BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 22-12**
	*	
MONTGOMERY COUNTY GOVERNMENT,	*	
	*	
	*	
EMPLOYER	*	
	*	

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FINAL DECISION

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

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

The Appeal was reviewed and considered by the Board.

FINDINGS OF FACT

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

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

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

unit members retroactive to March 29, 2020. The additional compensation was to be paid for the duration of the state of emergency related to COVID-19 that was declared by the State of Maryland. CX A.

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

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

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

APPLICABLE LAW AND POLICY

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

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

(b) Technical and procedural review of grievances.

. . .

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

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

(B) was timely filed; and

(C) otherwise complies with this section.

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

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

. . .

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

ISSUE

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

ANALYSIS AND CONCLUSIONS

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

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

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

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

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

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

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

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

Nor may Appellant claim that there is a continuing violation. It is true that a "time limitation may be waived . . . if the otherwise untimely allegation is part of a 'continuing violation,' *i.e*., a related series of acts, at least one of which occurred within the limitations period." MSPB Case No. 05-04 (2005). In this case no alleged violation occurred within the grievance time limits. The COVID front facing pay differential policy was only in effect from March 2020 to February

2021. Appellant's grievance was filed on August 24, 2021, six months after the end of the COVID-19 differential pay policy. Accordingly, we must find that the grievance does not allege and meet the standard for a continuing violation. MSPB Case No. 22-13 (2022). *See* MSPB Case No. 11-08 (2011) (appellant knew of wage compression event but found out about a Board ruling in other cases 5 years later); MSPB Case No. 17-16 (2017) (while salary effects of promotion decision continue, no related, discrete grievable acts within 30 days); MSPB Case No. 17-14 (2017) (request to alter chain of command denied and not reconsidered; continuing violation requires related, discrete grievable acts which occurred within 30 days prior to the grievance filing).

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

ORDER

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

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

For the Board
April 18, 2022

[redacted]
Harriet E. Davidson
Chair