

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

IN THE MATTER OF

**12 FIRE AND RESCUE
SERVICE EMPLOYEES,
APPELLANTS,**

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 22-41

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FINAL DECISION

Appellants are twelve Battalion Chiefs and Assistant Chiefs of the Montgomery County Fire and Rescue Service (MCFRS). They have filed appeals with the Merit System Protection Board (Board or MSPB) challenging decisions of the County’s Chief Administrative Officer (CAO) denying them emergency pay during the COVID-19 pandemic.

The County submitted responses to each of the appeals. (County Responses). Appellants each filed a response to the County’s submission. (Appellant Responses). On April 21, 2022, the County filed a motion to consolidate MSPB Case Nos. 22-21 through 22-32 and represented that Appellants had agreed that consolidation is appropriate, under certain conditions.¹ On June 7, 2022, the Board issued an order consolidating the appeals as MSPB Case No. 22-41.

The appeals were reviewed and considered by the Board.

FINDINGS OF FACT

Appellants are twelve (12) MCFRS management level employees at the rank of either Division Chief, Battalion Chief, or Assistant Chief. As high level supervisors above the rank of

¹ The County represented that the Appellant in Case No. 22-24 responded on behalf of the other appellants and agreed to “consent to consolidating the appeals on the following conditions:

1. When addressing the consolidated appeals, the Board will consider only those documents that, (a) I have already submitted as exhibits to my grievance; (b) the County has already submitted as exhibits; and (c) are otherwise mutually agreed to by all Appellants and the County; and,
2. Documents already submitted to the Board by the Appellants and the County will only be used for the specific grievance/appeal for which it was submitted.”

Motion for Consolidation, ¶ 11.

Captain, none of the appellants are members of the bargaining unit represented by the Montgomery County Career Fire Fighters Association, International Association of Fire Fighters, Local 1664, AFL-CIO (IAFF), or covered by the collective bargaining agreement. IAFF Agreement with Montgomery County, Article 1.

On March 5, 2020, in order to control and prevent the spread of COVID-19, the Governor of Maryland issued a proclamation under the authority of the Maryland Constitution and Title 14 of the Public Safety Article, declaring a state of emergency and catastrophic health emergency. County Exhibit (CX) 13.² The Governor's emergency declaration was renewed on March 17th and numerous times thereafter as the pandemic continued. On March 18, 2020, a letter from the County Executive was sent to all County employees. CX 18. The first line of the letter referenced the COVID-19 "public health emergency." On March 26, 2020, the President issued a Major Disaster Declaration for Maryland, authorizing emergency Federal funding coordinated through the Federal Emergency Management Administration (FEMA). CX 14. However, the Montgomery County Executive never declared a state of emergency. *See* MSPB Case No. 22-13 (2022).

On April 3, 2020, the County entered into agreements with three unions, including the IAFF, providing for COVID-19 differential compensation. CX 1-3. The agreements provided for the additional COVID-19 compensation for bargaining unit members to begin retroactive to March 29, 2020, and specifically waived the right of employees to receive emergency pay, as described in the collective bargaining agreement. *Id.* The additional compensation was to be paid for the duration of the declared State of Maryland COVID-19 state of emergency. *Id.* Under the Agreement with IAFF hours worked from March 29, 2020, were to be compensated at the rate of an additional \$10 per hour, except for those hours teleworked. CX 1. The County and the unions subsequently agreed to end the COVID-19 differential pay effective February 14, 2021. CX 4. *See* MSPB Case No. 22-13 (2022).

On April 10, 2020, the County Executive issued a press release publicly announcing that the County had reached an agreement concerning COVID-19 differential pay with the three unions representing County employees. CX 7. The press release specifically noted that "under provisions of existing county bargaining agreements . . . the unions could have insisted on much larger benefits, but they understood the importance of the ongoing fiscal health of the county." CX 7.

In addition to the April 10 press release there were communications to all County employees as well as public statements and testimony from County officials concerning the COVID pandemic emergency, and the local news media reported on the issue in 2020 and early 2021. *See, e.g.,* CX 16-31. Some communications by county officials did use the term "emergency" in discussing the County's response to the pandemic but these statements did not necessarily address hazard or emergency pay or pay issues regarding the appellants in this appeal. For example, a letter from the County Executive emailed to all County employees on March 18, 2020, referred to the "public health emergency" in the first line. CX 18. An April 6, 2020, issue of the County Employee Connect also referred to the "emergency." CX 21. But these did not change

² The County introduced 35 exhibits in eleven of the twelve appeals. MSPB Case No. (22-25) has 36 exhibits, with County Exhibit (CX) 36 being unique to that appeal. For each of the appeals CX 1 - 11 and CX 13 - 35 have identical numbering and content. For each of the twelve appeals CX 12 is the grievance form for that appellant.

the fact that there was no declaration of a state of emergency by the County Executive or any other issuance that covered all County employees.

In a letter dated April 29, 2020, twenty-six (26) MCFRS Battalion and Assistant Chiefs wrote to the County Executive and Chief Administrative Officer requesting COVID-19 hazard or general emergency pay. CX 6.³ Three of the appellants in this matter signed the joint letter: ██████ (22-21); ██████ (22-29); and ██████ (22-32). The letter quoted the April 10, 2020, press release language concerning the right of the unions to insist on larger benefits and from the union bargaining agreements that waived the right for employees to receive emergency pay. The letter further stated that since the personnel regulations exclude MLS employees from eligibility for emergency pay but make no mention of MCFRS management employees “we believe that there is a legal basis for paying . . . Fire Rescue Management Emergency Pay.” CX 6.

On July 2, 2020, the County Executive sent a letter to FEMA seeking reimbursement for labor costs related to the COVID-19 pandemic. CX 10, pp. 70-72. The letter sought to demonstrate that the County had a pre-existing obligation to members of the bargaining units to compensate employees for emergency pay, noting that in “a general emergency, bargaining unit members under each agreement are entitled to ‘twice their regular hourly rate.’” CX 10, p. 71. The letter further admitted that “the event triggering the emergency pay provision of the CBAs is the global COVID-19 pandemic . . . the Governor’s [COVID-19] emergency declarations, further reinforced by the Federal government’s disaster declaration - triggered the emergency pay provisions of the CBAs” and “the emergency pay provisions, while unquestionably invoked, were a financial catastrophe for the County.” CX 10, p. 71.

Emergency pay was explicitly addressed during a public hearing of the County Council on October 13, 2020. Agenda Item 9, a briefing on the Coronavirus Relief Fund, included a discussion of the COVID-19 differential pay.⁴ During that discussion the CAO reminded the Council that the contracts with the unions have emergency pay provisions and that the County was able to negotiate with the unions for a 75% reduction from the emergency pay rate.⁵ Apparently expressing his belief it was unclear whether the emergency pay provision of the union contracts were applicable, Council Member Hans Riemer said that a fair reading of the union contracts could lead in different directions.⁶ The CAO responded by discussing the requests for reimbursement from FEMA for the COVID differential pay program. With regard to FEMA eligibility criteria, he specifically said that it was important to FEMA that the County not seek reimbursement for a newly created pay obligation but instead, since the contracts with the unions already had emergency pay provisions at a higher rate, the County had negotiated a significantly reduced rate for emergency pay.⁷ The next day the media reported on the hearing and referenced the CAO’s statement that emergency pay is written into the union contracts. CX 28, Rebecca Tan, *This wealthy suburb gives out millions in pandemic hazard pay. Some officials aren’t sure the county can afford to*, The Washington Post, October 14, 2020.

³ A total of 56 police and fire managers signed the letter.

⁴ The Council hearing on Agenda Item 9 may be found at: <https://www.youtube.com/watch?v=BAjfiJW7N-E>. The discussion concerning COVID differential pay begins at 1:55:50.

⁵ The CAO’s remarks concerning the emergency pay provisions of the union contracts are at 2:00:57 to 2:01:35.

⁶ Beginning at 2:03:02.

⁷ Beginning at 2:05:48.

County employee eligibility for emergency pay during the COVID pandemic was also discussed in an October 30, 2020, *Washington Post* editorial. CX 25, *Local governments are tightening their belts. But Montgomery County is going on a spending spree*, The Washington Post, October 30, 2020. The editorial specifically addressed the County Executive's suggestion that the agreement to provide COVID differential pay was fiscally responsible because otherwise employees would have been entitled to emergency pay: "Mr. Elrich contends that Montgomery employees were entitled to the bonus pay under a previously negotiated labor agreement; he argued that his union allies actually cut the county a break by not demanding more." The last day for COVID differential pay was February 13, 2021. CX 4. An email announcing the end of COVID pay was sent to all County employees on February 14, 2021. CX 5. The last paychecks containing COVID pay were issued for the pay period ending on February 26, 2021.

The CAO provided the County Council with an update on the Coronavirus Relief Fund on March 23, 2021, and again included a discussion of Federal reimbursement for COVID-19 differential pay.⁸ His testimony clearly was focusing on the pre-existing emergency pay provisions in the union contracts and explained that the COVID differential pay was a replacement for the contractual emergency pay at a more affordable rate due to the long term nature of the COVID-19 pandemic.⁹ The public hearing testimony of the CAO was reported on by the news media. CX 29, Briana Adhikusuma, *County still working with FEMA on reimbursement of hazard-pay funding*, Bethesda Magazine, Bethesda Beat, April 2, 2021 ("Madaleno noted that instead of paying employees double time, the county negotiated with the unions for a decreased rate.").

Governor Hogan issued an Executive Order on June 15, 2021, terminating the various emergency proclamations and orders he had previously issued during the COVID-19 pandemic, effective July 1, 2021. Governor's Executive Order 21-06-15-01 (June 15, 2021).¹⁰

Twenty-three (23) MCFRS managers filed grievances concerning COVID-19 differential pay and settled with the County. See MSPB Case Nos. 21-33 and 21-114 (2021). Similar grievances were filed by 15 managers in the Montgomery County Sheriff's Office, 45 managers in the Montgomery County Police Department, and 16 Department of General Services managers. See MSPB Case Nos. 21-109, 21-110, 21-111 and 21-112. The County settled a total of 99 appeals.¹¹ As part of the settlement agreements the County paid COVID differential pay in exchange for waiver of claims to emergency pay.

For Fiscal Year 2022 Council Resolution No. 19-872 required Council approval for any emergency pay or hazard pay extending for more than 10 consecutive days and for any COVID-19 differential pay. CX 8. As a result, 83 of the settlement agreements that required FY22 funding were submitted to the County Council for approval. CX 9.

⁸ The Council hearing on Agenda Item 2B may be found at: <https://www.youtube.com/watch?v=LdhIRIJruw>. The discussion concerning COVID differential and emergency pay begins at 2:11:45.

⁹ See, e.g., 2:18:21.

¹⁰ Executive Order 21-06-15-01, entitled *Terminating Various Emergency Orders*, may be found at: <https://governor.maryland.gov/wp-content/uploads/2021/06/Termination-Roadmap-6.15.21.pdf>.

¹¹ The grievance filing dates for these appeals were as follows: MSPB Case No. 21-33 (10/15/20); MSPB Case No. 21-114 (10/2/20 to 12/6/20); MSPB Case No. 21-109 (9/23/20 to 10/6/20); MSPB Case No. 21-110 (10/25/20 to 2/26/21); MSPB Case No. 21-111 (10/5/20); MSPB Case No. 21-112 (9/30/20).

On November 30, 2021, the County Attorney and CAO testified at a public County Council hearing concerning a supplemental appropriation for the settlement agreements. CX 9 & 10.¹² In response to Council member questions about the July 2, 2020, letter that the County Executive had sent to FEMA, the then-County Attorney explained that the Office of the County Attorney (OCA) was recommending settlement because there was a possibility that the County could lose if challenged in litigation.

The CAO testified that FEMA would only reimburse the County for expenses incurred under pre-existing legal or contractual obligations and that the July 2, 2020, letter, and copies of collective bargaining agreements were provided to show that the County had pre-existing emergency pay provisions. The CAO asserted that the County's emergency pay provisions were intended for short term circumstances like severe weather events, but not designed for long term events such as the COVID-19 pandemic. The CAO further explained that although employees were potentially due emergency pay the unions and the County agreed to the COVID-19 differential pay because all sides acknowledged that the cost of double pay for an extended pandemic of unknown duration was unsustainable and unaffordable.

The Council held another public hearing on the supplemental appropriation for the settlement agreements on December 7, 2021.¹³ Counsel representing the twenty-two MCFRS appellants in MSPB Case No. 21-114 testified in support of Council funding of the settlement agreement and warned the Council that if the funding was not approved, under the settlement agreement the parties would return to the MSPB to finish litigating the appeals.

Ten of the appellants in this appeal previously filed front facing COVID-19 differential pay grievances. By Order dated October 4, 2021, the Board consolidated five of those appeals. MSPB Case Nos. 22-04, 22-06, 22-09, 22-10, and 22-11 were consolidated and referenced as MSPB Case No. 22-13. The other four appeals were MSPB Case Nos. 22-07, 22-12, 22-16, and 22-19. One of the appeals was withdrawn by the appellant and dismissed as moot on December 15, 2021. MSPB Case No. 22-14 (2021). The Board denied the remaining nine appeals as untimely filed on April 18, 2022.¹⁴

Prior to a promotion in September 2020 the Appellant in MSPB Case No. 22-25 was a member of the bargaining unit and received COVID-19 differential pay pursuant to the County's agreement with the IAFF. CX 1, CX 36 (22-25); Appellant's Response, March 14, 2022 ("March 16, 2020, through September 13, 2020, I was not a member of MCFRS management"). As a result, Appellant (22-25) only requested emergency pay from September 13, 2020, to June 5, 2021. CX 12. Appellant in MSPB Case No. 22-31 admits that she "primarily Teleworked" but nevertheless is seeking emergency pay for all hours worked between March 16, 2020, and June 5, 2021. CX 12.

Appellants filed grievances in this matter between December 15, 2021 (MSPB Case No. 22-24) and January 5, 2022. (MSPB Case No. 22-22). Appellants filed grievances that were

¹² A recording of the November 30 Council hearing is available at https://www.youtube.com/watch?v=sc6xGXn4_wI. Discussion concerning the COVID-19 differential pay supplemental appropriation begins at 1:36:20.

¹³ A recording of the public hearing is available at: https://www.youtube.com/watch?v=T45_JBKbLtA. Testimony on the supplemental appropriation begins at 0:04:45.

¹⁴ The appellants in MSPB Case Nos. 22-22 and 22-29 had not previously filed front facing COVID-19 differential pay grievances.

virtually identical. Indeed, the statements attached to the grievance forms filed by nine of the appellants are essentially identical. CX 12. The statements filed in MSPB 22-23, 22-25, and 22-31 are quite similar but contain some minor variations. For example, the appellant in 22-25 alleged that he became aware of the grounds for a grievance on December 1, 2021, while the appellant in 22-23 included additional references and included links to the source materials. The appellant in 22-31 added a paragraph acknowledging that she “primarily Teleworked” during the time at issue.

The appellants allege the support for the grievances was the fact that in March 2020 the Governor had declared a state of emergency, the President had declared a National Emergency, and that the County Executive had announced the closing of public schools and non-essential County government offices. They also rely on the agreements that were negotiated with the unions for their members concerning differential pay. The Appellants note that an April 9, 2020, timekeeping guidance from the OHR and Finance Directors made no mention of emergency pay. They contend that this omission, and similar omissions in other County communications, “appears to have been a deliberate effort not to notify the affected Public Safety Managers or respective Department heads that the general emergency pay provisions had been triggered” in an effort to avoid paying general emergency pay. CX 12.

The three Appellants who signed the April 29, 2020, joint letter to the County Executive requesting emergency pay (CX 6) filed grievances seeking emergency pay on December 20, 2021, (CX 12, 22-32); December 22, 2021, (CX 12, 22-29); and December 30, 2021 (CX 12, 22-21). Appellant in MSPB Case No. 22-22 filed a grievance on January 5, 2022. CX 12 (22-22).

The Office of Labor Relations (OLR) Chief denied all the grievances as untimely.

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 Appellants file timely grievances?

ANALYSIS AND CONCLUSIONS

The Governor of Maryland issued an executive order declaring a state of emergency during the COVID-19 pandemic from March 5, 2020, until July 1, 2021. Appellants seek emergency pay for hours they worked during that time. Appellants contend that their requests for emergency pay are valid and timely even though the County Executive never declared a state of emergency for Montgomery County, and Appellants did not file grievances for such pay until about six months after the end of the state of emergency. Appellants make those claims because they allege that they only became aware that they may have been entitled to emergency pay on November 30, 2021, as a result of Council testimony that day by the CAO and County Attorney and the public release of the July 2, 2020, FEMA letter. Appellants do not provide any other justifications for filing their claims as late as December 2021 and January 2022.

There was no consideration or determination by the CAO or the OLR Chief on the merits of Appellants' grievances. We thus consider whether the timeliness of the grievances filed by Appellants is dispositive.

Timeliness is the narrow issue before us. We need not address the question of whether MCFRS managers were legally qualified for and entitled to receive emergency pay during the COVID-19 pandemic. The only question before us is when the Appellants knew or should have known that they were not going to receive additional compensation as a result of the COVID-19 emergency so that they could make timely claims for emergency pay. The facts in the record demonstrate that they had sufficient information that gave them notice to file claims, as required by the grievance regulations, long before they actually filed grievances for emergency pay.

Timeliness

The grievance regulations limit the time within which a grievance may be filed to thirty calendar days after “the date on which the employee knew or should have known of the occurrence or action on which the grievance is based.” MCPR § 34-9(a)(1)(A).

Appellants contend that they only became aware that they could file grievances seeking emergency pay as a result of information revealed at the November 30, 2021, Council hearing on the COVID-19 front facing differential pay settlements. CX 12.¹⁵ See Appellant Responses. During that hearing the July 2, 2020, FEMA letter was discussed, and the Council testimony of the County Attorney contained statements expressing his view that employees such as appellants may have had claims to emergency pay.¹⁶ Even under this theory, Appellant ██████████ (22-22) filed an untimely grievance on January 5, 2022, 36 days after the November 30, 2021, Council hearing. MSPB Case No. 22-22 (CX 12). For that reason alone, the appeal in MSPB Case No. 22-22 must be dismissed as untimely.

Grievances seeking emergency pay were required to be filed by all appellants within 30 days after appellants knew or should have known of the basis for a grievance. Maryland courts have adopted a “discovery rule” which is used to determine when a party knew or should have known that they had a claim. *Hecht v. Resolution Trust. Corp.*, 333 Md. 324, 335 (1994). The discovery rule “contemplates actual knowledge that is express cognition, or awareness implied from ‘knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.’” *Poffenberger v. Risser*, 290 Md. 631, 637 (1981) (quoting *Fertitta v. Bay Shore Dev. Corp.*, 252 Md. 393, 402 (1969)). We must determine when appellants had actual knowledge of the basis for an emergency pay grievance or when such knowledge should be imputed or implied to appellants.

Under the discovery rule, a claim “accrues when the claimant in fact knew or reasonably should have known of the wrong.” *Poffenberger*, 290 Md. at 636. See MCPR § 34-9(a)(1)(A). Under the first prong of the discovery rule “a plaintiff must have notice of the nature and cause of his or her injury.” *Windesheim v. Larocca*, 443 Md. 312, 327 (2015) (quoting *Frederick Rd. Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 96 (2000)). That notice includes actual notice, which includes not only knowledge, but also information received from others, and inquiry notice, which is “circumstantial evidence from which notice may be inferred.” *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 637). The discovery rule thus may be satisfied if Appellants were on “inquiry notice.” *Dual, Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 167-68 (2004).

In the joint letter dated April 29, 2020, twenty-six (26) Battalion and Assistant Chiefs and thirty (30) police managers wrote to the County Executive and Chief Administrative Officer requesting COVID-19 hazard or general emergency pay. CX 6. In that joint letter a significant number of MCFRS leadership employees alleged that they were entitled to emergency pay. This

¹⁵ The statements attached to the grievance forms filed by nine of the appellants appear identical. The statements filed in MSPB 22-23, 22-25, and 22-31 are quite similar but contain some minor variations. CX 12. For example, the appellant in 22-25 alleged that he became aware of the grounds for a grievance on December 1, 2021.

¹⁶ Although the County Attorney testified before the Council that there was an argument that employees might be able to successfully assert before this Board that they were entitled to emergency pay, he did not say that he had concluded that they were entitled to such pay.

strongly suggests that knowledge of the April 10 press release was widespread among MCFRS and police managers.¹⁷

Three of the appellants in this matter were signatories to that joint letter. By having expressly articulated in writing a specific claim for emergency pay in April 2020, appellants ██████ (22-21), ██████ (22-29), and ██████ (22-32) evidenced actual knowledge that they were aware of the information necessary for them to file grievances seeking emergency pay. The signatures of those three appellants on the April 29, 2020, letter refutes their arguments that they were unaware of the possibility of a claim for emergency pay until November 30, 2021. We thus find that the grievances of ██████ (22-21), ██████ (22-29), and ██████ (22-32) were untimely filed by over 19 months and must be dismissed because we find they had actual knowledge that they would not be receiving additional compensation. *See* MSPB Case No. 17-14 (2017); MSPB Case No. 15-28 (2015); MSPB Case No. 11-08 (2011); MSPB Case No. 06-03 (2006).

Although we have already determined that four appellants had actual knowledge of the basis for emergency pay claims over 30 days before filing their untimely grievances,¹⁸ we shall also determine whether all 12 of the appellants knew or should have known that they had possible claims for emergency pay.

As noted above, on March 5, 2020, the Governor declared a State of Emergency and Catastrophic Health Emergency in response to the COVID-19 pandemic. CX 13. The emergency declaration was widely reported, and Appellants do not deny that they were aware of the Governor's emergency declaration. However, they argue that because the County Executive had not declared a general emergency, they were not aware that they might have viable claims for emergency pay until the November 30, 2021, Council hearing and release of the FEMA letter.¹⁹

Appellants make the distinction between the Governor's emergency declaration and the requirement in County law that the County Executive declare an emergency for employees to be eligible for general emergency pay. Under the County personnel regulations employees are entitled to general emergency pay if the employees are required to work "during a period of general emergency." MCPR, § 10-1(e). *See* MCPR, § 10-14. A "general emergency" is defined in MCPR § 1-29 as "[a] period *declared by the County Executive or CAO* during which government offices are closed and public services are temporarily limited or not available because of severe weather or other extraordinary conditions." (Emphasis added). While "other extraordinary conditions" may be construed to include an epidemic, the requirement of a declaration by the County Executive or CAO excludes the COVID-19 state of emergency declared by the Governor.

Nevertheless, the County took steps to ensure that it would not be faced with claims for emergency pay. On April 3, 2020, the County entered into agreements with the three unions that specifically waived the rights of bargaining unit employees to receive emergency pay, while providing for less expensive COVID-19 differential pay. CX 1-3. On April 10, 2020, the County Executive issued a press release publicly announcing the agreements and specifically stating that "under provisions of existing county bargaining agreements . . . the unions could have insisted on

¹⁷ Indeed, other public safety managers did file grievances seeking emergency pay in 2020. *See* CX 32-35.

¹⁸ ██████ (22-21), ██████ (22-22), ██████ (22-29), and ██████ (22-32).

¹⁹ It is undisputed that the County Executive never declared a COVID-19 pandemic state of emergency.

much larger benefits, but they understood the importance of the ongoing fiscal health of the county.” CX 7.

The April 10, 2020, press release was quoted in the April 29, 2020, joint letter from 56 members of police and MCFRS management, including 26 MCFRS managers. CX 6. The fact that so many public safety managers were aware of the potential claim for emergency pay suggests that such knowledge was widespread and available. Furthermore, the County Executive’s concern that employees might have been eligible for emergency pay was discussed by the CAO at public hearings and widely reported in the news media. *See supra*, pp. 2-4. Moreover, the union agreement with IAFF providing for COVID differential pay and specifically waiving emergency pay also provided Appellants with notice of a potential claim for emergency pay. CX 1.

Inquiry notice was triggered when the Appellants recognized, or reasonably should have recognized, that they may have been entitled to but were not to receive emergency pay, not when they found out that they might be able to “successfully craft a legal argument.” *Fitzgerald v. Bell*, 246 Md. App. 69, 94 (2020) (*quoting Estate of Adams v. Cont’l Ins. Co.*, 233 Md. App. 1, 32 (2017)). Inquiry notice began when Appellants became aware of facts that would cause a reasonable person to make further investigation, not when they discovered that claims for emergency pay were more likely to be successful. *See Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 451 (2000) (“The statute of limitations . . . begins to run when the plaintiff should know that he might have a potential claim against another person, not when the plaintiff develops a full-blown theory of recovery.”).

We find that Appellants were on actual notice and/or inquiry notice when they knew that the Governor had declared a state of emergency and that the County had made it clear that they were not to receive the COVID differential pay that their subordinates were receiving, nor the emergency pay provided in the County personnel regulations.

There is no continuing violation

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 emergency that appellants argue justified their double pay ended when the Governor’s emergency orders terminated effective July 1, 2021. Governor’s Executive Order 21-06-15-01 (June 15, 2021). Appellants’ grievances were filed about six months after the end of the state of emergency declared by the Governor. Accordingly, we must find that the grievances do not allege and meet the standard for a continuing violation. *See* MSPB Case No. 22-13 (2022).

There is no basis to waive the time limits

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.”). The fact that Appellants may have found evidence they perceived would bolster their arguments for emergency pay when they became

aware of the County Attorney's November 30, 2021, Council testimony and the July 2, 2020, FEMA letter does not provide a basis for waiving the grievance time limits. Becoming aware of a legal theory that might strengthen a claim does not excuse an untimely grievance. *Cf.*, MSPB Case No. 14-43 (2014) ("That he subsequently discovered evidence that he believed might have bolstered his appeal does not excuse the untimeliness of his appeal."). Appellants have 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. MSPB Case No. 22-13 (2022).

Claim Preclusion/Res Judicata

Most of the appellants in these appeals had also filed grievances and appeals seeking COVID differential pay.²⁰ Nine of those appellants had their COVID differential pay grievance appeals denied by the Board.

The appeals of those nine appellants are also barred under the doctrine of *res judicata*, which precludes a second action involving the same parties and based on claims that were, or could have been, raised in the prior proceeding.²¹

The elements of *res judicata* are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and (3) that there was a final judgment on the merits. *Colandrea v. Wilde Lake Community Association, Inc.*, 361 Md. 371, 392 (2000). Moreover, if a party could have raised a claim in the prior litigation it too may be barred by *res judicata*. *Colandrea*, 361 Md. at 392; MSPB Case No. 14-38 (2014); MSPB Case No. 20-08 (2020), *affirmed in part and reversed in part on other grounds*, *Lee v. Montgomery County*, Circuit Court Civil Action No. 482732-V (December 23, 2021).

These principles apply in administrative proceedings, such as those conducted by the Board. *Batson v. Shiflett*, 325 Md. 684, 702 (1992) ("agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court.").

Because the nine appellants in MSPB Case Nos. 22-21, 22-23 through 22-28, 22-31, and 22-32 knew or should have known that they had possible claims for emergency pay when they filed their grievances and appeals for COVID-19 differential pay in MSPB Case Nos. 22-07, 22-12, 22-13, 22-16, and 22-19, and had an opportunity to raise that issue with the Board as part of their appeals in those cases, their claims for emergency pay in this appeal are barred by the doctrine of *res judicata*. MSPB Case No. 14-38 (2014).²²

²⁰ Appellants in MSPB Case Nos. 22-22 and 22-29 did not previously file front facing COVID-19 differential pay grievances and only filed emergency pay grievances. Appellant in MSPB Case No. 22-30 withdrew her front facing differential pay appeal prior to a Board decision on the merits. *See* Order of Dismissal, MSPB Case No. 22-14 (2021).

²¹ Although the County did not raise the issue of *res judicata*, we do so *sua sponte*. MSPB Case No. 20-08 (2020), *affirmed in part and reversed in part on other grounds*, *Lee v. Montgomery County*, Circuit Court Civil Action No. 482732-V, (December 23, 2021); *See Sabersky v. Dep't of Justice*, 91 M.S.P.R. 210, 2002 WL 522300 (2002), *aff'd*, 61 F. App'x 676 (Fed. Cir. 2003) (issue of *res judicata* may be raised *sua sponte*).

²² This conclusion is reinforced by the fact that other public safety managers did indeed file grievances seeking emergency pay. *See* CX 32-35.

ORDER

Accordingly, for the above discussed reasons it is hereby **ORDERED** that the appeals in Case No. 22-41 be and hereby are **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
September 29, 2022


Harriet E. Davidson
Chair