

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

**IN THE MATTER OF**

**[REDACTED]**

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE NO. 18-27**

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**ORDER DENYING SUPPLEMENTAL EVIDENCE**

The Merit System Protection Board (Board or MSPB) held a hearing in the above captioned matter on July 7, 2020. The full day hearing convened at 9:16 a.m. and concluded at 5:38 p.m. The Board heard testimony from seven (7) witnesses, including the Appellant. The testimony of Appellant, which lasted approximately two (2) hours, had intermittent technical issues that disrupted her testimony. During the hearing, neither Appellant nor her attorney objected or otherwise suggested that Appellant was unable to fully provide her testimony.

Through their respective attorneys, the parties electronically filed post-hearing briefs the afternoon of August 17, 2020. *Email from B [REDACTED] L [REDACTED]*, August 17, 2020, 2:34 p.m.; *Email from S [REDACTED] K [REDACTED]*, August 17, 2020, 4:53 p.m. Appellant’s post-hearing brief did not mention technical issues with Appellant’s testimony or argue that any of Appellant’s testimony was incomplete. Appellant’s Post-Hearing Brief, August 17, 2020.

In addition to and separate from the post-hearing brief filed by her attorney, Appellant submitted an email with an attached document titled “Victim Impact Statement.” *Email from Appellant*, August 17, 2020, 3:44 p.m. In that document, submitted an hour before the post-hearing brief filed by her attorney, Appellant stated that “Due to internet interruptions beyond my control, I was unable to complete my MSPB Case 18-27 hearing testimony.” Appellant’s email transmitting the document was sent to the Board and counsel for the County. Noting that Appellant had not copied her own attorney, the Board’s Executive Director emailed Appellant’s attorney asking: “Were you aware that [Appellant] submitted the attached email and document this afternoon?” *Email from MSPB*, August 17, 2020, 5:17 p.m. Appellant’s attorney promptly

responded: “Mr. L [redacted] [Assistant County Attorney] forwarded me the email and attachment.”  
*Email from S [redacted] K [redacted]* August 17, 2020, 5:24 p.m.

The County immediately objected to Appellant’s supplemental document being accepted into the record, arguing that the submission was “testimony . . . not under oath, or subject to any penalty for dishonesty, nor was it subject to cross examination.” *Email from B [redacted] L [redacted]*, August 17, 2020, 5:34 p.m.

Having heard nothing further from Appellant or her attorney, on September 2, 2020, the Board requested that Appellant’s attorney provide a response to the County’s objection. The next day Appellant’s attorney responded as follows:

[Appellant] submitted the document for two reasons: First, while she was testifying, her internet cut out and we did not hear her continuing to speak. When Ms. Davidson asked if I was done (Tr. at 293), I did not know that [Appellant] had not finished testifying. Second, [Appellant] views the document as part of the closing argument.

If the County wants to cross examine [Appellant] regarding her submission, we could reopen the hearing for that purpose.

*Email from S [redacted] K [redacted]*, September 3, 2020. The County responded the next morning:

This Board “may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence . . .” See County Code 2A8(e).

The hearing was July 7, 2020. It ended after the County raised an objection to a particular question and Chair Davidson “directed Ms. K [redacted] to be very, very brief with this line of inquiry.” Tr. 292 Ms. K [redacted] then rested.

The transcript of the hearing was transmitted on July 16, 2020. On August 17, 2020, [Appellant] submitted her post hearing brief. [Appellant] raises the issue of not being able to complete her testimony due to internet connection issues for the first time here, on September 3, 2020.

[Appellant] had the opportunity to submit any evidence she chose at the hearing, and to make any argument she chose in her post-hearing brief.

[Appellant] has not alleged, much less established, any reason to grant the extraordinary relief of reopening the hearing to allow her to submit new evidence.

*Email from B [redacted] L [redacted]*, September 4, 2020.

Because the document submitted by Appellant was unclear as to precisely what testimony Appellant believed she was unable to provide due to technical problems, the Board provided Appellant with the opportunity to submit a written proffer of the testimony she alleged she was prevented from providing during the hearing. *Email to counsel from MSPB*, September 10, 2020.<sup>1</sup>

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<sup>1</sup> The email stated, in part:

The Board is aware that there were certain technical issues during [Appellant’s] testimony. Occasional difficulties are to be expected while the Board and the parties are attempting to become

The Board required that the proffer be strictly limited to the specific testimony that was disrupted by technical problems. The Board also asked both parties to address their positions on whether the proffered testimony may be submitted by way of an affidavit or written interrogatories under oath.

Appellant submitted a proffer of her additional testimony on September 17. *Email from S [REDACTED] K [REDACTED]*, September 17, 2020. The County objected to additional testimony. *Email from B [REDACTED] L [REDACTED]*, September 18, 2020. The County argued that Appellant did not raise any issues concerning her ability to provide testimony at or subsequent to the hearing until the post-hearing briefs were filed a month and a half after the hearing.<sup>2</sup> Aside from the procedural concern, the County asserted that:

[Appellant] has not supplied any reason that she would be prejudiced by the proffered evidence being excluded. Further its admission could lead to the County to seek to admit rebuttal evidence, and Appellant seeking to respond. Nor is the preferred evidence relevant to the ultimate inquiry.

We have carefully reviewed Appellant's proffer and scrutinized the hearing transcript. We conclude that although there were technical issues, Appellant and her attorney were given ample opportunity and wide latitude to fully present her testimony. Whenever Appellant's testimony was disrupted by technical issues, the problems were remedied, and her testimony continued. The proffered testimony adds little that is relevant and material to Appellant's case. For the most part it merely emphasizes, elaborates, and focuses testimony provided at the hearing. In some instances, the proffers included matters not the subject of inquiry or questions by Appellant's counsel or the County on cross examination.

With regard to Appellant's testimony regarding her conversations with a County Equal Employment Opportunity (EEO) Investigator, Hearing Transcript (Tr.) 226-27, there were technical issues during Appellant's answer to the question: "So, [Appellant], I'm sorry, who makes the decision about whether you get priority consideration?" Appellant's answer began "[REDACTED] [REDACTED] [the Occupational Medical Services (OMS) Program Manager] told me that [REDACTED]"

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conversant with unfamiliar video hearing technology. Although the Board is puzzled as to why Appellant's concerns were not raised at the hearing or subsequently in a more timely manner, the Board takes seriously its obligation to provide due process consistent with the rules. *See, e.g.*, MCPR §35-12(a)(2) ("Each party must have a reasonable amount of time to examine and crossexamine witnesses and to submit evidence.").

Therefore, because the document submitted by Appellant on August 17 is unclear as to precisely what testimony Appellant believes she was unable to provide due to technical problems, the Board has decided to provide Appellant with the opportunity to submit a written proffer of the testimony she claims to have been unable to provide during the hearing. MCPR §35-10(f)(4). The proffer shall be strictly limited to the specific testimony that was disrupted by technical problems. *See* Hearing Transcript, pp. 227, 256, 264-65, 268, 270-71, 290. The Board would also appreciate both parties providing their positions on whether the proffered testimony may be submitted by way of an affidavit or written interrogatories under oath.

<sup>2</sup> The County argued that it was not until September 3, two weeks after the post-hearing briefs, that Appellant first claimed that technical issues prevented her presenting her complete testimony. It may be true that September 3 was the first time Appellant's attorney raised the issue, but the Victim Impact Statement submitted by Appellant herself on August 17 did raise the concern.

[the EEO Investigator]” before her audio broke up. After the audio connection was restored her attorney again asked: “-- who you said told you -- who you said was responsible for getting you priority consideration.” Appellant then provided a lengthy answer that began on Tr. 227 and went on uninterrupted for 35 lines and ended on Tr. 229. There is no indication that Appellant lacked the ability to fully answer the question or of any technical problems with her continued testimony. Moreover, the proffer is for additional testimony, not responsive to any question asked at the hearing, concerning the EEO Investigator, including unreliable hearsay from the owner of the Rockville Deli and Appellant’s speculation about what his comments suggested about the EEO investigation. In addition, the proffered testimony is not material to Appellant’s case.

Appellant’s testimony regarding a request by Dr. S [REDACTED] S [REDACTED], the lead physician for OMS, for two years of medical records was not disrupted by a technical issue. Rather, while Appellant was looking for a document she turned away from the microphone and was difficult to hear. Tr. 256. Appellant nevertheless provided extended testimony about the request for medical records and her displeasure with that request. Appellant’s attorney asked her to stop looking for the document, Tr. 257, lines 4-7, and suggested that she could find the document later. Appellant’s proffer merely states what specific records the OMS physician was seeking and alleges that the request was in a Health Status Report. Appellant’s proffer does not concern a technical disruption in her testimony and provides no new or material evidence.

There were technical issues during Appellant’s testimony about why she felt that the County’s attempt to accommodate her by providing a standing desk was insufficient. Tr. 263-65. Appellant’s attorney asked her to continue her testimony and explain the problem with using a standing desk and Appellant did so. Tr. 264-65. There was another brief technical issue, Tr. 265, line 1, followed by her attorney again asking her about issues related or in addition to the standing desk, such as the condition of a cushioned mat for her to stand on. The proffer, however, concerns an IT employee offering to move the standing desk to provide Appellant with more room, and Appellant’s supervisor allegedly being rude to him and saying that he could not take up another cubicle with the standing desk. There is no indication that Appellant was prevented from addressing this matter in her hearing testimony. In any event, the proffered testimony is not material.

Appellant proffered testimony concerning her medical condition and the problems associated with the limited break times she was given. During the hearing, after some technical issues, a break in the hearing was called. When the hearing reconvened Appellant’s attorney had Appellant continue testifying about the standing mat and then move on to concerns about break times. Tr. 266-68. During Appellant’s testimony concerning the breaks there were problems with her audio. The Board’s Chair elicited her testimony on the topic. Tr. 268-69. Appellant’s attorney then asked Appellant if “in addition to the standing desk, the mat, the ten-minute breaks” was there any other issue concerning accommodations. Appellant then talked about being near a vent and the effect of the lower temperature on her before saying that the standing desk, mat, and ten-minute breaks were the only accommodations. Tr. 270. There is no indication that Appellant was prevented from fully addressing these matters in her hearing testimony.

After additional testimony, Appellant’s attorney asked Appellant about the wireless headphones she was given as an attempt at accommodation. Tr. 271. Appellant testified that she

had always used headphones but since new ones were wireless, she had problems. Tr. 271-72. Although there were technical difficulties, Appellant was permitted to provide the testimony she wished. Once again, the Board Chair asked a question which Appellant was able to answer. The proffer on this issue does not add anything of significance to Appellant's hearing testimony.

Appellant's testimony about priority placement and her conversations with the Program Manager for the County's OMS and the lead physician was marred by technical problems, but those issues were resolved, and she was able to testify at length. Tr. 273-86. There is no indication that Appellant was prevented from fully addressing these matters in her hearing testimony.

The final proffer concerned Appellant's allegations of emotional distress she suffered. Once again, there were technical difficulties with Appellant's audio, but her attorney was ultimately able to obtain Appellant's testimony. Tr. 290.

Finally, at the end of Appellant's testimony the Chair asked Appellant's attorney "are you done?" Appellant's attorney responded "I -- I -- I think so. Thank you, [Appellant]." Appellant then said, "Thank you all." Tr. 293. As discussed above, there was absolutely no indication by Appellant or her attorney suggesting that any testimony had been prevented or omitted.

In her Victim Impact Statement Appellant included a statement from the union representative who participated in some of the discussions with management on Appellant's behalf. Appellant had ample opportunity to have the representative testify at the hearing. In fact, she was on Appellant's witness list, but a decision was made not to have her testify at the hearing. In addition, there was no request to have the representative present evidence by any other means. Thus, we will not include the witness's unsworn statement in the record.

At no time during the hearing or for six weeks afterwards did Appellant or her attorney object or suggest that there was a need for additional testimony. Nor does Appellant's post-hearing brief argue that there was such a need for supplemental testimony. The Board concludes that Appellant had a full and fair opportunity to testify at the hearing, and that there is no justification for admitting additional testimony or other supplemental evidence.

For the above stated reasons, the Board **DENIES** Appellants request to introduce her Victim Impact Statement and the proffered testimony as supplemental evidence for the record.

For the Board  
October 7, 2020



Harriet Davidson  
Chair