

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

██████████,

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 19-13

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FINAL DECISION

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

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

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

- AX 1 – Letter from CAO regarding retirement benefits, November 19, 2018.
- AX 2 – Letter from CAO regarding group insurance benefits, with 4 attachments, November 19, 2018.

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

- AX 3 – Letter from Appellant’s attorney to CAO, October 9, 2018.
- AX 4 – Letter from ██████████ of OHR, December 12, 2002.

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

FINDINGS OF FACT

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

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

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

Through negotiations they resolved the case with the County reinstating him for six months so he could take retirement with the agreement that his future retirement

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

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

benefits would not be reduced as confirmed by the county in writing. In violation of the agreement the County has in fact reduced his benefits.

The settlement agreement, ¶3, provided that the County would reinstate Appellant effective July 9, 2000, with backpay and benefits, for a period of six months. Under ¶4, Appellant's "reinstatement for this six month period will make him eligible for early retirement, including group insurance benefits, effective February 1, 2001." Pursuant to ¶5 of the settlement agreement, if Appellant elected to take early retirement within 30 days of the union receiving the agreement he would "receive retroactive retirement benefits from February 1, 2001, the date he became eligible for early retirement." If Appellant did not elect to take early retirement within 30 days, under ¶6 of the agreement he would be considered to have resigned effective January 8, 2001. CX C.

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

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

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

* * *

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

AX 4, CX D (emphasis added).

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

In 2016, the County found that the incorrect cost of living adjustment had been applied to Appellant's retirement benefit, resulting in Appellant receiving overpayments totaling \$13,128.97 from February 1, 2001 through January 31, 2017. By letter dated December 23, 2016, Appellant

was notified of the overpayment and his repayment options. CX G. The letter also indicated that due to Appellant having reached the Social Security Normal Retirement Age of 66 on January 7, 2017, his monthly benefit would reduce as of February 1, 2017. *Id.*

Appellant filed a Complaint in the Circuit Court of Montgomery County on August 9, 2018, alleging breach of contract and breach of fiduciary duty due to the reductions in his retirement and health benefits. On October 15, 2018, the parties filed a Consent Line of Voluntary Dismissal Without Prejudice. CX H. Appellant then requested that the CAO provide an interpretation of the applicable law. The CAO provided his interpretations regarding Appellant's retirement benefits and group insurance benefits on November 19, 2018. CX A and B. Appellant then filed this appeal.

APPLICABLE LAW

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

§ 33-47. Administration.

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

§ 33-56. Interpretations.

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.

- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

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

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

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

* * *

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

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

§ 35-15. MSPB may enforce settlement agreements.

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

ISSUE

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

ANALYSIS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

The Settlement Agreement Was Not Breached

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

The Board has carefully considered the agreement and can find no language providing that Appellant is entitled to a level of retirement or group insurance benefits that differs from any other retiree with the same age and service profile as Appellant's who selected the same retirement options. The agreement merely provides that Appellant would be "eligible for early retirement, including group insurance benefits, effective February 1, 2001." CX C, ¶4. The agreement also specifically states that Appellant "may contact" OHR "to receive information regarding the effect of electing early retirement." CX C, ¶5.

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

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

Appellant does not challenge any of the County's exhibits or deny that they were received by Appellant. Nor does he deny signing and submitting the retirement and health insurance application forms, or the County's detailed description of the benefit election process. *See* CX D,

E, and M. Instead, Appellant's sole argument is that because the December 12, 2002, letter from the County states that his benefits "will not reduce," the County has promised to maintain his benefits without the reductions disclosed in the retirement and health insurance application forms. Appellant's Reply; Appeal Form; AX 3. Appellant apparently views this alleged promise as part of the settlement agreement.

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

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

It is clear to us that the word "not" is the result of an inadvertent scrivener's error. Besides being inconsistent with the documents provided to Appellant, including those which Appellant signed, insertion of the word "not" makes no sense in the totality of the circumstances or the context of the sentence. The County was not sending Appellant a letter specifying that he would receive pension payments in the amount of \$780.11, and that those payments would not be reduced to a specific amount. Deletion of the word "not" results in the December 12 letter accurately reflecting both parties' understanding of Appellant's retirement benefits at the time he signed the settlement agreement and the early retirement application. As it has long been "the fixed policy of the law to give effect to the real meaning of documents, without regard to inadvertent lapses of a merely verbal character," we conclude that inclusion of the word "not" in the December 12 letter was a typographical error that must be disregarded. *Farrell v. City of Baltimore*, 75 Md. 493, 23 A. 1096, 1096-97 (1892) (Citing Story, J., *Commentaries on the Law of Promissory Notes*, § 12 (1851), for a case "where a person signed a paper in these words: 'Borrowed of J. S. fifty pounds, which I promise not to pay;' and it was held . . . that the word 'not' ought to be rejected."). See *Chapman v. State*, 331 Md. 448, 474 (1993) ("obvious single typographical error" may be disregarded); *Attorney Grievance Comm'n of Maryland v. Ashworth*, 381 Md. 561, 570 (2004).

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

No Estoppel Against the County

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

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

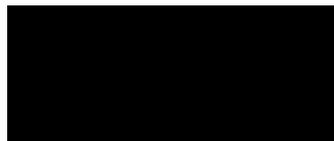
Accordingly, we find that the County is not estopped from reducing Appellant's benefits in accordance with the pension law and the calculations provided to Appellant at the time of his application for early retirement.

ORDER

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

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

For the Board
July 10, 2019



Michael J. Kator
Chair