

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

IN THE MATTER OF

██████████,

APPELLANT,

AND

**BETHESDA FIRE
DEPARTMENT,**

APPELLEE

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CASE NO. 22-36

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ORDER ON JURISDICTION

The Merit System Protection Board’s (MSPB or Board) Prehearing Order of September 7, 2022, ordered the Bethesda Fire Department (BFD) and Appellant to file briefs on jurisdictional issues raised by the BFD and the Board.

This appeal involves the removal of Appellant from both the Board of Directors and the membership rolls of the Bethesda Fire Department. The BFD argues that the MSPB does not have jurisdiction over Appellant’s removal from the Board of Directors but does have jurisdiction over Appellant’s removal as a member of the BFD. In addition, the parties were asked to address whether the Board has jurisdiction or authority to consider and provide relief for Appellant’s claims regarding reimbursement for certain items Appellant purchased and for meals.

The BFD was also asked to indicate the role Appellant was performing when he was engaging in the conduct described in each charge filed against him, and to specify the dates on which the alleged conduct occurred. The parties were also asked to indicate Appellant’s various positions within BFD over the past three years and the dates he served in those positions. The Board also asked the BFD to provide clarity on whether representation by Mr. ██████████, Executive Advisor to the BFD, would comport with Maryland law prohibiting the unauthorized practice of law.

The BFD filed a brief on September 21, 2022, addressing the jurisdictional issues and moving to dismiss the appeal insofar as it involves Appellant’s removal from the BFD Board of Directors and his request to be reimbursed. Appellant filed a response on October 6, 2022.

ANALYSIS AND CONCLUSIONS

Does the Board have jurisdiction over Appellant's removal from the BFD Board of Directors?

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 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.” This definition does not encompass membership on a local fire and rescue department’s (LFRD) governing board.

Appellant alleges that the BFD’s corporate bylaws give the MSPB jurisdiction because they provide that the BFD must comply with the Montgomery County personnel regulations (MCPR) in grievances. BFD Ex 2, §13.1B. However, nothing in the MCPR gives the MSPB jurisdiction over grievances by LFRD corporate board members, as opposed to volunteer firefighters subject to discipline. More importantly, even if the BFD corporate bylaws purported to give the MSPB jurisdiction over BFD board members, under Maryland law the BFD corporate bylaws could not vest the MSPB with jurisdiction. The MSPB’s jurisdiction is established by County law. *See Stewart v. State*, 287 Md. 524, 527-28 (1980) (it is “widely acknowledged” that “parties cannot confer jurisdiction . . . by consent.”); *State v. Walls*, 90 Md. App. 300, 305 (1992) (“Jurisdiction over the subject matter cannot be conferred by consent of the parties . . .”).

Appellant also argues that since County Code § 21-7(a) gives the MSPB jurisdiction over any volunteer firefighter aggrieved by an adverse final action of a LFRD, and he was aggrieved, the MSPB has jurisdiction over his removal from the BFD board. However, Appellant fails to note that § 21-7(a) says that the MSPB has jurisdiction when a volunteer firefighter is “aggrieved by an adverse final action . . . 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.*” (emphasis added). The provision expressly applies to individuals serving as volunteer firefighters acting in roles that are akin to employees, not to persons serving as members of the organization’s corporate governing body.

The Board finds that it lacks jurisdiction to hear Appellant’s appeal of his removal from the BFD corporate board. Accordingly, Appellant’s appeal concerning his removal from the BFD corporate board is **DISMISSED**.

Does the Board have jurisdiction over Appellant's removal as a volunteer firefighter/rescuer?

The BFD concedes that Appellant was “considered a ‘volunteer firefighter or rescuer.’” BFD Brief, p. 3. The Board thus finds that it has jurisdiction to hear Appellant’s appeal of his dismissal as a volunteer firefighter or rescuer.

May the Board order the BFD to reimburse Appellant for items he purchased and that were not returned to him?

Under County Code, § 33-14(c)(10) the Board may “Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.” Thus, the County Code confers on the Board expansive remedial powers, although such authority is limited to the types of relief listed in § 33-14(c)(1)-(9). *Opinion of the County Attorney*, (December 17, 2008) (MSPB authority under MCC § 33-14(c)(10) must be “interpreted to include only forms of relief similar to the types of relief enumerated in the preceding paragraphs.”). *See Lussier v. Maryland Racing Commission*, 343 Md. 681, 686-87 (1996) (in determining whether an administrative agency is authorized to act in a particular manner the governing standard is whether the action is “consistent with the letter and spirit of the law under which the agency acts.”). *Cf., Gutwein v. Easton Publishing Co.* 272 Md. 563 (1974), *cert. denied*, 420 U.S. 991 (1975) (State civil rights agency authority to “take affirmative action” did not permit the award of compensatory damages.).

Among the specifically identified relief in § 33-14(c)(1)-(9) is the authority to “Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale.” MCC § 33-14(c)(8). The failure to reimburse Appellant for items he provided to the BFD for training purposes, or to return the items to him, may be an adverse effect within the meaning of (c)(8).

The Board finds that it has jurisdiction to consider whether the requested relief is appropriate and supported by the evidence. Accordingly, the BFD’s motion to dismiss that part of the appeal is **DENIED**.

BFD representation.

The Board asked the BFD to provide clarity on whether representation by Mr. [REDACTED], a non-lawyer, would comport with MD Code Ann., Business Occupations and Professions Article (BOP), § 10-206. *See* BOP § 10-601 (“(a) Except as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar. . . (c) It is not a defense to a charge of a violation of this section that the defendant acted through an officer, director, partner, trustee, agent, or employee who is a lawyer.”).

Mr. [REDACTED]’s status is unclear from the parties’ submissions. BFD contends that Mr. [REDACTED] is serving as “an employee designated by an officer of a corporation” while Appellant suggests that he is a contractor not an employee. It is not within the purview of the matter before us to adjudicate the status of Mr. [REDACTED] within the BFD organization.

The Board considers Mr. [REDACTED] as counsel of record in this matter and recognizes that as an active member of the Maryland Bar he may represent the BFD before the MSPB. Mr. [REDACTED] and any other counsel entering an appearance and authorized to practice law in Maryland will be responsible for the conduct of the hearing, including but not limited to oral argument, objections, motions, the introduction of evidence, the examination of witnesses, and may make any pre or post hearing submissions on behalf of the BFD. *See Turkey Point Property Owners’ Association, Inc. v. Anderson*, 106 Md. App. 710, (1995) (Maryland corporation may not be represented by nonlawyer).

Appellant's status with the BFD.

Notwithstanding our finding that Appellant may be considered a volunteer firefighter or rescuer, the Board would also like further clarification as to Appellant's membership class under the Constitution and Bylaws of the BFD and the dates he was in different roles. As we understand it, County Code, § 21-21(j)(1) requires the BFD to maintain a detailed and accurate record for each volunteer that reflects their volunteer status. The BFD shall provide the Board with a copy of the detailed record of Appellant's service as a volunteer firefighter or rescuer for the last 4 years by **October 19, 2022.**

For the Board
October 13, 2022

[REDACTED]

Harriet E. Davidson
Chair