2004. Day 1 Tr. 195. During that time Appellant has held various positions of responsibility, including serving as President of the Board of Directors and Fire Chief. Day 1 Tr. 186, 195-96. In 2019 BFD appointed Appellant as a Life Member in the BFD, a class of membership that recognizes ten years of active service with the organization. Appellant Exhibit 1 and BFD Exhibit 2, p. 4, §2.2D; Day 1 Tr. 196; Day 2 Tr. 83.

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[2] BFD Exhibits 1 through 11 were admitted into the record. The BFD Exhibits are as follows:

Exhibit 1 - MSPB Appeal Documents
Exhibit 2 - Bethesda Fire Department Constitution and Bylaws, approved and adopted 5/7/20
Exhibit 3 - Appellant email 12/3/21
Exhibit 4 - Executive Regulation 22-00 AM, Code of Ethics & On-Duty Personal Conduct, effective 7/9/02
Exhibit 5 - RM Memorandum 9/30/21
Exhibit 6 - Emails related to 2/16/20 incident
Exhibit 7 - Documents related to July 2019 collision
Exhibit 8 - Documents related to tobacco use violation in local fire and rescue department (LFRD) vehicle
Exhibit 9 - MCVFRA meeting minutes 12/1/21 & supporting Title of the Maryland Code
Exhibit 10 - Documents related to fictitious Social Security Number
Exhibit 11 - Appellant response to Statement of Charges, 4/7/22

[3] Appellant Exhibits (AX) 1 through 8 were admitted into the record. Appellant's exhibits are as follows:

AX 1 - Bethesda Fire Department Bylaws, May 7, 2020
AX 2 - BFD Response to Appellant Request for Trial Board 2/2/22
AX 3 – Integrated Emergency Command Structure (IECS) Removal, email dated 3/1/22
AX 4 – Montgomery County Executive Regulation 21-06AM Certification Standards for Training, Experience, & Credentialing Requirements, effective date 11/6/07
AX 5 - Separation Reason from BFD, emails, 4/18/22
AX 6 – Montgomery County Volunteer Fire Rescue Association Bylaws – July 2021
AX 7 - PIMS_CHAIR_HELP-Updated 4/20/16
AX 8 - BFD Policy 21-01_Standby Meal Reimbursement Program_201201 & Meal Reimbursement Evaluation 12/1/20

In addition to the exhibits of the parties, the Board requested certain documents and they were entered into the record Board Exhibits (BX) 1-5 are the following:

BX 1 - Appellant's Length of Service Award Program Annual Certification, 2019-21
BX 2 - Appellant's Length of Service Award Program Annual Certification, 2019-21, signed
BX 3 - Return to Duty Email, January 4, 2022
BX 4 - Memorandum from NF, February 3, 2022
BX 5 - BFD Board of Directors Meeting Minutes, April 7, 2022

Due to Appellant's longstanding involvement and leadership roles, it was undisputed that he was considered an authority figure among the volunteers at the BFD and that he was aware of that role. Day 1 Tr. 186.

The BFD Board appointed VE as Acting Fire Chief on December 2, 2021. Day 1 Tr. 109.[4] Immediately after VE's appointment as Acting Fire Chief Appellant made known his displeasure with the appointment by sending the following email on December 3, 2021, at 10:56 pm to all the Board Members and active members of the BFD. Day 2 Tr. 10; BFD Exhibit 3. The email's subject line was "A706 Officially Out Of Service."[5] In its entirety the content of the email read:

> Dear Fellow Board Members,
>
> I and others expressed our concerns last night should [VE] be appointed Acting Chief of the Department, but our words fell on deaf ears. I will be unavailable to staff A706 until this issue is resolved.
>
> The unfortunate causality of this entire situation is that the citizens within our first due will have to rely on others to assist them in their time of need.
>
> [Appellant]

BFD Exhibit 3.

By stating that he would "be unavailable to staff A706" Appellant was saying that he would not be driving or otherwise serving on the BFD's only ambulance until VE was removed as Chief. BFD Exhibit 3; Day 1 Tr. 217; Day 2 Tr. 13, 17, 22-23. Appellant acknowledged that the other volunteer firefighter/rescuers at BFD understood his meaning. Day 2 Tr. 23. Appellant also admitted that he knew his actions would probably cause the BFD to be unable to provide ambulance services. Day 2 Tr. 49.

After Appellant's December 3rd email other BFD volunteers declined to staff the ambulance and consequently it was out of service for several weeks. Day 1 Tr. 110-12, 129-30, 147-48. Shortly thereafter, a number of volunteers resigned from BFD and joined the Glen Echo Volunteer Fire Department where Appellant also volunteered. Day 1 Tr. 111. Some volunteers called as witnesses by Appellant said that they had resigned from the BFD due to their belief that Chief VE lacked integrity. Day 1 Tr. 177, 182; Day 2 Tr. 71, 79.

Chief VE appealed to the volunteers to immediately return to their duties at the BFD. Day 1 Tr. 112. In response to the continuing widespread refusal of BFD volunteers to staff the ambulance, Chief VE issued a 30-day suspension to the volunteers who were participating in the walk out charging them with willful dereliction of duty, abandonment, putting the community at risk, and tarnishing the image and reputation of the BFD. Day 1 Tr. 112, 130.

However, before the volunteers had fully served their 30-day suspensions, Chief VE attempted to get volunteers to return by rescinding the suspensions and ordering them to return to duty. On January 4, 2022, Chief VE testified that he sent an email to all the volunteers who had refused to staff the ambulance, including Appellant, rescinding the suspensions. Day 1 Tr. 112-13; Board Exhibit 3. The Chief's email notified the recipients that he was lifting the suspension and ordering them to return to duty. Board Exhibit 3. The Chief's email also warned that "Failure to

[4] VE's acting capacity ended when he was appointed Fire Chief a month later. Day 1 Tr. 109.
[5] The BFD's sole ambulance was referred to as A706.

return to duty, per this directive, the department's staffing and standby policies, and various related BFD Chief's Orders and Informational Bulletins, shall result in disciplinary action, including the possibility of dismissal." Board Exhibit 3.

In his testimony at the second day of the hearing Appellant did not deny that he received the Chief's January 4th email:

> I'm not going to say I didn't receive it. I will say I don't recall receiving it. There were several times that my email account was suspended so I'm not going to say that I did not physically receive it. . . . I do know that I did receive correspondence, certainly at the end of December because I had attended the January board meeting. So I must have gotten -- my email would have been back on by then.

Day 2 Tr. 14 -15. At no time did Appellant report for duty or notify Chief VE that he was ready to return to duty. Day 2 Tr. 41-42.

Firefighters and rescuers receive training on the nature of their responsibilities. Day 1 Tr. 125. Appellant asserted that he had no responsibility to the community and that his actions only harmed the community "slightly" in that "there were no deaths because of a delayed response" due to the BFD ambulance being out of service. Day 2 Tr. 133.

Oaths of service are routinely administered to firefighters and rescuers. Day 1 Tr. 39-40; 84, 90-91; 117-18; 124-25; 161; 164-65; Day 2 Tr. 88. Some firefighters and rescuers did not recall taking an oath. Day 2 Tr. 53. Appellant testified that he has never taken an oath of service. Day 1 Tr. 199.

A September 30, 2021, memorandum from then BFD member RM to Montgomery County Fire and Rescue Service (MCFRS) Captain TP expressed his concerns about EMT classroom instruction. BFD Exhibit 5. RM, the author of the September 30, 2021, memorandum, testified and denied that Appellant made any discriminatory and disparaging comments about his age. Day 2 Tr. 55-56.

On February 16, 2020, the BFD ambulance crew dropped a patient during a transfer at Suburban Hospital. BFD Exhibit 6; Day 1 Tr. 119; Day 2 Tr. 66. Appellant was President of the BFD when the incident occurred. Day 1 Tr. 88. Appellant was not the Fire Chief at that time. Day 1 Tr. 119; Day 2 Tr. 67.

A dinner event for certain members of the BFD was scheduled for December 10, 2021, at Morton's Steak House. BFD Submission, p. 5. BFD funds were used to secure a reservation and when the event was cancelled the BFD lost about $3,000. Day 1 Tr. 90. BC testified that Appellant may have had some involvement in the planning for the event. Day 1 Tr. 51 - 54. Former BFD BOD member GD testified credibly that planning for the event involved the BFD executive committee but not Appellant. Day 2 Tr. 70.

Chief VE testified that Appellant had retained possession of the BFD Fire Chief's vehicle after he was no longer the Fire Chief. Day 1 Tr. 113-114. Chief VE further testified that Appellant did not promptly respond to instructions to return the vehicle and when he did return it the vehicle was in poor condition from Appellant smoking in the vehicle. Day 1 Tr. 114-15. Appellant admitted that he violated County and BFD policy by smoking in the vehicle. Day 1 Tr. 207 ("yes, I did. It was wrong"); Day 1 Tr. 213-14; Day 2 Tr. 134 ("I used bad judgment regarding smoking.").

Chief VE testified that the vehicle also suffered approximately $2,000 in unreported collision damage. Day 1 Tr. 115-16. Because there had not been a timely accident report the damage was not covered by the BFD's insurance. Day 1 Tr. 115-17. Appellant acknowledged that the damage occurred when he had an accident in 2019, but testified that he had promptly reported it to a prior Fire Chief and was disciplined by not being allowed to drive a BFD vehicle for two weeks. Day 1 Tr. 206, 231. *See* BFD Exhibit 7. Appellant's testimony on that issue was corroborated by former BFD Board member GD. Day 2 Tr. 70, 78.

Appellant was a member of the Montgomery County Volunteer Fire- Rescue Association (MCVFRA) Board while serving in his capacity as a member of the Board of Directors of the BFD. At a December 1, 2021, meeting of the MCVFRA Board, Appellant made a motion to remove $4,579 of funding for a BFD ambulance from a Senator William Amoss State grant funding request. BFD Exhibit 9. Appellant's motion to deduct $4,579 from the Amoss State grant funding request was passed by the MCVFRA Board. BFD Exhibit 9; AX 2; Day 1 Tr. 58. Appellant testified that the funding was not really eliminated, it was just delayed. Day 2 Tr. 134. A February 1, 2022, email from the President of the BFD to Appellant concerning this issue questions Appellant's action and says, "There will be a motion to remove you from the board on Thursday." AX 2.

When Appellant was Fire Chief of the BFD in 2020 he entered an alternative Social Security Number (SSN) for a BFD member who was not a U.S. citizen and had not yet been issued an official SSN in the Local Fire and Rescue Department (LFRD) Personnel Information Management System (PIMS). BFD Exhibit 10. The PIMS users guide permitted entry of an alternate SSN under certain circumstances. AX 7, p. 17; Day 1 Tr. 74-76.

The use of an incorrect SSN meant that the member was unable to obtain a Maryland Income Tax credit for his volunteer firefighter work. Day 1 Tr. 81-84; BFD Ex 10. Although Appellant attempted to change the member's SSN in PIMS to the correct one he was unsuccessful. Day 1 Tr. 80; BFD Exhibit 10. BC received notice that there was a continuing issue with the member's tax credit due to the SSN situation. Day 1 Tr. 79-80. BC then contacted the Length of Service Awards Program (LOSAP) administrator, and the incorrect SSN was promptly corrected. Day 1 Tr. 83-84.

BC, the Secretary of the BFD Board of Directors as well as the coordinator of the LOSAP, testified that on April 7, 2022, the BFD Board of Directors voted to remove Appellant as a member of the BFD. Day 1 Tr. 35-36. The vote to remove Appellant was 8-1 with one abstention, sufficient to meet the requirements of the BFD Bylaws for removal of a Life Member. Day 1 Tr. 37, 46; BFD Ex. 2 (p. 12, §9.3B). Appellant does not dispute that the vote concerning his termination based on the charges outlined above was properly conducted. Day 1 Tr. 46.[6]

ANALYSIS AND CONCLUSIONS

The Montgomery County Code provides the MSPB with jurisdiction over the discipline of volunteer firefighters and rescuers. The County Code, § 21-7(a), provides that "the Merit System

[6] Appellant requested a Trial Board under the BFD's Constitution and Bylaws, Article X. However, that request was rendered moot once the suspension was rescinded. We note also that the right to a Trial Board does not apply in cases involving removal or termination of BFD membership under §9.3 of the Constitution and Bylaws. Unlike disciplinary actions such as suspensions under §9.5, removal of membership is under the sole authority of the BFD Board of Directors. Membership in the BFD may be terminated by the Board for violation of law, breach of the Constitution and Bylaws or corporate charter, or "for other just cause supported by sufficient evidence." §9.3A.

Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee."

Under the County Code, § 21-1(c), a "volunteer" is defined as "an individual who, without salary, performs fire, rescue, emergency medical, or related services as provided in this Chapter with the Montgomery County Fire and Rescue Service." Because this definition does not encompass membership on a local fire and rescue department's governing board, on October 13, 2022, the Board dismissed for lack of jurisdiction Appellant's appeal insofar as it concerned his removal from the BFD corporate Board of Directors.

We now address the charges that apply to Appellant as a volunteer firefighter or rescuer and an operational member of the BFD. Based on our October 13, 2022, jurisdictional ruling the elements of any charges that relate solely to Appellant's status as a member of the BFD Board of Directors must be dismissed.

Charge 1 – Job Abandonment and Insubordination

Charge 1 pertains to Appellant's alleged job abandonment and insubordination beginning on December 3, 2021. The BFD's prehearing submission stated the charge as:

> Violation of Oath of Service, that during the month of December 2021, along with other members who have since been dropped from the rolls of the Bethesda Fire Department, Incorporated, you engaged in an act of insubordination by participating in a volunteer work walkout, abandoning your duties in relationship to providing operational service to the community served by the Bethesda Fire Department, Incorporated.

BFD Submission, p. 2.

Immediately after VE was appointed as Fire Chief by the BFD Board of Directors Appellant sent an email to the BFD Board and all members of the BFD expressing his disapproval and stating that until the "issue is resolved" Appellant would refuse to staff the BFD ambulance. BFD Exhibit 3. Appellant admits that he "was not happy" with the Board's decision to appoint VE. Day 1 Tr. 198-99.

By advising the entire BFD that he would "be unavailable to staff A706" Appellant was saying that he would not be serving on the BFD's only ambulance until Chief VE was removed from his post. BFD Exhibit 3; Day 1 Tr. 217; Day 2 Tr. 13, 17, 22-23. Appellant acknowledged that the other volunteer firefighter/rescuers at BFD understood his meaning. Day 2 Tr. 23. Appellant also admitted that he knew his actions would be harmful to the BFD's ability to provide ambulance services. Day 2 Tr. 49. Appellant's testimony that his actions only harmed the community "slightly" because "there were no deaths because of a delayed response" due to the BFD ambulance being out of service is, at the least, unprofessional, callous, and insensitive to the unnecessary health and safety suffering his actions could have caused. Day 2 Tr. 133.

Appellant's December 3rd email resulted in other BFD volunteers refusing to staff the ambulance and consequently it was out of service for several weeks. Day 1 Tr. 110-12, 129-30, 147-48. After Chief VE's efforts to get volunteers to resume their duties he issued 30-day suspensions to all volunteers participating in the work stoppage, charging them with willful

dereliction of duty, abandonment, contributing to putting the community at risk, and tarnishing the image and reputation of the BFD. Day 1 Tr. 112, 130.

In an attempt to get the ambulance back in service Chief VE rescinded the suspensions and ordered active members to return to duty.[7] On January 4, 2022, Chief VE sent an email to various volunteers who had refused to staff the ambulance, including Appellant, rescinding the suspensions. Day 1 Tr. 112-13; Board Exhibit 3. The Chief's email notified the recipients that he was lifting the suspension and ordering them to return to duty. Board Exhibit 3. The Chief's email also warned that "Failure to return to duty, per this directive, the department's staffing and standby policies, and various related BFD Chief's Orders and Informational Bulletins, shall result in disciplinary action, including the possibility of dismissal." Board Exhibit 3.

Appellant does not deny that he refused to staff the ambulance but asserts that he never encouraged other BFD members to leave the BFD. Day 1 Tr. 199. However, Appellant's email, copied to all BFD members, states that "the citizens within our first due will have to rely on others to assist them in their time of need." BFD Exhibit 3. Appellant admitted his meaning and intent was not just that he would not staff the ambulance, but that no volunteers at BFD would and that as a consequence citizens who called for emergency services would have to rely on responders from other fire companies. Day 1 Tr. 224. We find that Appellant not only refused to serve in the BFD's only ambulance but that he also played a leadership role in a walk out by other BFD volunteer firefighters and rescuers that significantly impaired the operational status of that ambulance.

Although Appellant claims that he never took an oath of service, Day 1 Tr. 199, we do not credit his denial. Such oaths are routinely administered to firefighters and rescuers, Day 1 Tr. 39-40; 84, 90-91; 117-18; 124-25; 161; 164-65; Day 2 Tr. 88, although it is possible that some firefighters and rescuers do not recall taking an oath. Day 2 Tr. 53.

Although an oath is a meaningful and solemn act, taking an oath is not the only reason a public safety responder would be aware of their obligations and responsibilities to the organization and the community they serve. Firefighters and rescuers receive training on the nature of their responsibilities. Day 1 Tr. 125. Given Appellant's extensive service in positions of significant responsibility we have no doubt that he understood the importance of order and discipline to a volunteer fire department, and was aware of his responsibilities and obligations to the BFD and the community it serves. Appellant's assertion that his oath was not to the community and that his actions only harmed the community "slightly" because "there were no deaths because of a delayed response" due to the BFD ambulance being out of service rings hollow. Day 2 Tr. 133. Rather than striving to protect life, health and safety, Appellant knew that as a leader in the BFD, his refusal to serve would provide encouragement to others to join him in the walk out and would put the

[7] We considered and rejected the possibility that because Appellant's dismissal followed a suspension that he might be able to claim that the dismissal was barred by the principle of double jeopardy. Even assuming that the rescinded suspension was disciplinary, "'administrative double jeopardy' has not been recognized in Maryland." *Montgomery County v. Krieger*, 110 Md. App. 717, 732 (1996). *C.f. Guide to MSPB Law and Practice* (2022) pp. 3020-28. Administrative double jeopardy for non-bargaining unit Montgomery County employees or volunteer firefighters and rescuers would likely require legislative or regulatory action. *See, e.g.*, MD Code Ann., State Personnel and Pensions, §11–103(b) ("After taking a disciplinary action against an employee, an appointing authority may not impose an additional disciplinary action against that employee for the same conduct unless additional information is made known to the appointing authority after the disciplinary action was taken.").

public at greater risk. Appellant's petulant action is unquestionably a betrayal of the oath and obligations of his position, and a fundamental ethos of a public safety position.

Appellant may have had a First Amendment right to raise concerns about what he may have believed to be the public safety impact of the appointment of Chief VE. *See Goldstein v. Chestnut Ridge VFD*, 218 F.3d 337 (4th Cir. 2000). However, it is the Appellant's actions in refusing to serve in the BFD's only ambulance and playing a leadership role in encouraging others in a walk out that impaired the operational status of that ambulance that is the offense. These actions did not constitute protected First Amendment speech. Even if his December 3, 2021, email could be characterized as speech addressing a matter of public concern, what he did differs markedly from the behavior discussed in *Goldstein v. Chestnut Ridge VFD*. In that case, the speech in question was protected because the volunteer fire company made only generalized and unsubstantiated allegations of disruption.

Insubordination is a serious offense that disrupts the workplace and threatens the ability of the organization to perform its functions. The adverse impact is particularly serious in a volunteer fire company where prompt obedience to lawful orders is essential. In this case, there was a clear refusal to obey the lawful order of the Fire Chief to return to duty.

Appellant not only was insubordinate by refusing to return to duty, but he also acted in an unjustified manner designed to undermine the operations of the BFD. Due to Appellant's actions the BFD's only ambulance was put out of service because he and many volunteer members deserted their responsibilities. Appellant's actions were expressly designed to pressure the BFD Board of Directors to remove Chief VE from his position. Appellant intentionally disrupted the operations of the BFD and put public safety at risk because he disagreed with the Board of Director's hiring decision.

Even if Appellant's concern over the appointment of Chief VE had some validity it would not excuse his disruptive behavior that undermined the operational status of the BFD. Appellant is entitled to his opinions, but he is not permitted to defy the Chief's authority and abandon his responsibilities to the BFD without consequence. It is a fundamental and long-standing tenet of the public sector workplace that an employee must "obey first, grieve later", *i.e*., obey valid orders and then file a grievance. MSPB Case Nos. 07-14 & 15 (2007); MSPB Case No. 98-03 (1998) ("Employees are expected to obey the lawful directions [and] file a grievance after the incident instead of disobeying supervisory directions."). *See Wyche v. United States Postal Serv*., 208 F. App'x 858, 861 (Fed. Cir. 2006) (Even when an employee believes that an order is not proper they must first comply with the order and then register a complaint or grievance); *Perron v. Department of Transportation*, 16 M.S.P.R. 382 (1983) (employee must follow an authorized order and raise any objection through the grievance process). This principle is particularly apt where an employee occupies an essential position as an emergency responder.[8]

[8] Appellant's assertion that as a Life Member of BFD he could choose when he wished to staff the ambulance is of no merit. Day 1 Tr. 196; Day 2 Tr. 23-24, 41-42. Appellant was not merely deciding whether he wanted to volunteer on certain shifts or days or take a vacation. He was riding on an ambulance for another volunteer fire company. Day 1 Tr. 214. He issued a defiant ultimatum to the BFD that no matter the impact on public safety he would not staff the BFD ambulance until the BFD Board was forced to reverse its appointment decision and Chief VE was removed from his post. And he clearly had a significant role in a work stoppage that crippled the BFD's operational effectiveness for a certain period of time.

Appellant does not allege that he was refusing to obey an illegal order, that Chief VE was not duly appointed and authorized to issue orders, or that staffing the ambulance would unreasonably endanger his health or safety. Refusing to obey Chief VE's lawful authorized order to return to work is the very definition of insubordination. MSPB Case No. 98-03 (1998) (Employee guilty of insubordination for failure to follow supervisor's lawful directions"). *See Bieber v. Department of the Army*, 287 F.3d 1358, 1364 (Fed. Cir. 2002) (Insubordination is a "willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.").

Appellant's egregious behavior of withholding his services in concert with others was unjustified, irresponsible, and harmful to the volunteer fire company he served. There can be no question that BFD's decision to dismiss Appellant was necessary to protect the organization and was based on just cause. MSPB Case Nos. 07-14 & 15 (2007) (refusal to follow instructions and disruption of the workplace justify dismissal). *See Bieber v. Department of the Army*, 287 F.3d 1358, 1364-65 (Fed. Cir. 2002) (insubordination and workplace disruption justify dismissal). *Cf. Goldstein v. Chestnut Ridge VFD*, 218 F.3d at 355. ("volunteer fire companies have a strong interest in the promotion of camaraderie and efficiency" and "in promoting internal harmony, trust, and camaraderie amongst [their] members"); 218 F.3d at 359 (concurrence) ("Police and fire departments cannot effectively protect public safety without some measure of order and discipline in their ranks.").

For the reasons discussed above we sustain Charge 1 and find that by itself it provides a reasonable basis for dismissal.

Charge 2 – Failure to Act on EMT Training Concerns and Making Discriminatory Remarks

Charge 2 involves a September 30, 2021, memorandum from a BFD member setting out his concerns about EMT classroom instruction and alleged remarks by Appellant concerning the age of the memorandum's author. BFD Exhibit 5. The BFD's prehearing submission states the charge as:

> Violation of the "Constitution and Bylaws of the Bethesda Fire Department, Incorporated," Article VIII, Section 8.1 (Fire Chief), Subsection (I)(8) [now (H)(8)], which states, "Establishing and enforcing guidelines to ensure the training of all Members of the Department to perform their duties competently." That after receiving correspondence from a [RM], who had recently completed the Emergency Medical Technician training reporting disparities between the training provided in the structured classroom environment and the in-station supporting training provided by members of the Bethesda Fire Department, Incorporated, you failed to take any proactive action upon such notification of concern, and according to writer, you're your [*sic*] receipt of the correspondence you made discriminatory and disparaging remarks based upon the writer's age.

BFD Submission, p. 3.

As part of the justification for Charge 2, the prehearing submission further states: "As a BFD leader, [Appellant], who even after no longer serving as 'Administrative Fire Chief,' acted as a senior operational advisor, received a copy of the memorandum penned by [RM], did not respond to the concerns, and inflamed the situation by his comments about the age of [RM]."

The BFD moved to withdraw Charge 2, but the Board decided to defer a decision on dismissal because the charge was considered by the BFD Board of Directors when it made its decision to dismiss Appellant. Day 1 Tr. 156; 189, 206.

Appellant called RM, the author of the September 30, 2021, memorandum, as a witness. RM credibly testified that Appellant made no discriminatory and disparaging comments about his age. Day 2 Tr. 55-56.

It is unclear whether for purposes of Charge 2 the BFD considered Appellant's status as a "senior operational advisor" to have been acting in his capacity as a member of the Board of Directors or as a volunteer firefighter/rescuer. Further, the charge is based on an alleged violation of a provision in the BFD Constitution and Bylaws that concerns the duties of the Fire Chief, but the charge suggests that Appellant was not serving as Fire Chief at the time of the alleged offense.

For the reasons stated above, the Board dismisses Charge 2.

Charge 3 - Failure to Ensure Proper Training and Counselling

Charge 3 concerns a February 16, 2020, incident in which the BFD ambulance crew dropped a patient. The charge as stated in the BFD prehearing submission is as follows:

> Violation of the "Constitution and Bylaws of the Bethesda Fire Department, Incorporated," Article VIII, Section 8.1 (Fire Chief), Subsection (I)(8) [now (H)(8)], which states, "Establishing and enforcing guidelines to ensure the training of all Members of the Department to perform their duties competently." That after the incident of February 16, 2020, upon learning of a serious incident involving the mishandling of a patient, wherein, the patient was dropped, as President and Assistant Fire Chief, you failed to appropriately act to ensure the involved members were immediately removed from service, immediately retrained, and returned to service based on clear review/confirmation that the circumstance did not stem from intentional negligence, or inability to perform based on other factors. Additionally, after learning of the potential need for critical incident stress counselling for the involved members, you did not act.

BFD Submission, p. 4.

It is unclear whether for purposes of Charge 3 the BFD considered Appellant to have been acting in his capacity as a member of the Board of Directors or as a volunteer firefighter/rescuer. Further, the charge is based on an alleged violation of a provision in the BFD Constitution and Bylaws that concerns the duties of the Fire Chief, but the charge itself suggests that Appellant was not serving as Fire Chief at the time of the alleged offense.

For these reasons Charge 3 cannot be sustained and must be dismissed.

Charge 4 - Acting Outside the Scope of Authority.

Charge 4 involved allegations that Appellant directed the expenditure of BFD funds for an unapproved dinner event scheduled for December 10, 2021, without BFD Board approval. The BFD's prehearing submission stated the charge as follows:

> Violation of the "Constitution and Bylaws of the Bethesda Fire Department, Incorporated," Article VIII, Section 8.1 (Fire Chief), wherein, you acted outside of the scope of your authority related to the financial activities of the Department.

> Specifically, you wrongfully ordered the Department's Administrator Specialist (JM) to expend funds for an unapproved December 10, 2021, social function involving only a small portion of the membership. Further, as the minimum amount required by Morton's Steak House was far more than reasonable based on the numbers of attendees, the expenditure was fiscally imprudent and was not approved by the Board of Directors, nor is it likely that it would have been if appropriately presented to the Board.

BFD Submission, p. 5.

The BFD sought to withdraw Charge 4. Day 1 Tr. 150-151, 153; 204. The Board decided to defer a decision on dismissal as the charge was considered by the BFD BOD in dismissing Appellant. Day 1 Tr. 156; 204, 206.

The testimony concerning Charge 4 does not support a finding of impropriety by Appellant. Former BFD BOD member GD testified with confidence that planning for the event involved the BFD executive committee but not Appellant. Day 2 Tr. 70. Witness BC's testimony that Appellant may have had some involvement in the planning for the event lacked certainty. Day 1 Tr. 51 – 54.

Moreover, it appears that if Appellant was involved in planning for the event he was most likely doing so in his capacity as a member of the Board of Directors rather than as a volunteer firefighter/rescuer. Accordingly, we find that the Board lacks jurisdiction over Charge 4.

For the reasons stated above, the Board cannot sustain and must dismiss Charge 4.

Charge 5 - Failure to Report Vehicle Damage and Take Steps Necessary to Address the Situation

Charge 5 concerns Appellant's alleged failure to report an accident and damage to the Chief's vehicle. The BFD's submission laid out the charge as follows:

> Violation of Montgomery County Fire and Rescue Service Policy and Procedure No. 24-02, dated June 15, 2012, (Vehicle Collision Investigation and Reporting Policy), multiple sections. After plainly visible vehicle damage occurred involving a Bethesda Fire Department, Incorporated vehicle under your control, which was consistent with a vehicle collision, you failed to:
>
> - Properly report the vehicle collision/damage;
> - Appropriately make arrangements for the timely filing of an insurance claim; and
> - Take the steps necessary to effect the repairs required to restore the vehicle to proper condition.
>
> ***It should be noted that although the specific policy provides for the enforcement of the policy to be handled by the County Fire Chief, the Bethesda Fire Department, Incorporated and its respective members are required to follow and comply with the conditions set forth and your actions are not consistent with this requirement.

BFD Submission, p. 6.

BFD alleged that Appellant did not follow the proper policy for reporting damage to the Chief's vehicle. Chief VE testified that the vehicle also suffered approximately $2,000 in unreported collision damage. Day 1 Tr. 115-16. Because there had not been a timely accident report the damage was not covered by the BFD's insurance. Day 1 Tr. 115-17.

Appellant acknowledged that the damage occurred when he had an accident in 2019 but testified that he had promptly reported it to a prior Fire Chief and was disciplined by not being allowed to drive a BFD vehicle for two weeks. Day 1 Tr. 206, 231; BFD Exhibit 7. Although there are no documents in the record reflecting the two-week driving suspension other than Appellant's written statement, BFD Exhibit 7, Appellant's testimony was corroborated by former BFD Board member GD. Day 2 Tr. 70, 78.

BFD did not attempt to dispute Appellant's testimony that he reported to a prior Chief and BFD did not discredit the testimony of GD supporting Appellant's version of events. It is not difficult to imagine that Chief VE was simply unaware of the events that occurred in 2019 or what action his predecessor took to address the accident.

We conclude that BFD has not carried its burden of proof and thus Charge 5 cannot be sustained.

Charge 6 - Use of Tobacco in a Vehicle of the BFD

Charge 6 alleges that Appellant violated the Montgomery County Fire and Rescue Services policy prohibiting the use of tobacco in LFRD vehicles, BFD Exhibit 8, as well as Montgomery County Code, §24-9(b)(6), which prohibits smoking in any County government workplace.[9] The BFD's prehearing submission stated the charge as follows:

> Violation of Montgomery County Division of Fire and Rescue Service Policies and Procedures No. 806, dated May 30, 2001, (Use of Tobacco Products), which although applies to career employees, makes reference to the prohibition outlined in "Policy 5.1 Use of tobacco is prohibited in all County and LFRD vehicles." This is supported by Montgomery County's overall smoking ban law (Bill 33-12, MC Code 24-9), which "prohibits smoking on County owned or leased property. This includes smoking in County vehicles; County buildings; and bus stops with or without shelters, as well as County owned parking garages." As Local Fire and Rescue Department (LFRD) vehicles belonging to the Bethesda Fire Department, Incorporated are supported by tax funds, they are considered quasi "County vehicles," and those entrusted with the care of these vehicles must comply with both law and policy. Upon your return of the Bethesda Fire Department, Incorporated vehicle entrusted in your care, it was determined that smoking of tobacco products had taken place within the vehicle.

BFD Submission, p. 7.

Chief VE testified that when Appellant returned the vehicle to the BFD it was in poor condition from Appellant smoking in the vehicle. Day 1 Tr. 114-15. Appellant admitted that he violated County and BFD policy by smoking in the vehicle. Day 1 Tr. 207 ("yes, I did. It was wrong"); Day 1 Tr. 213-14; Day 2 Tr. 134 ("I used bad judgment regarding smoking.").

Under the MCFRS policy prohibiting the use of tobacco products in LFRD vehicles an employee in violation of the policy is "subject to disciplinary action up to and including dismissal." §5.2. *See* §5.3 ("Employees . . . must not use tobacco products while on-duty or while off duty. Personnel who violate this section are subject to termination under the conditions of employment.").

[9] §24-9(a) defines "Workplace" to include "a motor vehicle owned or leased by the employer."

It is undisputed that Appellant used tobacco in the BFD's vehicle in violation of County law and policy. We therefore sustain Charge 6. Appellant's violation warrants disciplinary action and, although this offense alone may not justify dismissal, it serves to buttress our finding that he should be dismissed under Charge 1.

Charge 7 – Failure to Act in Good Faith as a Corporate Director

Charge 7 concerns an incident that occurred at the December 1, 2021, meeting of the Montgomery County Volunteer Fire- Rescue Association (MCVFRA) Board where Appellant made a motion to remove $4,579 of funding for a BFD ambulance from a State grant funding request. BFD Exhibit 9. The specifics of the charge are set out in the BFD's prehearing submission:

> Deviation from the tenets of Maryland Code, Corporations and Associations, § 2-405.1(d)(2), which states, "A director is not acting in good faith if the director has any knowledge concerning the matter in question which would cause the reliance to be unwarranted." During the Board of Directors meeting of the Montgomery County Volunteer Fire and Rescue Association (MCVFRA), held on December 1, 2021, you as both a member of the MCVFRA Board of Directors and the Bethesda Fire Department Board of Directors, represented without consultation that the Bethesda Fire Department, Incorporated would agree to the elimination of Senator William H. Amoss (aka "508") funding in the amount of $4,579 for the FY 2022 distribution cycle. You had no reason to believe that the Bethesda Fire Department, Incorporated would independently and voluntarily make such an offer, and thereby, your actions were not in good faith as a Board of Directors member of the Bethesda Fire Department, Incorporated.

BFD Submission, p. 8.

Appellant's motion to deduct $4,579 from an Amoss State grant funding request was passed. BFD Exhibit 9; AX 2; Day 1 Tr. 58. Appellant claims that the funding was not really eliminated, it was just delayed. Day 2 Tr. 134.

It is clear from the charge that it seeks to punish Appellant as a BFD BOD member. The charge states that Appellant's "actions were not in good faith as a Board of Directors member." The charge includes references to a section of the Corporations and Associations Article of the Maryland Annotated Code concerning the obligation of a director of a corporate board to act in good faith. Furthermore, a February 1, 2022, email from the President of the BFD to Appellant concerning this issue questions Appellant's action and says, "There will be a motion to remove you from the board on Thursday." AX 2.

Because Charge 7 solely concerns Appellant's responsibilities as a member of the BFD Board of Directors rather than as a volunteer firefighter/rescuer we find that the Board lacks jurisdiction. Accordingly, Charge 7 must be dismissed.

Charge 8 – Improper Use of a Fictitious Social Security Number

Charge 8 concerns an allegation that Appellant improperly provided a fictitious Social Security Number for a member of the BFD to State agencies. The BFD prehearing submission sets forth the charge as follows:

> In violation of Federal law, as an official of the Bethesda Fire Department, Incorporated, you knowingly and erroneously provided Maryland State

> Government Agencies with a fictitious Social Security Number (SSN) on behalf of a subordinate member of the Bethesda Fire Department, Incorporated. In addition to this being an unlawful act, the ensuing circumstances have caused hardship, harm, and legal concerns for the member.

BFD Submission, p. 9.

A BFD member was not a U.S. citizen and had not yet been issued an official SSN. When Appellant was Fire Chief of the BFD, he entered a fictitious SSN for that member in the LFRD Personnel Information Management System (PIMS). Appellant introduced evidence showing that the PIMS users guide permitted entry of an alternate SSN under certain circumstances. AX 7, p. 17; Day 1 Tr. 74-76.

The BFD takes the position that the use of an alternate SSN caused problems for the member when he tried to obtain the Maryland Income Tax credit for his volunteer firefighter work. Day 1 Tr. 81-84; BFD Ex 10. The record reflects that although Appellant attempted to change the member's SSN in PIMS to the correct one he was unsuccessful. Day 1 Tr. 80; BFD Exhibit 10. Ultimately, Ms. BC received notice that there was a continuing issue with the member's tax credit due to the SSN situation. Day 1 Tr. 79-80. Ms. BC then contacted the LOSAP administrator, and the incorrect SSN was corrected soon thereafter. Day 1 Tr. 83-84.

Appellant's use of a fictitious SSN in PIMS does not appear to have been improper, but his failure to take steps necessary to remedy the situation once the member obtained an official SSN was an unfortunate deficiency in performing his duties. As Fire Chief he should have asked individuals more familiar with PIMS to assist him in resolving the problem.

Appellant's administrative shortcoming does not, however, rise to the level of an offense warranting discipline. The charge against him is that he violated Federal law and caused hardship to a member of the BFD. We do not find evidence in the record showing that Appellant violated 42 U.S.C. §408 or intentionally provided false information to government agencies. At most Appellant simply did not exert the appropriate effort necessary to remedy the situation or show the initiative to contact someone who could. We do not view his incompetent behavior as misconduct. *See Public Service Commission v. Wilson*, 389 Md. 27, 77-79 (2005).

For the reasons discussed above we do not sustain Charge 8.

Fewer Than All Charges Sustained

As discussed above, we have sustained only Charges 1 and 6. In prior cases where the Board has sustained fewer than all of the agency's charges, the Board has mitigated the agency's discipline to the maximum reasonable penalty. MSPB Case No. 20-17 (2021); MSPB Case No. 18-02 (2017); MSPB Case No. 13-04 (2013). *Cf., LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

Here, given the egregious nature and seriousness of Appellant's unjustified and irresponsible misconduct that put the public health and safety at risk, and the violation of County regulations, the Board has determined that the maximum reasonable penalty is dismissal.

ORDER

Based upon the foregoing analysis, the Board finds that Appellant's dismissal as a volunteer firefighter/rescuer with the Bethesda Fire Department was reasonable and justified and therefore **DENIES** the appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §21-7(f), *Appeals of Board decisions*, Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules, Chapter 200, Rule 7-202.

For the Board
August 31, 2023

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 2024 the Board issued the following decisions on appeals concerning the denial of employment.

CASE NO. 24-09

FINAL DECISION

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of Appellant from the determination of the Montgomery County Office of Human Resources (OHR) Occupational Medical Services (OMS) division that Appellant was not medically acceptable to perform the duties of a Police Officer Candidate. The Appeal was officially filed February 5, 2024.[1] The County filed its response to the appeal (County Response) on March 5, 2024. Appellant did not file a reply to the County submission.

The appeal was considered and decided by the Board.

FINDINGS OF FACT

Appellant applied for a Grade P1 position as a Police Officer Candidate with the Montgomery County Police Department (MCPD). The class specification, job posting, and conditional offer indicated that candidates were required to successfully complete a medical examination protocol. *See* CE Ex. 1; CE Ex. 3; CE Ex. 4. The medical examination protocol specified for the position was a Core I exam.[2] *See* CE Ex. 3.

On October 18, 2023, appellant was issued a conditional offer of employment for the position, subject to her satisfying the County's medical standards for employment. *See* CE Ex. 4. Appellant presented for the physical examination on three separate occasions: October 30, 2023, November 27, 2023, and January 8, 2024. *See* CE Ex.2. As noted by the County's Employee Medical Examiner (EME), Dr. GS, appellant failed to meet the fitness requirements as established by the County on all three occasions.[3] *Id*.

On January 24, 2024, appellant's conditional offer was withdrawn based on the EME's assessment that she did not meet the required medical standards for the position. *See* CE Ex. No. 2.; CE Ex. No. 5.

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[1]The appeal was submitted online to the MSPB on February 2, 2024, at 12:19 a.m., a date and time when the MSPB office is not open. The appeal was officially received by the MSPB the next Board business day. *See* MSPB Case No. 18-13 (2018).

[2] The Core I Exam is defined as: "[Protocol that] may include the elements of the Core Exam and an exercise treadmill test, a test to determine blood type, and a respiratory function test. Physical ability testing is required for Police Officer, Deputy Sheriff, and Correctional Officer applicants. A Core I Exam is required for public safety classes that require formal medical monitoring under OSHA regulations or periodic health assessments to insure [sic] continued fitness for duty in occupations that involve high risks or occupations that require confined space entry and use of self-contained breathing apparatuses." *See* Montgomery County Personnel Regulations § 8-6(b)(2)(D).

[3] "Per Montgomery County requirement, Police Officer Candidates must have a maximum heart rate of 90% or less of predicted maximum and reach stage 4 (12 METS) in order to meet standards of fitness. On initial evaluation, [appellant] was able to complete the test of 12 METS but her maximum heart rate was 99% of predicted maximum, above the limit of 90% of predicted maximum. Candidates are given 3 attempts to achieve this goal. [Appellant] returned for a second attempt on 11/27/23 and reached a maximum heart rate of 98% of predicted maximum. Her third attempt was made on 1/8/24, at which time she again completed the test but her maximum heart rate was 93% of predicted maximum, again above the 90% limit required for applicants for the Montgomery County Police Department. Because [appellant] did not meet the fitness requirements as established by the County, she was rated as Not Fit For Duty." CE Ex. 2.

On February 2, 2024, appellant filled out an MSPB appeal form in which she alleged that the Department's decision was wrong because, after the conditional offer was withdrawn, she sought out her "primary physician who conducted an electrocardiogram (ECG) with favorable results." *See* 24-09 Appeal Form. Appellant further indicated that the action she wanted the Board to take was to "reconsider [her] situation, giving [her] more time to demonstrate that [her] body is healthy and fit to continue being part of this process." *Id*.

APPLICABLE CODE PROVISIONS AND REGULATIONS

MCPR Section 6. Recruitment and Application Rating Procedures

§ 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.

MCPR Section 8. Medical Examinations and Reasonable Accommodation

§ 8-1. Definitions.

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

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

§ 8-3. Medical requirements for employment.

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

§ 8-4. Medical standards and guidelines for medical examinations and pre-employment inquiries.

(a) Policy on medical standards and guidelines.

(1) The CAO must establish, consistent with the ADA:

(A) medical standards for positions and occupations; and

(B) guidelines for medical examinations and pre-employment inquiries.

(2) Medical standards and guidelines for medical examinations and pre-employment inquiries must be:

(A) job-related and used to determine if the applicant or employee can perform essential functions of the job with or without accommodation; and

(B) applied uniformly and consistently to all applicants and employees who are offered employment or employed in the same job class or occupational class.

(3) When performing medical examinations or inquiries, the EME must conduct an individualized assessment of an individual's current health status and functional capabilities:

(A) in relation to the essential functions, physical and psychological demands, working conditions, and workplace hazards of a particular occupation or position; and

(B) under appropriate occupational health guidelines and practices that are consistent with applicable Federal, State, and local statutes and regulations.

(4) The EME may refer an applicant or employee to another health care provider for an independent medical evaluation as necessary.

(5) The EME must not conduct medical examinations and pre-employment inquiries to determine if an applicant or employee has a disability or the nature or severity of the disability unless the examination or inquiry is job-related and consistent with business necessity.

(6) The EME must:

(A) maintain records of medical equipment maintenance and calibration;

(B) comply with regulatory medical testing requirements;

(C) educate Occupational Medical Services (OMS) staff in proper examination and testing procedures; and

(D) use certified laboratories for applicant and employee testing.

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

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

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

(b) ***Medical exam protocols***

(2) ***Types of medical exam protocols***.

(D) Core I Exam. The elements of the Core I Exam may include the elements of the Core Exam and an exercise treadmill test, a test to determine blood type, and a respiratory function test. Physical ability testing is required for Police Officer, Deputy Sheriff, and Correctional Officer applicants. A Core I Exam is required for public safety classes that require formal medical monitoring under OSHA regulations or periodic health assessments to insure continued fitness for duty in

occupations that involve high risks or occupations that require confined space entry and use of self-contained breathing apparatuses.

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 was arbitrary, capricious, illegal, or based on political affiliation or other non-merit factors. *See* Montgomery County Code, §33-9(c); MSPB Case No. 18-13 (2018); Montgomery County Personnel Regulations (MCPR) § 34-9(d)(2). The County argues that appellant has failed to prove that the County's decision was arbitrary, capricious, or illegal. The Board agrees and concludes that appellant's appeal is denied.

The County is authorized to establish medical standards for each County position. *See* MCPR § 8-4(a)(1)(A). An applicant must meet the required medical standards to be considered for the position. *See* MCPR § 8-3(a). The County may withdraw an offer of employment if the applicant fails to meet the medical standards for the position. *See* MCPR § 8-1(b).

In the instant case, appellant applied for a position as a Police Officer Candidate and the job specifications stated that her employment was conditioned on her successful clearance of the medical examination protocol for the position. Because of public safety concerns, it is reasonable for the County to not select a Police Officer Candidate who would be unable to perform the essential duties of the position. *See* MSPB Case No. 07-09 (2007) (where applicant had "extremely erratic fluctuations in blood glucose levels" it was reasonable for the medical examiner to conclude that the applicant was not fit for duty as a Police Officer Candidate).

There is no dispute that appellant failed to meet the fitness requirements specified for the Police Officer Candidate position. *See* CE Ex. 2. Appellant has provided no evidence that the County's decision to withdraw her conditional offer, based on her failure to meet those fitness requirements, 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. *See* Montgomery County Code, § 33-9(c); MCPR, § 6-14. As such, we conclude that appellant has not met her burden of proof and her appeal is denied.

We note that, going forward, appellant is free to apply for any open County position and undergo a new medical evaluation if required.[4]

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board **DENIES** Appellant's appeal from her nonselection for the position of Police Officer (IRC57963). It is further **ORDERED** that, should appellant apply for a future position, the County will reconsider appellant's medical acceptability based on her then existing medical condition.

[4] Should appellant experience nonselection after applying for a new position, such nonselection would be treated separate and apart from the instant case. Appellant would maintain appeal rights to the MSPB pursuant to Montgomery County Code § 33-9 and MCPR § 6-14.

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 29, 2024

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 2024 the Board issued the following grievance decisions.

CASE NO. 23-15

FINAL DECISION

Appellant, an Assistant Manager with Alcohol Beverage Services (ABS), filed a grievance challenging the new ABS system for scheduling work shifts and days off for store managers and assistant managers. On June 26, 2023, Appellant filed an appeal concerning the June 15, 2023, Step 2 grievance response of the designee of the Chief Administrative Officer (CAO)[1]. The Appeal presents this case as a consolidated grievance appeal by Appellant and ten (10) other ABS managers and assistant managers (Appellants)[2] over the change in the ABS work scheduling system.

On June 26 the Board established a schedule for submissions by the parties and requested that the parties provide an agreed upon list of the employees whose grievances were consolidated, certification that they were provided with copies of the Step 2 decision, and verification of which employees have joined this appeal. The County filed a response to the appeal on July 26, 2023. (County Response). Appellant filed a reply to the County's submission on August 16, 2023. (Appellant Response). On October 18, 2023, the Board again asked that the parties provide an agreed upon list of the employees whose grievances were consolidated, certification that they were provided with copies of the Step 2 decision, and verification of which employees have joined this appeal. Appellant provided some of the requested information on October 24, 2023. The County provided a supplemental response on October 26, 2023, (County Supplemental Response), indicating that there was not an agreed upon list and that Appellant JH had filed a timely appeal to the MSPB.

The Appeal and submissions by the parties were reviewed and considered by the Board.

FINDINGS OF FACT

On November 25, 2022, the then ABS Division Chief of Retail Operations issued an email setting out changes to the way ABS would schedule work hours for store managers and assistant managers. County Exhibit (CX) 1. The policy changes were to go into effect on January 1, 2023.

The policy outlined in the email reduced the number of weekend days per year that assistant managers would be off work while increasing the number of weekend days per year that store managers would be off. In its entirety the policy stated the following:

> We are making a change to the way we schedule hours for store management (Store Managers and Assistant Managers) going forward. These changes have been discussed with HR and are effective 1/1/2023. There are several reasons why these changes are being made. Some of these are ...
>
> - Improving Customer Service
> - Improving Coverage During Peak Hours and Hours of Largest Labor Need

[1] The appeal was submitted electronically on Friday, June 23, 2023, a date when the Merit System Protection Board (MSPB or Board) office was not open. The appeal was officially received by the MSPB the next business day for the Board.

[2] As will be discussed below, the Appellants are MA, CB, KG, JH, FK, DL, AQ, JR, LW, and JW.

- Aligning Hours to What a New Sales Forecasting and Labor Management System Will Require
- Reducing Labor Hours During Slow Times (Off Peak Hours)
- Ensuring Consistency in Schedules

At this time, these changes will impact Store Management (SM and ASM) only. Below is a detailed list of the changes that will take effect on 1/1/2023. ***Management should not change any scheduling patterns that you have been using for full time represented employees.*** Please reach out to your District Manager if you need further clarification.

• **Store Manager**

1 weekend off a month
Every Sunday Off
This results in an increase of weekend days off per year for store managers taking you from 52 weekend days off a year to 64 weekend days but allocates more payroll and coverage to Saturday where we need it the most. It is critical we have leadership in the stores on the busiest days of the week and this will help ensure that.

• **Assistant Manager**

1 weekend off a month
2 Additional Sundays a month
This results in a decrease of 4 weekend days off per year from 52 down to 48. Again, this gives the stores much needed leadership coverage on our busiest days of the week.

• **Schedule Standards**

As a reminder all managers (SM and ASM) should be working 2 opens, 1 middle shift and 2 closes per week or alternating between 2 closes and 3 opens one week and 3 closes and 2 opens the next week. Nobody at this point should be working one week of closing shifts and one week of open shifts.
All managers SM and ASM should work every Monday and your second day off if you're not off on the weekend should be Tuesday, Wednesday or Thursday.
SM and ASM should not be off on the same day in in the middle of the week (i.e., Both off on Tuesday. One should be off one of those three days, the other should be off on one of the remaining two days).

For the purpose of clarification these policies go into effect on the schedule starting 1/1/2023 and should not impact your full time represented employees. Any variance to this policy must be approved by the DM for that store and the Chief of Retail and will only be considered for 30 days or less, unless HR approves an extension for qualifying reasons.

CX 1 (emphasis in original).

Appellants dispute the validity of the County's claims concerning the benefits of the new scheduling policy. In support of their grievance appeals Appellants have argued that the County's five justifications for the policy change are unsupported by the evidence:

Improving Customer Service

Appellants maintain that customer service at ABS stores is excellent, citing data showing that the customer satisfaction rate remains over 90%. Appellants' Response, p. 3; Appeal Form, p. 2.

Improving Coverage During Peak Hours and Hours of Largest Labor Need

Appellants argue that coverage problems are the result of insufficient numbers of non-managerial frontline staff and the fact that individual store managers have no say in setting staffing levels at each store. Appellants' Response, p. 3; Appeal Form, pp. 2-3. Appellants further contend that the new policy over emphasizes weekend coverage because it ignores changes in customer shopping habits caused by the COVID pandemic. Appellants' Response, p. 4.

Reducing Labor Hours During Slow Times (Off Peak Hours)

Shortages of part-time (20 hours per week) employees results in excess staffing during non-peak hours. Appellants' Response, p. 3

Ensuring Consistency in Schedules

Appellants state that for over 20 years ABS store managers have had more predictable schedules like other ABS employees. Under the new policy, Appellants argue, managers are subject to schedules that are "inconsistent and erratic." The new schedule gives managers only two (2) consecutive days off once per month, which Appellants allege causes managers to be deprived of an appropriate work/life balance and results in low morale. Appellants' Response, pp. 3-4; Appeal Form, p. 3.[3]

Appellants also assert that by frequently denying managers and assistant managers two (2) consecutive days off in a workweek the policy is in violation of Montgomery County Personnel Regulation (MCPR) § 15-3(c) which provides that employees should be granted "2 consecutive days off in each workweek, subject to operational needs." Appellants' Response, p. 2.

Appellants claim that the new scheduling policy is less fair than the previous work scheduling policy and request that the previous work scheduling system be reinstated. Appeal Form, p. 6.

ISSUES

Did the County properly establish and implement the revised work schedule policy for ABS store managers and assistant managers?

APPLICABLE LAW

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, July 12, 2011, July 23, 2013, June 30, 2015, July 25, 2017, and July 17, 2018), Section 15, Work Schedules, Attendance, Hours of Work, provides, in pertinent part:

§15-2. Work schedules.

[3] One of the reasons given by ABS for the change in policy, "Aligning Hours to What a New Sales Forecasting and Labor Management System Will Require," does not seem to have been addressed by Appellants.

(c) ***Authority to change work schedule***. A supervisor may change the work schedule of an employee who reports to the supervisor. . . .

§ 15-3. Workday and workweek.

(c) ***Days off***. A department director should grant an employee 2 consecutive days off in each workweek, subject to operational needs.

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

§ 34-1. Definitions.

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

(1) concern the same subject; and

(2) request the same or similar relief.

§34-9. Grievance procedure.

(c) *Consolidated grievances.*

(1) The OLR Chief may consolidate 2 or more grievances and process them together to save time.

(2) OLR must give written notice to the employee or employees who filed the grievances that the grievances have been consolidated and will be processed together.

(3) If the employee gives written notice to the OLR Chief that the employee objects to the consolidation of the employee's grievance with other grievances, the OLR Chief must process the employee's grievance separately. . . .

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

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

(B) each employee receives consistent and appropriate relief.

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

§ 34-10. Appeal of a grievance decision.

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

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

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

Montgomery County Personnel Regulations (MCPR), 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, provides, in pertinent part:

> **§ 35-3. Appeal period**.
>
> (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee: . . . (3) receives a written final decision on a grievance. . .

ANALYSIS

Timeliness and Consolidation

The Appeal purports to be a consolidated grievance appeal by Appellant and ten (10) other ABS managers and assistant managers over the change in the ABS work scheduling system. *See* MCPR, § 34-1(c); § 34-9(c) (consolidated grievances).

The Step 2 decisions indicate that the grievances of 10 ABS managers were consolidated. There is some question over who the 10 Appellants addressed in the Step 2 decisions were, and there is inconsistency between Mr. JH's list of Appellants and the County's. The County identified the 10 Appellants addressed in the Step 2 decisions as MA, CB, KG, JH, FK, DL, AQ, JR, LW, and JW. Mr. JH identified the same individuals as the County with the exception of MA.[4] Mr. JH also identified BW and DW. The record indicates that BW did not file a grievance, and the County avers that OLR has no record of DW filing a grievance. *Affidavit of JH, Chief of the Office of Labor Relations*, ¶6.

The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 17-28 (2017); MSPB Case No. 11-08 (2011). *See* MCPR § 35-2(b) ("An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO"). Thus, we find that only the individuals who were identified by the County as having received Step 2 grievance decisions are proper appellants to this consolidated appeal.

Ten employees provided emails to the Board verifying that they wished to participate in the appeal with Appellant JH.[5] Those emails were not provided until after the Board asked for confirmation from Appellant that the other employees had authorized him to represent them. Because the 10-day appeal period had expired by the time those emails were sent the County Supplemental Response takes the position that despite Appellant signing his appeal by listing the other employees, only Appellant's appeal was timely filed.

While the Board generally will not waive the 10-day filing limit, the Board may waive the filing time limits for good cause shown. MSPB Case No. 18-16 (2018).

After examining the Step 2 decisions provided by the parties the Board was troubled to find that, contrary to the dictates of MCPR § 34-10(c), all of them failed to include a statement

[4] Mr. MA may not have filed a grievance at Step 1 but apparently attended the Step 2 hearing and was treated by the County as part of the consolidated grievance. We thus assume that the County has waived any procedural objections concerning the filing of a Step 1 grievance and allowed his inclusion in the consolidated grievances at Step 2.

[5] Those were: CB, KG, FK, DL, BW, DW, AQ, JR, LW, and JW. However, there is nothing in the record indicating that BW and DW filed Step 2 grievance appeals or received Step 2 decisions. Thus, they may not be considered appellants in this consolidated grievance appeal.

providing directions on how to appeal to the MSPB and notice of the appeal time limits.[6] We have previously held that notification to the employee of the time limits is a significant factor in determining whether good cause exists for waiving the appeal time limits. MSPB Case No. 18-16 (2018).[7]

MCPR § 34-10(c)(1) requires that a CAO's Step 2 decision state "how the employee may . . . file an appeal with the MSPB." Subsection (c)(2) requires that the CAO's decision also include "the time limits for appealing the grievance . . . to the MSPB." In previous decisions the Board has "strongly urge[d] the County to explicitly provide more detailed information in such notices, including a link to the Board's website, the mailing address for the Board's office, and the Board's telephone number." MSPB Case No. 18-16 (2018), footnote 6.

There is also an email from OLR on April 2, 2023, attached as an exhibit to the October 26 County Supplemental Response. It concerns the Step 2 grievance appeals and was sent to 8 of the 9 agreed upon appellants. The OLR email states, in part, that:

> the facts are same *[sic]* in all cases and so not everyone has to attend this [Step 2] hearing. All those affected (including anyone who did not file a grievance) will be included in the final decision. I will send the calendar invite shortly. If there is anyone who is missing, please feel free to forward it to them.

Although it is ambiguous, the email may be suggesting that OLR was treating all employees subject to the new scheduling policy, even those who had not filed grievances, as being included in or covered by the Step 2 decision. It is possible that OLR made these statements because it assumed that a decision rescinding or altering the ABS scheduling policy would necessarily impact all managers and assistant managers. This unfortunate language may have done a disservice to employees who received a forwarded copy of the OLR email and a calendar invite since they may have assumed that they were parties to the grievance and had no need to file their own grievances. We reluctantly conclude that the author's authority to make the statements is unclear and that the email is too ambiguous for us to consider it as waiving or extending the filing time limits for Steps 1 and 2 of the grievance procedure. *See* MCPR § 34-9(a)(5). We urge OLR to use greater care and precision in its communication with employees.

We will, however, address the County's argument that Mr. JH is the only one of the Appellants to have filed a timely appeal to the Board.

Applying the factors to consider in deciding whether to waive the time limit to appeal to the Board, as outlined in MSPB Case No. 18-16, we conclude that:

(1) The length of any delay was not egregious under the circumstances. Neither the June 15, 2023, Step 2 decision nor the April 2, 2023, OLR email provided accurate appeal guidance to the Appellants. Appellants are all *pro se* and may have assumed that once their grievances were consolidated at Step 2, they remained consolidated with Mr. JH for purposes of appeal to the

[6] The County admits that all the grievants in the consolidated Step 2 appeal to OLR were sent identical Step 2 decision letters (except for the addressee). *Email to MSPB Executive Director from SK, November 14, 2023.*

[7] "The factors in determining whether good cause exists for waiving the time limits include: (1) the length of the delay; (2) whether the employee was notified of the time limit; (3) whether there were circumstances beyond the employee's control affecting his or her ability to comply with the time limit; (4) the degree to which the employee was negligent; (5) whether any neglect was reasonably excusable; (6) whether there was unavoidable casualty or misfortune that could not reasonably have been prevented; and, (7) the extent and nature of prejudice to the agency that would result from a waiver of the time limit." MSPB Case No. 18-16 (2018).

Board. In any event, Appellants provided written ratification that they authorized Mr. JH's representation in a consolidated appeal promptly when verification was requested by the Board.

(2) Appellants were not properly notified of the time limit because the Step 2 decision failed to include information concerning the timing and method of appeals as required under MCPR § 34-10(c)(1). This reason alone justifies waiver of the appeal time limits to the Board.

(3) The factor concerning circumstances beyond the employee's control is not applicable.

(4) Because of the failure to provide proper notice of the appeal requirements to any of the Appellants they were not negligent.

(5) There was no neglect to be excused.

(6) The factor concerning unavoidable casualty or misfortune is not applicable.

(7) Finally, we see no significant prejudice to the agency that would result from a waiver of the time limit.

We thus find that under these circumstances there is good cause to waive the appeal time limits for the Appellants and treat this matter as a consolidated grievance appeal.

Appellants Have Not Met Their Burden of Proof

Appellants bear the burden of proof to show by a preponderance of the evidence that the ABS schedule change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2); MSPB Case No. 20-16 (2020); MSPB Case No. 17-21 (2017).

Appellants allege that the new scheduling policy has a negative impact on work/life balance, forces managers to work erratic schedules, and dictates that they only receive two consecutive days off once a month. Appeal Form, p. 2. Appellants also assert that the Chief of Retail Operations and his staff "have acted and continue to act maliciously against ABS Retail Management" and have engaged in "abuse of power." Appeal Form, p. 1.

The authority to establish employee schedules is vested in supervisors under the County's personnel regulations. MCPR § 15-2(c) ("A supervisor may change the work schedule of an employee who reports to the supervisor"). *See* MSPB Case No. 20-16 (2020) ("supervisors have wide discretion to determine work schedules"); MSPB Case No. 17-21 (2017).

Appellants contend that the scheduling policy is "arbitrary, capricious, and discriminatory against ABS Retail Store Management by subjecting **ONLY** us to the volatile effects from the implementation of this policy while leaving all other full time employees set schedules in place." Appellant Response, p. 2 (emphasis in original).

However, there is no merit to Appellants' argument that treating managers differently from non-managerial employees for purposes of scheduling is arbitrary, capricious, or discriminatory. While in practice the County may often apply the same policy standards to managers and non-managerial employees, that is not always the case, nor is it required. Non-supervisory employees are subject to various rules and policies that vary from those governing supervisory management

employees.[8] Appellants are not similarly situated to non-supervisory ABS employees for purposes of work scheduling.

Appellants also assert that the new scheduling system is in violation of MCPR §15-3(c), which provides, in part, that "A department director should grant an employee 2 consecutive days off in each workweek, subject to operational needs."[9]

While giving employees two consecutive days off should be the norm, it is not mandatory. The terms "shall" or "must" are used to indicate a mandatory obligation to act or to establish a mandatory requirement. Use of the word "should" in this regulation rather than "shall" or "must" indicates that the obligation or requirement is not mandatory. The term "should" is a best practice recommendation, as opposed to the more permissive "may." *See, e.g.,* Code of Maryland Regulations (COMAR) 05.04.02.02B(56). ("Should' is a term that indicates minimum good practice but does not impose an obligation to act.").

There is no indication in the record that the regulation has ever been interpreted to make two consecutive days off mandatory. Indeed, it appears that the opposite is true. The regulation concerning two consecutive days off has been in place for some time, and as far as we can tell it has never been considered mandatory when the needs of the workplace required otherwise. For example, §A.6, *Work Schedules: Attendance; Hours of Work*, subsection 6.2, *Work Day and Work Week*, of the Personnel Regulations for Montgomery County (approved December, 1980), stated that the normal work week would be established by the Chief Administrative Officer and "*Whenever practicable,* the policy of two consecutive days off shall be followed…". (emphasis added).

The County does not deny that under the new ABS scheduling policy Appellants might not be granted two consecutive days off in each workweek. Rather, the CAO's designee found in the Step 2 decision that the department provided an adequate explanation that the policy was justified by operational needs.

The policy itself sets out the justifications for the new scheduling system. A central justification appears to be to ensure that managers are on duty for more weekend days when ABS suggests that the stores are the busiest. Thus, store managers are required to work all but one Saturday per month while getting Sundays off, while assistant managers will have to work more weekend days per year, including Sundays. All managers will only have one weekend off per month. Under this approach there will be greater management coverage in the ABS retail stores on Saturdays. Notwithstanding Appellants' argument that post-pandemic ABS stores are less busy on weekends than in the past they do not contend that weekends, especially Saturdays, are less

[8] Supervisors and managers are not members of a collective bargaining unit and thus subject to the terms of the collective bargaining agreement.

[9] We note that the MCGEO Collective Bargaining Agreement does *not* apply to Appellants. Even so, the MCGEO agreement also makes the two consecutive days off rule subject to agency operating requirements:

> **13.2 Work Day and Work Week**
>
> (a) . . . The normal work week for full-time County employees is 40 hours (excluding all meal periods), Sunday through Saturday. *Whenever practicable*, 2 consecutive days off shall be granted to employees *unless work load requirements and/or demonstrated operational need, require otherwise.* The County shall provide reasonable advance notice of any change in the days off. (emphasis added).

busy than weekdays. On this record we must find that ABS has presented a valid justification for the policy that is not in violation of any County law, regulation, or policy.

As noted above, Appellants bear the burden of proof to show by a preponderance of the evidence that the scheduling policy change was in violation of a law, regulation, or policy, or was arbitrary, capricious, or discriminatory. MCPR § 34-9(d)(2). The County provided justification for its action, and based on this record there is no reason to conclude that the store manager scheduling policy is arbitrary, capricious, or discriminatory.

As Appellants have not demonstrated that the County's implementation of the work scheduling policy for managers and assistant managers violates any applicable provision of law, regulation, or policy, or was arbitrary, capricious, or discriminatory, the grievance appeals must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that the consolidated appeals in Case No. 23-15 be and hereby are **DENIED**.

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

For the Board
December 19, 2023

CASE NO. 24-08

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 the County's Chief Labor Relations Officer denying his grievance and requested relief. On January 30, 2024, appellant filed an appeal with the Board. The County submitted a response to the appeal (County Response) on February 28, 2024. Appellant filed his response to the County's submission on April 3, 2024 (Appellant Response).

The appeal was reviewed and considered by the Board.

FINDINGS OF FACT

In September 2014, appellant was hired as a Security Officer IV Grade 23 with the Montgomery County Police Department (MCPD). He was hired at the bottom of the pay grade (also referred to as "entry level pay") for the classification. At the time of his hiring, appellant was told that there were no salary negotiations and that all new employees were hired at entry level pay. *See* CE Ex. 1, Grievance.

It was the practice of MCPD at that time to hire many job classes at the base-level salary to avoid salary inequities caused by hiring individuals at higher salaries than existing employees in the same job class. This practice changed in May 2018 when the Office of Human Resources

(OHR) authorized departments to extend salary offers up to the grade's mid-point salary and conducted training on providing wage equity analyses for new hires. *See* County's Response at 2.

In 2022, at appellant's request, MCPD asked OHR to review appellant's salary for potential pay inequity and to consider providing appellant with a 20% increase in pay pursuant to Montgomery County Personnel Regulations (MCPR) § 10-16. *See* CE Ex. No. 4, MCPD Request for Special Within-Grade Pay Increase.

On February 13, 2023, OHR denied the request.[1] *See* CE Ex. No. 6, OHR's Response to MCPD's Request for Special Within Grade Request Pay Increase; CE Ex. No. 5, OHR's Analysis of MCPD's Request for Special Within-Grade Pay Increase.

On October 9, 2023, a Security Officer IV was hired at a midpoint Grade 23 salary, as opposed to minimum salary or entry level pay. *See* CE Ex. 1, Grievance; CE Ex. 2, Response to Grievance. Thereafter, on October 30, 2023, appellant filed a grievance with the Chief Administrative Officer (CAO) alleging that the County violated its hiring practices and/or unfairly changed its hiring practice which created a pay disparity or pay inequity between him and the newly hired employee.[2] *See* CE Ex. 1, Grievance.

In his grievance, appellant requested that his salary be adjusted to the amount it would have been had he been hired at the midpoint in 2014, to include all cost-of-living increases, general wage increases, longevity steps, seniority adjustments, and back pay that he would have accrued based on the midpoint salary.[3] *See* CE Ex. 1, Grievance.

On January 29, 2024, the CAO determined that, based on MCPR § 10-5[4], the Department had the authority to hire the most recent Security Officer IV at the midpoint of the salary range and doing so did not create any wage inequity. *See* CE Ex. 3, Grievance Decision. The grievance was thus denied. Appellant filed a timely appeal with the Board.

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[1] In its denial, OHR provided the following information as rationale:

> A review of the incumbents in the classification indicates approving this adjustment would create inequities within those similarly situated. The last three incumbents, inclusive of [Appellant] requesting, were brought in at the grade minimum.
>
> A review of the direct reports of those within the classification indicates that these employees who are the top-earning have been long-term county employees with 18 to 24 years of county service and salaries are based on their longevity.
>
> Both positions of Shift Supervisor over County Building and Facilities Security Force and Special Police Officer providing protection for the County Executive are represented in the Classification Specification for the Security Officer IV.

See CE Ex. No. 6, OHR's Response to MCPD's Request for Special Within Grade Request Pay Increase; CE Ex. No. 5, OHR's Analysis of MCPD's Request for Special Within-Grade Pay Increase.

[2] Notably, appellant's current salary is higher than that of the Security Officer IV who was hired in 2023 which prompted the grievance. *See* County's Response at 3.

[3] Since his hire, appellant has received all scheduled wage increases. *See* County Response.

[4] MCPR § 10-5 outlines the County's salary-setting policies.

On appeal, appellant contends that it is not "fair to hire one employee at entry level salary and another employee in the same job classification and grade at mid-level salary[.]" *See* Appeal Form. Appellant further contends that the department's 2018 change in policy (allowing new employees to be hired at the midpoint salary) was done "without notice or opportunity given to a select group, incumbent employees[,]" and that the new policy amounted to "wavering hiring practices [that] have created inconsistencies" and "single out and penalize a marginalized population of employees." *See* Appellant's Response.

APPLICABLE LAW AND POLICY

Montgomery County Personnel Regulations (MCPR)

MCPR § 10-2. General compensation policy. The County must provide a total compensation system designed to recruit and retain a high quality workforce. The CAO must periodically compare the compensation of County employees with the appropriate labor market and other area compensation systems to maintain a standard of comparability.

MCPR § 10-3

(a) The uniform salary plan consists of salary schedules authorized in Code Section 33-11(b) for:

(1) employees represented by certified employee organizations;

(2) minimum wage/seasonal employees;

(3) sworn police managers in the Police Leadership Service (PLS);

(4) uniformed fire/rescue managers;

(5) sworn deputy sheriff managers;

(6) uniformed correctional managers;

(7) medical doctors;

(8) employees in positions in the Management Leadership Service (MLS); and

(9) a General salary schedule (GSS) for all other employees.

(b) The Council must approve the uniform salary plan and any amendments adopted by Council resolution.

(c) The CAO must issue approved salary schedules for employee groups with salary rates or a salary range for each pay grade or pay band.

(d) The CAO must assign an occupational class to an appropriate pay grade or pay band on an approved salary schedule in the uniform salary plan.

(e) The salary rate or range for each pay grade or pay band on an approved salary schedule must remain in effect until a change to the salary schedule is approved by the County Council.

(f) The CAO must base a recommendation to amend a salary schedule on the factors

outlined in Section 33-11 of the County Code.

(g) The CAO must ensure that all occupational classes that require comparable experience and have comparable duties, responsibilities, and authority are paid comparable salaries that reflect the relative value of the services performed,

except for occupational classes on the following salary schedules:

(1) police bargaining unit;

(2) fire/rescue bargaining unit;

(3) deputy sheriffs in the OPT bargaining unit;

(4) minimum wage/seasonal;

(5) sworn police managers;

(6) uniformed fire/rescue managers;

(7) sworn deputy sheriff managers;

(8) uniformed correctional managers;

(9) medical doctors; and

(10) Management Leadership Service.

(h) Collective bargaining agreements may supersede the comparable pay for comparable work standard for some salary schedules.

MCPR § 10-5 Salary-setting policies.

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

(1) demoted the employee because of reduction-in-force or disability under Section 10-5(d); or

(2) reclassified or reallocated the employee's position to a lower pay grade or pay band under Section 10-5(f).

(b) Salary on appointment and reappointment for employees on the General Salary Schedule and Management Leadership Service Salary Schedule. A department director must set the base salary of a newly appointed or reappointed employee within the applicable pay grade or pay band under these Regulations and guidance established by the OHR Director and CAO.

MCPR § 10-16. Special within-grade pay increase.

(a) A department director may, with the written approval of the OHR Director, increase the base salary of a merit system employee to:

(2) resolve a pay inequity affecting an employee.

County Code § 33-11

(a) Classification.

(1) The Chief Administrative Officer must apply the classification standards in this Chapter and the Personnel Regulations to:

(A) establish and abolish occupational classes as necessary for effective and economical operation of the County government;

(B) assign all positions in the merit system to proper classes;

(C) assign pay grades to classes; and

(D) establish a procedure for the administrative review of an employee's objection to an assignment action that downgrades the employee's position.

ISSUE

Did the County violate its hiring practices and create a pay disparity when it hired a Security Officer IV at the midpoint for the Grade 23 pay grade?

ANALYSIS AND CONCLUSIONS

Appellant bears the burden of proof to show by a preponderance of the evidence that the County's actions violated a law, regulation, or policy, or were arbitrary, capricious, or discriminatory. *See* MCPR 34-9(d)(2).

The Montgomery County Personnel Regulations expressly authorize departments to negotiate salaries for newly appointed employees. *See* MCPR § 10-5(b)(1) ("[d]epartments and agencies have the authority to negotiate and determine salaries for candidates equal to or less than the midpoint of the salary range or pay band for a specific position."). This provision does not require that new employees be hired at the midpoint of the salary range. Rather, it is discretionary, meaning new employees may be hired starting at the base level salary or above up to the midpoint. *Id*.

The County is permitted to change its policies regarding pay grades, salary rates, and compensation. *See* County Code § 33-11(a)(1)(C) (detailing authority for the CAO to assign pay grades). The County may institute such changes in policies for the purpose of recruiting and retaining a high-quality workforce as well as maintaining a standard of comparability with the appropriate labor market. *See* MCPR § 10-2.

Here, the County adhered to its own policies and procedures when it hired a Security Officer IV at the midpoint salary in October 2023. Appellant has offered no evidence to support his allegation that the 2018 change in policy resulted in "severe salary inequity" or otherwise penalizes any specific group. *See* Appeal Form; Appellant's Response. Allegations without proof may not form a basis for us to uphold an appeal. *See* MSPB Case No. 20-04 (2020).

Because appellant has provided no evidence that the County violated any law, regulation, or policy, or that its actions were arbitrary, capricious or discriminatory, we conclude that the appeal is denied.

ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeal in Case No. 24-08 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 30, 2024

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 2024, the Board issued the following dismissal decisions.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 24-04

ORDER OF DISMISSAL

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (MSPB or Board) on December 18, 2023, seeking to appeal from the decision of the Housing Opportunities Commission (HOC)[1] to terminate her from her position.[2] The appeal form required Appellant to "Attach a copy of the Disciplinary Action or Notice of Termination." Appellant did not do so.

That same day, the Board's Executive Director sent Appellant's counsel a letter acknowledging receipt of the appeal. The acknowledgement letter stated that Appellant did not clearly show that she was a Montgomery County merit system employee and advised that the MSPB only has jurisdiction over disciplinary or termination appeals from employees in County merit system positions. Accordingly, the Board's Executive Director urged Appellant's counsel to explore his client's appeal rights, if any, to the HOC.

The Executive Director's letter further advised:

> If your legal analysis leads you to believe that your client is a County merit system employee there is a requirement that you file a copy of a Notice of Termination. *See* Montgomery County Personnel Regulations, § 29-4 and § 35-4(d). If you believe that the Board may assert jurisdiction over the termination of an HOC employee or a County merit system employee who has not submitted a Notice of Termination you may file an appropriate pleading and the Board will take it and any County response under consideration. You may wish to contact the Office of the County Attorney or the Office of Human Resources to discuss the situation and the impact on your client.

Appellant's appeal was given a case number, but the MSPB stayed its processing of the appeal until receipt of the appropriate documentation. Appellant's counsel was warned in the Board's acknowledgment letter dated December 18, 2023, that failure to provide the Board with a copy of the Notice of Termination may result in dismissal of his client's appeal without prejudice. To date, the Board has not received a copy of the Notice of Termination.

Having heard nothing further from Appellant or her attorney, on April 11, 2024, the Board issued a Show Cause Order requiring Appellant to provide either a Notice of Termination or a statement explaining why one could not be provided. The Notice of Termination or statement was

[1] The HOC is a state-authorized government organization that administers federal, state, county, and private affordable housing programs. Information regarding HOC's mission and history is available on its website at https://www.hocmc.org/.

[2] The appeal was filed by electronic mail on Friday, December 15, 2023, a day that the MSPB 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).

to be filed on or before close of business on April 25, 2024. Appellant was advised that absent the filing of the required documents and statement, the Board would dismiss her appeal.

To date no statement has been filed, and neither Appellant nor her attorney have communicated in any way with the Board.

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

The Board has jurisdiction to hear appeals from merit system employees. *See* MCPR § 35-2 (employees with merit system status have a right of appeal to the MSPB). Merit system employees are defined by § 33-6 of the Montgomery County Code as "[a]ll persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law." *See also* MCPR §§ 1-38, 1-39 and 1-40.

It is undisputed that Appellant is appealing her termination from HOC, which is not within the executive or legislative branches of the County government. As such, Appellant was not terminated from a merit system position with the County government.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over the instant appeal. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 24-04 is dismissed for lack of jurisdiction.

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

For the Board
May 28, 2024

CASE NO. 24-10

ORDER OF DISMISSAL

Appellant filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on March 5, 2024, seeking to appeal from the decision of Montgomery County Public Schools (MCPS) to terminate him from his position[1].

On March 5, 2024, an acknowledgement letter was sent to Appellant and the County from the MSPB's Office Services Coordinator (OSC). Because Appellant was appealing a termination by an entity of the County government, the letter also advised Appellant that:

> [T]he MSPB only has jurisdiction over disciplinary or termination appeals from employees in County merit system positions. Accordingly, I urge you to explore your appeal rights, if any, to the Montgomery County Public Schools (MCPS).
>
> If you believe that the Board may assert jurisdiction over the termination of an MCPS employee, you may file an appropriate pleading and the Board will take it and any County response under consideration.

Appellant responded to the OSC's email on March 10, 2024, and provided documentation including MCPS's appeal instructions.

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

The Board has jurisdiction to hear appeals from merit system employees. *See* MCPR § 35-2 (employees with merit system status have a right of appeal to the MSPB). Merit system employees are defined by § 33-6 of the Montgomery County Code as "[a]ll persons who are employed by the county in full-time or part-time year-round permanent career positions in any department/office/agency of the executive and legislative branches of the county government or in any other position specifically so designated by law." *See also* MCPR §§ 1-38, 1-39 and 1-40.

[1] The appeal was submitted online to the Merit System Protection Board (MSPB) on March 4, 2024, at 9:21 p.m., a time when the MSPB office is not open. The appeal was officially received by the MSPB the next Board business day.

It is undisputed that Appellant is appealing his termination from MCPS, a County Agency which is not within the executive and legislative branches of the county government. As such, Appellant was not terminated from a merit system position with the County government.

Based on the foregoing analysis, the Board concludes that it lacks jurisdiction over the instant appeal. Accordingly, it is hereby **ORDERED** that the appeal in Case No. 24-10 is dismissed for lack of jurisdiction.

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

For the Board
April 23, 2024

DISMISSAL FOR MOOTNESS

CASE NO. 23-10

ORDER OF DISMISSAL

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on March 22, 2023. The County filed a timely prehearing submission on May 8, 2023. Appellant's prehearing submission due date was June 1, 2023. Having not received Appellant's prehearing submission by June 6th, the Board's Office Services Coordinator sent an email to Appellant notifying him that his prehearing submission was overdue. On June 7, Appellant replied:

> Unfortunately, I have not had time to prepare my pre-hearing material. I understand the deadline has came *[sic]* and gone, at this point. Therefore, I have no choice but to withdraw my submission. I appreciate your time and assistance.

The Board's Executive Director scheduled a conference call with Appellant and the Associate County Attorney (ACA) assigned to this appeal. Prior to the call the ACA notified the Board that Appellant had a pending disability retirement application. Following the conference call, the ACA advised that if the disability retirement was approved it would be effective as of the last day Appellant worked. The ACA further advised that the disability retirement process could take six months and perhaps longer if an Independent Medical Examination is needed. The Board decided to hold the appeal in abeyance pending resolution of the disability application.

On October 24, 2023, the ACA notified the Board that Appellant had been approved for a non-service connected disability retirement. That same day, the Board received confirmation from Appellant that he does not object to the MSPB closing his case "with the understanding that my DOCR personnel records will be updated accordingly with the updated information."

The ACA confirmed that Appellant's disability retirement is retroactive to December 18, 2022, and that Appellant's personnel records have been updated to reflect that he retired. The effective date of Appellant's disability retirement is thus over 15 weeks prior to his April 5, 2023, appeal to the MSPB.

Pursuant to Montgomery County Personnel Regulation (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, because Appellant's disability retirement now officially predates the proposed termination by nearly four months, that termination is moot. Under longstanding Board precedent, an appeal must be dismissed as moot where the action appealed has been completely rescinded. *See, e.g.,* MSPB Case No. 17-03 (2016); MSPB Case No. 14-45 (2014); MSPB Case No. 14-11 (2014). The County has demonstrated to the Board that it has fully rescinded the action appealed.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-10 be and hereby is **DISMISSED** as moot. It is further **ORDERED** that within 30 days the County provide the Board with written certification that all electronic and hard copies of documents concerning or referencing the termination be removed from County and departmental personnel files, and that all

County records reflect that Appellant was not terminated but instead retired on disability.

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, 2023

DISMISSAL ON MULTIPLE GROUNDS

CASE NO. 24-01

ORDER OF DISMISSAL

Appellant, an employee with the Montgomery County Department of Police, electronically filed the above captioned appeal with the Merit System Protection Board (Board or MSPB) on July 3, 2023.[1] Appellant's Appeal Form indicates that she was recently informed that she is not considered a supervisor because she is classified as an Administrative Specialist III.

Appellant was advised by letter from the Board's Executive Director on July 3, 2023, that she must provide a copy of a Chief Administrative Officer's Step 2 grievance decision for the Board to have jurisdiction over her appeal. Upon receiving the request for documentation Appellant called the MSPB office that same day. Appellant told the Board's Office Services Coordinator (OSC) that she did not yet have any documentation. When asked whether she had filed a grievance, Appellant stated that the matter was currently with the Office of Internal Affairs (OIA) which could take thirty days. The OSC explained that the Board may choose to dismiss her appeal until documentation is received or that they may choose to continue the stay depending upon circumstances. Appellant said she would keep the Board informed of the OIA status.

On Sunday, September 3, 2023, Appellant emailed the OSC:

> Things are moving extremely slow regarding my issues and complaints. I was suggested to check back in with MSPB regarding filing my complaint. I am not sure where I left off with your office but I would like to proceed forward and add a few more issues to my complaint if possible. Can you please advise what steps I need to do to activate this complaint 24-01.

On September 5, the OSC responded, in part:

> As stated in the "Request Documents" letter (attached) which was sent to you on July 3, 2023, you must provide a copy of the Chief Administrative Officer's (CAO) decision in order for the Board to proceed with processing your grievance appeal per Montgomery County Personnel Regulations (MCPR), § 35-4(d)(2). To date, this office has not received the requested documentation.
>
> MCPR Section 34 covers grievances. Section 34-9(e) explains the steps of the grievance procedure.

That same day, Appellant called the MSPB office and asked for clarification regarding the grievance process saying that she was not familiar with it. The OSC went over the chart in MCPR §34-9(e) with her. Appellant seemed to understand that an appeal to the Merit System Protection Board is at Step 3 of the process and that she must go through Steps 1 and 2 before her appeal can proceed. She told the OSC that she has not yet filed a grievance but was about to do so.

[1] The appeal was filed by electronic mail on Sunday, July 2, 2023, a day that the MSPB 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).

On Friday, September 8, 2023, Appellant left a voicemail at the Board's office stating that she has questions about the grievance she just filed. On Monday, September 11th the OSC returned the call. Appellant said she filed her grievance on Wednesday September 6th and said she would be filing an appeal with the Board if she does not agree with the CAO's decision. The OSC again told Appellant that the Board could not process the appeal that she has already filed because she has not yet received the CAO's decision. She asked for information concerning how to file an appeal to the CAO. The OSC again went over the chart in MCPR §34-9(e) and explained the logistics of sending a CAO decision to the Board. Appellant acknowledged that the grievance process will take some time based on the given filing deadlines.

Lack of Jurisdiction and 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 the employee 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 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 has not completed Step 1 of the grievance procedure but, rather, attempted to go directly to Step 3, an appeal to the MSPB.

Direct appeals are not within the Board's jurisdiction. The Board has ruled numerous times that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 23-04 (2022); MSPB Case No. 17-28 (2017); MSPB Case No. 11-08 (2011). *See* MCPR § 35-2(b) ("An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO"). It is also 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).

Appellant's failure to follow the grievance procedure until receiving a CAO decision constitutes a failure to exhaust her 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).

We emphasize that dismissal of the instant appeal does not preclude Appellant from filing a new appeal with the Board after she has exhausted her administrative remedies.[2] She may again utilize the Board's online appeal form as she did with this appeal.

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 24-01 be and hereby is **DISMISSED WITHOUT PREJUDICE** for failure to comply with the Board's appeal procedures, for lack of jurisdiction, and for failure to exhaust administrative remedies. MCPR § 35-7(b), (c) & (e).

[2] We will not speculate whether any grievance Appellant files or has filed would be timely.

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 16, 2023

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 2024 the Board did not issue any decisions on a request for reconsideration of a Final Decision.

MOTIONS

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

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

The following is a decision on a motion concerning jurisdictional issues issued during an appeal proceeding in fiscal year 2024.

CASE NO. 23-08

DECISION GRANTING MOTION TO DISMISS

Appellant is a volunteer with the Montgomery County Fire and Rescue Service (MCFRS) who filed an appeal with the Merit System Protection Board (Board or MSPB) challenging the revocation of her Emergency Medical Services (EMS) provider credentials in Montgomery County.

On January 30, 2023, the County filed a Motion to Dismiss and a Motion to Continue Deadline to File Pre-hearing Submissions Pending a Decision on the County's Motion to Dismiss.[1] The County then filed a prehearing submission on February 6, 2023. Appellant filed a response opposing the County's motion to dismiss on February 8, 2023, and a prehearing submission on February 27, 2023.[2]

Appellant, who is also a physician, has served as an Emergency Medical Technician (EMT) volunteer firefighter/rescuer with the Wheaton Volunteer Rescue Squad and the Glen Echo Fire Department. Appellant Exhibit (AX) 1.

State regulations promulgated by the Maryland Institute for Emergency Medical Services Systems (MIEMSS) require that each Emergency Medical Systems Operational Program (EMSOP) in the State have a Medical Director and a Medical Review Committee (MRC). Code of Maryland Regulations (COMAR) 30.03.02.02A(2), 30.03.03.03, and 30.03.04.03.

Pursuant to those regulations the Montgomery County Medical Director and MRC are responsible for monitoring EMS providers in the County through a Quality Assurance Program. COMAR 30.03.04. The Medical Director has the full authority to suspend or limit the privileges of an EMS provider when the EMS provider "poses an imminent threat to the health or well-being of patients." COMAR 30.03.03.06D. The EMSOP's "policies and procedures, which shall include procedures for due process as the EMS operational program may require, shall govern suspensions and limitations of EMS provider privileges." 30.03.03.06F.

A Quality Assurance Inquiry[3] was conducted into allegations that on October 24, 2021, Appellant errantly administered medication that harmed a patient and resulted in the patient requiring resuscitation. MTD AX 3.[4] A separate Quality Assurance Inquiry was opened against Appellant due to allegations that she engaged in actions beyond the scope of her EMS credentials when she was with the Wheaton Volunteer Rescue Squad. County Exhibit (CX) 2.

The County MRC held a "hearing" on February 23, 2022, at which Appellant testified and called a witness on her behalf. MTD AX 3.[5] After the "hearing" concluded the full MRC

[1] County Exhibits attached to the Motion to Dismiss are labeled in this decision as MTD CX, while exhibits attached to the County Prehearing Submission are labeled simply as CX.

[2] Appellant Exhibits attached to the Opposition to the Motion to Dismiss are labeled in this decision as MTD AX, while exhibits attached to Appellant's Prehearing Submission are labeled as AX.

[3] A Quality Assurance Inquiry is an investigation into a Quality Assurance Concern, which is defined as "any issue, incident, anomaly or event that could require a response by the QAO [Quality Assurance Officer]. Concerns may be but are not limited to: incidents discovered through random audit, praise and thank you correspondence, complaints, self-reporting, hospital follow-up, and system monitoring." *See* MCFRS Policy and Procedure 21-04AM, *EMS Quality Management Plan* (August 31, 2021)

[4] Appellant does not deny responsibility for the error. MTD AX 9.

[5] The MRC is comprised of the MCFRS Quality Assurance Officer, the Medical Director as a non-voting member, the Emergency Medical and Integrated Healthcare Services (EMIHS) Section Assistant Chief, Battalion Chief, the

recommended to the Medical Director that there should be a "full and permanent revocation" of Appellant's "EMS credentials in Montgomery County at all levels of care." AX 22; CX 3. On February 28, 2022, the Medical Director upheld the MRC recommendation to permanently revoke Appellant's EMS credentials in Montgomery County. AX 5; CX 7.

The MRC and Medical Director found that without MCFRS approval, Appellant used MCFRS as a clinical site to meet the requirements of an outside and unapproved paramedic program at Creighton University. MTD AX 2; CX 3. Appellant used the allegedly unauthorized clinical experience to obtain certification as a National Registry Paramedic, which she then used to obtain a Maryland Paramedic License. CX 3 & 4. The MRC found that the quality of Appellant's "initial paramedic education suffered because of her improper use of Montgomery County as a clinical site," and that the "substandard initial education" resulted in the medical error that caused patient harm. AX 2; CX 3; CX 7. The Medical Director concluded that Appellant did not "seem to understand the nexus between her use of MCFRS for a clinical site, her substandard education, and the patient error that ultimately resulted in harm to the patient." *Id*. The MRC stated that it had "no confidence" in Appellant's "decision making, her integrity and her ability to function in a medical capacity." *Id.*

On April 4, 2022, Appellant received a letter from MIEMSS that included a copy of an Incident Review Committee Complaint filed with MIEMSS by MCFRS. MTD AX 3. The letter from MIEMSS advised that the Provider Review Panel would be reviewing Appellant's case. On April 18, 2022, Appellant's counsel emailed a letter to the Fire Chief notifying him that he was representing Appellant with regard to the revocation of her EMS credentials and suggesting the hope that "common ground" may be found so that the "situation can be satisfactorily resolved without much fanfare." MTD AX 4. The letter noted that Appellant had "received no notification of right of appeal within MCFRS," but indicated that since the MIEMSS review was underway Appellant was requesting that any further MCFRS action be stayed until the MIEMSS process was concluded. *Id.*

On June 15, 2022, MIEMMS closed the case without taking any action against Appellant. MTD AX 5. Appellant's counsel then sent a letter to the Fire Chief on June 30, 2022, advising him of the MIEMMS finding and suggesting that the Medical Director's revocation of Appellant's EMS credentials "was without legal authority and was undertaken following a deeply flawed investigation tainted by bias." MTD AX 6. Counsel's letter stated that there had not been notice of final action by the Fire Chief as the department head from which an appeal could be taken. Appellant's counsel requested a meeting with the Fire Chief to discuss the decision issued by the Medical Director to resolve the matter short of further administrative and legal avenues. *Id.*

When Appellant and her counsel did not receive a response from the Fire Chief her counsel sent an email on August 17, 2022. MTD AX 7. Counsel stated that he was aware that current Chief and prior Chief of the Wheaton Volunteer Rescue Squad had requested to meet with the Fire Chief and Appellant. The email expressed hope that the meeting could "avert the need for litigation" and stated that Counsel had no objections to such a meeting. Counsel concluded by saying that if the meeting did not take place the Fire Chief should reply to the June 30 letter. *Id*. The Fire Chief replied to the email, saying that he was evaluating the request from the Wheaton Volunteer Rescue Squad Chief and would respond in a few days. MTD AX 8.

Quality Improvement Officer, the Advanced Life Support (ALS) Educator from the MCFRS Public Safety Training Academy and other fire rescue professionals appointed by constituencies, such as the International Association of Fire Fighters and the Montgomery County Volunteer Fire Rescue Association.

A meeting between the Wheaton Volunteer Rescue Squad chiefs, the Fire Chief and Appellant apparently took place on September 9, 2022. On September 29, 2022, Appellant e-mailed a letter to the Fire Chief asking him to reinstate her EMS credentials. CX 8; MTD AX 9. After not receiving a response Appellant again emailed the Fire Chief on November 15, 2022, requesting reinstatement. MTD AX 10.

On December 15, 2022, the Fire Chief responded to Appellant, saying that he had reviewed the Medical Director's decision and "based on his conclusions, I cannot overturn his decision." CX 8; MTD AX 11. The Fire Chief's response did not provide any further explanation.

The County's prehearing submission states that Appellant was terminated pursuant to Montgomery County Personnel Regulation (MCPR) §§ 29-2(5) and (9) because, after the action of the Medical Director, she does not have the required certifications for her EMS position and has an impairment not susceptible to resolution that causes her to be unable to perform the essential functions of her job. County Submission, p. 2.[6] However, there is nothing in the record indicating that the Fire Chief took any action to terminate Appellant under Montgomery County Code, § 21-3(b) or MCPR §35-2(f).

Appellant's Appeal Form states her appeal as follows:

> The actions of Dr. [RS] and MCFRS are inconsistent with their treatment of similarly situated persons involved in the underlying incident and similar incidents, and the conclusions reached in the investigation are not based on any substantial facts or evidence. MIEMSS, the National Registry of EMTs (NREMT), and Creighton University (paramedic training program) did not find that my training was improper, nor that I committed a fraud with respect to my training program. I remain a Nationally Registered Paramedic in good standing and fully eligible to be licensed in the state of Maryland per MIEMSS.

Appeal Form, p. 3. Appellant stated the relief she is requesting as follows:

> Dr. [RS] permanently revoked my EMS credentials and authority to provide BLS [Basic Life Support] services in Montgomery County, Maryland, which further prevents me from volunteering in a minimum staffing capacity as a firefighter in Montgomery County. Fire Chief [SG] has refused to change Dr. [RS]'s decision. *I would ask that the Board fully reinstate my BLS EMS credentials and authority, return my prior IECS [Integrated Emergency Command Structure] rank, and further require Dr. [RS] and MCFRS to remove all references from my personnel file regarding this investigation.*

Appeal Form, p. 3 (emphasis added).

Clearly the issue in this case is limited to the question of whether there was an improper or illegal action by the Medical Director or the MCR in revoking the Appellant's EMT credentials and authority to provide BLS in Montgomery County. That can only be examined by this Board if in fact we have the jurisdictional authority to rule on the matter. We do not.

[6] Appellant's Prehearing Submission, p.11, n. 1, states that she "has been able to volunteer with MCFRS in an administrative capacity."

APPLICABLE CODE PROVISIONS AND REGULATIONS

Montgomery County Code, Chapter 21, Fire and Rescue Services, which provides, in pertinent part:

§ 21-3. Fire Chief; Division Chiefs.

(b) The Fire Chief is the uniformed department head of the Montgomery County Fire and Rescue Service, and has all powers of a department director. The Chief has full authority over all fire, rescue, and emergency medical services in the County, including any fire, rescue, and emergency medical services provided by local fire and rescue departments. The Chief must implement County law, regulations, and policies to effectively administer the Fire and Rescue Service.

(g) In addition to any other authority under this Chapter, the Fire Chief may take disciplinary action against any employee or volunteer in the Service, including those in a local fire and rescue department, for violating any County law, regulation, policy, or procedure, or any lawful order of the Chief or the Chief's designee. Disciplinary action under this subsection may include suspension or discharge of an employee and restriction or prohibition of a volunteer from participation in fire and rescue activities. The Chief must not take any action involving an employee or volunteer of a local department, except when the Chief finds that immediate action is required to protect the safety of the public or any employee or volunteer, unless the Chief finds that the local department has not satisfactorily resolved the problem in a timely and effective manner. Any finding by the Chief under the preceding sentence is not subject to appeal. Each employee or volunteer must give the Chief any information, not otherwise legally privileged, that the Chief reasonably needs to administer this Chapter.

§ 21-7. Appeals of certain disciplinary actions.

(a) *Jurisdiction.* Except as provided in subsection (g), the Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee.

Montgomery County Personnel Regulations (MCPR), 2001, Section 29, Termination, (as amended October 21, 2008), provides, in relevant part:

§ 29-1. Definition.

Termination: A nondisciplinary act by a department director to end an employee's County employment for a valid reason. Examples of valid reasons for termination include those stated in 33.07.01.29, 29-2.

§ 29-2. Reasons for termination.

(a) A department director may terminate the employment of an employee: . . .

(5) who does not have a current license or certification required as a minimum qualification for the employee's occupational class; . . .

(9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee's job; . . .

Montgomery County Personnel Regulations (MCPR), 2001, Section 33, Disciplinary Actions, (As amended December 11, 2007, October 21, 2008, November 3, 2009, and June 30, 2015), provides:

> **§ 33-10. Right of a Volunteer Firefighter or Rescuer to appeal a disciplinary action to the MSPB.** A volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may file a direct appeal with the MSPB under 33.07.01.35 of these Regulations, as if the individual were a County merit system employee.

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

> **§ 35-2(f).** A volunteer firefighter or rescuer may file an appeal with the MSPB over an adverse final action of the Fire Chief or local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire rescue activities, as if the individual were a County merit system employee. A volunteer firefighter or rescuer is entitled to a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal or involuntary resignation. The MSPB must hear and decide each such appeal except for an appeal of a personnel matter subject to an employee grievance procedure under a collective bargaining agreement.

ANALYSIS AND CONCLUSIONS

Appellant is appealing the revocation of her Emergency Medical Services provider credentials in Montgomery County and asking the Board to reinstate her BLS EMS credentials and her previous IECS rank. The County Motion to Dismiss contends that the MSPB lacks jurisdiction over the subject matter of this appeal, or the authority to reinstate Appellant's EMS credentials. The County further contends that even if the MSPB has jurisdiction, the appeal is untimely.

The parties have filed numerous documents into the record in support of and in opposition to the Motion to Dismiss and as part of their Prehearing Submissions. We have reviewed and considered the pleadings and the exhibits. Because we conclude that the Board has no jurisdiction over the Medical Director's decision to revoke Appellant's EMS certification, we need not address other issues raised by the Motion to Dismiss or in the Prehearing Submissions.

The Board Lacks Jurisdiction Over EMS Credentialing

This Board's jurisdiction is not plenary but is, rather, limited to that which is granted to it by statute. MSPB Case No. 14-42 (2015). *See Blakehurst Lifecare Community v. Baltimore County,* 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."). *See also King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over those actions which are specifically provided for by some law, rule, or regulation). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. MSPB Case No. 19-08 (2019); MSPB Case No. 18-17 (2018); MSPB Case No. 09-08 (2009). See Montgomery County Personnel Regulations (MCPR), § 35-7(c) ("The MSPB must dismiss an appeal if it determines it lacks jurisdiction.").

Appellant's EMS credentials were revoked by the Medical Director on February 28, 2022, pursuant to his authority under State regulations and County policies. AX 5; CX 7. He did so apparently at the recommendation of a properly constituted MRC in which the Appellant was represented and was allowed to address the MRC. The State regulation, COMAR 30.03.03.06D, provides that "through the granted authority of an EMS operational program, an EMS operational program medical director may suspend or limit the privileges of an EMS provider within that EMS operational program if, in the opinion of the EMS operational program medical director, the EMS provider poses an imminent threat to the health or well-being of patients." Both the MRC and the Medical Director found a nexus between Appellant's substandard initial education and the subsequent medical error that resulted in serious patient harm.

The Medical Director specifically stated that the decision resulted in "Permanent revocation of your EMS credentials in the County" and "Permanent revocation of your affiliation with the MCFRS EMS Operational Program." AX 5; CX 7.

The regulation further provides that "The EMS operational program's policies and procedures, which shall include procedures for due process as the EMS operational program may require, shall govern suspensions and limitations of EMS provider privileges." COMAR 30.03.03.06F.

Those policies are contained in MCFRS Policy and Procedure 21-04AM, *EMS Quality Management Plan* (August 31, 2021). That policy states, at § 7(c)(10)D, that "The Medical Director shall have final authority to approve any recommendation of the MRC." *See* Motion to Dismiss, MTD CX 1. The Medical Director is thus the final decisionmaker in such matters.

In a prior appeal the Board recognized that the medical Quality Assurance process is distinct from the disciplinary process. In MSPB Case No. 04-15 (2005), the Board in that case addressed multiple charges against an EMT who was a firefighter/rescuer, including an incident where the appellant was accused of violating medical protocols. The Quality Assurance Inquiry by the Medical Review Committee was put on hold pending the outcome of the disciplinary process. The Fire Chief testified that even though the quality assurance process was distinct from the disciplinary process there was a concern that if the Medical Review Committee took some action, it would be viewed as a disciplinary action. The Board dismissed the disciplinary charges concerning that incident for failure to issue the Statement of Charges in a timely manner. The Board then acknowledged that a Quality Assurance Inquiry by the Medical Review Committee and Medical Director was not a disciplinary action when it said:

> While the Board finds that this incident should not have been included in the Statement of Charges because of the failure to timely process it, the Board has not addressed the merits of the charge. *The Board urges the County to proceed with any medical remediation it deems necessary based upon its findings regarding this incident*.

MSPB Case No. 04-15 (2005), p.16, n. 2 (emphasis added).

The County asserts that as a result of the revocation of her EMS credentials Appellant was terminated pursuant to MCPR § 29-2(5) and (9) for failure to have a current license or certification required as a minimum qualification for her position. County Prehearing Submission, p. 2. Other than the statement on page 2 of the County Prehearing Submission, there is nothing in the record indicating that the Fire Chief or a local fire and rescue department took any action to terminate Appellant under

Montgomery County Code, § 21-3(b), (g), or MCPR § 35-2(f). It was the Medical Director's decision to revoke Appellant's EMS credentials which rendered Appellant unable to legally engage in EMS activity in Montgomery County.

While Appellant contends that there must be an administrative appeal beyond the Medical Director, the controlling regulations and polices provide otherwise. Appellant argues that the Fire Chief as the agency head has authority over the Medical Director. It is true that "The Fire Chief is the implementation and enforcement authority for all policies and regulations of the Montgomery County Fire and Rescue Service." COMCOR 21.02.15.06. However, that broad authority is subject to specific limits in regulations and policies. One of those limitations is contained in MCFRS Policy and Procedure 21-04AM, EMS Quality Management Plan (August 31, 2021), § 7(c)(10)D, which gives the Medical Director "final authority to approve any recommendation" of the Medical Review Committee.

Contrary to Appellants contentions, the decision of the Medical Director may not be appealed to the Fire Chief. COMAR 30.03.03.06D provides that "through the granted authority of an EMS operational program, an EMS operational program medical director may suspend or limit the privileges of an EMS provider within that EMS operational program if, in the opinion of the EMS operational program medical director, the EMS provider poses an imminent threat to the health or well-being of patients." The regulations further provide that "The EMS operational program's policies and procedures, which shall include procedures for due process as the EMS operational program may require, shall govern suspensions and limitations of EMS provider privileges." COMAR 30.03.03.06F. As noted above, MCFRS Policy and Procedure 21-04AM, § 7(c)(10)D, gives the Medical Director "final authority." Because the Medical Director was the final decisionmaker the Fire Chief had no authority to review or reverse the Medical Director's determination concerning Appellant's EMS credentials. The Medical Director's determination to revoke Appellant's EMS credentials constituted the County's final action.[7]

Appellant's EMS credentials were revoked by the Medical Director on February 28, 2022, pursuant to his authority under State regulations and County policies. AX 5; CX 7. The State regulation, COMAR 30.03.03.06D, provides that "through the granted authority of an EMS operational program, an EMS operational program medical director may suspend or limit the privileges of an EMS provider within that EMS operational program if, in the opinion of the EMS operational program medical director, the EMS provider poses an imminent threat to the health or well-being of patients."

The regulation further provides that "The EMS operational program's policies and procedures, which shall include procedures for due process as the EMS operational program may require, shall govern suspensions and limitations of EMS provider privileges." COMAR 30.03.03.06F. Those policies are contained in MCFRS Policy and Procedure 21-04AM, *EMS Quality Management Plan* (August 31, 2021). That policy states, at § 7(c)(10)D, that "The Medical Director shall have final authority to approve any recommendation of the MRC." The Medical Director is thus the final decisionmaker in such matters and this Board has no role in reviewing that decision.

[7] We find no policy or regulation providing that the Chief had authority to reverse the Medical Director's action. Nor does the Chief's December 15, 2022, response that "based on [the Medical Director's] conclusions, I cannot overturn his decision" suggest that he thought he had the authority. CX 8; MTD AX 11.

The Board does not have jurisdiction over the EMS credentialing process and may not order the Medical Director to reinstate Appellant's credentials.[8]

ORDER

For the reasons discussed above the County's Motion to Dismiss is **GRANTED** and the appeal is **DENIED** because the Board lacks jurisdiction to review credentialing decisions by the Medical Director.[9] All pending motions concerning discovery are **DISMISSED AS MOOT.**

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 21-7(f), *Appeals of Board decisions*, 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 25, 2023

[8] We note that Appellant may have a right to judicial review of the Medical Director's decision. Even if an administrative action is not subject to quasi-judicial administrative review (including by the MSPB), under Maryland law it may nevertheless be subject to an inherent right judicial review. *See Heaps v. Cobb*, 185 Md. 372 (1945). *See also* MD Rules, Title 7, Chapter 400 (Administrative Mandamus for quasi-judicial actions); Md Rule 15-701 (traditional mandamus).

[9] Because we find that the Board does not have jurisdiction to hear an appeal of the Medical Director's decision concerning EMS credentials, we need not determine whether such an appeal would be untimely under MCC § 21-7(b) and MCPR § 35-3(c).

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 FY24, the Board issued a decision concerning a petition to enforce a settlement agreement and two agreements were entered into the record.

CASE NO. 23-13

DECISION CONCERNING ENFORCEMENT OF SETTLEMENT AGREEMENT

On June 27, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board) concerning Appellant's suspension pending investigation. On January 10, 2019, the parties filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the Board issued an Order Accepting Settlement Agreement retaining jurisdiction to interpret and enforce the terms of the settlement agreement. *[Appellant] v. Montgomery County*, MSPB Case No. 18-33 (January 16, 2019).

On April 27, 2023, Appellant filed what appears to be, in part, a request for enforcement with the Board, alleging that the County has failed to comply with the terms of the Settlement Agreement by failing to fully reimburse her for the costs of insurance and attorney's fees. Appellant also objects to the online publication of a report by the County Office of Inspector General that she claims is defamatory, the failure of the County to return boxes of documents that she claims are hers, and the return of flexible spending account funds. *See* Appellant's "Update" received April 27, 2023; Appellant's Response received August 28, 2023.

Before making a determination regarding the need to seek enforcement of the Settlement Agreement in MSPB Case No. 18-33, the Board provided the County with the opportunity to respond to Appellant's enforcement request. On May 31, 2023, the County filed a response arguing that the County had fully complied with the Board's Order Accepting Settlement Agreement in MSPB Case No. 18-33. Appellant had the right to file a response on or before June 22, 2023, but did not do so until August 28. The Board has reviewed the record and considered the arguments of the parties.

The Board has reviewed the record and considered the arguments of the parties.

APPLICABLE LAW AND REGULATIONS

Montgomery County Personnel Regulations (MCPR), 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:

§ 35-15. MSPB may enforce settlement agreements.

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

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

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted to it by statute or regulation. MSPB Case No. 10-09; MSPB

Case No. 10-12; MSPB Case No. 10-16. *See, Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

As noted above, Montgomery County regulations specifically provide that the MSPB may interpret and enforce a settlement agreement. MCPR §35-15(a). The parties filed the Settlement Agreement with the Board on January 10, 2019. On January 16, 2019, the Board issued an Order Accepting Settlement Agreement. Accordingly, the Board has jurisdiction over Appellant's enforcement request and continues to have the authority to interpret and enforce the Settlement Agreement. MSPB Case No. 16-06 (2015).

Appellant Has the Burden of Proof

It is well established that a settlement agreement is a contract between the parties. MSPB Case No. 16-06 (2015); MSPB Case No. 10-01 (2009); MSPB Case No. 08-14 (2008). In construing and enforcing the Settlement Agreement this Board must thus apply basic principles of contract law. It is also a settled principle of Maryland contract law that the party seeking to enforce a contract has the burden of proof. MSPB Case No. 16-06 (2015) *citing Bd. of Trustees, Community College of Baltimore City v. Patient First Corp*., 444 Md. 452, 471-72 (2015); *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001); *Glen Alden Corp. v. Duvall*, 240 Md. 405, 422 (1965); *The Fischer Org., Inc. v. Landry's Seafood Restaurants, Inc.*, 143 Md. App. 65, 75 (2002)). The U.S. Merit System Protection Board also adheres to the same principle. MSPB Case No. 16-06 (2015) *citing Leeds v. U.S. Postal Service,* 108 M.S.P.R. 113 (2008); *Kolassa v. Department of the Treasury,* 59 M.S.P.R. 151, 154 (1993).

Thus, Appellant has the burden of proving by a preponderance of the evidence of record that there was a contractual obligation and that there was a material breach of that duty. MSPB Case No. 16-06 (2015); Montgomery County Administrative Procedure Act, §2A-10(b).

Appellant Has Failed to Carry Her Burden of Proof

In her filings Appellant makes claims that may be considered requests for settlement agreement enforcement. A primary claim is that she did not receive reimbursement of insurance premiums and attorney's fees:

> Despite an agreement reached with MSPB, the OCA [Office of the County Attorney] insisted that I re-pay 50% of insurance costs. This incurred additional legal fees of $1000. I want this money returned to me.
>
> MSPB determined that the full insurance premium would be paid to me. The OCA determined otherwise costing me funds directly and in legal fees.
>
> I incurred substantial personal and expenses, was denied the full refund of insurance (as per MSPB) and flex spending funds.
>
> I would like to have your support in having the funds returned to me related to the insurance and legal fees.

Appellant also seeks to have boxes of documents from her office returned to her if they do not contain privileged information or protected health information, *i.e.*, information that can be used to identify an individual and that is protected by federal or State law:

> Secondly, those boxes and files of documents that I collected need to be returned to me.
>
> At this time, what is necessary is for me to be allowed access to my files and cartons that were packed from my office space at the Pre-Release Center. I believe I have the right to retrieve what is mine and not privileged or protected health information. For me, that is essential in the interest of fairness.

Appellant also alleges that a report of the Office of Inspector General has defamed her in violation of the Settlement Agreement, which she believes prohibits the parties from taking "further action":

> I recently viewed the OIG site for Montgomery County and found a reference to an investigation (2019) and finding (2020) that obviously references me. This is defamation. . . The legal settlement includes language barring both parties from further action against each other. This is a clear violation. I could sue for defamation.
>
> The OIG posting on the website is slander. It needs to be removed. Per a settlement agreement, all parties agreed not to pursue further action. However, I will file suit unless this is removed.

With regard to reimbursement of insurance premiums, ¶ 3 of the settlement agreement provides that the County agreed "to reimburse [Appellant] $1,749.83 for the 60 days of insurance premiums she had to pay out of pocket." Appellant alleges that she did not receive "the full insurance premium" and has had to incur legal fees. Appellant Response, ¶ 4.

The County has provided evidence that Appellant received the promised $1,749.83 pursuant to the settlement agreement, including confirmation of receipt from Appellant's attorney and a copy of an endorsed check. County Exhibits (CX) 8-10. Appellant provided no evidence to the contrary.

In ¶ 4 of the settlement agreement the County agreed to "pay the reasonable attorneys' fees of [Appellant's] attorneys, B & E PC, for fees and costs related to the appeal in Case Number 18-33, in the amount of $7,500.00" within 30 days. The County provided documentation that it issued a check payable to B & E PC dated January 23, 2019, in the amount of $7,500, obtained email confirmation from the law firm of receipt, and received an endorsed copy of the check from the bank. CX 9, p. 3 ("We have received the check for our attorney fees."); CX 11 (endorsed check). Again, Appellant did not produce any evidence to show that the attorney's fees required under the settlement agreement were not paid.

Since pursuant to the settlement agreement the County paid Appellant $1,749.83 for out-of-pocket insurance costs and $7,500 for her attorney's fees, we infer that Appellant's reference to not being paid for insurance and attorney's fees likely concerns the erroneous backpay and benefits overpayments the County recouped.

Under ¶ 2 of the settlement agreement the County agreed to pay Appellant "back pay for the dates of September 6, 2018 through, and including, December 21, 2018." The County

Submission and exhibits document that the County made direct deposits of back pay to Appellant's bank accounts on January 4th and 11th, 2019. County Submission, p. 4; CX 6; CX 12. However, the County Department of Finance Payroll Section did not withhold health benefits contributions and deductions because Appellant's backpay was issued before the OHR health benefits office had updated Appellant's status in their records. CX 19, ¶s 8-10. As a result, Appellant was overpaid and had to make a direct COBRA payment of $1,434.30 to maintain her health insurance benefits. County Submission, p. 4; CX 15, ¶9.

The Office of the County Attorney and Appellant's attorney engaged in discussions over the best way to resolve the failure to withhold health insurance benefit premiums from Appellant's backpay and to make Appellant whole. County Submission, p. 5. The County had initially doubled the amount it would normally withhold for Appellant's portion of the benefits contributions from her January 19, 2019, and February 1, 2019, pay checks. CX 19, ¶13. Appellant's counsel and the County decided that the remaining overpayment balance of $2,482.33, would be deducted from Appellant's February 15, 2019, and March 1, 2019, paychecks ($1,241.17 per paycheck). CX 9, pp. 8-9, CX 17 CX 19, ¶14. Appellant's COBRA payment of $1434.30 was also refunded to her. CX 9; CX 14.

As the County was attempting to correct the payroll error the time within which it was required to certify to the Board that it had fully complied with the terms of the settlement agreement was about to expire on March 2, 2019. On February 19, 2019, Counsel for the County contacted the Board's Executive Director by email to provide a status update on compliance with the settlement agreement. CX 13. Counsel also explained the payroll error and the steps being taken to resolve the overpayment. Counsel also stated that Appellant's attorneys, who were copied on the email, did not believe that the County could certify that it was in compliance with the terms of the agreement until they had been able to see the March 15, 2019, paycheck. The County's position was that it had fully implement the settlement, and counsel asked if they should provide certification or wait until after the March 15 paycheck. *Id*. The Board's Executive Director replied on February 21, 2019, saying:

> If the County believes that it may legitimately certify full compliance with the terms of the settlement agreement, it is free to do so. If the Appellant feels that there is a breach of the agreement she may seek to enforce the terms by filing with the Board. However, given the circumstances, the Board suggests that the County wait until March 20, after the parties have confirmed that the payroll deductions are correct, to certify compliance with the settlement agreement. *Id.*

On March 19, 2019, after confirming that the deductions on Appellant's March 15, 2019, paycheck had returned to the proper amount, the County provided the Board with a certification that it had complied with the terms of the settlement agreement. CX 4.

Appellant's attorneys sent the County an invoice for $550 in attorney's fees related to discussions over the recoupment of overpayments to Appellant. CX 21. Effective May 6, 2019, the parties amended the settlement agreement to acknowledge the error in processing Appellant's backpay and benefits and the additional $550 in attorney's fees that were incurred by Appellant in order to resolve the issue. CX 2. Shortly thereafter the County paid the attorney's fees. CX 22.

We see no evidence that the County failed to provide Appellant with the correct amounts of backpay and reimbursement her for attorney's fees. Nor is there evidence that she was improperly charged for insurance premiums.

Although the settlement agreement contains no provision concerning flexible spending account (FSA) monies, the County provided documentation rebutting Appellant's suggestion that she was denied flexible spending account (FSA) funds. CX 15, ¶s 15 – 18, and CX 19, ¶ 21. Indeed, it appears that Appellant received $1,600 for FSA health claims despite only paying $799.89 through withholdings from her 2018 paychecks. CX 15, ¶ 16 and CX 19, ¶ 21. Appellant has submitted no evidence to indicate that she was denied FSA funds to which she was entitled.

With regard to the report of the Office of Inspector General that Appellant claims defames her, we see no term of the settlement agreement that is implicated. Contrary to Appellant's allegation that the "settlement includes language barring both parties from further action against each other" the agreement clearly contemplates the possibility of further action against Appellant by the County under certain circumstances. CX 1, ¶s 6- 8. Further, while non-disparagement clauses may be contained in some settlement agreements, there is no such language in the settlement agreement at issue. Thus, even if the OIG report could be considered an action against Appellant or defamatory, which we do not so find, there would be no violation of the settlement agreement.

As to the documents Appellant claims are personal and should be returned to her, Appellant provides no evidence that her personal property has been retained by the County and points to no provision of the settlement agreement that may have been violated.

Moreover, in January 2021, Appellant and the County entered into another settlement agreement to resolve a federal lawsuit. CX 24. In that agreement Appellant released all claims against the County. *See* CX 24, ¶12 ("all claims, demands, debts. causes of action or suits of any kind of nature whatsoever, including claims for compensatory, statutory or punitive damages, costs, expenses, attorney's fees, and compensation that may have accrued to (including on) the date this Agreement is executed in connection with any issues raised in [Appellant's] suit against the County, including any other charges or complaints in any other administrative forum, or state or federal court.").

Appellant has not carried her burden of proof to show a breach of the settlement agreement requiring Board enforcement action. In any event, any such claims were likely released by the subsequent settlement. For these reasons Appellant's request for enforcement is **DENIED**.

For the Board
October 10, 2023

CASE NO. 23-11 / 23-14 / 24-02

ORDER ACCEPTING SETTLEMENT AGREEMENT

On April 5, 2023, Appellant, an Administrative Specialist II with the Montgomery County Department of Recreation, filed an appeal with the Merit System Protection Board (Board or MSPB) challenging a five (5) day disciplinary suspension. MSPB Case No. 23-11. On June 15, 2023, Appellant filed an appeal challenging a dismissal from County employment. MSPB Case No. 23-14. On July 6, 2023, Appellant filed an appeal challenging the denial of a transfer to a new position. MSPB Case No. 24-02.

A prehearing conference in MSPB Case No. 23-11 was held on July 19, 2023, where the Board heard argument by the parties in favor of County's Motion to Consolidate with MSPB Case

No. 23-14. By order dated August 3, 2023, the Board granted the motion to consolidate MSPB Case Nos. 23-11 and 23-14. On August 30, 2023, the parties notified the Board that an agreement had been reached to settle all three appeals. On October 2, 2023, the parties filed a fully executed settlement agreement resolving MSPB Case Nos. 23-11, 23-14, and 24-02.

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

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

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

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has in all respects fully implemented the terms of the settlement agreement;
3. The appeals in MSPB Case Nos. 23-11, 23-14, and 24-02 be and hereby are **DISMISSED** as settled; and
4. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
October 10, 2023

CASE NO. 24-03

ORDER ACCEPTING SETTLEMENT AGREEMENT

On July 25, 2023, Appellant, a Lieutenant with the Montgomery County Department of Correction and Rehabilitation (DOCR), filed an appeal with the Merit System Protection Board (Board or MSPB) challenging a two (2) day disciplinary suspension.

On August 24, 2023, the County notified the Board that a settlement agreement had been reached. On September 29, 2023, the parties filed a fully executed settlement agreement.

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

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

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

1. The settlement agreement filed by the parties in this matter be entered into the Board's records;
2. Within 30 calendar days of this Order the County provide the Board with written certification, copied to Appellant, that it has in all respects fully implemented the terms of the settlement agreement;
3. The appeal in MSPB Case No. 24-03 be and hereby is **DISMISSED** as settled; and
4. The Board will retain jurisdiction over any disputes that arise concerning the interpretation or enforcement of the settlement agreement.

For the Board
October 10, 2023

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 2024.

CASE NO. 24-04

SHOW CAUSE ORDER

Appellant electronically filed the above captioned appeal with the Merit System Protection Board (MSPB or Board) on December 18, 2023, seeking to appeal from the decision of the Housing Opportunities Commission (HOC) to terminate her from her position.[1] The appeal form required Appellant to "Attach a copy of the Disciplinary Action or Notice of Termination." Appellant did not do so.

That same day the Board's Executive Director sent Appellant's counsel a letter acknowledging receipt of the appeal. The acknowledgement letter also explained that it is unclear whether Appellant is a Montgomery County merit system employee and advised that the MSPB only has jurisdiction over disciplinary or termination appeals from employees in County merit system positions. Accordingly, the Board's Executive Director urged Appellant's counsel to explore his client's appeal rights, if any, to the HOC.

The Executive Director's letter further advised:

> If your legal analysis leads you to believe that your client is a County merit system employee there is a requirement that you file a copy of a Notice of Termination. *See* Montgomery County Personnel Regulations, § 29-4 and § 35-4(d). If you believe that the Board may assert jurisdiction over the termination of an HOC employee or a County merit system employee who has not submitted a Notice of Termination you may file an appropriate pleading and the Board will take it and any County response under consideration. You may wish to contact the Office of the County Attorney or the Office of Human Resources to discuss the situation and the impact on your client.

Appellant's appeal was given a case number, but the MSPB stayed its processing of the appeal until receipt of the appropriate documentation. Appellant's counsel was warned that failure to provide the Board with a copy of the Notice of Termination may result in dismissal of his client's appeal without prejudice. To date, the Board has not received a copy of the Notice of Termination.

Accordingly, the Board hereby **ORDERS** Appellant to provide a Notice of Termination or a statement of such good cause as exists for why one cannot be provided and her appeal should not be dismissed for failure to comply with Board procedures regarding notice or for lack of jurisdiction. The Notice of Termination or statement shall be filed with the Board on or before close of business **April 25, 2024**, with a copy served on the County. The County shall have the right to file a response on or before **May 6, 2024**. Appellant may file the statement by email to MSPB.Mailbox@montgomerycountymd.gov or hardcopy mailed to and received by the Board's office at 100 Maryland Avenue, Suite 113, Rockville, Maryland 20850 by the due date.

Appellant is hereby notified that, absent the filing of the required documents or statement and a finding by the Board that there is good cause for the filing of her appeal without the required documents, the Board will dismiss this appeal.

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[1] The appeal was filed by electronic mail on Friday, December 15, 2023, a day that the MSPB 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).

For the Board
April 11, 2024

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 attorneys fee decisions during fiscal year 2024.

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 2024 the Board did not receive any proposed personnel regulations for review.

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 2024, the Board reviewed and, where appropriate, provided comments on the following new class creations:

1) New Occupational Class Creation – Forensic Scientist Series
2) New Occupational Class Creation – Licensed Bachelors Social Worker

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 2024 the MSPB reviewed one request for extension of a temporary promotion. The Board denied the request.

Classification and Compensation Audit

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

In June 2023 the Board entered into a contract with The Segal Company (Eastern States), Inc., to design and conduct a comprehensive review and audit of the County's classification and compensation program and procedures. The objective of the review is: (1) to ensure the accuracy,

equity, justice, validity, and integrity in the administration of the classification and compensation program and execution of its procedures; and (2) to determine the effectiveness of the current classification and compensation models and methodologies. The audit will determine whether the present Classification and Compensation Program and Procedures are administered properly and fairly in accordance with best practices, assuring equitable treatment of employees, coupled with meeting the needs of the County to attract and retain a quality work force. The audit will also determine the effectiveness of the County's job classification models and practices as compared to other similar public and private sector organizations in the regional market.

The Board anticipates that the audit report will be finalized by Spring 2025. When the independent review and audit is complete, the Board will submit the audit report to the County Council, County Executive, and the Chief Administrative Officer.