

**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. 23-04

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ORDER OF DISMISSAL

On September 7, 2022, the Merit System Protection Board (MSPB or Board) received by electronic mail what appeared to be an appeal concerning Appellant’s requests for transfers and leave with the Department of Recreation.¹ That same day the Board’s Executive Director sent Appellant a letter acknowledging receipt of the appeal and requesting Appellant’s home mailing address.

Because the attachment Appellant submitted with his appeal suggested that he had already filed grievances through his union representative, the acknowledgement letter advised Appellant that if the issues he was raising were covered by the MCGEO collective bargaining agreement the MSPB may not have jurisdiction to hear his appeal. Montgomery County Personnel Regulations (MCPR), § 34-2(c). Appellant was further told that he should consult with his union representative about his options, and that even if he wished to file an administrative grievance, he should also be aware that the MSPB does not have the authority to accept a direct appeal of a grievance. Appellant was directed to MCPR [Section 34](#) for information regarding the administrative grievance procedure, specifically, the first two steps of the grievance procedure in MCPR, § 34-9(e). Appellant was further advised that he may wish to explore the possibility of filing grievances before the time for doing so had expired. Appellant was asked to provide a copy of a Chief Administrative Officer (CAO)’s Step 2 decision or provide an adequate explanation of the reason for a direct grievance appeal.

When Appellant had not provided his home mailing address or a CAO’s Step 2 decision, and otherwise contacted the Board, on October 27, 2022, the Board ordered Appellant to provide

¹ The appeal was filed by electronic mail on September 6, 2022, after MSPB office hours. Accordingly, the appeal is considered to have been officially received the next Board business day. *See* MSPB Case No. 18-13 (2018).

a statement of such good cause as exists for why he has failed to file the required documentation. The statement was to be filed with the Board on or before close of business November 8, 2022, with a copy served on the County. The County had the right to file a response on or before November 14, 2022. Appellant was notified that absent the proper filing of documentation and a finding by the Board of good cause for his failure to timely file the documentation, the Board would dismiss his appeal. MCPR § 35-7(b); MSPB Case No. 18-26 (2018); MSPB Case No. 17-06 (2017); MSPB Case No. 15-09 (2015).

On October 31, 2022, the Board received an email response from Appellant with two attachments.² Appellant also provided his home address. That same day, the Board's Executive Director sent a reply asking Appellant if his email was his entire response to the Show Cause Order, whether Appellant had additional information concerning his pursuit of the grievance process under the collective bargaining agreement or the administrative grievance procedure, and whether Appellant filed a grievance appeal to the CAO or only a direct appeal to the MSPB.

On November 7, 2022, the Board received Appellant's response by email with an attachment which he requested be added "as documentation of unfair hiring practices in Montgomery County Recreation."³ That same day, the Board's Executive Director acknowledged receipt of Appellant's supplemental submission and asked if Appellant would be providing information and documentation concerning any grievances Appellant had filed. The Executive Director also asked whether Appellant has filed any grievances other than the ones through MCGEO and, if so, whether he appealed any of those grievances to the CAO at Step 2 of the grievance procedure. Appellant was also reminded that under the Show Cause Order, his deadline for his statement was close of business the next day. Appellant responded by email later that day but did not provide the requested documentation or information.

Appellant's email included the statements "I have an ongoing Grievance for unfair hiring practices thru my Union" and "It took 9 months for my Union to file a grievance." Appellant indicated that he had filed employment discrimination complaints and that he has been in contact with the Office of Labor Relations (OLR). Appellant also stated that "While I have been fighting Recreation, I have experienced retaliation in the form of denied leave, tough work assignments and not allowed 4 transfers." MCPR § 34-7(a) provides that an employee may file a complaint with OLR for retaliation based on the filing of a grievance. An appeal to the MSPB is only allowed "if the OLR Chief denies the complaint" and the employee files the appeal with the MSPB within 10 working days after the employee receives the OLR Chief's decision. § 34-7(c). Although Appellant's email says that "I have been to OLR and am still waiting for a positive result," it is not clear whether he filed a retaliation complaint with OLR, or if he did, when the complaint was filed.

If Appellant filed a complaint of retaliation with OLR and has not received a written report of findings within 30 calendar days, he may treat the failure to respond as a denial and appeal to the MSPB under MCPR § 34-7(c). Section 34 of the MCPR concerning grievances permits an employee to appeal a grievance to the next highest level if a response was not provided. MCPR §

² Appellant sent an email to the MSPB mailbox on Friday, October 28, 2022, a date that the MSPB office is closed.

³ Appellant responded to the Executive Director's October 31 email on Saturday, November 5, 2022, a date that the MSPB office is closed.

34-9(a)(3) (“If the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level.”). Although § 34-9(a)(3) does not specifically mention OLR or complaints of retaliation, we find that the right to appeal a non-response exists since the terms “complaint” and “grievance” are treated interchangeably in the personnel regulations. MCPR §34-7 refers to “complaints of harassment or retaliation” and the definition in MCPR §1-31 says that a grievance is a “formal complaint.”⁴

Despite repeated requests for Appellant to provide information and documentation about any grievances and complaints he has filed there is no indication that he has filed any administrative grievances and followed the appeals process of the grievance procedure. Rather, it appears that the only grievance Appellant has pursued is under the collective bargaining agreement. To the extent that Appellant is seeking to file a direct Board appeal of a grievance, he is doing so without exhausting his administrative remedies. Such direct appeals are not within the Board’s jurisdiction. The Board has previously ruled that an employee must pursue and exhaust the various steps of the applicable administrative grievance procedure as a prerequisite to filing a grievance appeal with the Board. MSPB Case No. 17-28 (2017); MSPB Case No. 11-08 (2011). See MCPR § 35-2(b) (“An employee . . . may file an appeal with the MSPB . . . after receiving an adverse final decision on a grievance from the CAO”). Further, the Board lacks jurisdiction to hear an appeal by a bargaining unit employee over an issue covered by the collective bargaining agreement’s grievance procedure. MCPR § 34-2(c); MSPB Case No. 16-05 (2015); MSPB Case No. 14-07 (2013).

Accordingly, it is hereby **ORDERED** that the appeal in Case No. 23-04 be and hereby is **DISMISSED WITHOUT PREJUDICE** for failure to comply with the Board’s appeal procedures, for lack of jurisdiction, and for failure to exhaust administrative remedies. MCPR § 35-7(b), (c) & (e).

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
December 6, 2022


Harriet E. Davidson
Chair

⁴Our view might be different if the personnel regulations expressly required that an employee be specifically advised that the failure to respond to a grievance or complaint within the stated time limits would constitute a deemed denial. We also note that neither the Grievance Form for County Grievance Procedure (MCPR Appendix Q) nor the Department/Supervisor Grievance Response Form (MCPR Appendix R) advise that an appeal may be taken to the next step upon a failure to respond within the applicable time limits. See *Hughes v. Moyer*, 452 Md. 77, 97-98 (2017) (“the right to be heard ‘has little reality or worth unless one is informed . . . and can choose for himself whether to appeal or default, acquiesce or contest.’”).