BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 20-08**
	*	
MONTGOMERY COUNTY GOVERNMENT,	*	
	*	
	*	
EMPLOYER	*	
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SUPPLEMENTAL DECISION CONCERNING ENFORCEMENT OF SETTLEMENT AGREEMENT

On October 16, 2019, [redacted] (Appellant) filed a Complaint with the Merit System Protection Board (Board or MSPB) seeking to enforce the terms of a September 25, 2015, settlement agreement filed with the Board in MSPB Case No. 15-24.[1] Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15, the Board had issued an Order accepting the settlement agreement into the record and retaining jurisdiction over any disputes concerning interpretation or enforcement. MSPB Case No. 15-24 (September 30, 2015).

A little over a month after entering into the settlement agreement Appellant filed a motion with the Board to enforce the agreement, claiming that the County had breached the agreement by not giving her assigned parking in the Executive Office Building (EOB). The Board ruled on December 17, 2015, that there was no breach of the settlement agreement. MSPB Case No. 16-06 (2015).

In her 2019 enforcement request Appellant alleged that the County breached the 2015 settlement agreement by failing to remove certain documents from her personnel file and by failing to provide her with the proper salary and benefits.

[1]In 2015 the Department of Police had issued a Notice of Disciplinary Action seeking to dismiss Appellant from her Management Leadership Service (MLS) III position as Chief of Financial and Grants Management. After the merits hearing before the Board the parties reached a settlement.

On June 8, 2020, the Board issued a Decision Concerning Enforcement of Settlement Agreement denying Appellant's request for enforcement. Appellant then filed a petition for judicial review in the Circuit Court for Montgomery County.

The Circuit Court issued an opinion and order remanding the matter to the MSPB. [redacted] *v. Montgomery County*, Civil Case No. 482732-V, MSPB Case No. 20-08 (December 23, 2021). The Court:

1. affirmed the Board's ruling that *res judicata* barred Appellant's claim for a parking spot in the EOB parking lot;
2. affirmed the Board's ruling that *res judicata* barred Appellant's claim for paid time off (PTO) that had been rescinded before the Board issued its decision in MSPB Case No. 16-06 in December 2015;
3. reversed the Board's ruling that *res judicata* barred Appellant's claim for PTO not granted after the Board issued its decision in MSPB Case No. 16-06;
4. reversed the Board's ruling that Appellant's claims were untimely; and
5. affirmed the Board's decision that the County did not materially breach the Agreement regarding (a) the contents and maintenance of confidential personnel files, and (b) the proper calculation of Appellant's cost of living adjustments.

The Court remanded the matter to the Board to determine: (1) whether the County failed to grant PTO to Appellant in January 2016 and every six months thereafter; and, if so, (2) whether the County's failure to grant PTO was a material breach of the Agreement.

On February 7, 2022, the Board issued a scheduling order asking the parties to brief the two issues remanded by the Circuit Court. Appellant filed a brief on March 8, 2022, the County filed a response on March 28th, and Appellant filed a reply brief on April 11th. The Board then considered and decided the enforcement request.

The County Failed to Grant PTO In January 2016 and Thereafter

It is undisputed that Appellant was denied PTO after the settlement agreement went into effect.

Failure to Grant PTO Was a Material Breach of the Agreement

Under the 2015 settlement agreement Appellant was demoted to a Grade 25 Program Manager position but her salary and benefits were frozen at her MLS III level for 4 years. The Settlement Agreement provides, in part:

A. Ms. [redacted] will be placed in a Grade 25 position within the Department of Finance as a Program Manager II with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years, from October 19, 2015 to October 19, 2019. The COLA for FY16 is to be implemented as though Ms.

[redacted] had been continuously employed during the period of her separation. The parties intend that the Settlement Agreement results in no break in service for Ms. [redacted]. Moreover, the parties agree that the "redline freeze" acts as a floor for salary and benefits, but Ms. [redacted] is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to.

B. After four (4) years on October 19, 2019, Ms. [redacted]'s salary shall be the top of grade for the position she occupies if the position she occupies is below an M-3. However, at the conclusion of 4 years, on October 19, 2019, if Ms. [redacted] occupies an M-3 position, her salary shall not be less than her former M-3 salary on October 19, 2019.

Appellant alleges that the County breached the agreement by giving her sick and annual leave instead of PTO.

APPLICABLE LAW AND REGULATIONS

Montgomery County Personnel Regulations (MCPR), 2001 (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, February 23, 2016, July 17, 2018, and June 1, 2020), *Section 1, Definitions,* which provides, in pertinent part:

> **§ 1-49.** ***Paid time off (PTO)***: A type of leave granted to MLS employees in the Retirement Savings Plan that may be used as sick or annual leave.

Montgomery County Personnel Regulations, 2001 (as amended July 12, 2005, October 21, 2008, July 12, 2011, June 30, 2015, and July 17, 2018), *Section 16, Annual Leave,* which states in applicable part:

> **§ 16-12. Paid time off (PTO) and annual leave.** PTO is a type of leave granted to MLS employees who are members of the Retirement Savings Plan or the Guaranteed Retirement Income Plan.
>
> **(a)** ***Crediting and accumulation of PTO. An employee who is granted PTO*****:**
>
> (1) does not earn annual leave;
>
> (2) must be credited with:
>
> (A) 140 PTO hours at the beginning of the leave year if a full-time employee;
>
> (B) 140 PTO hours at the beginning of the 14th pay period of the leave year if a full-time employee;
>
> (C) a prorated number of PTO hours at the beginning of the leave year and at the beginning of the 14th pay period, if a part-time employee; and
>
> (3) may accumulate PTO without limit;
>
> **(c)** ***Use of PTO*****.** PTO may be used for the same reasons as annual leave. . .

(d) ***Conversion of annual leave to PTO for certain MLS employees. . .***

> (3) If an MLS employee who receives PTO leaves the MLS position and is promoted, demoted, or reassigned to a non-MLS merit system position, the CAO must:
>
> > (A) allow the employee to retain and use the unused PTO hours that the employee had accumulated before the current leave year and a prorated share of the unused PTO hours for the current leave year; and
> >
> > (B) allow the employee to earn annual leave from the effective date of the employee's promotion, demotion, or reassignment to a non-MLS position. . . .

ANALYSIS

It is Appellant's burden to prove by a preponderance of the evidence that there was a material breach of the settlement agreement. MSPB Case No. 16-06 (2015).

Timeliness

The County's brief includes a timeliness argument the Circuit Court specifically rejected. The County posits no compelling reason for why the Board should or could disregard the Circuit Court's ruling. Accordingly, the timeliness argument must be rejected by the Board.

Failure to Grant PTO Was a Breach of the Agreement

Under the 2015 settlement agreement Appellant was demoted to a Grade 25 Program Manager position, but her salary and benefits were frozen at her MLS III level for 4 years. Paragraph A of the Settlement Agreement provides, in part:

> Ms. [redacted] will be placed in a Grade 25 position within the Department of Finance as a Program Manager II with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years, from October 19, 2015 to October 19, 2019. . . . Moreover, the parties agree that the "redline freeze" acts as a floor for salary and benefits. . .

Appellant alleges that the County breached the settlement agreement by giving her sick and annual leave instead of PTO. The County argues that the agreement does not provide that Appellant would earn PTO in a General Salary Schedule (GSS) Grade 25 position. County Brief in Opposition, p. 2. The County suggests that "[i]f PTO was contemplated as a benefit during negotiations, specific language would have been included in the Settlement documents to overcome the Personnel Regulations and strict adherence to Benefit designations and distinctions between a GSS and MLS employee." County Brief in Opposition, p. 5. The County's position is unpersuasive.[2]

[2] While we gather that the County's position is that providing Appellant with PTO after she left an MLS position would have been contrary to MCPR § 16-12(d)(3), the retention of Appellant's MLS "salary and benefits" was

In considering Appellant's first breach of contract claim concerning parking the Board found that the agreement term "benefits" was broad enough to include free parking even though we also concluded that under the facts there was no material breach. MSPB Case No. 16-06 (2015).

Here we find no difficultly in concluding that the term "benefits" as used repeatedly in the agreement is broad enough to include leave benefits. *Merryman v. Univ. of Balt*., 473 Md. 1, 29 (2021) ("It is clear that holiday leave is a fringe benefit because it is a benefit, other than wages, received by an employee from an employer."). *See Marren v. DOJ*, 50 M.S.P.R. 369, 373 (1991) ("Annual leave provided by law is a benefit"); *Greenspan v. Dep't of Veterans Affairs*, 94 M.S.P.R. 247, 252 (2003) (same). *C.f.,* Maryland Labor and Employment Article, § 3-1201(d)(2) ("'Employment benefits' includes . . . sick leave, annual leave . . .") (wage & hour law); 2 C.F.R. § 200.431(a) ("Fringe benefits include, but are not limited to, the costs of leave (vacation, family-related, sick or military) . . .") (Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards); 41 C.F.R. § 60-20.6(b) ("'fringe benefits' includes, but is not limited to, . . . leave; and other terms, conditions, and privileges of employment.") (OFCCP nondiscrimination regulations).

As an MLS employee Appellant was entitled to PTO under which an employee may use the leave for any purpose (*e.g.*, as sick or annual leave). MCPR § 1-49. PTO is requested and approved like any other leave. Full-time employees like Appellant are credited with 140 hours of PTO at the beginning of the leave year and another 140 hours of PTO in July of each year. There is no limit to the number of PTO hours that may be carried over from one leave year to the next, but upon separation from County service the maximum payout is 600 hours. MCPR § 16-12(e).

The County provided an affidavit and documents indicating that upon her demotion Appellant had 310.8 hours of accrued PTO. During the four years after the settlement Appellant used both her accrued PTO leave and the annual and sick leave she earned as a GSS Grade 25. County Opposition (December 19, 2019), Exhibit H, Affidavit of [redacted], ¶s 9 & 10. *See* MCPR § 16-12(d)(3). Appellant did not earn both types of leave at the same time. When Appellant was reinstated pursuant to the agreement, she was initially credited with the full 140 hours of PTO she would have earned on July 1, 2015, had she not been dismissed prior to that date. The County then rescinded 64.57 hours of PTO that reflected the portion of time after the settlement agreement was signed on September 25, 2015, until the end of the year. During that time, she was given annual and sick leave as a non-MLS, GSS Grade 25 employee.

We find that for the period from January 1, 2016, until the end of the four years Appellant was entitled under the settlement agreement to a "redline freeze" of her MLS salary and benefits. Providing Appellant with annual and sick leave instead of PTO was a breach of the agreement.

Failure to Grant PTO Was a Material Breach of the Agreement

To demonstrate a material breach Appellant must show that she has "been deprived of [a] benefit which she reasonably could have expected from the Settlement Agreement. . .". MSPB

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expressly part of the settlement agreement. At a minimum the agreement required that Appellant be given PTO or the additional annual leave necessary to match the amount of PTO leave to which she was entitled.

Case No. 16-06 (2015). A material breach is one that relates to a matter of vital importance and goes to the essence of the contract. *Id*.

Whether or not a breach is material is usually a question of fact. *Barufaldi v. Ocean City*, 196 Md. App. 1, 23 (2010) *aff'd mem*., 434 Md. 381 (2013):

> A breach is material when it "is such that further performance of the contract would be 'different in substance from that which was contracted for'." *Dialist, supra*, 42 Md. App. at 178 (1979) (*quoting Traylor v. Grafton*, 273 Md. 649, 687, 332 A.2d 651 (1975), *in turn quoting Speed, supra*, 153 Md. at 661). Ordinarily, this is a question of fact. *See Speed, supra*, 153 Md. at 661-62 ("Whether a given breach is material or essential, or not, is a question of fact'' (*quoting Williston on Contracts*, sec. 866)). There are instances, however, when the issue is so clear that it may be decided as a matter of law. *Id*. at 662.

Whether there was a material breach in this case depends, in part, on the actual difference in benefits between PTO and normal leave for that time. Appellant alleges that the "difference can be quantified as leave valued at $6,223.65." Appellant's Reply Brief, p. 5. Appellant persuasively argues that the amount at issue is significant enough that it must be considered "material."

Appellant calculates that the amount of PTO that should have been granted to Appellant minus her actual leave usage would result in a PTO balance of 94.57 hours, and that her average pay rate for that time period was $65.81, for a total of $6,223.65. Appellant's Brief, p. 7; Appellant's Response (February 3, 2020), p. 10.

However, we find Appellant's calculation to be in error. The 94.57 figure includes a claim for the 64.57 hours of rescinded PTO that the Circuit Court concluded was barred by *res judicata* plus the 30-hour difference between the PTO Appellant should have earned from January 2016 until July 2019 (1,120) and the annual/sick leave she actually used (1,090). At the $65.81 hourly rate Appellant proposes the 30-hours are worth $1,974.30.

The County argues that there is no material breach because Appellant received annual and sick leave. The County does not address Appellant's claim that she would have had additional hours of leave or make any argument concerning the correct figure for PTO not granted after December 31, 2015.

We find that the PTO was a material benefit of the agreement and that the nearly $2,000 of lost leave is significant. We thus hold that the County's failure to grant PTO was a material breach of the Agreement.

Appellant has also requested that the agreement be reinstated and extended for an additional four-year period. Given that the breach is limited to the loss of PTO and that most of that leave was offset by Appellant's earning of and using annual and sick leave, reinstating and extending the settlement agreement for another four years would be excessive. Granting Appellant's proposed relief would provide that to which Appellant is not entitled, *i.e*., the MLS salary and benefits for an additional four years.

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant's request to enforce the terms of the settlement agreement regarding Paid Time Off benefits from January 1, 2016, to October 19, 2019, is **GRANTED**, and that the County shall pay Appellant the 30 hour difference between the PTO Appellant should have earned from January 2016 until July 2019 (1,120) and the annual/sick leave she used (1,090) at Appellant's rate of pay on October 19, 2019, or her current rate of pay, whichever is higher, and in no event less than $1,974.30.

Although Appellant has not prevailed on all of her claims, because the Board has found in favor of Appellant on the issue of PTO the County must pay reasonable attorney fees and costs. Under Maryland law and Board precedent when an appellant partially prevails the Board will only award a portion of the fees incurred. Montgomery County Code, § 33-14(c), provides the Board with remedial authority to "[o]rder the County to reimburse or pay *all or part of the employee's reasonable attorney's fees*." *See* MSPB Case No. 15-27 (2017); MSPB Case No. 13-02 (2013); MCPR § 35-16(a)(9).

Appellant shall submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have ten (10) calendar days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, § 33-14(c)(9).

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

For the Board
June 15, 2022

[redacted]
Harriet E. Davidson
Chair