

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

IN THE MATTER OF

[REDACTED]

APELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NOS. 24-05 & 24-12

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**DECISION GRANTING MONTGOMERY COUNTY GOVERNMENT'S MOTION TO
QUASH**

Appellant is a Fire Code Inspector III with the Department of Permitting Services (DPS) who filed an appeal with the Merit System Protection Board (Board or MSPB) on December 26, 2023, claiming a denial of employment (MSPB Case No. 24-05). That same day, the Board acknowledged the appeal and advised Appellant that it was necessary to provide a copy of the Notice of Nonselection per Montgomery County Personnel Regulations (MCPR), 2001 § 35-4(d)(3). On April 10, 2024, Appellant filed a second appeal with the MSPB claiming denial of employment based upon the same nonselection (MSPB Case No. 24-12). On April 30, 2024, the Board consolidated the two appeals.

On May 15, 2024, Montgomery County Government (County) filed its Response to the Appeal. On October 10, 2024, the MSPB issued a Request for Additional Information letter to the County, requiring the County to provide responses no later than October 24, 2024. The MSPB also provided Appellant with a November 7, 2024, deadline to reply to the County's responses to the Request for Additional Information, should Appellant wish to file a reply.

The County provided its responses to the MSPB's Request for Additional Information letter on October 24, 2024. Appellant did not reply to the County's response by the November 7, 2024, deadline. Instead, Appellant's counsel propounded Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on the County on November 7, 2024. In response, the County filed a Motion to Quash Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on November 12, 2024. Appellant's Counsel filed

Appellant's Response to Respondent's Motion to Quash Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents on November 20, 2024.

ARGUMENTS OF THE PARTIES

In support of its Motion, the County argues that appeals processed via the development of a written record do not contemplate discovery practice. The County points to language in the Board's Appeals Process.¹ The County distinguishes written record appeals with appeals that require a hearing, which the MSPB Hearing Procedures expressly provide for up to and until a pre-hearing submission is filed.² The County further argues that the discovery request was filed well after the matter was originally filed (approximately seven (7) months) and that the information sought is not relevant for the MSPB's analysis and decision.

Appellant argues that discovery, including interrogatories and the right to inspect documents, is permitted in denial of employment appeals. Appellant suggests that the discovery is necessary "to prove that the appellant was the best qualified person for the position and that an arbitrary and non-merit-based interview and selection process led to a biased and wrongful selection decision." Appellant Response, p. 1-2. Appellant specifically claims that "[t]he workforce composition and hiring/promotion data is needed to determine it [sic] employment parity exists in the department compared to the relevant labor market." *Id.* Appellant additionally argues that "the number of formal grievances, discrimination cases and lawsuits filed by similar situated persons and levied against the County can indicate a systemic problem in the County's hiring and promotion practices." *Id.*

ANALYSIS AND CONCLUSIONS

There are two types of appeals that MSPB processes: 1) those that a merit system employee has a right to an evidentiary hearing, and 2) grievances where the MSPB issues a decision based upon a review of a written record. See Montgomery County Code (MCC) § 33-12³; MCPR § 35-

¹ See <https://www.montgomerycountymd.gov/mspb/appeals.html>.

² See <https://www.montgomerycountymd.gov/mspb/hearing-procedures.html>.

³ **Sec. 33-12. Appeals of disciplinary actions; grievance procedures.**

- (a) *Appeals of certain disciplinary actions.* Any merit system employee, excluding those in probationary status, who has been notified of impending removal, demotion or suspension shall be entitled to file an appeal to the board, which shall cause a hearing to be scheduled without undue delay unless the appeal has been settled during administrative review of the appeal by the chief administrative officer or a designee. Any merit system employee who is the subject of other disciplinary action not specified above may file an appeal with the board, but such appeal may or may not require a hearing as the board may determine.
- (b) *Grievances.* A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. The determination of the board as to what constitutes a term or condition of employment shall be final. Grievances do not include the following: Classification allocations,

10(a).⁴ Matters that require an evidentiary hearing are limited to demotions, suspensions, dismissals, terminations, or involuntary resignations. MCPR § 35-10(a)(1). For matters that require a hearing, the County's Administrative Procedures Act (APA) applies. MCC § 2A-2(c)⁵. In matters where a hearing is required, the APA authorizes discovery. *See* MCC § 2A-7(b)⁶.

except due process violations; failure to reemploy a probationary employee; or other employment matters for which another forum is available to provide relief or the board determines are not suitable matters for the grievance resolution process. A grievance shall include termination by resignation which is found by the board to have been submitted under circumstances which cause the resignation to be involuntary; in the even to such a finding, the board shall require the appointing authority to substantiate the termination as in the case of a removal. The county executive shall prescribe, in the personnel regulations adopted under method (1) of section 2A-15 of this Code, procedures which seek to secure at the lowest possible level a fair, prompt and mutually satisfactory resolution to a grievance. In providing these procedures, the county executive shall ensure that any grievance based upon an alleged improper application of a merit system law or regulation concerning a disputed issue of fact is entitled to resolution after a fact-finding inquiry authorized by the board. Grievances based upon an alleged improper interpretation of merit system laws or regulations do not require a hearing during the grievance resolution process.

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⁴ **35-10. Appellant's right to review; right to hearing.**

(a)

- (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.
- (2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.

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⁵ **Sec. 2A-2. Applicability.**

This Chapter governs the following administrative appeals and proceedings and applies whether a hearing is conducted by a hearing examiner or another designated official.

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- (c) Appeals, grievances and complaints filed pursuant to Chapter 33, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Merit System Protection Board.

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⁶ **Sec. 2A-7. Prehearing procedures.**

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- (b) Discovery. Subject to the provisions of the state public information law:

The MSPB reviews all other matters based upon a review of the written record. MCPR § 35-10(a)(2). In such cases, the MSPB may require a hearing if it “believes that the record is incomplete or inconsistent and requires oral testimony to clarify issues.” MCPR § 35-2(b)⁷.

An Employee who applies but is not selected for a merit system position may file a direct appeal with the MSPB alleging that the nonselection was “arbitrary and capricious, illegal, based

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- (1) Any party shall have the right to review at reasonable hours and locations and to copy at its own expense documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law.
 - (2) No investigative agency involved in the complaint or proceeding shall unreasonably refuse to any party to a hearing access to files and personnel connected with any matter relevant to the complaint.
 - (3) The provisions contained herein shall not infringe upon any attorney-client privilege and shall not include the work product of counsel to any party to the proceedings.
 - (4) Where it appears that a party possesses information or evidence necessary or helpful in developing a complete factual picture of a case, a hearing authority may order such party to answer interrogatories or submit itself or its witnesses to depositions upon its own motion or for good cause shown by any other party. Failure of a party to submit to ordered discovery may be cause for entry of a default judgment against the offending party or such other equitable sanction as the hearing authority may deem appropriate and just.

⁷ **35-2. Right of appeal to MSPB.**

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- (b) An employee with merit system status may file an appeal with the MSPB over the other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral testimony to clarify issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

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on political affiliation . . . or non-merit factors . . .” MCC § 33-9(c)⁸. *See also* MCPR § 6-14⁹; MCPR § 35-2(c)¹⁰. While an employee may file a direct appeal with MSPB for nonselection, the employee is not entitled to a hearing. *See* MSPB Case No. 15-04 (“As Appellant is alleging a nonselection, there is no right to a hearing before the Board. MCPR, 2001, Section 35-10(a)(1) & (2).”).

The Board has previously held that discovery is only permitted under the County’s Administrative Procedure Act in cases involving hearings before the Board. *See* MSPB Case. No. 18-19 (2018); MSPB Case No. 15-04 (2015). Generally, grievances are not entitled to hearings; thus, discovery is not permitted. *See* MSPB 15-04 (2015). However, if the MSPB determines there is a need for a hearing per MCPR § 35-2(b), discovery is permitted in accordance with the County’s Administrative Procedures Act. *See Id.*; MCPR § 35-12(b).

After reviewing the County’s submission in response to the MSPB’s requests for additional information, the MSPB has determined that there is a complete record for the MSPB to review and issue a decision on the merits, and that there is no need for a hearing in this matter. Accordingly, the discovery sought by Appellant is not permitted in this case and the County’s Motion to Quash is granted. The County is not required to respond to Appellant’s First Set of Interrogatories and First Set of Requests for Production of Documents.

⁸ **Sec. 33-9. Equal employment opportunity and affirmative action.**

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Appeals by applicants. Any applicant for employment or promotion to a merit system position may appeal decisions of the chief administrative officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by Chapter 27, “Human Relations and Civil Liberties,” of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the chief administrative officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors, may be filed directly with the merit system protection board. Appeals filed with the merit system protection board shall be considered pursuant to procedures adopted by the board. The board may order such relief as is provided by law or regulation.

⁹ 6-14. Appeals by applicants. Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual’s application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

¹⁰ **35-2. Right of appeal to MSPB.**


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(c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.

ORDER

For the reasons discussed above the County's Motion to Quash Appellant's First Set of Interrogatories and First Set of Requests for Production of Documents is **GRANTED**.

For the Board
December 17, 2024


Barbara S. Fredericks
Chair